

Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022

Bill No.105 of 2022

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Abstract

The Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 aims to: replace the existing *Prohibition of Incitement to Hatred Act, 1989* with provisions creating new incitement to violence or hatred offences, introduce a range of specific aggravated by hatred offences, provide that evidence of hatred against a person or a group of persons on account of their protected characteristics or any of those characteristics may be considered an aggravating factor during sentencing for any offence other than one created under the Bill, and provide for a new offence of condoning, denying or grossly trivialising genocide, crimes against humanity and war crimes.



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Summary and Key Messages

- The Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 was published on Tuesday 1 November 2022, with Second Stage Debate scheduled for Wednesday, 9 November 2022.
- The Bill is comprised of four Parts, which in turn include 36 sections and one Schedule:
 - Part 1 (sections 1-5): Preliminary and General
 - Part 2 (sections 6-16): Prohibition of Incitement to Violence or Hatred
 - Part 3 (sections 17-20): Offences Aggravated by Hatred
 - Part 4 (sections 21-36): Amendment to Other Enactments
- The primary aims of the Bill are to:
 - Repeal the *Prohibition of Incitement to Hatred Act, 1989* and replace it with provisions creating new incitement to violence or hatred offences
 - provide for an offence of condoning, denying or grossly trivialising genocide, crimes against humanity and war crimes against persons on account of their protected characteristics;
 - provide for offences aggravated by hatred; and
 - provide for a provision requiring courts to take account of evidence of hatred on the part of the perpetrator against a person or a group of persons on account of their protected characteristics or any of those characteristics during sentencing for offences other than those created under the Bill.
- Section 2 of the Bill provides for a definition of “hatred” for the purposes of the Bill.
- Section 3 of the Bill provides for 10 protected characteristics: race, colour, nationality, religion, national or ethnic origin, descent, gender, sex characteristics, sexual orientation and disability.
- Section 4 of the Bill repeals the *Prohibition of Incitement to Hatred Act, 1989*.
- Section 7 of the Bill provides for an offence of incitement to violence or hatred against persons on account of their protected characteristics.
- Section 8 provides for an offence of condonation, denial or gross trivialisation of genocide, etc., against persons on account of their protected characteristics, as required under Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.
- Section 10 provides for an offence of preparing or possessing material likely to incite violence or hatred against persons on account of their protected characteristics.
- The Bill provides for the use of an “intent or recklessness” legal test in respect of the incitement to violence or hatred offences created under sections 7 and 10.
- The Bill provides for a defence of “reasonable and genuine contribution to literary, artistic, political, scientific, religious or academic discourse” in proceedings concerning alleged offences under sections 7 and 10.
- Section 15 affords An Garda Síochána (AGS) extensive powers of search and seizure in relation to the offences created under Part 2.

- Part 3 provides for offences aggravated by hatred, and amends the provisions of the *Criminal Damage Act 1991* (section 17), the *Criminal Justice (Public Order) Act 1994* (section 18), and the *Non-Fatal Offences against the Person Act 1997* (section 19).
- Part 3 also provides for evidence of hatred on the part of the perpetrator against a person or a group of persons on account of their protected characteristics or any of those characteristics to be taken into account during sentencing for any offence other than one created under the Bill (section 20).
- The Bill introduces a ‘demonstration test’ in addition to the ‘motivation test’ included in the General Scheme to determine if the “aggravated by hatred” element is present for the purpose of the new aggravated by hatred offences provided for under Part 3.

This Bill Digest focuses on Parts 1, 2 and 3 of the Bill, and does not consider consequential amendments arising from these Parts that are contained in Part 4 of the Bill. It contains:

- A Table of Provisions;
- A discussion of the background to the Bill, including a discussion of the need for the legislation, the 2019 public consultation surrounding the *Prohibition of Incitement to Hatred Act, 1989*, previous attempts to legislate for hate crime in Ireland, and the pre-legislative scrutiny process;
- A discussion of the State’s obligations under EU law and international law relevant to hate speech and hate crime; and
- A discussion of the Principal Provisions of the Bill, including consideration of their compatibility with the Constitution, EU law and relevant international law, and a discussion of the extent to which they evolved relative to the General Scheme of the Bill in response to stakeholder commentary.

Glossary and abbreviations

Use Normal style for ordinary paragraph text.

Table 1 Glossary and abbreviations

Term	Meaning
1989 Act	<i>Prohibition of Incitement to Hatred Act, 1989</i>
1991 Act	<i>Criminal Damage Act 1991</i>
1994 Act	<i>Criminal Justice (Public Order) Act 1994</i>
1997 Act	<i>Non-Fatal Offences against the Person Act 1997</i>
AGS	An Garda Síochána
CERD	UN Committee on the Elimination of Racial Discrimination
CFREU	Charter of Fundamental Rights of the European Union
COE	Council of Europe
Department	Department of Justice
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
Framework Decision	Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law
ICCL	Irish Council for Civil Liberties
ICCPR	International Convention on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IHREC	Irish Human Rights and Equality Commission
IMT	International Military Tribunal
INAR	Irish Network Against Racism
Inchoate Offence	An offence committed even though the substantive crime with which it is connected is not committed ¹
Joint Committee	Joint Committee on Justice
LRC	Law Reform Commission
NYCI	National Youth Council of Ireland
PLS	Pre-Legislative Scrutiny
UDHR	Universal Declaration of Human Rights

¹ Murdoch and Hunt's Encyclopedia of Irish Law, Bloomsbury Professional (2021), entry on 'inchoate crime'.

Table of provisions

A summary of the Bill's provisions is included in Table 2 below.

Table 2 Table of provisions of the Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022

Section	Title	Effect
Part 1: Preliminary and General		
1	Short title and commencement	This is a standard provision that states how the Act may be cited and provides for the commencement of the Act. Different provisions of the Act may be commenced by the Minister at different times.
2	Interpretation	This provides for the interpretation of “Framework Decision”, “hatred” and “protected characteristic”, and clarifies that a word or expression used in both the Act and the Framework Decision, unless the context otherwise requires, has the same meaning.
3	Meaning of protected characteristic	This provides for ten protected characteristics for the purposes of the Act, with the exception of section 8, which has a separate definition for “protected characteristics”. <ul style="list-style-type: none"> • Race • Colour • Nationality • Religion • National or ethnic origin • Descent • Gender • Sex characteristics • Sexual orientation, or • Disability It also clarifies a number of references in relation to certain characteristics and terms.
4	Repeal	This provides for the repeal of the Prohibition of Incitement to Hatred Act, 1989 .
5	Expenses	This is a standard provision relating to the expenses incurred in the administration of the Act.
Part 2: Prohibition of Incitement to Violence or Hatred		
6	Interpretation and application (Part 2)	This provides meanings for the following terms in Part 2: <ul style="list-style-type: none"> • “information system” • “material” • “public place” • “reasonable and genuine contribution” It also provides that a person shall be regarded as communicating material to the public or a section of the public if the person: <ul style="list-style-type: none"> • Displays, publishes, distributes, or disseminates the material, • Shows or plays the material, or

Section	Title	Effect
		<ul style="list-style-type: none"> Makes the material available in any other way including through the use of an information system, to the public or a section of the public. <p>Finally, the section clarifies what is meant by behaviour for the purposes of Part 2.</p>
7	Offence of incitement to violence or hatred against persons on account of their protected characteristics	<p>This provides that a person is guilty of an offence if:</p> <ul style="list-style-type: none"> They communicate material to the public or a section of the public, or behave in a public place in a manner, that is likely to incite violence or hatred against a person or group of persons on account of their protected characteristics or any of those characteristics, and Do so with intent to incite such violence or hatred, or are reckless as to whether such violence or hatred is thereby incited. <p>The section further provides that it is not an offence for relevant service providers under the e-Commerce Directive to do an act to which provisions concerning “mere conduit”, caching and hosting apply, if the requirements for liability not to apply are satisfied.²</p> <p>The section also sets out a series of defences, including defences for bodies corporate, and provides for the following penalties for those guilty of an offence:</p> <ul style="list-style-type: none"> Summary conviction: Class A fine and/or up to 12 months imprisonment, or Conviction on indictment: a fine and/or up to 5 years imprisonment. <p>In addition to the provisions on the e-Commerce Directive and defences, section 7 is also subject to section 11 below.</p>
8	Offence of condonation, denial or gross trivialisation of genocide, etc., against persons on account of their protected characteristics	<p>This provides for an offence of condonation, denial, or gross trivialisation of genocide etc. against persons on account of their protected characteristics.</p> <p>For a person to be guilty of an offence, a number of elements apply:</p> <ul style="list-style-type: none"> The person communicates material to the public or a section of the public, or behaves in a public place in a manner that condones, denies, or grossly trivialises: <ul style="list-style-type: none"> Genocide, A crime against humanity, A war crime, or

² [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) [2000] OJ L 178/1. The Directive transposed by the [European Communities \(Directive 2000/31/EC\) Regulations 2003](#), S.I. No. 68 of 2003. Regulations 16 to 18 relate to “mere conduit”, caching and hosting provisions respectively referred to in the Bill respectively.

Section	Title	Effect
		<ul style="list-style-type: none"> ○ An act specified in Article 6 of the Charter of the International Military Tribunal. • Such communication of material or behaviour is directed against a person / group of persons on account of their protected characteristics or any of those characteristics. • This is done with the intention of inciting violence or hatred against such persons / groups of persons on account of their protected characteristics or any of those characteristics. <p>A person convicted of an offence is liable to a class A fine (up to €5,000) and/or up to 12 months imprisonment.</p> <p>The section also provides for meanings for the following terms:</p> <ul style="list-style-type: none"> • an act specified in Article 6 of the Charter of the International Military Tribunal • Charter of the International Military Tribunal • court in the State • crime against humanity • genocide • protected characteristic • Rome Statute • war crime <p>Section 8 is also subject to section 11 below.</p>
9	Provisions relating to offences under sections 7 and 8	<p>This provides that a person may be found guilty of an offence under sections 7 or 8 irrespective of whether the material or behaviour actually incited violence or hatred against a person or group of persons on account of their protected characteristics or any of those characteristics.</p> <p>It sets out the requirements to be proven by the prosecution for a presumption to arise that an individual intended to communicate material to the public for the purposes of sections 7 and 8, and the circumstances whereby this presumption can be rebutted by the accused.</p>
10	Offence of preparing or possessing material likely to incite violence or hatred against persons on account of their protected characteristics	<p>This provides for an offence of preparing or possessing material likely to incite violence or hatred against persons on account of their protected characteristics.</p> <p>It also provides for three defences to the offence.</p> <p>It provides for a rebuttable presumption to arise, that a person shown to be in possession of material possesses it contrary to section 10(1), where it is reasonable to assume that the material was not intended to be for the personal use of the person.</p> <p>Finally, the section provides that persons guilty of an offence under the section are liable to the following.</p> <ul style="list-style-type: none"> • Summary conviction: A class C fine (up to €2,500) and/or up to 6 months imprisonment, or • Conviction on indictment: A class A fine (up to €5,000) and/or up to 2 years imprisonment.
11	Protection of freedom of expression	<p>This provides that material or behaviour is not taken to incite violence or hatred against a person / group of persons on</p>

Section	Title	Effect
		account of their protected characteristics or any of those characteristics solely on the basis of it including or involving discussion or criticism of matters relating to a protected characteristic.
12	Jurisdiction	<p>This provides that the State has jurisdiction to prosecute an offence under section 7 or 8 that is committed by a person using an information system if:</p> <ul style="list-style-type: none"> • The person was in the State when the offence was committed, whether or not the offence involved material hosted on an information system in the State, or • The offence involved material hosted on an information system in the State, whether or not the person was in the State when the offence was committed.
13	Offences by bodies corporate	<p>This sets out the circumstances for corporate liability to arise for 'relevant offences', i.e., offences under sections 7, 8 and 10, or inciting, aiding and abetting or attempting to commit such offences. It provides for a defence where the body corporate can prove it took all reasonable steps and exercised all due diligence to avoid the commission of the relevant offence.</p> <p>It also provides that an officer of a body corporate, or someone purporting to act as such, can also be held liable if the corporate offence was committed with their consent or connivance, or was due to their wilful neglect. Members may also be liable in such circumstances in situations where a body corporate is managed by its members.</p>
14	Certain proceedings only by or with consent of Director of Public Prosecutions	This provides that once a person is charged with an offence under section 7, 8 or 10, no further proceedings may be taken except by or with the consent of the DPP. This provision does not apply to any remand in custody or on bail.
15	Search warrants	<p>This sets out the search and seizure powers available to An Garda Síochána in relation to offences under sections 7, 8 and 10.</p> <p>It sets out the procedure for the granting of a search warrant by a judge of the District Court, and for the operation of the search warrant. It also provides for specific powers for members of An Garda Síochána regarding the operation of, and access to, information in computers at the place being searched.</p> <p>The section also provides for an offence where a person;</p> <ol style="list-style-type: none"> (i) obstructs or attempts to obstruct a member of An Garda Síochána acting under the authority of a search warrant issued under the section (a "member"); (ii) fails to comply with requirements regarding the provision of access to information on computers, or the provision of information to a member; or (iii) provides false or misleading information to a member.

Section	Title	Effect
16	Forfeiture	<p>This provides that the court may order that any material that relates to the offence be forfeited and either destroyed or otherwise disposed of as the court may determine.</p> <p>It makes further provision that the court shall not make such an order if a person claiming to own the material or be otherwise interested in it applies to be heard by the court unless they have been given an opportunity to show why the order should not be made.</p> <p>Finally, provision is also made that the order shall not take effect until the expiry of the ordinary time for making an appeal, or where an appeal is instituted, until it or any further appeal is finally decided or abandoned, or the ordinary time for instituting any further appeal has expired.</p>
Part 3: Offences Aggravated by Hatred		
17	Amendment of the Criminal Damage Act 1991	<p>This inserts the following amendments into the Criminal Damage Act 1991:</p> <ul style="list-style-type: none"> • Definitions for 'Act of 2022', 'hatred', and 'protected characteristic' • A new section 2A – Damaging property aggravated by hatred <p>It also amends section 6(1) and section 7 of that Act to extend those provisions to the new section 2A.</p> <p>The section also provides that if the evidence does not warrant conviction for an aggravated offence, a person charged with any of the above offences may be found guilty of the ordinary form of the offence.</p>
18	Amendment of Criminal Justice (Public Order) Act 1994	<p>This makes the following amendments to the Criminal Justice (Public Order) Act 1994:</p> <ul style="list-style-type: none"> • Definitions for 'Act of 2022', 'hatred', and 'protected characteristic' • A new section 3A – Aggravation of certain offences by hatred • A new section 6A – Threatening, abusive or insulting behaviour in public place aggravated by hatred • A new section 7A – Distribution or display in public place of material which is threatening, abusive, insulting or obscene aggravated by hatred • Extends section 8 of that Act, insofar as it relates to persons acting contrary to sections 6 and 7 of that Act, to the new sections 6A and 7A. • A new section 11A – Entering building, etc., with intent to commit an offence aggravated by hatred • A new section 18A – Assault with intent to cause bodily harm or commit indictable offence aggravated by hatred. • Adds sections 6A, 7A, 11A and 18A to the relevant provisions under section 24(5) of that Act. <p>The section also provides that if the evidence does not warrant conviction for an aggravated offence, a person charged with any of the above offences may be found guilty of the ordinary form of the offence.</p>

Section	Title	Effect
19	Amendment of Non-Fatal Offences against the Person Act, 1997	<p>This makes the following amendments to the Non-Fatal Offences against the Person Act, 1997:</p> <ul style="list-style-type: none"> • Definitions for ‘Act of 2022’, ‘hatred’, and ‘protected characteristic’ • A new section 1A – Aggravation of certain offences by hatred • A new section 2A – Assault aggravated by hatred • A new section 3A – Assault causing harm aggravated by hatred • A new section 4A – Causing serious harm aggravated by hatred • A new section 5A – Threats to kill or cause serious harm aggravated by hatred • A new section 9A – Coercion aggravated by hatred • A new section 10A – Harassment aggravated by hatred, and • A new section 13A – Endangerment aggravated by hatred <p>The section also provides that if the evidence does not warrant conviction for an aggravated offence, a person charged with any of the above offences may be found guilty of the ordinary form of the offence.</p>
20	Hatred against persons on account of their protected characteristics as aggravating factor in sentencing for certain offences	<p>This obliges the courts to take evidence that there was hatred against a person or a group of persons on account of their protected characteristics into account as an aggravating factor for the purposes of determining the sentence.</p> <p>It also obliges the courts to impose a greater sentence than that which would have been imposed in the absence of such a factor, except where the sentence is a life sentence or the court considers there is good reason for not doing so and provides that the sentence imposed shall not be greater than the maximum sentence for the offence concerned.</p> <p>Where it applies a greater sentence, the court must also state and record in the proceedings that a greater sentence is imposed pursuant to the section, and the protected characteristic(s) of the person / group of persons by reference to which that greater sentence is applied.</p> <p>This provision applies to offences other than those provided for by sections 7, 8 and 10, and Part 3 of the Bill.</p>
Part 4: Amendments of Other Enactments		
21	Amendment of Schedule to Criminal Law (Jurisdiction) Act 1976	<p>This is a consequential amendment to extend the application of paragraph 6A of the Schedule to the Criminal Law (Jurisdiction) Act 1976, which relates to offences for the purposes of the Act, to section 2A of the Criminal Damage Act 1991 in relation to arson, and paragraph 7 of the same Schedule to section 4A of the Non-Fatal Offences against the Person Act 1997 (causing serious harm aggravated by hatred).</p>
22	Amendment of First Schedule to Extradition (Amendment) Act 1994	<p>This is a consequential amendment to extend the application of paragraph 6 of the First Schedule to the Extradition (Amendment) Act 1994, which relates to offences to which section 3 of Extradition (European Convention on the</p>

Section	Title	Effect
		Suppression of Terrorism) Act, 1987 applies, to sections 3A and 4A of the <i>Non-Fatal Offences against the Person Act 1997</i> , and paragraph 11 to section 2A of the <i>Criminal Damage Act 1991</i> .
23	Amendment of Schedule to Bail Act 1997	This is a consequential amendment to extend the application of the Schedule to the Bail Act 1997 , which relates to serious offences for the purposes of that Act, as follows: <ul style="list-style-type: none"> Extend paragraph 7 of that Schedule to sections 3A, 4A, 5A, 9A, 10A and 13A of the <i>Non-Fatal Offences against the Person Act 1997</i>, Extend paragraph 8 of that Schedule to section 18A of the <i>Criminal Justice (Public Order) Act 1994</i>, and Extend paragraph 18 to section 2A of the <i>Criminal Damage Act 1991</i>.
24	Amendment of Second Schedule to Criminal Justice (Safety of United Nations Workers) Act 2000	This is a consequential amendment to extend the application of the Second Schedule to the Criminal Justice (Safety of United Nations Workers) Act 2000 , which relates to offences for the purposes of sections 2 and 3 of that Act, as follows: <ul style="list-style-type: none"> Extend paragraph 4 of Part I of the Schedule to sections 2A, 3A, 4A, 5A and 13A of the <i>Non-Fatal Offences against the Person Act 1997</i>, and Extend paragraph 2 of Part II of the Schedule to section 2A of the <i>Criminal Damage Act 1991</i>.
25	Amendment of section 3 of Criminal Justice (Public Order) Act 2003	This is a consequential amendment to extend the application of section 3 of the Criminal Justice (Public Order) Act 2003 , which relates to exclusion orders, to sections 6A and 7A of the <i>Criminal Justice (Public Order) Act 1994</i> .
26	Amendment of Criminal Justice (Terrorist Offences) Act 2005	These are consequential amendments to the Criminal Justice (Terrorist Offences) Act 2005 to do the following: <ul style="list-style-type: none"> In Part 1 of Schedule 2 to the Act, extend the application of paragraph 2 to sections 3A, 4A and 13A of the <i>Non-Fatal Offences against the Person Act 1997</i>, and extend the application of paragraph 5 to section 2A of the <i>Criminal Damage Act 1991</i>. In Part 1 of Schedule 6 to the Act, extend the application of paragraph 2 to sections 2A, 3A, 4A and 13A of the <i>Non-Fatal Offences against the Person Act 1997</i>, and extend the application of paragraph 6 to section 2A of the <i>Criminal Damage Act 1991</i>.
27	Amendment of Schedule 3 to Criminal Justice Act 2006	These are consequential amendments to Schedule 3 to the Criminal Justice Act 2006 , which relates to offences for the purposes of restriction of movement orders, to do the following: <ul style="list-style-type: none"> Extend the application of paragraph 1 of the Schedule to sections 6A and 11A of the <i>Criminal Justice (Public Order) Act 1994</i>, and Extend the application of paragraph 2 of the Schedule to sections 2A, 3A and 9A <i>Non-Fatal Offences against the Person Act 1997</i>.

