

Nasc Submission to Joint Committee on Justice on the Criminal Justice (Hate Crime) Bill, 2021

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1. Nasc, Migrant and Refugee Rights Centre (Nasc) would like to thank the Joint Committee on Justice for the invitation to make a written submission on the General Scheme of the Criminal Justice (Hate Crime) Bill 2021. Nasc is a non-governmental organisation based in Cork City, Ireland. Nasc, the Irish word for 'link', empowers migrants to realise and fulfil their rights. Nasc works with migrants and refugees to advocate and lead for change within Ireland's immigration and protection systems, to ensure fairness, access to justice and the protection of human rights.

About Us

2. Nasc, founded in May 2000, has over two decades of experience supporting refugees, asylum seekers and ethnic minority communities in Ireland. Through our various projects including our free legal service, our migrant youth project and our education and employment project for refugee women, Nasc provides information, advice and support to over 1,200 people annually.

3. In 2012 Nasc published *Stop the Silence: A Snapshot of Racism in Cork*¹ based on our experience of piloting a third-party reporting initiative for racist incidents in Cork City. In 2013 Nasc published *In From the Margins: Roma in Ireland*² which examined racism and structural racism experienced by Roma communities in Ireland. In 2014, Nasc developed an Anti-Racism Toolkit for Schools that continues to be used by schools in anti-racism teaching. We are members of the Irish Network Against Racism (INAR) and we support people who have experienced racism or witnessed a racist incident through INAR's [iReport Racist Incident Reporting System](#) mechanism. Nasc is also a member of the Coalition Against Hate Crime and we have contributed to, and support, the submission made separately by the Coalition Against Hate Crime.

4. This submission is directly informed by our day-to-day experiences working with migrants, refugees, asylum seekers and ethnic minorities living in Ireland. This submission aims to identify issues disproportionately impacting Ireland's migrant, asylum seeking and ethnic minority communities.

General Principles

5. Nasc broadly welcomes the General Scheme of the Criminal Justice (Hate Crime) Bill 2021 which will replace the Incitement to Hatred Act, 1989 and will introduce, for the first time, aggravated offences and aggravated sentencing for offences motivated by hate. This legislation alone will not produce societal change and there must be investment in anti-racism resources. We believe that this legislation is one part of a multi-faceted approach needed to combat hate and intolerance in our communities. We would also like to stress the need for resources for victim support and for community work at grassroots level around the country.

6. We are concerned that the public consultation in October 2019 was limited to a review of the Prohibition of Incitement to Hatred Act 1989 and did not address hate crime. We believe that this

¹ Nasc, *Stop the Silence: A Snapshot of Racism in Cork* (2012) available at <https://nascireland.org/publications/stop-silence-snapshot-racism-cork-2012>

² Nasc, *In From The Margins: Roma In Ireland* (2013) available at <https://nascireland.org/publications/margins-roma-ireland-2013>

was a missed opportunity for the communities most affected by hate crime to make their voices heard about their lived experience of hate crime. We are also concerned that there is widespread misunderstanding and misrepresentation of what this legislation will entail. Training, education and a public awareness campaign is needed to ensure that the public understand this legislation.

7. Finally, Nasc urges the government to give urgent consideration to implementing an immigration firewall for migrants making reports to, or cooperating with, an investigation the Garda Síochána. Nasc has previously raised the need for such a firewall in submissions including our submission to the European Commission consultation on ‘Preventing and combatting gender-based violence against women and domestic violence’³. Presently a migrant, refugee or asylum seeker who reports any offence to the Garda Síochána risks their immigration status being investigated. This has a chilling effect on migrants, especially undocumented migrants, making reports to, or cooperating with, the Garda Síochána and undermines trust in the Garda Síochána amongst migrant communities. We strongly believe that the Garda Síochána investigating a crime should not refer the victim or the witness to the Garda National Immigration Bureau to investigate their immigration status.

Analysis of Heads of Bill

Head 1: Preliminary and General

8. Nasc recommends that the name of the proposed Act be amended to include a reference to the offence of Incitement to Hatred. The General Scheme of the Bill has two parts – Part 1 Incitement to Hatred and Part 2 Hate Crime. Both parts should be given equal weight in the name of the Act. We are concerned that naming only Hate Crime in the title of the Bill will lead to confusion and may lead people to conflate incitement to hatred with hate crime offences.

