

General Scheme

Criminal Justice (Hate Crime) Bill 2021

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Head 1 Preliminary and general

Short title and commencement

Provide that:

- (1) This Act may be cited as the Criminal Justice (Hate Crime) Act 2021.

- (2) This Act comes into operation on such day or days as the Minister may, by order or orders, appoint either generally or with reference to a particular purpose or provision and different days may be so appointed for different purposes or different provisions.

Note

This is a standard provision.

Head 2 Interpretation

Provide that:

In this Act—

“hatred” means detestation, significant ill will or hostility, of a magnitude likely to lead to harm or unlawful discrimination against a person or group of people due to their association with a protected characteristic

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

“ethnicity” includes membership of the Traveller community

“religion” includes the absence of religious belief

“gender” includes gender expression or identity

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

“Minister” means the Minister for Justice

Note

This is a standard provision which defines words and terms used in the Bill.

Part 1 – Incitement to Hatred

Head 3

Provide that:

- (1) A person is guilty of an offence who –

communicates to the public or a section of the public by any means, for the purpose of inciting, or being reckless as to whether such communication will incite, hatred against another person or group of people due to their real or perceived association with a protected characteristic.

- (2) A person guilty of an offence under paragraph 1 shall be liable –
 - (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both, or

on conviction on indictment, to a fine or imprisonment for a term not exceeding 5 years, or both.

- (3) Subject to paragraph (5), a person is guilty of an offence who -

publishes or otherwise disseminates, broadcasts or displays to the public, or a section of the public, images, recordings or any other representations of a communication the subject of paragraph (1) above.

- (4) A person guilty of an offence under paragraph (3) shall be liable –

(a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both, or

on conviction on indictment, to a fine or imprisonment for a term not exceeding 2 years, or both.

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

(a) the material concerned consisted solely of

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

(b) in the case of dissemination of material by a body corporate,

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

(c) In the case of dissemination or distribution of material by an individual,

- that they were unaware and had no reason to suspect that the communication concerned was intended or likely, in all the circumstances including the manner in which they either obtained or disseminated it, to stir up hatred.

(6) In proceedings for an offence under paragraphs (1) or (3) of this section, it shall be presumed that:

- a person publishing or communicating material under paragraphs (1) or (3) knew what that material contained
- understood what it meant, and
- where posted on a public forum, knew it would be public speech

unless that person can show, on the balance of probabilities, that this was not the case.

(7) A person may be found guilty of an offence under this section irrespective of;

(a) whether or not the communication the subject of the offence was successful in inciting any other person to hatred, and,

(b) whether or not any actual instance of harm or unlawful discrimination is shown to have occurred, or to have been likely to occur, as a result.

- (8) In a prosecution for an offence under paragraph 3 where the offence was committed using an information system, and
- whether or not the offence involves material hosted on an information system in the State; the person was physically present in the State when the offence occurred,
 - whether or not the person was physically present in the State when the offence occurred, the offence involves material hosted on an information system in the State, or
 - whether or not the person was physically present in the State any person to whom the material the subject of the offence was disseminated was physically present in the State,

that offence may be prosecuted as an offence taking place within the State.

- (9) No prosecution may be taken under this Part except with the consent of the Director of Public Prosecutions

Note

Paragraphs (1) and (3) create new offences of incitement to hatred. These are to replace the offences in the 1989 Prohibition of Incitement to Hatred Act, which is being repealed by this Bill (Head 10).

Paragraph (1) prohibits communicating with the public by any means, where the purpose of the communication is to incite hatred, or where the person is aware that there is a significant risk that the communication will incite hatred. The incitement can be against a person, or a group of people, but must be due to their association with a protected characteristic as defined in Head 2.

Paragraph (3) prohibits disseminating or distributing of communications prohibited under paragraph 1 to the public or a section of the public.

Paragraphs (2) and (4) set out the penalties, where a person is found guilty of incitement to hatred. The offences in paragraphs (1) and (3) can each be tried summarily, or on indictment. On summary conviction, the person can be fined, or sentenced to up to 12 months (or both). The penalty on indictment is an unlimited fine, and/or up to 5 years imprisonment for an incitement offence under paragraph (1), two years for a distribution offence under paragraph (3).

Paragraph (5)(a) contains an exception for publication or distribution of communications which consist solely of a reasonable and genuine contribution to certain fields such as literary, artistic or scientific discourse, or are necessary for lawful purposes such as the reporting or prosecution of an offence under this Act. To note is that these exceptions apply only to offences under paragraph (3) – there is no exception where the person communicating is deliberately or recklessly inciting hatred.

Paragraph (5)(b) contains a defence which can be used where a body corporate is charged with a distribution offence under paragraph (3), if they can show that they have effective and reasonable measures in place to deal with this kind of material generally, were complying with their own measures at the time of the offence and did not know or have reason to suspect that the specific material concerned was inciteful. This 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. There are a couple of things to note about this defence: firstly that it does not apply where there is deliberate or reckless incitement by the company, and secondly, it only applies where all three tests are met (reasonable measures, being applied properly, and no knowledge that the specific content at hand is inciteful).