Section	Title	Effect
28	Amendment of Schedule 2 to Criminal Justice Act 2007	This is a consequential amendment to Schedule 2 of the Criminal Justice Act 2007 , which relates to offences for the purposes of Part 3 of that Act, to extend its application to sections 4A and 5A.
29	Amendment of section 71 of Broadcasting Act 2009	This is a consequential amendment to section 71(6) of the Broadcasting Act 2009 to replace the reference to the <i>Prohibition of Incitement to Hatred Act, 1989</i> with the title of the Bill once enacted.
30	Amendment of Schedule to Criminal Procedure Act 2010	This is a consequential amendment to the Schedule to the Criminal Procedure Act 2010 , which relates to relevant offences under the Act, to extend the application of paragraph 10 of the Schedule to section 4A of the <i>Non-Fatal Offences against the Person Act 1997</i> , and inserting a new paragraph 20A in the Schedule to extend its application to section 2A of the <i>Criminal Damage Act 1991</i> .
31	Amendment of Schedule 3 to National Vetting Bureau (Children and Vulnerable Persons) Act 2012	This is a consequential amendment to Schedule 3 to the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 , which relates to excluded offences for the purposes of section 14A of that Act, to extend the application of paragraph 17 of the Schedule to section 18A of the <i>Criminal Justice (Public Order) Act 1994</i> .
32	Amendment of Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012	These are consequential amendments to the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 , which are as follows: <ul style="list-style-type: none"> • Extends the application of paragraph 18 of Schedule 1 to the Act, which relates to offences against children for the purposes of an offence under section 2 of that Act, to sections 3A, 4A, 5A and 13A of the <i>Non-Fatal Offences against the Person Act 1997</i>, and • Replacing paragraph 11 of Schedule 2, which relates to offences against vulnerable persons for the purposes of section 3 of that Act, to extend it to section 3A of the <i>Non-Fatal Offences against the Person Act 1997</i>.
33	Amendment of Schedule to Taxi Regulation Act 2013	This makes consequential amendments to Part 2 of the Schedule to the Taxi Regulation Act 2013 , which relates to specified offences under that Act, to: <ul style="list-style-type: none"> • Extend the application of paragraph 2 to section 18A of the <i>Criminal Justice (Public Order) Act 1994</i>, • Extend the application of paragraph 3 to section 2A of the <i>Non-Fatal Offences against the Person Act 1997</i>, and • Inserts a new paragraph 9A to add section 2A of the <i>Criminal Damage Act 1991</i> to the Schedule's provisions.
34	Amendment of section 2 of Criminal Justice (Victims of Crime) Act 2017	This amends section 2(1) of the Criminal Justice (Victims of Crime) Act 2017 in paragraph (d) of the definition of a "protection measure" to include both sections 10 and 10A of the <i>Non-Fatal Offences against the Person Act 1997</i> .

Section	Title	Effect
35	Amendment of Schedule 2 to European Union (Passenger Name Record Data) Regulations 2018	This amends Schedule 2 of the European Union (Passenger Name Record Data) Regulations 2018 ³ , which relates to serious crime for the purposes of the Regulations, to do the following: <ul style="list-style-type: none"> • In paragraph 7, extend the reference to sections of the <i>Criminal Damage Act 1991</i> to include section 2A, • In paragraph 12, extend the reference to sections of the <i>Criminal Justice (Public Order) Act 1994</i> to include section 18A, and extend the reference to sections of the <i>Non-Fatal Offences against the Person Act 1997</i> to include sections 3A, 4A, 5A, and 13A.
36	Amendment of section 1 of Criminal Law (Extraterritorial Jurisdiction) Act 2019	This amends section 1 of the Criminal Law (Extraterritorial Jurisdiction) Act 2019 in paragraph (a) of the definition of “relevant offence” to include sections 3A, 4A, 5A and 9A of the <i>Non-Fatal Offences against the Person Act 1997</i> .
<p>Schedule: Council Framework Decision 2008/913/JHA This includes the text of Framework Decision 2008/913/JHA.</p>		

Source: Derived from [Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022](#) and the [Explanatory Memorandum to the Bill](#).

³ [European Union \(Passenger Name Record Data\) Regulations 2018](#), S.I. No. 177 of 2018.

Introduction

The [Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022](#) (the Bill) was published on 1 November 2022. An [Explanatory Memorandum](#) was also published, with the Bill scheduled for Second Stage debate on 9 November 2022.

The Bill is comprised of four Parts, which altogether contain 36 Sections, and an accompanying Schedule that contains the text of the EU Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. The four Parts are as follows:

- Part 1: Preliminary and General;
- Part 2: Prohibition of Incitement to Violence or Hatred;
- Part 3: Offences Aggravated by Hatred; and
- Part 4: Amendments of other Enactments.

The Bill was previously referred to as the Criminal Justice (Hate Crime) Bill and was known as this during the pre-legislative scrutiny (PLS) process. According to its Long Title, the Bill aims to:

- amend the existing law concerning the prohibition of incitement to violence or hatred to provide for new incitement to violence or hatred offences;
- provide for an offence of condoning, denying or grossly trivialising genocide, war crimes, crimes against humanity and crimes against peace thereby giving effect to 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 (the “Framework Decision”);
- repeal the *Prohibition of Incitement to Hatred Act 1989* (the “1989 Act”);
- amend the *Criminal Damage Act 1991*, the *Criminal Justice (Public Order) Act 1994*, the *Non-Fatal Offences against the Person Act, 1997* and other enactments in order to provide for new hate crime offences, based on an aggravated offences model;
- in respect of offences other than the new aggravated offences, to allow for hatred against a person or a group of persons on account of their protected characteristics or any one of those characteristics to be an aggravating factor during sentencing; and to provide for related matters.

Background

Policy and legislative context

The [Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022](#) was published on the Oireachtas website on 1 November 2022. Once enacted, the Bill will repeal and replace the [Prohibition of Incitement to Hatred Act, 1989](#) (also referred to in this Digest as the “1989 Act”).⁴ As is discussed in detail below, the 1989 Act has been deemed ineffective in combatting hate speech, in particular online hate speech, by multiple international human rights monitoring bodies,⁵ as well as the Irish Law Reform Commission.⁶

Ireland does not currently have any specific hate crime legislation. Furthermore, whilst a sentencing court may take into account the fact that a crime was motivated by hatred or bias when sentencing, it is not obliged under legislation to do so. Over the years, numerous international and domestic human rights monitoring bodies have called for the enactment of hate crime legislation and for a specific statutory provision requiring that a hate motivation be considered an aggravating factor when sentencing.⁷ Indeed, as discussed in more detail below, Ireland has obligations under both EU law and international law to implement measures to address hate speech and hate crime, including measures in the criminal justice sphere. Legal obligations aside, effective measures are necessary to tackle the specific forms of harm caused by hate speech and hate crime, not only to victims, but also to the overall cohesiveness of society.

In 2017, [Lifecycle of a Hate Crime: Country Report for Ireland](#) was published. The report, which was commissioned by the Irish Council for Civil Liberties (ICCL) and prepared by Dr Jennifer Schweppe and Dr Amanda Haynes of the University of Limerick, presents the findings of comprehensive primary and secondary research conducted over two years tracing the Lifecycle of a Hate Crime within selected EU Member States, including Ireland. The recommendations arising from the Report include the reform of the *Prohibition of Incitement to Hatred Act, 1989*, in particular to address cyber hate and expand the range of protected groups; the introduction of aggravated (hate crime) offences; and the introduction of sentencing provisions in respect of hate crime.⁸ In a statement released on 4 July 2018, the then Minister for Justice and Equality, Charlie Flanagan,

⁴ [Prohibition of Incitement to Hatred Act, 1989](#) (No. 19 of 1989) (last accessed 6 November 2022).

⁵ See, e.g., Committee on the Elimination of Racial Discrimination (CERD), [‘Concluding observations on the combined fifth to ninth reports of Ireland’](#) (23 January 2020) UN Doc CERD/C/IRL/CO/5-9, para. 19 (last accessed 6 November 2022); and European Commission against Racism and Intolerance (ECRI) [‘Conclusions on Ireland: Fifth Monitoring Cycle’](#) (adopted on 7 December 2021/published on 3 March 2022) pp 9 and 16 (last accessed 6 November 2022).

⁶ Law Reform Commission, [‘Report on Harmful Communications and Digital Safety’](#) (2016) LRC 116-2016, para. 2.254 (last accessed 6 November 2022).

⁷ See, e.g., CERD, [‘Concluding observations on the combined fifth to ninth reports of Ireland’](#) (12 December 2019) UN Doc CERD/C/IRL/CO/5-9, para. 22 (a) and (f) (last accessed 24 October 2022); IHREC, [‘Developing a National Action Plan Against Racism: Submission to the Anti-Racism Committee’](#) (2021) pp 69-70 (last accessed 6 November 2022); and ECRI, [‘Conclusions on Ireland: Fifth Monitoring Cycle’](#) (adopted on 7 December 2021/published on 3 March 2022) para. 54 (last accessed 6 November 2022).

⁸ Jennifer Schweppe and Amanda Haynes, [Lifecycle of a Hate Crime: Country Report for Ireland](#) (ICCL 2017) p. 203 (last accessed 6 November 2022).

indicated that the Report's findings would feed into an ongoing review of the 1989 Act being conducted by the Department of Justice and Equality.⁹

On 23 October 2019, the government [launched a public consultation on the *Prohibition of Incitement to Hatred Act, 1989*](#). The process and findings of the consultation are considered in more detail in a separate section below. The findings of the 2019 consultation, informed the development of the present Bill as did research conducted by the Department of Justice and Equality into the effectiveness of approaches to hate-crime legislation in other countries.¹⁰

The Programme for Government, *Our Shared Future*, includes two stated commitments in relation to hate crimes:

- “Introduce Hate Crime legislation within 12 months of the formation of the Government. This legislation will create specific offences, to ensure that those who target victims because of their association with a particular identity characteristic are identified as perpetrators of hate crime. This legislation will be on the basis of an aggravated offences model. It will be supported by training across the criminal justice system, as well as victim supports
- In order to ensure that those who seek to encourage and incite others to hate minority groups can be prosecuted, we will revise and update the Incitement to Hatred Act 1989, taking account of the public consultation conducted in 2019”¹¹.

The Bill seeks to address lacunae in the existing law by creating new hate aggravated offences, namely, crimes that are aggravated by hatred against protected characteristics, including race, colour, nationality, religion, ethnic or national origin, descent, sex characteristics, sexual orientation, gender and disability. In respect of offences other than the new aggravated offences, the Bill will also allow for hatred against a person or a group of persons on account of their protected characteristics or any one of those characteristics to be regarded as an aggravating factor during sentencing.

The Bill has implications for the enjoyment of several human rights guaranteed under the [Constitution](#), the [Charter of Fundamental Rights of the European Union](#) (CFREU),¹² the [European Convention of Human Rights](#) (ECHR) and several international human rights treaties ratified by Ireland. These rights include, but are not limited to, the right to freedom from discrimination,¹³ the

⁹ Department of Justice, [Statement by Minister Flanagan on hate crime legislation](#) (speech), 4 July 2018.

¹⁰ The Findings and Research on Approaches in other countries are available to access [here](#).

¹¹ Programme for Government: [Our Shared Future](#), p. 86.

¹² [Charter of Fundamental Rights of the European Union](#), (2012/C 326/02), included in *OJ C 326, 26 November 2012, pp 391–407* (last accessed 6 November 2022) (hereinafter referred to as “CFREU”). CFREU imposes binding obligations on the State when it is implementing EU law.

¹³ See, e.g., [CFREU](#), Article 21; [European Convention of Human Rights](#), adopted 4 November 1950, entered into force 3 September 1953 (last accessed 6 November 2022) (hereinafter referred to as “ECHR”), Article 14. Article 14 must be applied in conjunction with another substantive provision of the Convention.

right to equality before the law,¹⁴ the right to a fair trial in due course of law,¹⁵ and, in particular, the right to freedom of expression.¹⁶ Accordingly, the Bill should be compatible with the enjoyment of these rights and with existing and forthcoming legislation in the area, including:

- The [Criminal Justice \(Offences Relating to Information Systems\) Act 2017](#),
- The [Harassment, Harmful Communications and Related Offences Act 2020](#),
- The [Victim's Rights Directive](#),
- The [Online Safety and Media Regulation Bill 2022](#) (the "OSMR Bill"). and
- The proposed [Digital Services Act](#).

Compatibility is also necessary to avoid any implementation gap in addressing hate speech and hate crime.¹⁷

The rationale underlying the new legislation

As the UN Secretary General, Antonio Guterres, observes "[h]ate speech undermines social cohesion, erodes shared values and can lay the foundation for violence, undermining peace, stability, sustainable development and the fulfillment of human rights for all".¹⁸ Similarly, the European Commission notes:

"Hate speech and hate crime affect not only the individual victims and their communities, causing them suffering and limiting their fundamental rights and freedoms, but also society at large. Hate undermines the very foundations of our society. It weakens mutual understanding and respect for diversity on which pluralistic and democratic societies are built."¹⁹

ICCL observes that hate crimes are signal crimes in that they transmit a message of rejection to victims and the communities to which they belong, which can lead to their alienation from the state and law enforcement mechanisms if left unaddressed.²⁰ The sense of fear that they incubate can

¹⁴ See, e.g., [Constitution of Ireland](#) (1937) (last accessed 6 November 2022) Article 40.1; Equal Status Acts 2000-2018; [CFREU](#), Article 20.

¹⁵ See, e.g., [Constitution of Ireland](#), Article 38.1; [Universal Declaration of Human Rights](#), adopted 10 December 1948 (last accessed 6 November 2022) (hereinafter referred to as "UDHR"), Articles 10 and 11; [International Covenant on Civil and Political Rights](#), adopted 16 December 1966, entered into force 23 March 1976 (last accessed 6 November 2022) (hereinafter referred to as "ICCPR") Article 14; [ECHR](#), Article 6; and [CFREU](#), Articles 47-50.

¹⁶ See, e.g., [Constitution of Ireland](#), Article 40.6.1° (i); [UDHR](#), Article 19; ICCPR, Articles 19 and 20 [ECHR](#), Article 10; and [CFREU](#), Article 11.

¹⁷ ECRI, '[Conclusions on Ireland: Fifth Monitoring Cycle](#)' (adopted on 7 December 2021/published on 3 March 2022) p. 5 (last accessed 24 October 2022). See also CERD, '[Concluding observations on the combined fifth to ninth reports of Ireland](#)' (12 December 2019) UN Doc CERD/C/IRL/CO/5-9, para 20 (c) (last accessed 24 October 2022).

¹⁸ [United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences](#) (September 2020) p. 3 (last accessed 7 November 2022).

¹⁹ European Commission, [Communication From The Commission To The European Parliament And The Council Brussels: A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime](#) (2021) 9.12.2021 COM(2021) 777 final, p. 1 (last accessed 7 November 2022).

²⁰ ICCL Submission (August 2021) p. 9, included in the 'Combined Submissions' appended to the [PLS Report](#).

give rise to self-censorship, which in turn can undermine the enjoyment of other human rights.²¹ To give just one example concerning the right to freedom of movement,²² victims of hate crimes and hate incidents in Ireland have reported avoiding public spaces, transport and walking in their own neighbourhoods to minimise the risk of being targeted.²³

Reports indicate increasing rates of hate speech and hate crime across the EU region and indeed worldwide in recent years.²⁴ Factors reportedly contributing to this trend include increasing internet and social media usage, and a sense of insecurity as a result of the Covid-19 pandemic.²⁵ Unfortunately, Ireland is no outlier in this regard. Several human rights monitoring bodies have expressed concern over reported increases in instances of hate speech, hate crime and hate incidents in Ireland in recent years, in particular, via online and social media platforms.²⁶ As the Law Reform Commission observed in a 2016 Report on '[Harmful Communications and Digital Safety](#)':

“[t]he internet offers a substantial means to promote hatred and facilitate hate speech as it allows groups to mobilise, offer information to youthful or impressionable sections of society and make verbal attacks on an instantaneous basis to wide audiences.”²⁷

Furthermore, online hate speech can spread very quickly, including across borders, garner massive numbers of views and remain accessible long after the initial comments were made or disseminated.²⁸

Hate incidents, sometimes referred to as racist incidents, encompass a variety of acts, which may or may not equate to criminal offences.²⁹ It is important to record all hate incidents, as research indicates that even supposedly 'mild' incidents can cause considerable harm and may act as

²¹ ICCL Submission (August 2021) p. 7; and IHREC Submission (February 2022) p. 2, included in the 'Combined Submissions' appended to the PLS Report.

²² As protected for example, under [International Covenant on Civil and Political Rights, Article 12](#).

²³ Michael, L. and others (2022) [Reports of racism in Ireland: Data from iReport.ie. - Annual Report 2021](#), (Dublin: INAR) p. 19 (last accessed 7 November 2022).

²⁴ European Commission, [Communication From The Commission To The European Parliament And The Council Brussels: A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime](#) (2021) 9.12.2021 COM(2021) 777 final, p. 1 (last accessed 7 November 2022); and [United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences](#) (September 2020) p. 3 (last accessed 7 November 2022).

²⁵ European Commission, [Communication From The Commission To The European Parliament And The Council Brussels: A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime](#) (2021) 9.12.2021 COM(2021) 777 final, p. 2 (last accessed 7 November 2022).

²⁶ See, e.g., CERD, '[Concluding observations on the combined fifth to ninth reports of Ireland](#)' (12 December 2019) UN Doc CERD/C/IRL/CO/5-9, paras 19-21 (last accessed 24 October 2022); ECRI, [ECRI Report on Ireland: fifth monitoring cycle](#), adopted on 2 April 2019, pp 15-17 (last accessed 5 November 2022); and Michael, L. and others (2022) [Reports of racism in Ireland: Data from iReport.ie. - Annual Report 2021](#), (Dublin: INAR) (last accessed 7 November 2022).

²⁷ Law Reform Commission, '[Harmful Communications and Digital Safety](#)' (2016), p. 115 (last accessed 28 October 2022).

²⁸ *Ibid.*, p. 116.

²⁹ Michael, L. and others (2022) [Reports of racism in Ireland: Data from iReport.ie. - Annual Report 2021](#), (Dublin: INAR) p. 4 (last accessed 7 November 2022).

forewarnings of hate crimes.³⁰ Research indicates that many victims are reluctant to officially report hate incidents and hate crimes due to a lack of trust and/or confidence in An Garda Síochána (AGS), a fear of not being taken seriously, uncertainty regarding whether or not the incident is unlawful, a fear of misgendering in the case of victims of transphobic crimes, and the time it takes to report an incident.³¹

In response to recommendations from numerous human rights monitoring bodies,³² AGS undertook to address underreporting of hate crime and hate incidents in 2019, including by improving its technological recording capabilities and delivering guidelines to staff regarding the identification of hate crimes and hate incidents.³³ In implementing this undertaking, AGS adopted new definitions of hate crimes and hate incidents in 2019, which incorporate the perspective of the victim, in accordance with international best practice. In October 2020, AGS began recording hate-related discriminatory motives on Pulse, namely, where the hate crimes or hate incidents are “perceived by the victim or any 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”.³⁴

AGS published its first official statistics following the introduction of this new reporting system in October 2022. The statistics indicate that 389 hate crimes were reported to AGS during 2021 in addition to 59 non-crime hate incidents, altogether comprising 448 hate-related incidents.³⁵ Despite this improvement in data collection, AGS acknowledges in its report that underreporting is still prevalent and undertakes to “work with all partners to build confidence and trust to encourage reporting”.³⁶

The existing domestic legal framework

This section of the Digest provides an overview of the existing domestic legal framework. First, it outlines the constitutional ramifications of the Bill, focussing on the right to freedom of expression. Next, it outlines the principal provisions of the [Prohibition of Incitement to Hatred Act, 1989](#). It then discusses previous efforts to legislate for hate crime.

Constitutional considerations

The provisions of the [Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022](#) (the “Bill”) have implications for many constitutionally protected rights, including but not

³⁰ Ibid.

³¹ See, e.g., *ibid.*, pp 9-10; David J McInerney, *The Realities of Policing Diverse Communities from Minority and Police Perspectives* (Cambridge Scholars 2020) 68; and Haynes A. and Schweppe J. 2018. [Gendered policing and policing gender: The trans community and An Garda Síochána](#) (accessed 7 November 2022).

³² See, e.g., CERD, ‘[Concluding observations on the combined fifth to ninth reports of Ireland](#)’ (12 December 2019) UN Doc CERD/C/IRL/CO/5-9, para. 22(e) (last accessed 24 October 2022); and ECRI, [ECRI Report on Ireland: fifth monitoring cycle](#), adopted on 2 April 2019, para. 54 (last accessed 5 November 2022).

³³ AGS, [Diversity and Integration Strategy for 2019-2021](#) (2019) p. 8 (last accessed 5 November 2022).