Recommendation: Amend the name to the Criminal Justice (Incitement to Hatred and Hate Crime) Act, 2021

Head 2: Interpretation

9. Nasc is concerned that the definition of “hatred” provided does not reflect international standards and is insufficiently clear to provide certainty to the public, prosecutors, and judiciary. We note that the term “significant ill will” is vague and does not have a clear meaning in law. We also note that when this definition of ‘hatred’ is used in paragraph 1 of Head 3 of the Bill it leads to unnecessary duplication:

“A person is guilty of an offence who –

Communicates to the public or a section of the public by any means, for the purpose of inciting, or being reckless as to whether such communication will incite, [detestation, significant ill will or hostility, of a magnitude likely to lead to harm or unlawful discrimination against a person or group of people

³ Nasc, Submission to the European Commission consultation on ‘Preventing and combatting gender-based violence against women and domestic violence’, 10 May 2021, available at https://nascireland.org/sites/default/files/Submissions/Nasc%20submission_Preventing%20and%20combattin%20gender-based%20violence%20against%20women%20and%20domestic%20violence_Migrant%20Women.pdf

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

10. Nasc supports the definition of ‘protected characteristics’ as set out in Head 2 and we particularly welcome the inclusion of ‘gender expression or identity’. We understand that it may be unworkable for the legislation to attempt to deal with all forms of hate and that this legislation attempts to capture the most serious form of hate based on immutable characteristics.

Recommendation: The government should provide a clear justification for choosing the definition of hatred as set out in Head 2.

The government should provide a framework for its decision on what characteristics fall within the ‘protected characteristics’.

PART 1

Head 3: Incitement to Hatred

Paragraph 1

11. Nasc is pleased to see that the Incitement to Hatred provisions provide for communication to the public or a section of the public “by any means”. We believe that this is an important element in future-proofing this legislation as communication tools and platforms continue to develop rapidly.

12. Nasc welcomes the inclusion in paragraph 1 of “real or perceived association with a protected characteristic”. Nasc’s experience of working with migrants, refugees, asylum seekers and people from ethnic minority backgrounds indicates that multi-racial or multi-ethnic families can become targets for incitement to hatred and we are pleased that this Bill would offer them protection.

Paragraph 3

13. Nasc shares the concerns outlined in the Coalition Against Hate Crime submission that paragraph 3 of Head 3 is insufficiently clear that body corporates can be held responsible for the facilitation of the dissemination of incitement to hatred.

Paragraph 5

14. Paragraph 5(a) provides for defences to a prosecution for Incitement to Hatred. The defences included are more extensive than those contained in the predecessor legislation, the Prohibition of the Incitement to Hatred Act, 1989⁴. The General Scheme of the 2021 Bill introduces new defences for “reasonable and genuine contribution to literary, artistic, political, scientific or academic discourse” which apply to the distribution of inciting material. Nasc is concerned that these are overly broad and are not defined in the legislation.

⁴ Section 5 of the Prohibition of Incitement to Hatred Act, 1989 provides for *inter alia* the following defences: “fair and accurate report of proceedings in either House of the Oireachtas or a committee of the Oireachtas or of either such House or an official report or publication of the Oireachtas or either such House or such a committee, or

(b) a fair and accurate report of proceedings publicly heard before a court, or a tribunal exercising functions or powers of a judicial nature, where the report is published contemporaneously with the proceedings or, if it is not reasonably practicable or would be unlawful to publish a report of them contemporaneously, as soon as publication is reasonably practicable and lawful.”

15. Nasc has genuine concerns as to how “a reasonable and genuine contribution” may be defined. Are these objectively “reasonable and genuine” contributions? Our view is that if the discourse would otherwise reach the threshold set out in Paragraph 1 of “inciting or being reckless as to whether such communication will incite, hatred...”, it is then an oxymoron to say that it was a “reasonable” contribution to the discourse? We would also argue that it is unclear what is meant by a “genuine” contribution. Does a deliberately provocative contribution fall outside of these exceptions?

16. A key concern for Nasc is the inclusion of “political discourse” here. The question of what might constitute ‘political discourse’ is a philosophical question not best suited for determination by a prosecutor or by judiciary. It could potentially be defined so broadly that all speech referencing migration or borders could be couched as political discourse and make the incitement provisions unworkable. Further, is discourse by someone who is a political figure protected by this defence? Is discourse that would otherwise constitute incitement from a person standing for election protected by the “political” exemption? This is particularly worrying in light of the increasing populist political tactic of deliberately fomenting sectarianism or racism against minority groups with inflammatory and inciting speech. Housing and accommodation have traditionally been a focal point for this in Ireland. This is particularly true of both accommodation for Ireland’s Traveller communities⁵ and direct provision accommodation for international protection applicants⁶. Conversely there is an argument that those engaging in politics, and particularly elected representatives, should be held to a higher standard rather than a lower standard.