Paragraph 5(c) contains a defence for an individual charged with a distribution offence, where they can show that they did not know, and had no reason to suspect, in all the circumstances that the material was intended or likely to be inciteful. 'All the circumstances' includes the manner in which they received the material, and the manner in which they distributed it.

Paragraph (6) contains a number of presumptions which the court is entitled to make in a prosecution for incitement to hatred. Firstly, the prosecution does not have to prove that a person knew what their material contained. Unless the person can show, more likely than not, that they didn't know what the material contained, then it can be presumed that they did. Secondly, the prosecution does not have to prove that the person knew what their material meant, and thirdly, where a person posts material on a public forum (so on their social media account, for example) the court is entitled to presume that the person knew it would be public. Similarly, for these last two, if the person can show that, more likely than not, they didn't know those things, then they can rebut the presumption.

Paragraph (7) is designed to ensure a person can still be found guilty of incitement to hatred even if no imminent harm to any other actual person occurred as a result of their actions. This is designed to cover situations where, for example, those present are sympathetic to the victim, rather than siding with the perpetrator. The offence of incitement to hatred is composed of the mental element (intent or recklessness) and the act (communicating with the public or a section thereof) and does not require any actual consequences as a result of that act in order for the person to be guilty.

Paragraph (8) provides for jurisdiction over offences committed by a person inside the State who is using material hosted on an information system outside the State, or a person outside the State who is using material hosted on an information system inside the State (as required under Article 9 of EU Council framework decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law). The section also covers material disseminated to persons inside the State, so for example

a person distributing hateful material online from Northern Ireland to people south of the border would be covered. The section states that each of these offence types may be prosecuted as offences occurring inside the State.

Paragraph (9) prevents any prosecutions taking place for incitement to hatred without the consent of the Director of Public Prosecutions. This is intended to prevent vexatious, frivolous or malicious prosecutions under this part of the Act.

Part 2 - Hate Crime

Head 4 – Amendment of the Non-Fatal Offences Against the Person Act 1997

Provide that:

The Non-Fatal Offences Against the Person Act 1997 is amended:

(1) After section 2, to insert a new section 2A as follows:

Assault aggravated by prejudice

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

A person guilty of assault aggravated by prejudice shall be liable on

summary conviction to a [Class C fine] or to imprisonment for a term not exceeding 9 months or to both.

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

(2) After section 3 to insert a new section 3A as follows:

Assault causing harm, aggravated by prejudice

In this Act, assault causing harm, aggravated by prejudice, means an assault causing harm (within the meaning of section 3 of this Act) that was motivated by prejudice on the part of the perpetrator against a protected characteristic within the meaning of section 2 of the Hate Crime Act 2021.

A person guilty of assault aggravated by prejudice shall be liable -

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to [Class C fine] or to both, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both.

A person prosecuted for assault causing harm, aggravated by prejudice, may, if the evidence does not warrant a conviction for assault causing harm, aggravated by prejudice but warrants a conviction for assault causing harm under section 3, be found guilty of assault causing harm under that section.

(3) After section 4 to insert a new section 4A as follows:

Causing serious harm, aggravated by prejudice

In this Act, causing serious harm, aggravated by prejudice, means causing serious harm (within the meaning of section 4 of this Act) that was motivated by prejudice on the part of the perpetrator against a protected characteristic within the meaning of section 2 of the Hate Crime Act 2021.

A person guilty of causing serious harm, aggravated by prejudice shall be liable on conviction on indictment to a fine or to imprisonment for life or to both.

A person prosecuted for causing serious harm, aggravated by prejudice, may, if the evidence does not warrant a conviction for causing serious harm, aggravated by prejudice but warrants a conviction for causing serious harm under section 4, be found guilty of causing serious harm under that section.

(4) After section 5 to insert a new section 5A as follows:

Threats to kill or cause serious harm, aggravated by prejudice

In this Act, a threat to kill or cause serious harm, aggravated by prejudice, means a threat to kill or cause serious harm (within the meaning of section 5 of this Act) that was motivated by prejudice on the part of the perpetrator against a protected characteristic within the meaning of section 2 of the Hate Crime Act 2021.

A person guilty of threats to kill or cause serious harm, aggravated by prejudice shall be liable –

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to [Class C fine] or to both, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 12 years or to both.

A person prosecuted for threats to kill or cause serious harm, aggravated by prejudice, may, if the evidence does not warrant a conviction for threats to kill or cause serious harm, aggravated by prejudice, but warrants a conviction for threats to kill or cause serious harm under section 5, be found guilty of threats to kill or cause serious harm under that section

(5) After section 9 to insert a new section 9A as follows:

Coercion aggravated by prejudice

In this Act, coercion aggravated by prejudice, means coercion (within the meaning of section 9 of this Act) that was motivated by prejudice on the part of the perpetrator against a protected characteristic within the meaning of section 2 of the Hate Crime Act 2021.