³⁴ [AGS webpage on hate crime statistics](#) (last accessed 7 November 2022).

³⁵ Ibid.

³⁶ [AGS webpage on hate crime statistics](#) (last accessed 7 November 2022).

limited to, the right to equality before the law,³⁷ the right to a fair trial in due course of law³⁸ and, in particular, the right to freedom of expression.³⁹ The right to freely express convictions and opinions is explicitly guaranteed under Article 40.6.1^o.i of the [Constitution](#). In *The Irish Times v Ireland*, Barrington J in the High Court held that Article 40.6.1^o.i also implicitly protects the right “to communicate facts”.⁴⁰ Furthermore, he determined that a right to communicate facts, convictions, opinions and feelings is one of the unspecified rights protected under Article 40.3 of the [Constitution](#).⁴¹ His findings have been upheld by the High Court and the Supreme Court in subsequent case law.⁴² The case law suggests that whilst it is not necessary to demonstrate that a citizen was attempting to influence public opinion, there may need to be *some public dimension* to a statement in order for it to be protected under Article 40.6.1^o.i.⁴³

Article 40.6.1^o.i clarifies that the right to freedom of expression is *not* an absolute right, stipulating that “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”.⁴⁴ The article further provides that “[t]he publication or utterance of seditious or indecent matter is an offence which shall be punishable in accordance with law”.⁴⁵ The enjoyment of constitutional rights, including freedom of expression, may also be limited where their exercise amounts to an abuse of rights either because: (i) the activity in question is subversive of the Constitution itself,⁴⁶ or (ii) the effect of the exercise of the right amounts to an abuse of the rights of others.⁴⁷

The [Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022](#) imposes restrictions on certain rights and freedoms guaranteed under the Constitution, in particular the right to freedom of expression. Hence, it is important that its provisions are compatible with these rights. The constitutionality of legislative provisions can be challenged in two ways: either by the President, before signing a Bill into law,⁴⁸ or by a citizen claiming a violation of their constitutional rights once a Bill has been enacted.

³⁷ [Constitution of Ireland](#), Article 40.1.

³⁸ [Constitution of Ireland](#), Article 38.1.

³⁹ [Constitution of Ireland](#), Article 40.6.1^o (i).

⁴⁰ [1998] 1 IR 359 at [405], [1998] 2 ILRM 161 at [192]–[193].

⁴¹ Article 40.3. 1^o provides that “[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”. Over the years, the superior courts have determined that several unspecified or unenumerated rights, which are not explicitly stated in the Constitution, are guaranteed under this provision.

⁴² See, e.g., *Murphy v Independent Radio and Television Commission* [1999] 1 IR 12, [1998] 2 ILRM 360; *Holland v Governor of Portlaoise Prison* [2004] IEHC 97, [2004] 2 IR 573; and *Mahon v Post Publications* [2007] IESC 15, [2007] 3 IR 338, [2007] 2 ILRM 1 at [51] and [95].

⁴³ See discussion in Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn., 2018 Bloomsbury Professional) at paras 7.6.10 and 7.6.11.

⁴⁴ [Constitution of Ireland](#), Article 40.6.1^o.i.

⁴⁵ [Constitution of Ireland](#), Article 40.6.1^o.i.

⁴⁶ See, e.g., *Quinn v Wren* [1985] IR 322, [1985] ILRM 410.

⁴⁷ See, e.g., *Crowley v Ireland* [1980] IR 102 [125]

⁴⁸ Constitution of Ireland, Article 26.

Prohibition of Incitement to Hatred Act, 1989

At present, the only legislation governing hate speech in Ireland is the [Prohibition of Incitement to Hatred Act, 1989](#) (1989 Act). It is the main existing piece of domestic legislation, which imposes restrictions on the right to freedom of expression with a view to combating hate speech. The restrictions imposed under the Act tend to be justified on the public order ground provided for under Article 40.6.1^o.i of the Constitution.⁴⁹ However, some commentators have suggested that the Act could amount to an excessive restriction on the constitutionally protected right to freedom of expression.⁵⁰ The main provisions of the 1989 Act are outlined below.

[Section 1](#) includes definitions for several important terms included in the Act, including hatred and broadcast.

Sections 2-4 of the 1989 Act create hate speech-related offences. [Section 2\(1\)](#) effectively provides that it shall be an offence to:

- a) publish or distribute written material;
- b) publicly use words, behave or display written material; or
- c) distribute or show or play a recording of visual images or sounds,

if the written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.

The Law Reform Commission asserts that the inclusion of the words “any place other than inside a private residence” in [Section 2\(1\)](#) indicates that the offence is broad enough to capture online incidents of hate speech.⁵¹ [Section 2\(2\)\(a\)](#) provides for a number of defences in proceedings concerning an alleged offence under section 2.

[Section 3](#) creates an offence concerning the broadcast of an item involving threatening, abusive or insulting visual images or sounds where committed with intent to stir up hatred or where, having regard to all the circumstances, hatred is likely to be stirred up by the broadcast. Subsections (3)-(6) provide for a number of defences in proceedings concerning an alleged offence under section 3.

[Section 4\(1\)](#) provides for an offence relating to the possession of certain materials which are threatening, abusive or insulting with a view to them being distributed, displayed, broadcast or otherwise published, in the State or elsewhere. Section 4(2) provides for a number of defences in proceedings concerning an alleged offence under the section.

Reports of judicial and parliamentary proceedings are excluded from the scope of the 1989 Act under [Section 5](#).

[Section 6](#) outline the applicable penalties where a person is found guilty of a summary offence and an indictable offence under sections 2, 3 or 4 of the 1989 Act. These penalties are as follows:

⁴⁹ Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn., 2018 Bloomsbury Professional) at para. 7.6.51.

⁵⁰ See Daly, ‘Reform of the Prohibition of Incitement to Hatred Act 1989’ (2007) 17(3) ICLJ 16, 19–20.

⁵¹ Law Reform Commission, ‘[Harmful Communications and Digital Safety](#)’ (2016), pp 115-116 (last accessed 28 October 2022).

- **Summary:** A fine of up to €2,500 (class C) or imprisonment of up to 6 months, or both.⁵²
- **Indictment:** A fine of up to €25,400 or imprisonment of up to 2 years, or both.⁵³

[Section 7](#) allows for corporate liability to arise where an offence under the 1989 Act is committed by a body corporate. It also outlines the circumstances in which certain officers of a company, persons purporting to act as officers of the company and members of the company exercising management functions may be found guilty of an offence under the Act.

[Section 8](#) confirms that no proceedings may be brought forward regarding an alleged offence under the 1989 Act (other than any remand in custody or on bail) without the consent of the Director of Public Prosecutions.

[Sections 9, 10 and 11](#) deal with powers of search and seizure, arrest, and forfeiture respectively relating to the implementation of the 1989 Act.

As mentioned previously, the 1989 Act is widely considered to have been ineffective at combatting hate speech, and it is proposed that it be repealed and replaced by the [Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022](#) (the “Bill”).

Convictions under the 1989 Act

A central issue concerning the 1989 Act is its apparent lack of success in securing convictions. According to Murdoch and Hunt, the first conviction under the Act is believed to have taken place in 2000.⁵⁴ In 2017, the Irish Courts Service revealed that there had been 44 prosecutions and five convictions under the *1989 Act* since 2000.⁵⁵ On announcing publication of the Bill, the Department of Justice also stated the following:

The need for new legislation to address hate speech and hate crime has been recognised for many years. The Prohibition of Incitement to Hatred Act 1989, has been widely considered as ineffective, with only about 50 prosecutions in the more than 30 years since it was enacted. The 1989 Act is being repealed and replaced with new, simpler provisions designed to be more effective in securing convictions.⁵⁶

Schweppe and Walsh, in a 2008 Report commissioned by the National Action Plan Against Racism, attribute the dearth of prosecutions to factors including, insufficient evidence, difficulties with definitions in the Act, procedural issues and prosecutorial discretion (for example, where it is determined by the Director of Public Prosecutions that it would be easier to secure a conviction

⁵² Under [section 6\(2\) of the Fines Act 2010](#), a maximum fine of £1,000 translates to a Class C fine (of up to €2,500).

⁵³ Under [section 9\(2\) of the Fines Act 2010](#), a maximum fine of £10,000 translates to a maximum fine of €25,400.

⁵⁴ Murdoch and Hunt’s Encyclopedia of Irish Law, Bloomsbury Professional, 2021, entry for ‘Hatred, Incitement to’.

⁵⁵ Conor Gallagher, ‘[Courts Service reveals five convictions for hate crime since 1989](#)’ (The Irish Times, 19 June 2017) (last accessed 6 November 2022).

⁵⁶ Department of Justice, [New Bill to tackle hate crime and hate speech includes clear provision to protect freedom of expression](#) (press release), 27 October 2022.

under another piece of criminal legislation).⁵⁷ Whilst prosecutions and convictions are not a definitive barometer of the effectiveness of criminal legislation, increasing reports of hate incidents⁵⁸ suggest that the *1989 Act* is not an adequate deterrent.

Particular difficulties have been observed in relation to prosecuting online hate speech under the Act. In its 2016 Report on Harmful Communications and Digital Safety, the Law Reform Commission noted that:

“... Incitement includes publication, broadcast and preparation of materials. The 1989 Act is not limited to offline behaviour as it extends to words used, behaviour or material displayed in “any place other than inside a private residence.” However, the 1989 Act has been subject to significant criticism for its perceived inefficacy, illustrated by the limited number of prosecutions that have been taken under it.”⁵⁹

Previous draft legislation related to the current Bill

On 21 July 2016, the Criminal Justice (Aggravation by Prejudice) Bill (Bill 75 of 2016) was initiated in Dáil Éireann by Deputies Fiona Loughlin and Margaret Murphy O’Mahony. According to its [Long Title](#), the Bill sought to:

make provision for aggravation by prejudice of offences in circumstances where an offence, at the time of commission, is accompanied by prejudice relating to the race, colour or ethnic origin, a disability, sexual orientation or transgender identity of a person and to provide for related matters.

The Bill was [debated at second stage](#) on 4 October 2016. The Bill lapsed with the dissolution of the Dáil and Seanad on 14 January 2020.

On 6 November 2020, a Private Member’s Bill, the [Criminal Justice \(Hate Crime\) Bill 2020](#), was published and introduced before Seanad Éireann. According to its [Long Title](#), the Bill seeks to:

“make provision for hate crime; the imposition of a heavier penalty on an offender whose commission of a relevant offence (a list of which is contained in the schedule to this Act) is accompanied by hate crime against an individual based on said individual’s asylum or refugee status, race, colour, religion, nationality, ethnicity, disability, sexual orientation, transgender identity, sex characteristics, age or perceived age and to provide for related matters.”

The Bill was [debated at Second Stage](#) in Seanad Éireann on 17 November 2020.

Public consultation on the Prohibition of Incitement to Hatred Act, 1989

On 23 October 2019, the government [launched a public consultation on the Prohibition of Incitement to Hatred Act, 1989](#). The terms of the consultation indicated that a specific, separate consultation would be convened concerning hate crime, which would invite submissions from

⁵⁷ Jennifer Schweppe and Dermot Walsh, ‘Combating Racism and Xenophobia through the Criminal Law: a Report Commissioned by the National Action Plan Against Racism’ (2008) pp 100-101.

⁵⁸ See, e.g., Conor Gallagher, ‘[Courts Service reveals five convictions for hate crime since 1989](#)’ (Irish Times, 19 June 2017) (last accessed 6 November 2022).

⁵⁹ Law Reform Commission, [Report on Harmful Communications and Digital Safety](#), LRC 116-2016, at p.9.

experts and members of the public. Nevertheless, noting that real-world experiences of hate crime and hate speech are closely linked, the terms invited members of the public to include material in their submissions concerning hate crime. To the authors' knowledge, a separate consultation on hate crime was never convened. Participants in the consultation on hate speech were requested to answer questions concerning four preliminary issues:

- whether the list of protected characteristics covered by the 1989 Act should be changed;
- whether the use of the term 'hatred' in the Act should be changed;
- whether the wording of the 1989 Act is adequate to deal with online communications; and
- whether the need to prove the intent or likelihood of stirring up hatred should be changed.

The government received 182 detailed written [submissions](#) from civil society groups, professional and academic organisations, and individuals.⁶⁰ An online survey composed of five questions was also made publicly available on the Department of Justice website between October 2019 and January 2020. 3,526 responses in total were received.⁶¹ The Department convened seven discussion workshops nationwide in addition to a series of meetings with relevant stakeholders.⁶² The main findings of the consultation are outlined verbatim below:

1. The 1989 Act is not effective in dealing with incitement to hatred and should be replaced by a single piece of legislation to deal with both incitement to hatred and hate crime
2. The definition of 'ethnicity' in the new legislation should explicitly include membership of the Travelling Community on the same footing as other ethnicities
3. The characteristics protected by the new legislation should include all of those listed in the 1989 Act, and also gender, gender expression or identity, and disability
4. New offences of incitement to hatred are needed & should prohibit:
 - (i) deliberately or recklessly inciting hatred against a person or group of people due to their association with a protected characteristic, &
 - (ii) displaying or distributing material inciting hatred
5. The new legislation should contain robust safeguards for freedom of expression, such as protections for reasonable and genuine contributions to

⁶⁰ [Legislating for Hate Speech and Hate Crime in Ireland: Report on the Public Consultation](#) (2020) p. 11 (last accessed 7 November 2022).

⁶¹ Ibid.

⁶² Ibid.

- literary, artistic, political, scientific or academic discourse, and fair and accurate reporting
6. Thresholds for criminal incitement to hatred should be high, for example incitement to harm or unlawful discrimination. However, it should not be necessary to show that anyone was actually influenced by the incitement or persuaded to act upon it
 7. A company accused of displaying or distributing hateful material should be able to defend itself by showing that it has reasonable measures in place to prevent dissemination of this type of material in general, was complying with those measures at the time and was unaware and had no reason to suspect that this particular content was inciteful
 8. To be meaningful, the new legislation must also deal effectively with hate crime. Threatening and abusive communications, criminal damage, harassment, assault and intimidation are all common forms of hate crime as described by participants in this consultation and specific, aggravated forms of existing criminal offences should be included in the legislation to deal with these and ensure that such crimes are properly categorised and recorded
 9. Additional elements may be needed to help ensure the new legislation is effective, such as allowing alternative verdicts for juries where the aggravating 'hate' element is not proven, and including a general provision (for crimes that are not specific hate offences) to say that a judge will always consider whether hate should be an aggravating factor in sentence, and where it is, that this factor will be on the record
 10. Not every hate incident is serious enough to be a crime – many incidents are better dealt with outside the criminal sphere and proper measures to ensure this happens will be needed. In the long term, prevention of such incidents is the most desirable outcome for all concerned. Success in this regard will depend almost entirely on non-criminal, education and awareness-based measures⁶³

The [findings of the 2019 consultation](#), informed the development of the present Bill.

⁶³ The ten findings are copied verbatim from: *ibid.*, p. 38.

Development of the Bill

As noted above, the Programme for Government included commitments to introduce hate crime legislation and revise and update the *Prohibition of Incitement to Hatred Act, 1989*, taking account of the public consultation conducted in 2019.⁶⁴ In April 2021, the Minister for Justice received approval from Cabinet to publish the [General Scheme of the Criminal Justice \(Hate Crime\) Bill 2021](#). The Bill was forwarded to the Joint Committee on Justice for pre-legislative scrutiny during the same month.

The General Scheme originally provided for eight ‘protected characteristics’, which proposed to revise the original characteristics referenced in the 1989 Act “to add gender, including gender expression or identity, and disability, and to ensure Traveller ethnicity is recognised in the main definitions in the new law, on the same basis as other ethnicities.”⁶⁵

The General Scheme also proposed to provide for hate aggravated offences, carrying an enhanced penalty in comparison to the ordinary offence, with the record of the aggravated offence clearly stating that it was motivated by prejudice.

The [Justice Plan 2022](#) also reiterated the objective of publishing a Hate Crime Bill to reform and modernise the law through the introduction of new, specific hate aggravated offences for crimes motivated by prejudice against protected characteristics, with tougher sentences than ordinary forms of crime.⁶⁶ This also included a delivery date of Q2 of 2022.⁶⁷

Pre-legislative scrutiny of the General Scheme of the Bill

In accordance with Standing Order 173, in April 2021 the Minister for Justice forwarded the General Scheme to the Joint Committee on Justice for the purpose of conducting pre-legislative scrutiny (PLS). The Joint Committee published its [Report on Pre-Legislative Scrutiny of the General Scheme of the Criminal Justice \(Hate Crime\) Bill 2021](#) (PLS Report) in April 2022.

As part of the PLS process, the Joint Committee on Justice received submissions from the following stakeholders, which are included in an Appendix to the [PLS Report](#):

- Dr. Séamus Taylor, Head of the Department of Applied Social Studies, Maynooth University;
- BeLong To Youth Services;
- Pavee Point Traveller and Roma Centre (Pavee Point);
- Nasc;
- Dr. Jennifer Schweppe and Dr. Amanda Haynes, Co-Directors, European Centre for the Study of Hate;
- The Coalition Against Hate Crime Ireland (the “Coalition”);
- Irish Council for Civil Liberties (ICCL);
- the Irish Network Against Racism (INAR);

⁶⁴ Government of Ireland, Programme for Government – Our Shared Future, at p.86.

⁶⁵ Department of Justice, [Tough sentences for hate crimes under new Bill from Minister McEntee](#) (press release), 16 April 2021.

⁶⁶ Department of Justice, Justice Plan 2022, at p.15.

⁶⁷ Ibid.

- National Youth Council of Ireland (NYCI);
- LGBT Ireland;
- The Irish Human Rights and Equality Commission;
- Unite the Union; and
- Dr Sinéad Kane.

On 17 November 2021, the Committee held a public hearing where it engaged with several stakeholders, including representatives of civil society organisations, academics and representatives of the Department of Justice.

The PLS Report made 16 recommendations in total. The Report also summarised evidence across six broad themes:

1. Determining whether an offence was motivated by prejudice (Head 8)
2. How to ensure that hate crime legislation will be able to prosecute effectively
3. Incitement to hatred and defences against prosecution for incitement offences (Head 3)
4. Impact of proposed legislation on Good Friday Agreement
5. Impact of hate crimes against disabled individuals
6. Effective implementation of hate crime legislation and how to encourage reporting of hate crime incidents.

Responding to a Parliamentary Question in June 2022, the Minister for Justice, Helen McEntee TD, stated that her officials have been examining the recommendations made, adding that “some of these recommendations have required further legal advice, and consultation with key stakeholders”.⁶⁸ In July 2022, the Minister announced her intention to amend the approach of the Bill to include a ‘demonstration test’ as an alternative to the ‘motivation test’ proposed by the General Scheme:

“A motivation test for hate crime requires proof of someone’s subjective motivation for committing an offence - what was in their mind at that exact moment. However, the Minister has now concluded that motivation alone in proving hate crime offences can be difficult to establish and therefore might not result in a conviction.

A demonstration test means simply that a perpetrator demonstrates hatred towards a member of a protected group/characteristic at the time of an offence being committed.”⁶⁹

The addition of the demonstration test is the first recommendation of the Joint Committee in its report (see below), as well as key stakeholders consulted by the Minister.⁷⁰

It should be noted that multiple stakeholders during the PLS process stressed that criminal offences alone cannot combat hate crime and hate speech. They noted that a range of additional supplementary measures are needed to tackle these distinct problems, for example:

- a National Action Plan Against Hate Speech and Hate Crime;

⁶⁸ Helen McEntee TD, Minister for Justice, Response to Parliamentary Question No. 293: Crime Prevention, Written Answer, *Dáil Éireann Debate*, 7 July 2022.

⁶⁹ Department of Justice, [Minister McEntee to update new Hate Crime legislation to make it easier to secure prosecutions and convictions](#) (press release), 13 July 2022.

⁷⁰ *Ibid.*

- public awareness raising and campaigns surrounding the harm caused by hate speech and hate crime, which should be accessible for all;
- education in schools surrounding hate crime and hate speech;
- improved data collection, including the compilation of disaggregated data surrounding the recording, investigation, prosecution and sentencing of hate crimes and hate speech offences;
- ongoing education and training, including anti-bias and anti-racism training, for individuals working in law enforcement and other relevant public sector professionals; improved supports for victims, including effective mechanisms to enable and encourage victims to report hate crimes and hate speech offences;
- the use of restorative justice mechanisms; and
- further consultations with affected communities and key stakeholders regarding their experience of hate crime in order to understand their needs.⁷¹

PLS Recommendations

This section of the Digest seeks to assess the extent to which the Committee's recommendations have been addressed **in the Bill, as presented for Second Stage**. To do this, a traffic light system is used by the L&RS, indicating whether a key issue is accepted and reflected in the Bill, whether a consistent or unclear approach is used, and whether the recommendation has not been accepted or is not reflected in the Bill. This traffic light approach represents the L&RS' own, independent analysis of the Bill.