17. Nasc has similar concerns with regard to the exception for contributions to ‘academic discourse’. It is important to be cognisant that research, including academic research from institutes of education in Ireland are not automatically ethically neutral. Again, this defence throws up many questions including whether anything published in an academic journal would potentially be covered by this defence, and if so, what would then constitute an academic journal? Would Islamophobic material that would otherwise meet the incitement threshold distributed by a lecturer in a class be protected?

18. Although Nasc advocates against these blanket defences, we recognise that these are complex and contentious questions that require careful balancing of rights. However, we would strongly urge the drafters to justify the inclusion of each defence and provide clear guidance in the legislation as to how these defences may be construed.

19. Paragraph 5(c) sets out a defence to incitement for an individual who has disseminated or distributed material. This paragraph uses the phrase “to stir up hatred” for the first time. As this phrase is not used or defined elsewhere in the Act, Nasc recommends that it is replaced with “to incite hatred.”

Paragraph 7

⁵ See Rosaleen McDonagh, *Peter Casey will not succeed in winding clock back on Travellers* (Irish Times) (01/11/2018) available at <https://www.irishtimes.com/opinion/peter-casey-will-not-succeed-in-winding-clock-back-on-travellers-1.3681706> “In the run-up to an election, parish-pump politics ensured that anti-Traveller rhetoric would galvanise the vote. Travellers were fair game; catcalls and dog whistles, disapproval and undermining an already fractured Traveller community was the norm. This was how elections were fought and won.”

⁶ Press Release, *Nasc strongly condemns suspected arson attack at proposed direct provision centre in Rooskey*, Nasc, Migrant and Refugee Rights Centre (Jan 2019) available at <https://nascireland.org/news/2019/nasc-strongly-condemns-suspected-arson-attack-proposed-direct-provision-centre-rooskey>

20. Paragraph 7 provides that there is no requirement to show that harm occurred or that the communication ‘successfully’ incited hatred. Nasc believes that this provision is important to ensure that victims have access to justice.

PART 2 – Hate Crime

21. Heads 4 to 6 of the Bill create twelve new aggravated offences, amending the Non-Fatal Offences Against the Person Act 1997, the Criminal Damage Act 1991 and the Criminal Justice (Public Order) Act 1994. These new offences share the same essential elements of an offence “[] *that was motivated by prejudice... against a protected characteristic...*” and we will discuss each of these elements of Heads 4-6 together below.

22. Nasc would like to see the rationale for choosing these twelve specific offences. As raised separately in the Coalition Against Hate Crime Submission, crimes such as sexual offences are excluded. We would welcome a consultation with individuals and groups identified with the protected characteristics on what aggravated offences should be included.

Heads 4 - 6:

“Motivated by prejudice”

23. The government has decided to opt for an *animus* model rather than a discriminatory selection model to determine whether a hate offence has been committed. Per the *animus* model, a hate crime is committed when the offence is motivated by, or the offender has demonstrated, prejudice against a protected group. In *A Comparative Analysis of Hate Crime Legislation*, Chalmers and Leverick characterise the former (motivation) as a subjective animus model and the latter (demonstration of hostility) as an objective animus model.⁷ Demonstration of hostility can usually be satisfied by “proof of motive or proof of the expression of hostility in connection with the offence.”⁸

24. Nasc’s chief concern with Heads 4 to 6 is the use of the ‘motivation’ test to determine whether a hate crime has been committed. In its current form, the proposed legislation would require the prosecution to prove beyond a reasonable doubt⁹ that the perpetrator was motivated, at least in part,¹⁰ by prejudice in committing the act. This requires the prosecution to prove the intention behind the offence. We are concerned that in the case, for example, of a racially motivated offence, absent evidence that the offender is ideologically racist, the aggravated offence will not be successfully prosecuted. Even in circumstances where there was racist behaviour on the occasion, such as a racist slur being used, it may well be a defence to say that the slur used was in the heat of the moment or unrelated to the reason for the offence. We believe that this falls below the level of protection in law that people with protected characteristics expect and will result in few prosecutions.

⁷ J Chalmers & F Leverick, *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (July 2017) University of Glasgow available at https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf

⁸ Ibid

⁹ Head 8 of the Bill includes a requirement that the prosecution must demonstrate “beyond a reasonable doubt” that the offence was motivated by prejudice.

¹⁰ Head 8 of the Bill states that “it shall not be necessary to show that prejudice was the only, or the principal motivation for the offence.”