A key setting out the traffic light dashboard is set out in Table 3 below. A fourth icon within the three-colour scale normally used has been added to account for recommendations that have not been implemented in the Bill, but there are additional considerations of which Members are made aware, e.g. the implementation of the recommendation being outside the scope of primary legislation.

The L&RS is grateful to the Departmental officials for providing their assessment of the actions taken and comments in relation to the PLS recommendations. These are replicated in the right-hand column of the table and were derived from a separate analysis provided by the Department to the Joint Committee.⁷²

⁷¹ See generally the 'Combined Submissions' appended to the [PLS Report](#).



⁷² The Departmental commentary is reproduced from material submitted to the L&RS on 8 November 2022.




Table 3 Key to traffic light dashboard comparing the Bill as published with Committee PLS recommendations.






L&RS categorisation of the Department's response in the Bill to the Committee's key issue	Traffic light dashboard used in Error! Reference source not found. Table 4 to highlight impact of the Committee's PLS conclusion
Recommendation has clearly been accepted and is reflected in the Bill.	
The Bill may be described as adopting an approach consistent with the recommendation or the impact of the key issue is unclear.	
Recommendation has not been implemented in the Bill, but additional considerations are present.	
Recommendation has not been accepted or implemented in the Bill.	






Source: L&RS

Table 4: Traffic light dashboard comparing the Bill as published with Committee PLS recommendations.

Commentary as per the Committee Report	Whether addressed (either in whole or in part) in the Bill
1. The Committee recommends that a demonstration test of proof for hate crime offences be introduced under Head 8 to ensure the legislation will be robust and will result in the effective prosecution of hate crime offences.	 <p>The Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 has evolved significantly during the drafting process and now looks very different to the General Scheme that was reviewed for pre-legislative scrutiny by the Joint Justice Committee.</p> <p>The provisions have been restructured in such a way that Head 8 no longer features. However, the Committee's recommendation that the demonstration test of proof be incorporated into the legislation has been taken on board in the Bill as published and features in all hate crime offences in Sections 16, 17 and 18.</p>
2. The Committee recommends that the defences against incitement to hatred under Head(3)(5)(a) be re-evaluated and more clearly defined, particularly the provision of using political discourse as a defence.	 <p>The defences in the Bill as published have not been changed in any substantial way as the policy intent was to keep them relatively broad to allow for judicial discretion in their application.</p> <p>Refining them further would result in them being overly prescriptive and only applicable in a narrow set of circumstances, whereas it is impossible to predict the breadth of</p>

		situations where these defences may be required.
3. The Committee recommends that the incitement to hatred or hate speech element of the Bill, contained in Head 3, be removed from this Bill and included as an amendment to the Prohibition Of Incitement To Hatred Act, 1989 where it would be better placed.		<p>The extensive public consultation that informed development of this legislation centred on minority groups testimony of their lived experience of both hate speech and hate crime, applying to the same identity characteristics. It was on this basis that the Department decided to incorporate both elements in the Bill.</p> <p>Given that the 1989 Prohibition of Incitement to Hatred Act has been largely ineffective, updating the incitement to hatred provisions was urgently required. Removing these provisions from the Bill and progressing them through separate legislation would have led to considerable delays in introducing the simplified, more effective and modernised provisions that now underpin the Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022</p>
4. The Committee recommends that arising from the provisions of Section 6 of the Good Friday Agreement, the General Scheme be re-assessed and altered, to rectify the disparities between the proposed legislation and existing hate crime legislation in Northern Ireland. This could be achieved through including a demonstration test of hostility in the legislation, or alternatively through having a narrow model used in the aggravated offence and a broader model used in the aggravated sentencing provisions.		<p>The Department sought legal advice in relation to this recommendation and can confirm that the Good Friday Agreement does not require exact parity between legislative provisions in Northern Ireland and the Republic of Ireland.</p> <p>Nonetheless, as per recommendation 1, the suggestion to include a demonstration test of proof for hate crime offences has been taken on board and as a result there is strong alignment between the provisions of this Bill and the provisions in force in Northern Ireland.</p>
5. The Committee recommends the inclusion of the word 'contempt' in the definition of hate under Head 2, aimed at allowing for a broader framework to address instances of hate crime against disabled individuals.		<p>The definition of hatred has been amended in the Bill as drafted as "hatred against a person or group of persons in the State or elsewhere on account of their protected characteristics or any one of those characteristics".</p> <p>On the advice of the Attorney General, for the purpose of this legislation, "hatred" takes on its ordinary meaning as opposed to being set out as a definition, as it is a concept that is universally understood.</p>
6. The Committee recommends that training on hate crime and hate speech be made available to all relevant professionals and that the need for additional training for these professionals, such as anti-racism and		While it is recognised that training and education are critical elements in the battle against hate and intolerance in our society, this recommendation is not within the scope of matters which can be addressed in primary legislation.

anti-discrimination training, be assessed.		
7. The Committee recommends that a public awareness campaign be launched to coincide with the publication of the legislation and to raise public awareness. This campaign should target those within protected categories and should ensure that it is accessible to these groups in being translated into relevant languages or being accessible to those who may have literacy issues.		Similarly to recommendation 6, this recommendation is very important but falls outside of the scope of primary legislation.
8. The Committee recommends that data on the incidence and impacts of hate crime and hate speech in Ireland be collected in an anonymised fashion. This data should be used to monitor the effectiveness of the legislation and in setting targets around the reduction of hate crime incidents.		This recommendation is more relevant for An Garda Síochána and falls outside of the scope of primary legislation.
9. The Committee recommends that consideration be given to ensuring the legislation contains protections against the sharing of an individual's migration status or other sensitive attributes when they report a hate crime offence.		There has been no specific protection of this nature built into the legislation as this would come down to enforcement policies and is more relevant for An Garda Síochána.
10. The Committee recommends that the Department of Justice establish performance indicators to monitor the following: handling of discriminatory incidents, levels of satisfaction with the police service among marginalised communities and ethnic minorities, training of liaison officers, racial awareness training, stop and search procedures, and complaints about racism in police forces.		Although important, this recommendation is outside of the scope of primary legislation.
11. The Committee recommends that the Bill should include a requirement for a comprehensive review of the legislation, such as within 3 years, as well as consultative monitoring of its implementation.		<p>In accordance with Dáil Standing Order 164A and Seanad Standing Order 168 (2016), the Minister shall produce a post-enactment report to be laid in the Parliamentary Library 12 months after a Bill is enacted.</p> <p>This report will provide information gathered from relevant agencies on how the Act has operated over the course of the first 12 months of its enactment.</p>

<p>12. The Committee recommends that consideration be given to expanding the number of protected characteristics in order that the Bill is in-line with the characteristics in the Equality Acts.</p>		<p>The list of protected characteristics have been expanded since the General Scheme to include descent and sex characteristics on the basis of submissions made during the pre-legislative scrutiny process and in line with international standards.</p> <p>The Equality Acts are currently under review, and following this review, the list of protected characteristic in this Bill may be expanded if there is evidence to suggest such changes are required.</p>
<p>13. The Committee recommends consideration be given to prejudice based on both actual and perceived membership or association with a protected characteristic being included in aggravated offences while being mindful for the need for clarity in the law.</p>		<p>The Department has taken on board this recommendation and throughout the Bill there is reference to hatred on account of the victim's membership or presumed membership of a group defined by reference to a protected characteristic.</p>
<p>14. The Committee recommends that the defences provided for in this legislation must synergise and complement other legislation seeking to regulate online content, e.g. the 'Online Safety and Media Regulation Bill 2022'.</p>		<p>Significant engagement has taken place between the Department of Justice and the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media to ensure that the provisions of the Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 Bills and the Online Safety and Media Regulation Bill 2022' dovetail.</p>
<p>15. The Committee recommends that, to align with comparable international jurisdiction, the terms 'bias' and 'hostility' are included as motivation for an aggravated offence.</p>		<p>The Bill has been restructured so this recommendation no longer applies. All hate crime offences are now aggravated by hatred, which will take on its usual meaning.</p> <p>This will allow for a wider range of behaviour to be captured than the general scheme provided.</p>
<p>16. The Committee recommends that the provision under Head 9 is changed to an incitement offence to reflect the requirements of the EU Council framework decision 2008/913/JHA, as well as expanding the offence to war crimes and crimes against humanity.</p>		<p>This recommendation has been taken on board and the provision has been expanded accordingly and now features as section 8 of the Bill, as published.</p> <p>The relevant provisions have been developed in close consultation with the Department of Foreign Affairs to ensure that the definitions used comply with Government policy and international obligations, and achieve the intended objectives.</p>

Sources: [PLS Report](#), L&RS and Department of Justice. The L&RS is grateful to the Department of Justice for providing its analysis of how it has responded to the Committee's recommendations. The traffic light analysis represents the analysis of the L&RS.

International Obligations

The State's obligations to address hate speech under EU law and international law

This section discusses the State's obligations under EU law and international law with regard to hate speech. EU law imposes obligations on EU Member States to tackle hate speech, including through criminal measures. In so doing, Member States must concurrently ensure respect for fundamental rights, in particular the right to freedom of expression, which is guaranteed under [Article 11 of the CFREU](#).

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 (the "Framework Decision") imposes obligations on EU member states, including Ireland, to criminalise certain forms of hate speech. One of the purposes of the [Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022](#) is to give effect to the State's obligations under the Framework Decision. Article 1(1) requires of the Framework Decision requires EU Member States to implement measures to ensure that certain *intentional* conduct amounting to incitement to violence or hatred is punishable under domestic law, including:

- "(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; and
- (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material."⁷³

Significantly, Article 1 explicitly includes the word 'intentional' indicating that the provision requires the criminalisation of "intentional" conduct. Subparagraph 2 of Article 1, allows Member States to "choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting".⁷⁴

Ireland has also ratified several international human rights law treaties, which impose obligations on state parties to implement measures at the domestic level to combat hate speech, including by criminalising its most severe forms.⁷⁵

Article 5 of the Convention on the [Prevention and Punishment of the Crime of Genocide Convention](#) (the "Genocide Convention") imposes an obligation on state parties to criminalise direct and public incitement to commit genocide.

⁷³ Article 1(1) of the [Framework Decision](#). Article 6 of the Charter of the International Military Tribunal (IMT) afforded the IMT jurisdiction over war crimes, crimes against humanity and crimes against peace (aggression) as defined in Article 6.

⁷⁴ [Framework Decision](#), Article 1(2).

⁷⁵ By ratifying an international treaty, Ireland becomes a 'state party' to the treaty and agrees to implement the obligations imposed on state parties under the treaty's provisions. The discussion does not encompass all relevant provisions under international law. For a more comprehensive analysis, see: Judit Bayer and Petra Bard, [Hate speech and hate crime in the EU and the evaluation of online content regulation approaches](#) (Report commissioned by Libe Committee of European Parliament, 2020) (last accessed 7 November 2022).

[Article 20 of the International Covenant on Civil and Political Rights](#) (ICCPR) requires that “any propaganda for war” or “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” be prohibited by law.⁷⁶

[Article 4 of the International Convention on the Elimination of Racial Discrimination](#) (ICERD) imposes some of the most far-reaching obligations on state parties concerning the criminalisation of hate speech. It requires state parties *inter alia* to:

- (i) criminalise the dissemination of ideas based on racial superiority or hatred;
- (ii) criminalise incitement to racial discrimination against members of a group based on their race, colour, descent, or national or ethnic origin;
- (iii) criminalise incitement to acts of violence against any race or group of persons of another colour or ethnic origin’;
- (iv) criminalise the provision of assistance, including financial, to racist activities;
- (v) declare illegal and prohibit organisations and organised and other propaganda activities, which promote and incite racial discrimination; and
- (vi) criminalise participation in such organisations or activities.⁷⁷

The [European Convention on Human Rights](#) (ECHR) doesn’t impose an explicit obligation on state parties, including Ireland, to prohibit incitement to hatred. Nevertheless, the European Court of Human Rights (ECtHR), which oversees the implementation of the ECHR, has upheld restrictions on the right to freedom of expression, which seek to combat the most severe forms of hate speech. The ECtHR also combats the most severe forms of hate speech through [Article 17 of the ECHR](#). Article 17 effectively provides that the Convention cannot be relied upon to justify any action, including extreme forms of hate speech, which seek to destroy ECHR rights or limit their enjoyment to a greater extent than is provided for under the ECHR.⁷⁸

Notably, creating criminal sanctions for the most severe forms of hate speech can also be viewed as a component of the victim’s right to an effective remedy under the ECHR, ICERD and ICCPR.⁷⁹

When adopting and implementing measures to address hate speech, states must simultaneously ensure respect for the right to freedom of expression, a right which is guaranteed under [Article 10 of the ECHR](#) and [Article 19 of ICCPR](#). Significantly, the right is not an absolute right as its exercise entails ‘special duties and responsibilities’. Any restrictions imposed upon the enjoyment of the right to freedom of expression must be:

- (i) provided for by law, usually in a piece of domestic legislation;
- (ii) in pursuit of a legitimate aim (national security, public order, public safety, the prevention of disorder or crime, and the protection of the rights or reputation of others);⁸⁰

⁷⁶ ICCPR, Article 20(1).

⁷⁷ See also CERD, ‘[General Comment No. 35: Combating Racist Hate Speech](#)’ (26 September 2013) UN Doc CERD/C/GC/35, para. 13 (last accessed 5 November 2022).

⁷⁸ Article 5 of the ICCPR contains an equivalent provision.

⁷⁹ [ECHR](#), Article 13; ICERD, Article 6; and ICCPR, Article 2 (3).

⁸⁰ See Article 19(3) ICCPR; and [ECHR](#), Article 10(2).

(iii) necessary to achieve the legitimate aim and proportionate to that aim. According, to the Human Rights Committee, the treaty monitoring body comprised of independent experts which oversees the implementation of ICCPR, a restriction is not necessary if the legitimate aim can be protected in other ways that do not restrict the enjoyment of freedom of expression.⁸¹

The right to freedom of expression has been described by the Human Rights Committee as ‘one of the cornerstones of a democratic society’.⁸² In recognition of its importance, international law only mandates criminalisation of the most severe or extreme forms of hate speech.⁸³ It doesn’t require the criminalisation, or indeed even prohibition under law, of *legitimate* forms of expression, including expression that may be considered offensive, shocking or disturbing to some.⁸⁴ Less severe forms of hate speech may require civil or administrative law-based restrictions, or public policy responses.⁸⁵ In determining which forms of hate speech are severe enough to attract a criminal penalty, regard is often had to the six criteria established in the [Rabat Plan of Action](#), which was adopted at an expert workshop on the prohibition of incitement to national, racial or religious hatred convened by the Office of the High Commissioner for Human Rights (OHCHR) in 2012. The six criteria are as follows:

- (i) the social and political context prevalent at the time of the alleged offence;
- (ii) the speaker’s position or status in society and specifically regarding the target audience;
- (iii) the intent of the speaker;
- (iv) the content and form of the speech;
- (v) the extent of the speech act (taking into account elements such as the reach and public nature of the speech; and the means of dissemination);⁸⁶ and
- (vi) the likelihood of the speech actually inciting action, including imminence (with a requirement for a reasonable probability that the speech would succeed in inciting

⁸¹ *Ballantyne, Davidson and McIntyre v. Canada*, Human Rights Committee, 31 March 1993

⁸² Human Rights Committee, General Comment No. 34 Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 (12 September 2011) para. 13 (last accessed 5 November 2022).

⁸³ As confirmed in: *ibid.*, para. 12; Human Rights Committee, [General Comment No. 34 Article 19: Freedoms of opinion and expression](#), CCPR/C/GC/34 (12 September 2011) para. 52 (last accessed 5 November 2022); UN 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 and 79 (last accessed 5 November 2022); and ECRI, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, CRI(2016)15, p. 13 (last accessed 5 November 2022).

⁸⁴ *Handyside v. the UK*, ECHR, Application no.: 5493/72, 7 December 1976; and [United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences](#) (September 2020) p. 5 (last accessed 7 November 2022).

⁸⁵ [United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences](#) (September 2020) p. 5 (last accessed 5 November 2022).

⁸⁶ CERD observes that repetition could suggest ‘the existence of a deliberate strategy to engender hostility towards ethnic and racial groups’. See CERD, [General Comment No. 35: Combating Racist Hate Speech](#) (26 September 2013) UN Doc CERD/C/GC/35, para. 15 (last accessed 5 November 2022).

actual action against the target group, recognizing that such causation should be rather direct).⁸⁷

CERD, the UN treaty monitoring body that oversees the implementation of ICERD, suggests that the objectives of the speech should also be taken into account as well as the economic climate.⁸⁸ The latter factor is notable in an Irish context given that research suggests that attitudes amongst the Irish public toward immigration deteriorate and improve in accordance with corresponding changes in the performance of the economy.⁸⁹ The European Commission against Racism and Intolerance (ECRI), a monitoring body comprised of independent experts appointed by Council of Europe (CoE) member states to monitor racism across COE territory, suggests that regard should be had to whether or not there are already serious tensions within the society concerned.⁹⁰ Regarding the speaker's status, ECRI infers that consideration should be afforded to whether they held a particular position of influence by virtue of being a religious, political or community leader.⁹¹ Regarding the content and form/nature of the speech, ECRI suggests that regard should be had to whether the speech contains any misinformation or negative stereotyping and stigmatisation.⁹²

There is considerable debate surrounding the 'intent' criterion and, in particular, regarding whether 'recklessness' as opposed to 'intent' should be sufficient to ground a conviction.⁹³ International law is not entirely unambiguous in this regard. The Rabat Plan of Action suggests that 'intent' must be demonstrated for an act to constitute an offence for the purposes of Article 20 of ICCPR. It indicates that negligence and recklessness are insufficient as Article 20 explicitly requires "advocacy" and "incitement" as opposed to merely the distribution or circulation of material. ECRI takes a slightly different approach although its commentary in this regard focuses predominantly on the ECHR. It indicates that it is *not* absolutely necessary to demonstrate 'intent' to incite the commission of acts of violence, intimidation, hostility or discrimination, and rather that the threshold for criminal responsibility for severe acts of hate speech may be satisfied where an element of recklessness is proven, namely, where the commission of the impugned acts 'can reasonably be expected to be the effect of using the hate speech concerned'.⁹⁴ ECRI submits that its position is in line with the jurisprudence of the ECtHR, which it observes has upheld the compatibility of Article 10 of the ECHR with the imposition of criminal sanctions in respect of remarks 'where it should

⁸⁷ The above is a slightly abbreviated version of the criteria; for the verbatim version, see: [Rabat Plan of Action](#), para. 29 (last accessed 23 October 2022).

⁸⁸ CERD, '[General Comment No. 35: Combating Racist Hate Speech](#)' (26 September 2013) UN Doc CERD/C/GC/35, para. 16 (last accessed 5 November 2022).

⁸⁹ See, e.g., McGinnity F., Grotti R., Russell H., and Fahey E. 2018. *Attitudes to diversity in Ireland*, vii and 15 (last accessed 8 November 2022)

⁹⁰ ECRI, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, CRI(2016)15, para. 16 (last accessed 5 November 2022).

⁹¹ ECRI, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, CRI(2016)15, para. 16 (last accessed 5 November 2022).

⁹² ECRI, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, CRI(2016)15, para. 16 (last accessed 5 November 2022).

⁹³ For more information, see detailed discussion in IHREC Submission (February 2022) pp 34-38, included in the 'Combined Submissions' appended to the [PLS Report](#).

⁹⁴ ECRI, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, CRI(2016)15, para. 17 and see also generally, paras 14-18 (last accessed 5 November 2022).

have been appreciated that these were likely to exacerbate an already explosive situation'.⁹⁵ On the other hand, the Irish Human Rights and Equality Commission (IHREC) suggests that, to some extent, the ECtHR jurisprudence supports the position that 'intent' is necessary.⁹⁶ As noted above, Article 1 of the EU Framework Decision explicitly includes the word 'intentional' suggesting that the provision requires the criminalisation of intentional conduct.

The State's obligations to address hate crime under EU law and international law

International organisations such as the UN, the COE and the EU have yet to adopt a universally accepted definition of hate crime.⁹⁷ Despite a widespread recognition that acts amounting to hate crimes need to be addressed under criminal law, there isn't a uniform approach regarding how exactly criminal law should deal with them. Whereas some states include substantive offences motivated by bias or prejudice in their criminal code, others simply allow for harsher penalties to be imposed for an offence when it is motivated by prejudice or bias. The ECRI has inferred that both approaches are acceptable recommending that:

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

- defining common offences but with a racist or xenophobic nature as specific offences;
- enabling the racist or xenophobic motives of the offender to be specifically taken into account.⁹⁸

The present Bill provides for specific 'aggravated by hatred' offences, which attract stricter penalties. It also requires the courts to take account of evidence of hatred on the part of the perpetrator against a person or a group of persons on account of their protected characteristics or any of those characteristics when imposing a sentence for an offence other than an offence created under the Bill.

A number of provisions under EU law and international instruments ratified by Ireland create obligations regarding hate crime. Article 4 of the Framework Decision requires EU member states to ensure that, in respect of offences other than hate speech-related offence as defined under Articles 1 and 2 of the Framework Decision, "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". A European Parliament Resolution of 14 March 2013 on strengthening the fight against racism, xenophobia and hate crime also mandates a number of actions to be taken by EU institutions and EU Member States to combat hate crime.⁹⁹

⁹⁵ Ibid., para. 18. The ECRI explicitly references *Zana v. Turkey* [GC], no. 18954/91, 25 November 1997; and *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, 8 July 1999, in support of its argument.

⁹⁶ IHREC Submission (February 2022) p. 35, included in the 'Combined Submissions' appended to the [PLS Report](#). It refers explicitly to: *Jersild v. Denmark*, no. 15890/89 (September 1994) para. 30.

⁹⁷ Schweppe J. 2021. What is a Hate Crime. *Cogent Social Sciences* 7: 1-15, p. 2.

⁹⁸ ECRI, [ECRI General Policy Recommendation No. 1 on Combating racism, xenophobia, antisemitism and intolerance](#), Adopted by ECRI on 4 October 1996, 4 October 1996, CRI(96)43, p. 4 (last accessed 5 November 2022).

⁹⁹ [European Parliament resolution of 14 March 2013 on strengthening the fight against racism, xenophobia and hate crime](#) (2013/2543(RSP)) (2016/C 036/13) (last accessed 24 October 2022).

Interestingly, the Resolution notes that the Irish Presidency of the EU initiated a debate at the informal Justice and Home Affairs Council from 17-18 January 2013 concerning EU action to counter hate crime, racism, anti-Semitism, xenophobia and homophobia.¹⁰⁰ It further notes that the Irish Presidency drew attention to the fact that improved protection and data collection were required.¹⁰¹

It has also been argued that legislative recognition of the hate element of crimes is necessary to ensure adherence to obligations in respect of victims' rights arising under the [Victim's Rights Directive](#).¹⁰² Notably, Article 83(1) of the [TFEU](#) outlines areas of crime where the European Parliament and the Council may delineate minimum rules regarding the definition of criminal offences and sanctions applicable across all EU member states. In a [December 2021 communication to the European Commission and the Council, the European Parliament](#) indicated its intention to adopt a decision extending the list of areas of crime covered by Article 83(1) to include hate speech and hate crime with a view to establishing a common legal framework to combat these problems across the EU.¹⁰³

Under [Article 4 of ICERD](#), state parties are also required to criminalise acts of violence against any race or group of persons of another colour or ethnic origin, and to criminalise the provision of any assistance to racist activities, including the financing thereof. In *Abdu v. Bulgaria*, the ECtHR confirmed the existence of an obligation under ICERD to make violence based on racial considerations a criminal offence.¹⁰⁴

Also of note, the ECRI, in its [General Policy Recommendation No. 1](#) on combating racism, xenophobia, antisemitism and intolerance, recommends that states '[e]nsure that criminal prosecution of offences of a racist or xenophobic nature is given a high priority and is actively and consistently undertaken'.¹⁰⁵

¹⁰⁰ *Ibid.*, Preamble.

¹⁰¹ *Ibid.*

¹⁰² Schweppe and Haynes Submission (August 2021) p. 32, included in the 'Combined Submissions' appended to the [PLS Report](#).

¹⁰³ [Communication from the Commission to the European Parliament and the Council A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime](#) (2021) Brussels, 9.12.2021 COM(2021) 777 final.

¹⁰⁴ *Abdu v. Bulgaria*, ECtHR App no 26827/08, 11 March 2014, para. 47.

¹⁰⁵ ECRI, [ECRI General Policy Recommendation No. 1 on Combating racism, xenophobia, antisemitism and intolerance](#), Adopted by ECRI on 4 October 1996, 4 October 1996, CRI(96)43, p. 5 (last accessed 5 November 2022).

Principal Provisions of the Bill

This section of the Bill Digest examines selected provisions of the Bill from within Parts 1, 2 and 3 i.e. the principal provisions of the Bill. Part 4, which primarily consists of consequential amendments, is not considered. In so doing, the Bill Digest considers the extent to which the Bill is compatible with existing obligations under the Constitution, EU law and international law. It also considers the extent to which the Bill has evolved in response to concerns raised by stakeholder during the PLS process.

Part 1: Preliminary and General

This Part of the Bill contains preliminary and general provisions. It has five sections.

Section 1: Short Title and Commencement

Section 1(1) provides that the short title of the Bill is the Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022. The Bill was previously known as the Criminal Justice (Hate Crime) Bill 2021. However, during the PLS process, several stakeholders including Nasc, ICCL, Schweppe and Haynes, the Coalition Against Hate Crime Ireland (the “Coalition”), NYCI, INAR and IHREC recommended that the title of the Bill be updated to reflect the fact that it deals with two distinct categories of offence, namely, incitement to hatred offences and hate crime.¹⁰⁶ The change in title incorporates these recommendations. During the PLS process, some stakeholders, including the Coalition and NYCI, also suggested that it may be preferable to address hate crime and incitement to hatred offences in two separate pieces of legislation given that they deal with two distinct problems.¹⁰⁷ This suggestion was ultimately not taken on board; instead, the title of the Bill was changed.

Section 2: Interpretation

Section 2(1) includes definitions for three important terms used throughout the Bill, namely, “Framework Decision”, “hatred” and “protected characteristic”.

Section 2(1) clarifies that any reference to “Framework Decision” in the Bill constitutes a reference to [EU Framework Decision 2008/913/JHA](#) of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. **Section 2(2)** clarifies that any word or expression used in the Bill, which is also included in the Framework Decision, shall have the same meaning as it has under the Framework Decision unless the context requires otherwise.

Section 2(1) provides that ““protected characteristic” shall be construed in accordance with section 3” of the Bill.

“Hatred” is defined under **section 2(1)** as:

¹⁰⁶ See: Nasc Submission (13 August 2021) p. 2; ICCL Submission (August 2021) p. 14; Schweppe and Haynes Submission (August 2021) pp 9 and 21; Coalition Submission (August 2021) pp 1 and 7; NYCI Submission (August 2021) p. 6; INAR Submission (August 2021) p. 3; and IHREC Submission (February 2022) p. 22, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁰⁷ See: Coalition Submission (August 2021) p. 1; and NYCI submission (August 2021) p. 5; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

“hatred against a person or a group of persons in the State or elsewhere on account of their protected characteristics or any one of those characteristics”.

The phrase “in the State or elsewhere” may have been included to ensure consistency with section 12 of the Bill and Article 9 of the Framework Decision which both deal with jurisdictional issues and are discussed in more detail below. The definition of hatred under section 2(1) differs considerably from the definition of “hatred”, which was included in Head 2 of General Scheme, namely:

“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”.¹⁰⁸

The change may reflect the fact that during the PLS process, several stakeholders raised concerns regarding the definition included in Head 2. For example, Dr. Séamus Taylor, BeLonG To, Pavee Point, Dr. Sinéad Kane, INAR, Nasc and Unite the Union raised concerns regarding the inclusion of the phrase “of a magnitude”, indicating that it could give rise to interpretation difficulties and/or establish an onerous threshold that would be difficult to satisfy in practice.¹⁰⁹ Nasc suggested that the definition of “hatred” under Head 2 was insufficiently,¹¹⁰ clear whereas Schweppes and Haynes indicated that it was overly broad.¹¹¹

During the PLS, several stakeholders, including ICCL, NYCI, Nasc, Pavee Point, the Coalition, LGBT Ireland and IHREC, stressed that the definition of hatred included in the Bill should correspond with relevant international standards,¹¹² in particular, the definitions of “hatred” included in the ECRI’s General Policy Recommendation No. 15 on Combating Hate Speech,¹¹³ the 2012 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion on Hate Speech and Incitement to Hatred,¹¹⁴ and the Rabat Plan of Action.¹¹⁵ All of these definitions draw upon Principle 12.1 of the Camden Principles, which defines “hatred” as “intense

¹⁰⁸ General Scheme Criminal Justice (Hate Crime) Bill 2021, available at [Tough sentences for hate crimes under new Bill from Minister McEntee](#) (press release), 16 April 2021.

¹⁰⁹ See: Dr. Séamus Taylor Submission (5 August 2021) pp 1 and 6; BeLonG To Submission (13 August 2021) p. 4; Pavee Point Submission, p. 4; Dr. Sinéad Kane Submission (11 August 2021); Unite the Union Submission (19 August 2021); and INAR Submission (August 2021) p. 3; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹¹⁰ Nasc Submission (13 August 2021) p. 2; appended to the [PLS Report](#).

¹¹¹ Schweppe and Haynes Submission (2021) P. 28; appended to the [PLS Report](#).

¹¹² See: Pavee Point Submission, p. 7; NYCI Submission (August 2021) p. 6; Nasc Submission (13 August 2021) p. 2; Coalition Submission (August 2021) pp 7-8; LGBT Ireland Submission (August 2021) p. 9; Unite the Union Submission (19 August 2021); and IHREC Submission (February 2022) pp 28-29; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹¹³ ECRI, [ECRI’s General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, CRI(2016)15, p. 15 (last accessed on 5 November 2022).

¹¹⁴ UN General Assembly, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion on Hate Speech and Incitement to Hatred’ (7 September 2012) UN Doc A/67/357, para. 44, available [here](#) (last accessed 5 November 2022).

¹¹⁵ UNGA, ‘Rabat Plan of Action’ (11 January 2013) UN Doc A/HRC/22/17/Add.4, p. 10, footnote 5, available [here](#) (last accessed 5 November 2022).

and irrational emotions of opprobrium, enmity and detestation towards the target group”.¹¹⁶ However, the definition of hatred included in section 2(1) omits a definition of the substance of “hatred” defining it as “hatred against a person or a group of persons in the State or elsewhere on account of their protected characteristics or any one of those characteristics”. Notably, the UN Special Rapporteur on the Right to Freedom of Opinion and Expression has acknowledged that legislating for incitement to hatred offences entails “difficult-to-define language of emotion”.¹¹⁷ Nevertheless, the ECRI has stressed the importance of ensuring that hate speech offences 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.”¹¹⁸ In other words, without legal clarity it is difficult for individuals to reasonably foresee the threshold between criminal and non-criminal communications and behaviour.

Section 2 omits a definition of violence. A definition of violence is also omitted from the Framework Decision. Accordingly, it may be useful to include a definition for the purposes of legal clarity. The UN Special Rapporteur on Freedom of Expression has used the following definition of violence, which IHREC cited in its submission to the PLS: “[v]iolence” 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”.¹¹⁹

Section 3. meaning of protected characteristic

Section 3(1) provides that, apart from section 8, whenever the phrase “protected characteristic” is used in the Bill in relation to a person or a group of persons, it shall mean: “(a) race, (b) colour, (c) nationality, (d) religion, (e) national or ethnic origin, (f) descent, (g) gender, (h) sex characteristics, (i) sexual orientation, or (j) disability”.

The list of protected characteristics has changed between the grounds included in the 1989 Act and the protected characteristics included in both the General Scheme and the Bill. These are set out in the below table.

¹¹⁶ Article 19, ‘[The Camden principles on freedom of expression and equality](#)’ (2009), p. 10, (last accessed 5 November 2022).

¹¹⁷ See UNGA, ‘[Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#)’ (9 October 2019) UN Doc A/74/486, para. 12, (last accessed 5 November 2022).

¹¹⁸ ECRI, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, CRI(2016)15, p. 59, para. 175, (last accessed 5 November 2022) emphasis in original.

¹¹⁹ UN General Assembly (UNGA), ‘[Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#)’ (7 September 2012) UN Doc A/67/357, para. 44(f), (last accessed 5 November 2022).

Table 5: Comparison of Protected Characteristics in 1989 Act and the General Scheme / Bill

1989 Act	General Scheme to the Bill	The Bill
1. Race	1. Race	1. Race
2. Colour	2. Colour	2. Colour
3. Nationality	3. Nationality	3. Nationality
4. Religion	4. Religion	4. Religion
5. Ethnic or national origins	5. Ethnic or national origin	5. National or ethnic origin
6. Membership of the Travelling community	6. Sexual orientation	6. Descent
7. Sexual orientation	7. Gender	7. Gender
	8. Disability	8. Sex characteristics
		9. Sexual orientation
		10. Disability

Source: Prohibition of Incitement to Hatred Act 1989, General Scheme to the Criminal Justice (Hate Crime) Bill 2021 and Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022

The list included in section 3 is comprised of the same protected characteristics, which were included in Head 2 of the General Scheme with the addition of “descent” and “sex characteristics”. The addition of “descent” likely seeks to ensure adherence to preambular paragraph 7 of the [Framework Decision](#) which requires EU Member States to punish incitement 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”.¹²⁰ The inclusion of “sex characteristics” as an additional protected characteristic gives effect to recommendations received from multiple stakeholders during the PLS process, including BeLonG To, ICCL, Schweppe and Haynes, the Coalition, and LGBT Ireland.¹²¹

During the PLS process, multiple stakeholders observed that several characteristics were omitted from the list of protected characteristics provided in Head 2, such as family status, marital status, age, citizenship, place of origin, socioeconomic status, sex characteristics, refugee status, address or postcode, employment status, homelessness, and sex worker status. They requested that the government provide additional clarification regarding the rationale underlying its selection of the “protected characteristics” included in the Bill.¹²² Notably, three of the nine core discriminatory grounds identified in [section 3 of the Equal Status Act 2000](#), namely, marital status, family status and age, are omitted from the list of protected characteristics included in section 3(1) of the Bill.¹²³ The ECRI strongly recommended in its 2019 Report on Ireland that “citizenship” and “language” be included as protected characteristics in Ireland’s hate speech and hate crime legislation.¹²⁴

In its August 2021 submission to the Joint Committee on Justice concerning the General Scheme, the Department of Justice explained that the list of protected characteristics provided in Head 2

¹²⁰ Emphasis added.

¹²¹ See: BeLonG To Submission (13 August 2021) p. 5; Coalition Submission (August 2021) p. 8; LGBT Ireland Submission (August 2021) p. 9; Schweppe and Haynes (August 2021) p. 27; and ICCL Submission (August 2021) pp 4, 15 and 39; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹²² See [PLS Report](#), pp 31-32.

¹²³ Equal Status Act 2000, section 3.

¹²⁴ ECRI, [ECRI Report on Ireland: fifth monitoring cycle](#), adopted on 2 April 2019, p.19, para 35 (last accessed 5 November 2022).

was based on the protected characteristics included in the 1989 Act along with two additions: gender (including gender expression or identity) and disability. The Department indicated that some of the “prohibited grounds” included in Ireland’s equality legislation were omitted because:

- (a) it was too difficult to define them with the level of precision necessary to achieve legal certainty when defining a criminal offence;
- or
- (b) there was insufficient evidence to demonstrate that they presented “a significant trigger for hate crimes or incitement to hatred”.¹²⁵

However, regarding the latter justification, several stakeholders observed that the [2019 public consultation surrounding the Bill](#) focussed primarily on hate speech, as distinct from hate crime.¹²⁶ Some stakeholders, including ICCL, Schweppe and Haynes, and the Coalition, noted the absence of systematically collected data surrounding hate crime using effective data collection mechanisms. They inferred that in the absence of such data it was difficult to rely upon an “evidence base” to justify the inclusion/exclusion of certain characteristics in/from the list of protected characteristics.¹²⁷ Also of relevance in this regard, IHREC in its submission, citing the [ECRI’s 2019 Report on Ireland](#), remarked that the “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 the acts.”¹²⁸ Notably, this comment was made before the consultation on hate speech was completed and the results thereof were published. However, as indicated previously the consultation focussed primarily on hate speech as opposed to hate crime.

Section 3(2) provides additional clarification regarding the meaning of some of the individual “protected characteristics” included in section 3(1). In this regard, it clarifies that the term “religion” includes the absence of a religious conviction or belief. It stipulates that any “references to ‘descent’ include references to persons or groups of persons who descend from persons who could be identified by certain characteristics (such as race or colour), but not necessarily all of those characteristics still exist”. This definition appears to derive from the definition of descent included in [preamble paragraph 7 to the Framework Decision](#).

Section 3(2) clarifies that “national or ethnic origin” encompasses membership of the Traveller community as defined under [section 2 of the Equal Status Act 2000](#). It indicates that gender means “the gender of a person or the gender which a person expresses as the person’s preferred gender or with which the person identifies and includes transgender and a gender other than those of male

¹²⁵ See DOJ Submission (August 2021) p. 2, para. 10, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹²⁶ See, e.g.,: ICCL Submission (August 2021) pp 3 and 6-7, paras 3-4; Schweppe and Haynes Submission (August 2021) pp 9 and 20; Coalition Submission (August 2021) pp 1 and 6; NYCI Submission (August 2021) p. 5; INAR Submission (August 2021) p. 8; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹²⁷ See ICCL Submission (August 2021) pp 6-7; Schweppe and Haynes Submission (August 2021) p. 6; and Coalition Submission (August 2021); included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹²⁸ IHREC Submission (February 2022) pp 21-22, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

and female”. This definition appears broad enough to encompass gender identity and gender expression.

Section 3(2) clarifies that the terms “sexual orientation” and “disability” have the same meanings as they have under [section 2 of the Equal Status Act 2000](#). It also indicates that the term “sex characteristics” encompasses “the physical and biological features of a person relating to sex”. It is not specified where this definition derives from. The [World Health Organization’s webpage concerning ‘sexual health’](#) includes the following definition for sex: “[s]ex refers to the biological characteristics that define humans as female or male. While these sets of biological characteristics are not mutually exclusive, as there are individuals who possess both, they tend to differentiate humans as males and females.”¹²⁹ In a glossary of key terms included on its website, the [European Institute for Gender Equality](#) (EIGE), an autonomous body of the EU, defines sex as: “[b]iological and physiological characteristics that define humans as female or male.”¹³⁰

In their submissions to the PLS process, some stakeholders, including Schweppe and Haynes, INAR and Unite the Union, argued that the definition of “protected characteristics” should be broad enough to encompass both actual/real and perceived/presumed association with/membership of, a protected group.¹³¹ In such a case, the definition of “protected characteristics” would clarify that the term “presumed” and/or “perceived” (depending on the terminology used) refers to the presumption/perception of the offender.¹³² Unite the Union inferred that this was necessary to ensure alignment with Ireland’s equality legislation.¹³³ [Section 3\(1\)\(a\) of the Equal Status Act 2000](#) allows for an individual to benefit from the protection afforded under the Act where they are treated less favourably as a result of a discriminatory ground being mistakenly “imputed” to them.

Notably, under Head 3 of the [General Scheme](#), which proposed two new incitement to hatred offences, liability could arise where an individual or group was targeted based on their actual or *perceived* association with a protected characteristic. The inclusion of the phrase “actual or perceived” prior to the term “association” was welcomed by numerous stakeholders as it affords protection to victims of hate speech who are targeted on the basis of the offender’s *mistaken* perception or presumption that the victim belongs to a “protected group”.¹³⁴ In contrast, Heads 4-6 of the [General Scheme](#), which proposed 12 new ‘hate crime’ offences, did not explicitly provide for situations where the perpetrator was motivated by prejudice based on a mistaken perception that the victim belongs to a protected group. Several stakeholders stressed that the legislation should

¹²⁹ World Health Organisation, [Sexual health \(who.int\)](#) (last accessed 5 November 2022).

¹³⁰ European Institute for Gender Equality, [sex | European Institute for Gender Equality \(europa.eu\)](#) (last accessed 5 November 2022).

¹³¹ See: Schweppe and Haynes Submission (August 2021) p. 11; INAR Submission (August 2021) p. 3; and Unite the Union Submission (19 August 2021) p. 2; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹³² Schweppe and Haynes Submission (August 2021) p. 11, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹³³ Unite the Union Submission (19 August 2021) p. 2, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹³⁴ See, e.g., Schweppe and Haynes Submission (August 2021) p. 11; and Unite the Union Submission (19 August 2021) p. 2; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

be consistent in its approach to “protected characteristics”.¹³⁵ However, this recommendation is not reflected in the Bill.