25. Nasc's preference is for the use of a 'demonstration' test. This would be satisfied by proof that the offender expressed hostility (eg use of a racist, ableist, homophobic etc slur during the commission of the offence) or by proof of motive. The demonstration test recognises that harm that occurs to the victim when the victim experiences the offence as a 'hate crime'. In most cases it will be easier hostility was demonstrated than the offender was motivated by prejudice when s/he committed the act or offence.

26. We recognise that this is a particularly complex and contested area and there are concerns that the 'demonstration' test may lead to disproportionately high levels of prosecution. An argument may also be made that Head 8 of the Bill which outlines the bias indicators that the court or jury may take into consideration when assessing whether the offence was motivated by prejudice includes as one of the indicators "evidence of comments, written statements, gestures or other indications by the defendant of hostility towards a protected characteristic immediately before, during or after the event." However, while this evidence would likely be enough to ground a case based on a 'demonstration of hostility' test, under the proposed Irish legislation it would not be taken "to be proof in and of itself"¹¹.

27. Nasc's belief is that introduction of Hate Crime legislation is a recognition of the exceptional nature of the harm that caused by hate crime not just to the victim themselves, but also to their families and communities. We believe that the legislation should be clear, practical and enforceable and a demonstration test would promote enforceability.

"Against a protected characteristic":

28. We note that this is inconsistent with the definition provided in Head 3 which refers to "*hatred against another person or group of people due to their real or perceived association with a protected characteristic.*" We believe that the working of Head 3 is preferable as it also provides protection to those with a "real or perceived association with a protected characteristic". As we noted above, our experience of working with migrant communities has been that multi-ethnic or multi-racial families are often targeted for abuse.

Alternative verdicts

29. Nasc would like to welcome the provision for an alternative verdict in circumstances where the aggravated element of the offence has not been sufficiently proven.

Recommendations: Nasc believe that requirement to show that the act was 'motivated by prejudice' is too high a threshold and will limit access to justice for victims of offences. We recommend that the 'demonstration of hatred' test be used instead.

Nasc recommends that the phrase "*against a protected characteristic*" contained in Heads 4, 5 and 6 is replaced by to "*hatred against another person or group of people due to their real or perceived association with a protected characteristic.*"

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

30. Nasc welcomes the creation of a general provision to enhance sentencing for other offences in circumstances the offence is motivated "in whole or in part" by prejudice. We are concerned that

¹¹ Head 8 of the Bill states that "None of the [eight factors, based on the list of 'bias indicators' published by the Office for Democratic Institutions and Human Rights of the OSCE] shall be taken to be proof of motivation in and of itself, however the presence of several of the indicators listed may be given weight in determining the likelihood that the incident was motivated by prejudice..."

Head 7 refers to a schedule of offences - Schedule 1, however Schedule 1 does not appear to be published. We would urge the government to publish this schedule of offences as soon as possible and its rationale for the offences it has decided to include in Schedule 1.

31. Head 7 requires the court, in circumstances where the court has determined that the offence was motivated by prejudice and is enhancing the sentence on that basis, to ensure that the “record of the proceedings” reflects that the “offence was thus aggravated by prejudice”. Nasc would also urge the government to clarify what they mean by the “record of the proceedings”. It is our understanding that no such record is maintained at District Court level. Given the significance of having the prejudice element of the offence recorded, it is important that the government clarify this.

Head 8 – Determining whether an offence was motivated by prejudice

32. We welcome the inclusion in Head 8 of the clarification that *“in determining motivation by prejudice for the purposes of this Act, it shall not be necessary to show that prejudice was the only, or principal motivation for the offence.”* Nasc believes that this is essential to ensuring that the legislation is enforceable.

Head 9 – Denial or gross trivialisation of crimes of genocide

33. Head 9 introduced a new offence of publicly condoning, denying or grossly trivialising an act of genocide. We are concerned at the introduction of a blanket offence which may result in conviction regardless of the motivation or whether any harm was experienced by a person or group of people with a real or perceived association with a protected characteristic. This goes significantly beyond the text of EU Council Framework decision 2008/913/JHA which requires the condoning, denial or trivialisation to be *“directed against a group of persons or a member of such a group defined by reference to race, colour, religion, decent or national or ethnic origin when the conduct is carried out in a manner likely to incite violence against such a group or a member of such a group.”*

34. We are also concerned that the legislation addresses only genocide and not crimes against humanity or war crimes as required by the EU Council Framework decision 2008/913/JHA and so is not an adequate transposition.

Recommendation: We recommend that Head 9 is amended to be consistent with the text of EU Council Framework decision 2008/913/JHA.

Head 10 - Repeal

No Further Comment

Head 11 – Consequential Amendments to Other Acts

No Further Comment