In contrast to the General Scheme, the new incitement to hatred offences provided for under Sections 7, 8 and 10 omit any phrase such as “perceived or actual” thereby indicating that liability may not arise in respect of these offences where the victim was targeted based on the offender’s *mistaken* perception as to the victim’s “protected characteristics”. It is unclear why this change was made as compared with the General Scheme. Part 3 of the Bill, which provides for new ‘aggravated by hatred’ offences (hate crimes), allows for the use of a demonstration test or a motivation test to determine if the offence was indeed ‘aggravated by hatred’. Part 3 clarifies that the demonstration test requires that it be shown that the perpetrator demonstrated hatred towards a specific victim on account of that “victim’s membership or presumed membership of a group defined by reference to a protected characteristic”. Accordingly, it allows for situations where the perpetrator mistakenly presumed that the victim belonged to a protected group. However, the motivation test, which can apply whether or not a specific victim exists, requires that the offence be “motivated (wholly or partly) by hatred towards a group of persons on account of the group being defined by reference to a protected characteristic”. Accordingly, the test does not explicitly clarify that it encompasses situations where the offender was motivated, in whole or in part, by a mistaken presumption that a victim, in cases where a specific victims exists, belonged to a protected group. It is worth noting in this regard that the Organisation for Security and Co-operation in Europe’s Office for Democratic Institutions and Human Rights (‘ODIHR’) stipulates that hate crimes are comprised of two elements: (i) a base offence; and (ii) a bias motive meaning that the perpetrator intentionally selected the target of the hate crime because of an *actual or perceived* protected characteristic.¹³⁶ Furthermore, the ECtHR has held that:

“the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence, which is part of the responsibility incumbent on States under Article 3 taken in conjunction with Article 14 of the Convention, 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”.¹³⁷

Section 4: Repeal of the 1989 Act

Section 4 provides that the 1989 Act is to be repealed, which follows from the stated intention to do this in Head 10 of the General Scheme of the Bill.

¹³⁶ OSCE/ODIHR, [Hate Crime Laws: a Practical Guide](#) (2009) p. 16 (last accessed 5 November 2022) emphasis added.

¹³⁷ [Škorjanec v. Croatia](#), Application no. 25536/14, 26 March 2017, § 56. [Article 3](#) of the ECHR concerns the prohibition of torture. [Article 14](#) of the ECHR concerns the right to freedom from discrimination.

Part 2: Prohibition of Incitement to Violence or Hatred

One of the purposes of this part of the Bill is to provide for a new offence of incitement to violence or hatred. It will also create a new offence of preparing or possessing material likely to incite violence or hatred. These new offences will replace the existing offences under the 1989 Act. Part 2 will also create a new offence of condonation, denial or gross trivialisation of genocide etc., which is a requirement under the Framework Directive. Part 2 has 11 sections.

It is noted as a general observation that the phrase “incite violence or hatred against such a person or such a group of persons on account of those characteristics or any of those characteristics” and similarly formulated phrases are used frequently across sections 7-11 of this Part. The formulation of these phrases, when read alongside the definition of “hatred” provided in section 2, may give rise to duplication.¹³⁸

Section 6. Interpretation and application (Part 2)

Section 6 provides definitions for several terms used in Part 2 for the purposes of Part 2. It is particularly important to have a familiarity with these terms when interpreting section 7.

Section 6(1) defines “material” broadly as “anything that is capable of being looked at, read, watched or listened to, either directly or after conversion from data stored in another form”.

Section 6(1) clarifies that “information system” has the same meaning as it has under [section 1 of the Criminal Justice \(Offences Relating to Information Systems\) Act 2017](#). This provision gives effect to ICCL’s recommendation during the PLS process to include a definition for “information system” in the interests of clarity.¹³⁹

Section 6(1) defines “public place” as “any place to which the public have access whether as of right or by permission and whether subject to or free of charge”. This definition, particularly when read in tandem with the definition of “communicating material” under section 6(2), is compatible with the [ECRI’s](#) assertion that “[a]n expression should be considered to have been used in public where this occurred in any physical place or through any electronic form of communication to which the general public have access.”¹⁴⁰

Section 6(2) provides that “a person shall be regarded as communicating material to the public or a section of the public if the person—

- (a) displays, publishes, distributes or disseminates the material,

¹³⁸ For example, section 7(1)(a) includes the phrase, “that is likely to incite violence or hatred against a person or a group of persons on account of their protected characteristics or any of those characteristics”. As noted previously, section 2 defines “hatred” as “hatred against a person or a group of persons in the State or elsewhere on account of their protected characteristics or any one of those characteristics”. If you insert the definition of hatred provided in section 2 into section 7(1)(a), the section reads: “that is likely to incite violence or hatred against a person or a group of persons in the State or elsewhere on account of their protected characteristics or any one of those characteristics against a person or a group of persons on account of their protected characteristics or any of those characteristics”.

¹³⁹ ICCL Submission (August 2021) p.26, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁴⁰ ECRI, [ECRI’s General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, at p. 19, para. 20 (last accessed 5 November 2022).

- (b) shows or plays the material, or
 - (c) makes the material available in any other way including through the use of an information system,
- to the public or a section of the public”.

The definition of “communicating material” in section 6(2), and in particular section 6(2)(c), clarifies that hate speech can be disseminated using various vehicles, both offline *and* online. This is in line with international best practice, which recognises that “use of hate speech in the vast majority of cases takes place through the media and the Internet”.¹⁴¹ The reference to “the public or a section of the public” reflects the requirement, in line with EU law,¹⁴² for a public context. The ECRI considers this to be “an essential requirement when it is recommended that criminal sanctions be imposed on certain uses of hate speech as this limits the extent of interference with the right to freedom of expression”.¹⁴³ The requirement for a public context also reflects the fact that the right to freedom of expression includes the right to freedom of opinion.¹⁴⁴

Section 6(3) clarifies that “behaviour” “shall include behaviour of any kind and, in particular, things that the person says, or otherwise communicates, as well as things that the person does and such behaviour may consist of a single act or a course of conduct”. The definition of “behaviour” in section 6(3) is designed to capture the fact, as recognised by international experts and monitoring bodies, that hate speech can be communicated in multiple forms, not only spoken and written words, but also signs, memes, symbols, paintings, videos, plays, music and conduct, for example, gestures.¹⁴⁵

Section 7: Offence of incitement to violence or hatred against persons on account of their protected characteristics

Section 7 of the Bill creates a new offence of incitement to violence or hatred against persons on account of their protected characteristics. The section seeks to give effect to Ireland’s obligation to implement measures to criminalise the conduct referred to in [Article 1\(1\)\(a\) and \(b\)](#) of the Framework Decision. Section 7(1) provides that, subject to subsections (2) to (4) and section 11, a person shall be guilty of an offence under this section if:—

- (a) the person
 - (i) communicates material to the public or a section of the public, or
 - (ii) behaves in a public place in a manner,

¹⁴¹ ECRI, ECRI’s General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015, p. 46, para. 130, available [here](#) (last accessed 5 November 2022).

¹⁴² See, e.g., [Framework Decision, Article 1](#).

¹⁴³ ECRI, ECRI’s General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015, at p. 19, para. 20, available [here](#) (last accessed 5 November 2022).

¹⁴⁴ For example, [Article 19\(1\) of ICCPR](#) provides that “everyone has the right to hold opinions without interference”. The words “without interference” indicate that nobody can be required to think in a particular way. Nevertheless, limitations can be imposed on the *expression of opinions to others*.

¹⁴⁵ See, e.g., ECRI, ECRI’s General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015, p. 17, para. 11 (last accessed 5 November 2022).

that is likely to incite violence or hatred against a person or a group of persons on account of their protected characteristics or any of those characteristics, and

(b) does so with intent to incite violence or hatred against such a person or group of persons on account of those characteristics or any of those characteristics or being reckless as to whether such violence or hatred is thereby incited”.

Reading the above definitions in tandem with Section 7(1), it appears that Section 7 effectively combines in one singular offence elements of the communication and distribution offences, which were proposed under Heads 3(1) and 3(3) of the [General Scheme](#) respectively.¹⁴⁶ This change is significant in that the defences provided for in Section 7(3) of the Bill were only available in respect of the distribution offence under the General Scheme, as discussed below.

Likely to incite violence or hatred

Section 7(1)(a) indicates that in order for liability to arise, the offender must publicly communicate material or behave in a manner that is likely to incite violence or hatred against a person or a group of persons on account of their protected characteristics or any of those characteristics.¹⁴⁷

The Recklessness Test

The addition of ‘recklessness’ in **section 7(1)(b)** extends the applicable legal test beyond that included in the 1989 Act, which requires proof of intention to incite hatred. Section 7 doesn’t clarify what precisely is meant by the term “recklessness”. However, the [Explanatory Memorandum for the Bill](#) indicates that the relevant legal threshold for the offence is “intent or recklessness, which means that the individual must have intended to incite violence or hatred, or have thought about it, realised that the communication would be *likely* to incite violence or hatred, and decided to press ahead anyway”.¹⁴⁸ The wording of the [Explanatory Memorandum](#) suggests that a subjective test will be used to determine recklessness. However, the ECRI appears to recommend using an objective test to determine recklessness, namely “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.”¹⁴⁹ It may be beneficial for the precise contours of the recklessness test to be clarified to ensure legal clarity.

During the PLS process, multiple stakeholders, including Dr. Taylor, BelongTo, the Coalition, NYCI, Dr. Sinéad Kane, and INAR, welcomed the inclusion of the “intent or recklessness”

¹⁴⁶ The proposed communication offence provided for under the [General Scheme](#) seems to have been designed to address “behaviour” as defined under Section 6(3) of the Bill.

¹⁴⁷ In determining whether the communication or behaviour is likely to incite violence or hatred, regard might be had to the six criteria outlined in the Rabat Plan of Action (available [here](#)), in particular context. UNGA, ‘Rabat Plan of Action (11 January 2013) UN Doc A/HRC/22/17/Add.4, para. 29 (last accessed 5 November 2022).

¹⁴⁸ [Explanatory Memorandum for the Criminal Justice \(Incitement to Violence or Hatred and Hate Offences\) Bill 2022](#), p. 2 (last accessed 5 November 2022).

¹⁴⁹ ECRI, ECRI’s General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015, para. 17 and, see also generally, paras 14-18 (last accessed 5 November 2022).

threshold under Head 3.¹⁵⁰ However, IHREC questioned whether the use of a “recklessness” threshold to ground a conviction for an incitement to hatred offence was compatible with the right to freedom of speech as protected under Article 40.6 of the Constitution, Article 10 of the [ECHR](#) and Article 19(2) of the ICCPR. IHREC acknowledged that there was “no definitive international consensus” surrounding the appropriate legal threshold.¹⁵¹ However, it stated its view that “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 conduct be criminalised”.¹⁵²

Defences to an Offence under Section 7

Section 7(3) stipulates that, “[i]n any proceedings for an offence under this section, it shall be a defence to prove that the material concerned or, insofar as appropriate, the behaviour concerned consisted solely of—

- (a) a reasonable and genuine contribution to literary, artistic, political, scientific, religious or academic discourse,
- (b) a statement that is the subject of the defence of absolute privilege, or
- (c) material or behaviour, as the case may be, that is necessary for any other lawful purpose, including law enforcement or the investigation or prosecution of an offence.”

Notably, Head 3(5)(a) of the [General Scheme](#) of the Bill allowed for similar defences to those outlined in subsections (a) and (c) above to be relied upon in respect of the proposed offence of publishing or otherwise disseminating, broadcasting or displaying a communication that was likely to incite hatred.¹⁵³ An explanatory note in the [General Scheme](#) clarified that these “exceptions apply only to offences under paragraph (3) – there is no exception where the person communicating is deliberately or recklessly inciting hatred.” In its August 2021 submission to the Joint Committee on Justice concerning the General Scheme, the Department of Justice also stated, “*It is important to note that the defences in this section only apply to the distribution offence, and that there is no defence built into this legislation for incitement to hatred, or “hate speech”*”.¹⁵⁴ However, section 7(3) of the Bill, read alongside the definition of behaviour in Section 6(3), indicates that these defences are available, insofar as appropriate, where the alleged offence concerns something that a person says or otherwise communicates. Notably, the provision

¹⁵⁰ Dr. Séamus Taylor Submission (5 August 2021) pp 2 and 6; BeLonG To Submission (13 August 2021) p. 2; Dr. Sinéad Kane Submission (11 August 2021); NYCI Submission (August 2021) p. 9; INAR Submission (August 2021) p. 4; and Coalition Submission (August 2021) p. 9; included in the ‘Combined Submissions’ appended to the PLS Report (available [here](#)).

¹⁵¹ See previous discussion concerning the ‘recklessness’ test above in the section discussing the State’s obligations under EU law and international law concerning hate speech.

¹⁵² IHREC Submission (February 2022) pp 37-38, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁵³ The defences included under Head 3(5)(a) were slightly different. For example, the Head did not explicitly provide for a defence where it was shown that the material concerned consisted solely of reasonable and genuine contribution to religious discourse.

¹⁵⁴ See DOJ Submission (August 2021) p. 3, para. 16 [emphasis added], included in the ‘Combined Submissions’ appended to the [PLS Report](#).

includes a proviso to the extent that the defences will only be available in respect of behaviour “insofar as appropriate”. However, it is unclear what exactly is meant by the phrase “insofar as appropriate”.

The inclusion of these defences in Head 3(5)(a) of the [General Scheme](#) solely as potential defences to the proposed distribution offence generated considerable concern amongst stakeholders during the PLS process. Several stakeholders expressed concern that the defences were considerably wider than the equivalent defences contained in the 1989 Act,¹⁵⁵ and could render the legislation ineffective,¹⁵⁶ and unworkable.¹⁵⁷ ICCL recommended the removal of the phrase “other lawful purpose” as it could have a broad application,¹⁵⁸ whereas the Coalition and NYCI observed that the same phrase was very vague.¹⁵⁹ The phrase is retained in Section 7(3)(c) of the Bill, which indicates that a lawful purpose could include law enforcement or the investigation or prosecution of an offence; however, this list is not exhaustive.

The proposed defence of “reasonable and genuine contribution to literary, artistic, political, scientific, or academic discourse” was considered to be particularly problematic with some stakeholders raising concerns regarding definitional clarity. For example, ICCL, the Coalition and NYCI observed that the term “genuine” was very subjective, in particular, insofar as it relates to artistic contributions, and was insufficiently defined in the [General Scheme](#).¹⁶⁰ Similarly, INAR and BelonG To observed that the phrase “reasonable or genuine contribution” was insufficiently defined in the [General Scheme](#).¹⁶¹ Seemingly in response to these concerns, section 6(1) of the Bill now indicates that an objective test will be used to determine what constitutes a “reasonable and genuine contribution”. It stipulates that the phrase “means a contribution that is considered by a reasonable person as being reasonably necessary or incidental to such discourse”.

In their submission to the PLS process, Schweppe and Haynes stated that the allowance for a “reasonable and genuine contribution to...political...discourse” could “provide an almost unsurmountable defence” whereas they considered the “reasonable and genuine contribution to academic discourse” defence to be “overly broad”.¹⁶² Similarly, ICCL suggested that the defence could “provide a shield to those who do wish to cause harm but do it in the context of ‘academic or

¹⁵⁵ Pavee Point Submission, p. 4; NYCI Submission (August 2021) p. 6; and Coalition Submission (August 2021) p. 10; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁵⁶ INAR Submission (August 2021) p. 6, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁵⁷ Schweppe and Haynes Submission (August 2021) p. 6, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁵⁸ ICCL Submission (August 2021) p. 22, para. 38, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁵⁹ Coalition Submission (August 2021) p. 10; NYCI Submission (August 2021) p. 7; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁶⁰ Coalition Submission (August 2021) p. 10; NYCI Submission (August 2021) p. 7; and ICCL Submission (August 2021) p. 22; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁶¹ Nasc Submission (13 August 2021) p. 6; and BelonG To (13 August 2021) p. 6; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁶² Schweppe and Haynes Submission (August 2021) p. 29, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

political discourse’.”¹⁶³ Nasc indicated that the phrase “political discourse” could be so broadly defined as to render the legislation unworkable.¹⁶⁴ Several stakeholders such as the Coalition, NYCI, Nasc, ICCL and Pavee Point observed that certain minorities, including migrants, Travellers, and the Roma Community are often the victims of inflammatory speech in the political sphere, particularly during election campaigns.¹⁶⁵ Some stakeholders, such as the Coalition, ICCL and NYCI, also noted that migrants have been targets of hate speech in the academic sphere.¹⁶⁶ Nasc called for clear guidance in the legislation regarding how these defences are to be construed.¹⁶⁷

Notably, the UN Committee on the Elimination of Racial Discrimination (CERD) expressed concern in its 2019 Concluding Observations on Ireland’s combined fifth to ninth reports regarding “frequent incidents of racist hate speech made by politicians, especially during election campaigns”.¹⁶⁸ More generally, in its General Comment No. 35 on Combating Racist Hate Speech, CERD noted that it “consistently draws attention to the role of politicians and other public opinion-formers in contributing to the creation of a negative climate towards groups protected by the Convention.”¹⁶⁹

Some stakeholders inferred that the defence of “reasonable and genuine contribution to political discourse” was superfluous given it was also a defence under Head 3(5)(a) to show “that the material concerned consisted solely of utterance made under Oireachtas privilege”.¹⁷⁰ Instead of using this wording, section 7(3)(c) of the Bill provides for a defence of “absolute privilege”. However, it doesn’t include a definition for “absolute privilege” or indicate whether it is to be interpreted as having the same meaning as “absolute privilege” under [Section 17 of the Defamation Act 2009](#), as amended. The Bill would benefit from clarity in this regard as the scope of Section 17 of the *Defamation Act 2009*, as amended, is considerably broader than the defence of Oireachtas privilege provided for in the [General Scheme](#).

Corporate Liability for Incitement to Violence or Hatred under Section 7

Section 7(4) indicates that a corporate body shall have a defence in proceedings concerning an offence under section 7 where it can “prove, as respects the communication of material by the body corporate, that—

¹⁶³ ICCL Submission (August 2021) p. 22; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁶⁴ Nasc Submission (13 August 2021) p. 4, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁶⁵ Nasc Submission (13 August 2021) p. 4; ICCL Submission (August 2021) pp 7 and 22; Pavee Point Submission, p. 4; NYCI Submission (August 2021) p. 7; and Coalition Submission (August 2021) p. 10; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁶⁶ Coalition Submission (August 2021) p. 10; ICCL Submission (August 2021) p. 22; and NYCI Submission (August 2021) p. 7; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁶⁷ Nasc Submission (13 August 2021) p. 4, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁶⁸ CERD, ‘[Concluding observations on the combined fifth to ninth reports of Ireland](#)’ (12 December 2019) UN Doc CERD/C/IRL/CO/5-9, para. 19 (last accessed 24 October 2022).

¹⁶⁹ CERD, ‘[General Comment No. 35: Combating Racist Hate Speech](#)’ (26 September 2013) UN Doc CERD/C/GC/35, p. 15 (last accessed 5 November 2022).

¹⁷⁰ [PLS Report](#), p. 20.

- (a) it has reasonable and effective measures in place to prevent the communication generally of material inciting violence or hatred against a person or a group of persons on account of their protected characteristics or any of those characteristics,
- (b) it was complying with the measures referred to in paragraph (a) at the time the offence concerned was alleged to have been committed, and
- (c) it did not know and had no reason to suspect at the time the offence concerned was alleged to have been committed that the content of the material concerned was intended or likely to incite violence or hatred against a person or a group of persons on account of their protected characteristics or any of those characteristics.”

Section 7(4) does not indicate what might amount to ‘reasonable and effective measures’ for the purposes of this defence. The inclusion of the phrase “as respects the communication of material” suggests that this defence is only available in respect of the “communication of material”, as defined under section 6(2). A similarly worded defence was included in the [General Scheme](#) under Head 3(5)(b) for corporate actors accused of the distribution/dissemination of incitement material offence proposed under Head 3(3). An explanatory note in the [General Scheme](#) indicated that this defence is “intended to provide a reasonable avenue for companies (including social media companies) who are engaged in good-faith efforts to deal with material inciting hatred, but who, despite their best efforts, missed a specific piece of content.” The note clarified that the defence proposed under Head 3(3) “does not apply where there is deliberate or reckless incitement by the company”. The inclusion of the phrase “and had no reason to suspect” indicates that a recklessness standard applies for the purposes of the Bill.

During the PLS process several stakeholders raised questions regarding the applicable threshold for corporate liability. IHREC stated its opinion that the recklessness test for the corporate offence set the threshold too low as it suggested that corporate liability could arise if, at the time the offence occurred, there was *any* reason whatsoever for the company to suspect that the material was intended or likely to incite hatred.¹⁷¹ IHREC argued that proof of intent should be required in respect of any corporate incitement offences.¹⁷² IHREC also inferred that voluntary strategies and codes of conduct for companies might be more effective than criminal measures in achieving the necessary balance between the right to freedom of expression on the one hand and the need to protect users from hate speech on online platforms on the other.¹⁷³

Several other stakeholders, including ICCL, the Coalition and LGBT Ireland indicated that that it wasn’t entirely clear if the corporate offence encompassed *knowing facilitation*.¹⁷⁴ For example,

¹⁷¹ IHREC Submission (February 2022) pp 42-44, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁷² IHREC Submission (February 2022) p. 55, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁷³ IHREC Submission (February 2022) pp 43-45, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁷⁴ ICCL Submission (August 2021) p. 20 para. 31; the Coalition Submission (August 2021) p. 9, para. 21; LGBT Ireland Submission (August 2021) p. 10; and see also Nasc Submission (August 2021) p. 15, para. 13; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

ICCL queried whether liability would arise under the section where a social media company facilitates the dissemination of the material constituting incitement on its platform without making a deliberate decision to disseminate it.¹⁷⁵ Some stakeholders indicated that the Bill would benefit from more precise wording in this regard.¹⁷⁶ ICCL also queried whether corporate liability could arise in cases involving amplification, namely, where “a company knowingly amplified problematic content (for example through particular algorithms) that was then disseminated by others as a result of that amplification for profit”.¹⁷⁷

Several stakeholders, including BelongTo, ICCL and the Coalition, stressed the importance of ensuring that the Bill is compatible with existing and forthcoming domestic and European legislation that seeks to regulate online content, including the [Harassment, Harmful Communications and Related Offences Act 2020](#), the [Digital Services Act](#), and the [Online Safety and Media Regulation Bill 2022](#) (OSMR Bill).¹⁷⁸ ICCL indicated that the Bill should be compatible with the [Convention on Cybercrime](#) (ETS No. 185) given that the government has committed to ratifying the treaty.¹⁷⁹

During the PLS process, IHREC cautioned that the corporate liability provisions in the [General Scheme](#) may be incompatible with Ireland’s obligations under EU law, in particular, Article 15 of the [Directive on Electronic Commerce](#).¹⁸⁰ Article 15 provides that EU Member States shall not impose a general obligation on information service providers, when providing services covered by Articles 12 (mere conduit), 13 (caching) and 14 (hosting), to:

- (a) monitor the information which they transmit or store, or
- (b) actively to seek facts or circumstances indicating illegal activity.

Section 7(2) of the Bill seems to address this concern. It provides that it shall not be an offence under Section 7 for “a relevant service provider, within the meaning of the [European Communities \(Directive 2000/31/EC\) Regulations 2003 \(S.I. No. 68 of 2003\)](#), to do an act to which Regulations 16, 17 or 18 of those Regulations applies if the requirements of the Regulation concerned for liability not to apply are satisfied.” Regulations 16 (liability of intermediate service providers – “mere conduit”), 17 (caching) and 18 (hosting) give effect to Articles 12 (mere conduit), 13 (caching) and 14 (hosting) of the Directive on Electronic Commerce.

¹⁷⁵ ICCL Submission (August 2021) p. 20 para. 31, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁷⁶ ICCL Submission (August 2021) p. 20 para. 31; the Coalition Submission (August 2021) p. 9, para. 21; and LGBT Ireland Submission (August 2021) p. 10; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁷⁷ ICCL Submission (August 2021) p. 20 para. 32, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁷⁸ ICCL Submission (August 2021) pp 4 and 21, para. 33; the Coalition Submission (August 2021) p. 10; BeLonG To Submission (13 August 2021) pp 6 and 15; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁷⁹ ICCL Submission (August 2021) p. 21 para. 33, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁸⁰ IHREC Submission (February 2022) pp 42-44, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

Sections 7(2) and 7(4) should be read alongside section 13, which specifically addresses offences by bodies corporate.

Penalties for a section 7 offence

Section 7(5) provides that a person found guilty of a summary offence under section 7 shall be liable to a fine not exceeding €5,000 (a class A fine) and/or imprisonment for up to a year. It provides that a person convicted on indictment shall be liable to a fine and/or imprisonment for up to 5 years.

Section 8: Offence of condonation, denial or gross trivialisation of genocide, etc.

As discussed previously, Ireland has obligations both as a state party to the [Genocide Convention](#) and as a state party to the [Rome Statute of the International Criminal Court](#) to criminalise 'direct and public incitement to commit genocide'. Furthermore, Article 1(1) of the [Framework Decision](#) requires EU Member States to implement measures to make the following intentional conduct punishable:

“(c) 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;

(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, 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”.

Article 1(4) of the [Framework Decision](#) clarifies that an EU Member State may “make a statement that it will make punishable the act of *denying or grossly trivialising* the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.”

As confirmed in the [Explanatory Memorandum](#) for the Bill, **Section 8** of the Bill seeks to give effect to Ireland’s obligations under the Genocide Convention and the [Framework Decision](#) by creating a new offence of condonation, denial or gross trivialisation of genocide, etc., against persons on account of their protected characteristics. **Section 8(1)** provides that, subject to section 11, it shall be an offence to:

(a) communicate material to the public or a section thereof; or

(b) behave in a public place in a manner,
that condones, denies or grossly trivialises—

- (i) genocide,
- (ii) a crime against humanity,
- (iii) a war crime, or
- (iv) an act specified in Article 6 of the Charter of the International Military Tribunal,

where such communication of material or behaviour is directed against a person or group of persons on account of their protected characteristics or any of those characteristics and is done

with intent to incite violence or hatred against such a person or such a group of persons on account of those characteristics or any of those characteristics.

Section 8(1) requires that the relevant communication or behaviour “is done with intent to incite violence or hatred against such a person or such a group of persons on account of those characteristics or any of those characteristics”. The requirement for “intent” is consistent with Article 1(1) of the Framework Decision, which requires EU Member States to “take the measures necessary to ensure that the following *intentional* conduct is punishable”¹⁸¹ before listing the conduct that requires punishment. However, unlike the [Framework Decision](#),¹⁸² section 8 of the Bill does not explicitly require that the intentional conduct be carried out in a manner likely to incite violence or hatred.

Section 8(6) clarifies that, for the purposes of the section, “protected characteristic”, means race, colour, religion, national or ethnic origin or descent as defined in section 3(1). This list corresponds with the list of characteristics included in Article 1(1)(c) and Article 1(1)(d) of the [Framework Decision](#). However, it omits some of the characteristics included in the list of “protected characteristics” contained in section 2 of the Bill. Notably, preambular paragraph 10 of the [Framework Decision](#) stipulates that “[t]his Framework Decision does not prevent a Member State from adopting provisions in national law which extend Article 1(1)(c) and (d) to crimes directed against a group of persons defined by other criteria than race, colour, religion, descent or national or ethnic origin, such as social status or political convictions.” Hence, it would appear permissible to extend the list of protected characteristics for the purposes of section 8, and accordingly the scope of protection afforded thereunder, whilst still adhering to the requirements of the Framework Decision.

Section 8(3) provides definitions for certain important terms included in Section 8(1). However, it omits a definition for the term “gross trivialisation”. A definition for this term is also omitted from the [Framework Decision](#). During the PLS process, some stakeholders, including the Coalition, NYCI and INAR, recommended that a clear definition be included for “gross trivialisation” in the Bill in order to ensure legal clarity.¹⁸³

The definitions included in Section 8(3) for “crime against humanity”, “genocide”, and “war crime” do not entirely correspond with the definitions included for these terms in Article 1 of the Framework Decision. For example, Article 1 of the [Framework Decision](#) clarifies that for the purpose of the Decision, the term ‘crimes against humanity’ shall have the same meaning as that included in [Article 7 of the Rome Statute of the International Criminal Court](#) (the “Rome Statute”). However, Section 8(3) of the Bill stipulates that:

“‘crime against humanity’ (other than in the definition of “an act specified in Article 6 of the Charter of the International Military Tribunal”) means any of the acts specified in Article 7 of the Rome Statute where such an act has been determined to be a crime against humanity by a final decision of a court in the State or of an international court or tribunal”.

¹⁸¹ Article 1(1) Emphasis added.

¹⁸² See Article 1(1)(c) and (d) Emphasis added.

¹⁸³ NYCI Submission (August 2021) p. 11; Coalition Submission (August 2021) p. 18; and INAR Submission (August 2021) p. 9; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

The proviso included for acts specified in Article 6 of the Charter of the International Military Tribunal (IMT) reflects the fact that section 8 of the Bill, in giving effect to Article 1(1)(d) of the [Framework Decision](#), also prohibits the public condoning, denial or gross trivialisation of war crimes and crimes against humanity as defined under Article 6 of the IMT. The definitions provided for war crimes and crimes against humanity under Article 6 of the IMT differ somewhat from the definitions included in Articles 5 and 7 of the Rome Statute. Hence there is a rationale underlying the inclusion of this proviso.

However, the inclusion of the additional wording, “where such an act has been determined to be a crime against humanity by a final decision of a court in the State or of an international court or tribunal” is slightly problematic when read alongside Section 8(1).¹⁸⁴ As indicated above, Article 1(4) of the [Framework Decision](#) permits EU Member States to criminalise the act of *denying or grossly trivialising* the crimes of genocide, crimes against humanity and war crimes as defined under Articles 6, 7 and 8 of the Rome Statute respectively and/or the crimes defined in Article 6 of the Charter of the IMT *only* where the crimes have been established by a final decision of a national court of that Member State and/or an international court, or by a final decision of an international court only. Crucially, Article 1(4) makes no mention of “public condoning” and the [European Commission](#) has confirmed that the possibility of rendering criminalisation contingent upon such a court decision “is not provided for the act of condoning” these crimes.¹⁸⁵ However, section 8(1) of the Bill does not draw any differentiation between (i) condoning, and (ii) denial or gross trivialisation, before listing the four relevant crimes/acts, namely, genocide, a crime against humanity, a war crime, or an act specified in Article 6 of the IMT Charter. Hence, the definitions provided for those crimes in section 8(3), including the built-in requirement concerning the need for a final court decision, apply to the offence of condoning. Consequently, section 8 is difficult to reconcile with Article 1(4) of the [Framework Decision](#).

It is also worth noting that section 8(3) provides that “court in the State” has the same meaning as the meaning assigned to “court” under [section 3\(5\) of the International Criminal Court Act 2006](#). The *International Criminal Court Act 2006* gives effect to Ireland’s obligation as a state party to the Rome Statute to enact legislation affording domestic courts subject matter jurisdiction over the crimes included in the Rome Statute. Section 3(5) of the International Criminal Court Act 2006 stipulates that, for the purpose of section 3, a “court” means “a court in the State and includes a court-martial, whether held within or outside the State”.

Article 3(2) of the [Framework Decision](#) requires EU Member States to ensure that the conduct referred to in Article 1(1)(c) and (d) “is punishable by criminal penalties of a maximum of at least

¹⁸⁴ Equivalent provisions concerning the need for a “final decision” of a court in the State or of an international court or tribunal are included in the definitions of “genocide” and “war crime” included in section 8(3). The definition provided in section 8(3) for “an act specified in Article 6 of the Charter of the International Military Tribunal” also includes a requirement for a determination by an international court, the IMT, that the act amounts to a crime against peace, a war crime or a crime against humanity within the meaning of Article 6.

¹⁸⁵ European Commission, ‘Final Report From The Commission To The European Parliament And The Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law’ (2014) COM(2014) 27, p. 3 (last accessed 4 November 2022).

between 1 and 3 years of imprisonment”. Reflecting the lower end of the spectrum, **section 8(2)** clarifies that a person found guilty of an offence under section 8 shall be liable on summary conviction to a class A fine (€5,000) and/or imprisonment for a term not exceeding 12 months. By way of comparison, a 2014 Report by the European Commission indicated that the maximum penalty for public condoning, denial or gross trivialisation across EU member states ranged from 1 year and fine (Belgium) to 20 years (Austria).¹⁸⁶ The Report noted that like Ireland, several states including Denmark, France, Latvia, Lithuania, Romania and the Czech Republic afforded courts the option of imposing a fine or other penalty.¹⁸⁷

Section 9. Provisions relating to offences under sections 7 and 8

Section 9 contains provisions relating to offences under sections 7 and 8 of the Bill.

Section 9(1) Inchoate Offence

Section 9(1) provides that:

“[a] person may be found guilty of an offence under section 7 or 8 irrespective of whether the communication of material or behaviour the subject of the offence was successful in inciting another person to violence or hatred against a person or a group of persons on account of their protected characteristics (within the meaning of section 7 or 8, as the case may be) or any of those characteristics.”

Section 9(1) effectively clarifies, in accordance with international law, that the incitement to hatred offences created under sections 7 and 8 are inchoate offences. As the [Rabat Plan of Action](#) stipulates, “[i]ncitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime.”¹⁸⁸ The [Law Reform Commission](#) has defined specific inchoate defences as “crimes that have the character of being “inchoate” in that they criminalise actions preliminary to the completion of harm to a protected interest. Or they criminalise actions and conduct that risk such harm; such harm need not be completed.”¹⁸⁹ In this regard, Section 9(1) may be endeavouring to remedy a

¹⁸⁶ European Commission ‘Final Report From The Commission To The European Parliament And The Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law’ (2014) COM(2014) 27, p. 6 (last accessed 4 November 2022) available [here](#).

¹⁸⁷ European Commission, ‘Final Report From The Commission To The European Parliament And The Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law’ (2014) COM(2014) 27, p. 6 (last accessed 4 November 2022) available [here](#).

¹⁸⁸ UNGA, ‘[Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred](#)’* (11 January 2013) UN Doc A/HRC/22/17/Add.4, para. 29(f) (last accessed 5 November 2022).

¹⁸⁹ Law Reform Commission, ‘[Report on Inchoate Offences](#)’ (November 2010) LRC 99 – 2010, p. 5 (last accessed 5 November 2022).

perceived shortcoming in the 1989 Act, which was considered to lack sufficient clarity in this regard.¹⁹⁰

Section 9(2)

Section 9(2) provides that “[s]ubject to subsection (3), in any proceedings for an offence under section 7 or 8, where it is proved that the person communicating the material concerned—

- (a) knew what the material contained,
- (b) understood the meaning of the material, and
- (c) made the material available on a platform that is or may be accessible by the public or a section of the public,

it shall be presumed that the person intended to communicate the material to the public or a section of the public.”

This section effectively provides that once the prosecution has proven that a person accused of communicating material constituting incitement on a platform: (i) knew what the material contained, (ii) understood the material’s meaning, and (iii) made the material available on a platform that is/may be accessible to the public or section thereof, it will be presumed that the accused intended to communicate the material to the public or a section thereof.

Section 9(3) indicates that the accused can rebut this presumption by showing that at the time of the alleged offence they did not in fact know that the material communicated would be made available to the public or a section thereof.

Bearing in mind the [ECRI](#)’s comment regarding the need for hate speech offences to be defined with sufficient precision and clarity, the Bill could potentially benefit from the inclusion of a definition for “platform”.¹⁹¹

Section 10: Offence of preparing or possessing material likely to incite violence or hatred

Section 10 of the Bill creates a new offence of preparing or possessing material likely to incite violence or hatred against persons on account of their protected characteristics. A similar offence was provided for in [Section 4 of the 1989 Act](#). Section 10(1) indicates that liability will arise under this section where a person prepares or possesses material:

- that is likely to incite violence or hatred against a person or a group of persons on account of their protected characteristics or any of those characteristics;
- with a view to the material being communicated to the public or a section thereof, either by the person themselves or another person, and

¹⁹⁰ ICCL Submission (August 2021) para. 46, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁹¹ ECRI, [ECRI General Policy Recommendation No. 15 on Combating Hate Speech](#), adopted on 8 December 2015, CRI(2016)15, p. 59, para. 175, (last accessed 5 November 2022) emphasis in original.

- with intent to incite violence or hatred or being reckless as to whether such violence or hatred is thereby incited.

Section 10(1)(b) confirms that the applicable legal threshold for liability in respect of an offence under section 10 is intent or recklessness. Accordingly, the previous discussion regarding the appropriateness of using a recklessness standard in respect of an incitement to hatred or violence offence under section 7 is also relevant here.

Section 10(2) confirms that the same substantive defences as are provided for in section 7(3) (reasonable and genuine contribution to political discourse etc.) are available in proceedings concerning an alleged offence under section 10. Hence the concerns expressed above regarding those defences are also relevant here.

Section 10(1)(a) requires that it must be established that the person prepared or possessed the material “with a view” to it being communicated publicly. Of relevance in this regard, Section 10(3) provides that in proceedings concerning an offence under section 10, if:

- the prosecution proves that the accused was in possession of material that is likely to incite violence or hatred; and
- it is reasonable to assume that the material was not intended for the accused’s personal use

a presumption will arise that the accused was in possession of the material in contravention of section 10(1). The accused can rebut this presumption by adducing evidence to the contrary. Accordingly, **section 10(3)** allows for a rebuttable presumption to arise that an accused was in possession of the relevant material in contravention of section 10(1) where it is considered *reasonable* to assume that the material was not intended for their personal use.

Section 10(4) provides that a person found guilty of a summary offence under this section shall be liable to a €2,500 fine (class C fine) and/or imprisonment for a term not exceeding 6 months, whereas an individual found guilty on indictment shall be liable to a €5,000 fine (class A fine) and/or imprisonment for a term not exceeding 2 years.

Section 11. Protection of freedom of expression

Section 11 provides that, for the purpose of Part 2:

“any material or behaviour is not taken to incite violence or hatred against a person or a group of persons on account of their protected characteristics or any of those characteristics solely on the basis that that material or behaviour includes or involves discussion or criticism of matters relating to a protected characteristic”.

Sections 7, 8 and 10 clarify that the incitement to violence or hatred offences created under these sections are subject to section 11. The [Explanatory Memorandum](#) confirms that section 11 was included as a general safeguard aimed at protecting the right to freedom of expression.¹⁹² As discussed previously, any criminal measures that seek to combat hate speech must be compatible with the right to freedom of expression, which entails a right to shock, disturb and offend.

¹⁹² [Explanatory Memorandum](#), p. 3.

Furthermore, any restrictions imposed on the right to freedom of expression in the form of hate speech offences must be clearly provided for by law, necessary and proportionate. In order to ensure respect for the right to freedom of expression, international law only requires the criminalisation of the most severe forms of hate speech. However, as discussed previously, identifying which hate speech should attract a criminal penalty is not necessarily an easy or straightforward task. Statements of international best practice, in particular the six criteria included in the [Rabat Plan of Action](#), will offer valuable guidance when seeking to distinguish between lawful and unlawful material or behaviour for the purposes of this section.

Section 12: Jurisdiction

Section 12 of the Bill seeks to give effect to Article 9 of the [Framework Decision](#).¹⁹³ It addresses the contemporary reality that the distribution of material likely to incite violence and hatred often occurs online and consequently this material can spread quickly across borders.¹⁹⁴ The DOJ has indicated that the offence is particularly relevant in an Irish context relevant given that several social media companies have premises in the State.¹⁹⁵

Article 9(1) of the Framework Decision requires EU Member States to take the necessary steps to establish jurisdiction in respect of the conduct provided for in Articles 1 and 2 of the [Framework Decision](#) where the conduct has been committed:

- (a) in whole or in part within their territory;
- (b) by one of their nationals; or
- (c) for the benefit of a legal person whose head office is located in their territory.

However, Article 9(3) indicates that Member State may decide not to apply, or to apply only in specific cases or circumstances, the jurisdiction rule set out in Article 9(1)(b) and (c). No such latitude is afforded in respect of the jurisdiction rule set out in Article 9(1)(a). Furthermore, Article 9(2) requires Member States to ensure that the jurisdiction established in accordance with Article 9(1)(a) extends to cases where the conduct is committed through an information system and:

- (a) the offender commits the conduct when physically present in its territory, whether or not the conduct involves material hosted on an information system in its territory; or
- (b) the conduct involves material hosted on an information system in its territory, whether or not the offender commits the conduct when physically present in its territory.

In accordance with Article 9 of the [Framework Decision](#), **Section 12** provides that an offence under section 7 or section 8, which involves the use of an information system, may be prosecuted as an offence taking place within the State: “—

“(a) if the person was in the State when the offence was committed, whether or not the offence involved material hosted on an information system in the State, or

(b) if the offence involved material hosted on an information system in the State, whether or not the person was in the State when the offence was committed.”

¹⁹³ See [Explanatory Memorandum](#), p. 3.

¹⁹⁴ See DOJ Submission (August 2021) para. 22, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

¹⁹⁵ See DOJ Submission (August 2021) para. 22, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

As indicated above, **Section 6(1)** clarifies that “information system” has the same meaning as it has under [section 1 of the Criminal Justice \(Offences Relating to Information Systems\) Act 2017](#).

The term “hosted” is not defined in the Bill or in the Framework Decision. The inclusion of a definition in the Bill outlining what is meant by “hosted” would enhance legal clarity. IHREC observed in its submission to the PLS process that in the absence of such a definition, it is unclear if information systems of large internet intermediaries, which use Ireland as a base for their operations and activities, are “hosted” in the State for the purposes of the section.¹⁹⁶

Section 13: Offences by Bodies Corporate

The [Explanatory Memorandum](#) indicates that section 13 gives effect to Article 5 of the Framework Decision. Article 5 of the [Framework Decision](#) requires EU member states to take the necessary measures to ensure that legal persons, including corporate actors, can be held liable for the conduct amounting to incitement to violence or hatred referred to in Articles 1 and 2 of the [Framework Decision](#), where that conduct is committed for the benefit of the legal person by a person with a leading position within the legal person.

Section 13(1) of the Bill clarifies that corporate liability may arise where a “relevant person” commits a “relevant offence” for the benefit of a body corporate. A relevant person is defined in **section 13(7)** as “a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, or (b) an employee, subsidiary or agent of the body corporate”.

Section 13(7) confirms that relevant offences comprise the incitement to violence or hatred offences provided for under sections 7, 8 and 10, and, in accordance with Article 2 of the [Framework Decision](#), the offence of inciting, aiding and abetting, or attempting the commission of any of these offences.

In order for liability to arise, and in accordance with Article 5(2) of the Framework Decision, section 13(1) provides that the commission of the relevant offence must be “attributable to the failure by a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, to exercise, at the time of the commission of the relevant offence and in all the circumstances of the case, the requisite degree of supervision or control of the relevant person”.

Notably, **section 13(2)** provides that it shall be a defence for a body corporate “to prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence”.

In accordance with **section 13(3)**, where it is proven that the offence was committed “with the consent or connivance, or was attributable to any wilful neglect,” of a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, that person shall be guilty of an offence in addition to the body corporate. Furthermore, **section 13(4)** provides that where the affairs of a body corporate are managed by its members, those members can also be liable for any of the acts and defaults listed in section 13(3) as if they were a director or manager of the body corporate.

Section 13(5) confirms that a body corporate found guilty of an offence under section 13(1) is liable on conviction on indictment to a fine.

¹⁹⁶ IHREC Submission (February 2022) p. 45, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

Section 15: Search Warrants

Section 15 affords An Garda Síochána (AGS) extensive powers of search and seizure in relation to the offences created under Part 2. Section 15(1) permits a District Court judge to grant a search warrant in respect of a place and any persons found at that place, where the judge is satisfied, based on information received under oath from a member of AGS, that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence under Part 2 is to be found at that place.

Sections 15(2) – (5) outline in more detail the powers associated with a search warrant issued pursuant to section 15(1). These powers include the power to examine, seize and retain anything found at the place, which is the subject of the warrant, or anything found in the possession of a person present at that place at the time of the search, which the AGS member reasonably believes to be evidence of, or relating to, the commission of an offence under section 7, 8 or 10, as the case may be. This includes the power to take possession of a computer and require any password and other information necessary to enable the member to examine the information accessible by the computer.

Section 15(7) provides that a person who obstructs or attempts to obstruct a member acting under the authority of a search warrant under Section 15 or fails to comply with certain requirements under the section may be found guilty of an offence. **Section 15(8)** provides that a person found guilty of an offence under Section 15(7) shall be liable on summary conviction to a €5,000 (class A) fine and/or imprisonment for a term not exceeding 12 months.

Notably, [Article 40.5 of the Constitution of Ireland](#) provides that “[t]he dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law”. An arrest executed as a result of an unlawful entry of the home will be deemed illegal and any evidence obtained as a result of an unlawful entry of the home may be deemed inadmissible in court. Accordingly, it will be vital that all the applicable legal formalities are upheld surrounding the issuance and execution of search warrants under Section 15.

Part 3: Offences Aggravated by Hatred

This Part of the Bill consists of four sections, which introduce a series of aggravated by hatred offences to some of those contained in each of the three Acts:

- [Criminal Damage Act 1991](#) (1991 Act)
- [Criminal Justice \(Public Order\) Act 1994](#) (1994 Act)
- [Non-Fatal Offences against the Person Act 1997](#) (1997 Act)

These are set out in sections 17-19 as amendments to the above three Acts, but have common elements which are described below. All three provisions (sections 17-19) clarify that it is immaterial if that accused person’s hatred is also on account (to an extent) of any other factor. This provision appears to be somewhat difficult to reconcile with the specific definition of hatred provided in section 2(1), namely, “hatred against a person or a group of persons in the State or elsewhere on account of their protected characteristics or any one of those characteristics”.

Sections 17-19 also provide for two tests for determining if an offence is aggravated by hatred.

Demonstration and Motivation Tests

The first test, known as the **demonstration test**, requires that where there is a **specific victim** of the offence:

- at the time of committing the offence, or immediately before or after doing so, the perpetrator **demonstrates hatred** towards the victim, and
- the hatred is on account of the victim's membership or **presumed membership** of a group defined by reference to a protected characteristic.

Sections 17-19 also clarify what is meant by “presumed” and “membership”:

- **Membership**, in relation to a group, includes association with members of the group, and
- **Presumed** means presumed by the person who commits an offence under any of the new sections to the 1991, 1994 or 1997 Acts.

The demonstration test was not included in the General Scheme, but its inclusion was recommended by the Joint Committee on Justice following its PLS of the Bill “to ensure the legislation will be robust and will result in the effective prosecution of hate crime offences”.¹⁹⁷

The second test, known as the **motivation test**, applies whether or not there is a specific victim of the offence. Under this test, it must be proven beyond a reasonable doubt that the offence was motivated (wholly or partly) by hatred towards a group of persons on account of the group being defined by reference to a protected characteristic. Unlike the demonstration test, there is no reference to “presumed membership” of a group defined by a protected characteristic with regard to the motivation test in circumstances where the offence was perpetrated against a specific victim.

The motivation test was the sole test used to establish the “aggravated by hatred” element for the aggravated offences included in the General Scheme, but received some scrutiny during the PLS process.

According to the PLS Report, it was observed by some stakeholders in PLS hearings, for example, Dr. Séamus Taylor and Nasc, that the motivation test presented a burden of proof that was too high, and that not having a demonstration test would result in low levels of prosecution for aggravated by hatred crimes.¹⁹⁸ Dr. Taylor referenced legislation in England and Wales on hate crime in support of this argument.¹⁹⁹ However, others, in particular Schweppe and Haynes, argued that there is a need to find a balance between addressing the hate element of crimes and considering the stigmatising impact arising from a conviction for a hate crime offence, while also noting that the demonstration test had been rejected in New South Wales because it was believed to be too wide.²⁰⁰

¹⁹⁷ Joint Committee on Justice, [Report on Pre-Legislative Scrutiny of the General Scheme of the Criminal Justice \(Hate Crime\) Bill 2021](#), April 2022, at p. 7.

¹⁹⁸ Joint Committee on Justice, [Report on Pre-Legislative Scrutiny of the General Scheme of the Criminal Justice \(Hate Crime\) Bill 2021](#), April 2022, at pp 12-13.

¹⁹⁹ Joint Committee on Justice, [Report on Pre-Legislative Scrutiny of the General Scheme of the Criminal Justice \(Hate Crime\) Bill 2021](#), April 2022, at p.12.

²⁰⁰ *Ibid*, at pp.13-14.

Removal of Bias Indicators

A significant difference between the Bill and the General Scheme is that the Bill does not retain the list of bias indicators that were contained in Head 8 the General Scheme. The bias indicators included in the General Scheme are as follows:

1. Evidence of the perception of any victim or witness to the event as to the motivation of the defendant
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
3. Ethnic, religious or cultural differences between the perpetrator and the victim
4. Evidence of the defendant's affiliation with or membership of any organised hate group
5. Whether the location or timing of the offence has any particular significance in terms of a protected characteristic
6. Patterns or similarities to any frequent previous crimes or incidents which were motivated by prejudice
7. The nature of the incident itself and whether any aspects of this suggest a bias motivation
8. The absence of any other credible motive.²⁰¹

According to the General Scheme, the indicators were based on the list of internationally accepted bias indicators published by the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE.²⁰² The inclusion of bias indicators was nonetheless raised by a number of stakeholders during the PLS process. Some suggested that such indicators were more appropriately set out in a good practice guide, rather than in the legislation itself.²⁰³ ICCL noted that bias indicators are usually an investigative tool found in policy guidance, separate to legislation. IHREC recommended that, instead of including the bias indicators in the Bill, the enactment of legislation be accompanied by the publication of guidance on the specific bias indicators for each form of hate crime against a protected characteristic.²⁰⁴ Schweppe and Haynes' submission from the European Centre for the Study of Hate stated that the authors were unaware of any legislation internationally which includes bias indicators²⁰⁵, as did the submission received from the Coalition.²⁰⁶ INAR

²⁰¹ Department of Justice, General Scheme of the Criminal Justice (Hate Crime) Bill 2021, at pp.21-22.

²⁰² *Ibid*, at p.22.

²⁰³ See for example, Submission of Pavee Point Traveller and Roma Centre on the General Scheme Criminal Justice (Hate Crime) Bill 2021, at p.5; ICCL, Submission on the General Scheme Criminal Justice (Hate Crime) Bill 2021, at p.5; NYCI, Submission on the Criminal Justice (Hate Crime) Bill 2021, at p.10, included in the 'Combined Submissions' appended to the [PLS Report](#).

²⁰⁴ ICCL, Submission of the Irish Council of Civil Liberties on the General Scheme Criminal Justice (Hate Crime) Bill 2021, at p.35; IHREC, Submission on the General Scheme of the Criminal Justice (Hate Crime) Bill, February 2022, at p.53, included in the 'Combined Submissions' appended to the [PLS Report](#).

²⁰⁵ Dr Jennifer Schweppe and Dr Amanda Haynes, Submission to the Joint Committee on Justice on the General Scheme Criminal Justice (Hate Crime) Bill 2021, at p.38, included in the 'Combined Submissions' appended to the [PLS Report](#).

²⁰⁶ Coalition Against Hate Crime Ireland, Submission on the General Scheme of the Criminal Justice (Hate Crime) Bill 2021, at p.17, included in the 'Combined Submissions' appended to the [PLS Report](#).

suggested removing reference to “bias indicators are objective facts in the legislation” in the General Scheme, and adopting a demonstration test.²⁰⁷

While the bias indicators set out in Head 8 of the General Scheme were ultimately removed, the Bill does not include reference to the publication of guidance as suggested by some submissions.

Aggravated Offences

Each new provision in the 1991, 1994 and 1997 Acts is structured to provide for the following:

- Expressly links the aggravated offence to the existing offence in the Act
- Provides for aggravated penalties for those guilty of the aggravated offence, and
- If the evidence does not warrant conviction for an aggravated offence, a person charged of such an offence can be found guilty of an existing offence in the Act.²⁰⁸

The offences that the Bill proposes to add aggravating factors to are set out in the below table.

Table 6: Corresponding ordinary offences to aggravated offences contained in the Bill

Section	Offence
Criminal Damage Act 1991	
Section 2	Damaging property
Criminal Justice (Public Order) Act 1994	
Section 6	Threatening, abusive or insulting behaviour in public place
Section 7	Distribution or display in public place of material which is threatening, abusive, insulting or obscene
Section 11	Entering building, etc., with intent to commit an offence
Section 18	Assault with intent to cause bodily harm or commit indictable offence
Non-Fatal Offences against the Person Act 1997	
Section 2	Assault
Section 3	Assault causing harm
Section 4	Causing serious harm
Section 5	Threats to kill or cause serious harm
Section 9	Coercion
Section 10	Harassment
Section 13	Endangerment

These offences correspond with the aggravated by hatred offences included in the General Scheme. During the PLS process, some stakeholders such as ICCL and the Coalition welcomed the utilisation of an aggravated offences model; however, queried the rationale underlying the

²⁰⁷ Irish Network Against Racism, Comments on the General Scheme of the Criminal Justice (Hate Crime) Bill 2021 at p.8, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

²⁰⁸ This addition was welcomed by several stakeholders during the PLS who indicated that it would incentivise prosecutions under the Bill as even if the aggravated by hatred element was not proven, a conviction could still be secured for the base offence. See, e.g., Coalition Against Hate Crime Ireland, Submission on the General Scheme of the Criminal Justice (Hate Crime) Bill 2021, at para. 35, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

selection of the 12 offences included in the Bill.²⁰⁹ ICCL remarked that “this is an aspect of hate crime legislation in which specific consultations with affected groups and communities, as well as with other relevant stakeholders, would have been vital in contributing to a more transparent determination process that corresponded directly to the offences actually experienced as hate crimes by affected groups.”²¹⁰ The Coalition made a similar observation.²¹¹ ICCL and the Coalition noted that the list of aggravated offences should reflect the offences most commonly perpetrated against individuals and groups based on their association with one of the protected characteristics.²¹²

Penalties for Aggravated Offences

This section of the principal provisions focuses on the differences between the existing penalties under the current Acts, and the new penalties proposed by the Bill for the aggravated versions of the offences.

Section 17: Amendments to the Criminal Damage Act 1991

Section 17 of the Bill amends the *Criminal Damage Act 1991* to insert a new section 2A, which is a form of the existing section 2 of the 1991 Act that is aggravated by hatred. Section 2 of the 1991 Act relates to damaging property. While this section contains all the common elements to the aggravated offences described above, it also provides that where the demonstration test applies (subsection 2(a) of section 2A) the person to whom the property belongs or is treated as belonging for the purposes of the Act, shall be regarded as the victim of the offence.

Table 7 below sets out the maximum fines and prison terms provided for under the 1991 Act and the Bill. However, it should be noted that neither the 1991 Act nor the Bill stipulate a maximum fine for convictions for indictment for certain offences, as indicated below.

²⁰⁹ ICCL Submission (August 2021) p. 5; and Coalition Against Hate Crime Ireland, Submission on the General Scheme of the Criminal Justice (Hate Crime) Bill 2021, at paras 30-32

²¹⁰ ICCL Submission (August 2021) pp 28-29, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

²¹¹ Coalition Against Hate Crime Ireland, Submission on the General Scheme of the Criminal Justice (Hate Crime) Bill 2021, at para. 32, included in the ‘Combined Submissions’ appended to the [PLS Report](#).

²¹² Coalition Against Hate Crime Ireland, Submission on the General Scheme of the Criminal Justice (Hate Crime) Bill 2021, at para. 33; and ICCL Submission (August 2021) p. 29; included in the ‘Combined Submissions’ appended to the [PLS Report](#).

Table 7: Penalties for Summary Conviction and Conviction on Indictment for Ordinary and Aggravated Offences under the 1991 Act and the Bill

Ordinary Offences (1991 Act)			Proposed Aggravated Offences (Bill)	
Section	Max. Fine	Max. Prison Term	Max. Fine	Max. Prison Term
Summary	€2,500 (Class C) ²¹³	Up to 12 months	€4,000 (Class B)	Up to 12 months
Indictment				
Section 2(1)/2A(1)	€22,220 ²¹⁴	10 years	-	12 years
- Arson	-	Life	-	Life
Section 2(2)/2A(2)	-	Life	-	Life
Section 2(3)/2A(3)	€22,220	10 years	-	12 years
- Arson	-	Life	-	Life

Source: Derived from the 1991 Act and the Bill

Sections 17(c)-(d) also extend the existing provisions of the 1991 Act to section 2A by amending [section 6](#) and [section 7 of the 1991 Act](#). These respectively relate to lawful excuse for damaging property, and proceedings for offences under sections 2, 3 and 4 of the 1991 Act.

Section 18: Amendments to the Criminal Justice (Public Order) Act 1994

Section 18 of the Bill makes amendments to the *Criminal Justice (Public Order) Act 1994* to provide for four offences aggravated by hatred, which are each linked to existing offences in the Act:

- Section 6: Threatening, abusive or insulting behaviour in public place aggravated by hatred
- Section 7: Distribution or display in public place of material which is threatening, abusive, insulting or obscene aggravated by hatred
- Section 11: Entering building, etc., with intent to commit an offence aggravated by hatred, and
- Section 18: Assault with intent to cause bodily harm or commit indictable offence aggravated by hatred.

The aggravated offences each carry more severe penalties for summary and indictable offences, which are set out in the Tables below. Both the 1994 Act and the Bill provide that a fine, prison sentence or both may be applied. Neither the 1994 Act nor the Bill stipulate a maximum fine for convictions on indictment under section 18 or 18A.

²¹³ Under [section 6\(2\) of the Fines Act 2010](#), a maximum fine of £1,000 translates to a class C fine.

²¹⁴ Under [section 9\(2\) of the Fines Act 2010](#), a maximum fine of £10,000 translates to a maximum fine of €22,220.

Table 8: Penalties for Summary Conviction for Ordinary and Aggravated Offences under the 1994 Act and the Bill

Section	Ordinary Offences (1994 Act)		Proposed Aggravated Offences (Bill)	
	Max. Fine	Max. Prison Term	Max. Fine	Max. Prison Term
Section 6/6A	€1,000	Up to 3 months	€2,500 (Class C)	Up to 6 months
Section 7/7A	€1,000	Up to 3 months	€2,500 (Class C)	Up to 6 months
Section 11/11A	€2,500	Up to 6 months	€4,000 (Class B)	Up to 9 months
Section 18/18A	€2,500	Up to 12 months	€4,000 (Class B)	Up to 12 months

Source: Derived from the 1994 Act and the Bill

Table 9: Penalties for Conviction on Indictment for Ordinary and Aggravated Offences

Section	Ordinary Offences (1994 Act)		Proposed Aggravated Offences (Bill)	
	Max. Fine	Max. Prison Term	Max. Fine	Max. Prison Term
Section 18/18A	-	5 years	-	7 years

Source: Derived from the 1994 Act and the Bill

Section 19: Amendments to the Non-Fatal Offences against the Person Act 1997

Section 19 of the Bill makes amendments to the *Non-Fatal Offences against the Person Act 1997* to provide for seven offences aggravated by hatred, which are each linked to existing offences in the Act:

- Assault aggravated by hatred
- Assault causing harm aggravated by hatred
- Causing serious harm aggravated by hatred
- Threats to kill or cause serious harm aggravated by hatred
- Coercion aggravated by hatred
- Harassment aggravated by hatred
- Endangerment aggravated by hatred

The aggravated offences each carry more severe penalties for summary and indictable offences, which are set out in the Tables below. It should be noted that sections 2/2A can only be tried summarily, while sections 4/4A can only be tried on indictment. Both the 1997 Act and the Bill provide that a fine, prison sentence or both may be applied, although neither the 1997 Act nor the Bill stipulates a maximum fine for conviction for indictment for the ordinary or aggravated versions of offences.

Table 10: Penalties for Summary Conviction for Ordinary and Aggravated Offences

Section	Ordinary Offences (1997 Act)		Proposed Aggravated Offences (Bill)	
	Max. Fine	Max. Prison Term	Max. Fine	Max. Prison Term
Section 2/2A	€2,500 (Class C) ²¹⁵	6 months	€4,000 (Class B)	9 months
Section 3/3A	€2,500 (Class C)	12 months	€4,000 (Class B)	12 months
Section 5/5A	€2,500 (Class C)	12 months	€4,000 (Class B)	12 months
Section 9/9A	€2,500 (Class C)	12 months	€4,000 (Class B)	12 months
Section 10/10A	€5,000 (Class A)	12 months	€5,000 (Class A)	12 months
Section 13/13A	€2,500 (Class C)	12 months	€4,000 (Class B)	12 months

Source: Derived from the 1997 Act and the Bill

Table 11: Penalties for Conviction on Indictment for Ordinary and Aggravated Offences

Section	Ordinary Offences (1997 Act)		Proposed Aggravated Offences (Bill)	
	Max. Fine	Max. Prison Term	Max. Fine	Max. Prison Term
Section 3/3A	-	5 years	-	7 years
Section 4/4A	-	Life	-	Life
Section 5/5A	-	10 years	-	12 years
Section 9/9A	-	5 years	-	7 years
Section 10/10A	-	10 years	-	12 years
Section 13/13A	-	7 years	-	9 years

Source: Derived from the 1997 Act and the Bill

Section 20: Sentencing and Other Offences

Section 20 obliges the courts to take evidence that there was hatred against a person or a group of persons on account of their protected characteristics into account as an aggravating factor for the purposes of determining the sentence for any offence other than the offences in Part 3 of the Bill.

It also obliges the courts to impose a greater sentence than that which would have been imposed in the absence of such a factor, except where the sentence is a life sentence or the court considers there is good reason for not doing so. The section also provides that the sentence imposed shall not be greater than the maximum sentence for the offence concerned.

Where it applies a greater sentence, the court must also state and record in the proceedings that a greater sentence is imposed pursuant to the section, and the protected characteristic(s) of the person / group of persons by reference to which that greater sentence is applied.

This provision applies to offences **other than** offences contained in sections 7, 8 and 10 of the Bill, as well as the additional 12 aggravated offences to existing offences that are proposed by Part 3 of the Bill.

²¹⁵ While a fine of £1,500 is stated in the legislation, under [section 6\(2\) of the Fines Act 2010](#) this translates into a class C fine. This is the case for sections 2, 3, 5, 9 and 13 of the 1997 Act.

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