A person guilty of coercion aggravated by prejudice shall be liable –

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a [Class C fine] or to both, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both.

A person prosecuted for coercion aggravated by prejudice, may, if the evidence does not warrant a conviction for coercion aggravated by

prejudice, but warrants a conviction for coercion under section 9 be found guilty of coercion under that section

(6) After section 10 to insert a new section 10A as follows:

Harassment aggravated by prejudice

In this Act, harassment aggravated by prejudice, means harassment (within the meaning of section 10 of this Act) that was motivated by prejudice on the part of the perpetrator against a protected characteristic within the meaning of section 2 of the Hate Crime Act 2021.

A person guilty of harassment aggravated by prejudice shall be liable –

- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a [Class C fine] or to both, or
- (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 12 years or to both.

A person prosecuted for harassment aggravated by prejudice may, if the evidence does not warrant a conviction for harassment aggravated by prejudice, but warrants a conviction for harassment under section 10, be found guilty of harassment under that section

(7) After section 13 to insert a new section 13A as follows:

Endangerment aggravated by prejudice

In this Act, endangerment aggravated by prejudice, means endangerment (within the meaning of section 13 of this Act) that was

motivated by prejudice on the part of the perpetrator against a protected characteristic within the meaning of section 2 of the Hate Crime Act 2021.

A person guilty of endangerment aggravated by prejudice shall be liable –

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a [Class C fine] or to both, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 9 years or to both.

A person prosecuted for endangerment aggravated by prejudice, may, if the evidence does not warrant a conviction for endangerment aggravated by prejudice but warrants a conviction for endangerment under section 13, be found guilty of endangerment under that section

Note

Head 4 contains a series of seven amendments to the Non-Fatal Offences Against the Person Act 1997. Each amendment creates a new, aggravated form of an existing offence under the Act. These aggravated offences generally carry an increased penalty, compared to the 'ordinary' form of the offence. In each new offence, there is provision for an alternative verdict, whereby the jury can find the person guilty of the ordinary form of the offence, if they find that the 'aggravation' aspect has not been proven.

Head 5 – Amendment of the Criminal Damage Act 1991

Provide that:

The Criminal Damage Act 1991 is amended:

(1) after section 2, to insert a new section 2A as follows:

Damaging property, aggravated by prejudice

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

A person guilty of damaging property aggravated by prejudice shall be liable –

(1) on summary conviction, to a [Class C fine] or imprisonment for a term not exceeding 12 months or both, and

(2) on conviction on indictment for an offence under this section charged as arson, or an offence of damaging property while —

(a) intending to damage any property or being reckless as to whether any property would be damaged, and

(b) intending by the damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered,

to a fine or imprisonment for life or both

(3) on conviction on indictment for any other offence under this section, to a fine or to imprisonment for a term not exceeding twelve years or both.

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

Note

Head 5 amends the Criminal Damage Act 1991 to create a new, aggravated form of the existing offence of damaging property under the Act. This aggravated offence carries an increased penalty, compared to the 'ordinary' form of the offence. There is provision for an alternative verdict, whereby the jury can find the person guilty of the ordinary form of the offence, if they find that the 'aggravation' aspect has not been proven.

Head 6 – Amendment of the Criminal Justice (Public Order) Act 1994

Provide that the Criminal Justice (Public Order) Act 1994 is amended:

(1) To insert a new section 6A after section 6 as follows:

Threatening, abusive or insulting behaviour in a public place, aggravated by prejudice

In this Act, threatening, abusive or insulting behaviour in a public place aggravated by prejudice, means threatening, abusive or insulting behaviour in a public place (within the meaning of section 6 of this Act) that was motivated by prejudice on the part of the perpetrator against a protected characteristic within the meaning of section 2 of the Hate Crime Act 2021.

A person guilty of threatening, abusive or insulting behaviour in a public place aggravated by prejudice shall be liable on summary conviction to a [Class C fine] or imprisonment for a term not exceeding six months, or both.

A person prosecuted for threatening, abusive or insulting behaviour in a public place aggravated by prejudice may, if the evidence does not warrant a conviction for threatening, abusive or insulting behaviour in a public place aggravated by prejudice but warrants a conviction for threatening, abusive or insulting behaviour in a public under section 6, be found guilty of assault under that section.

(2) To insert a new section 7A after section 7 as follows:

Distribution or display in a public place of material which is threatening, abusive, insulting or obscene, aggravated by prejudice

In this Act, distribution or display in a public place of material which is threatening, abusive, insulting or obscene, aggravated by prejudice, means distribution or display in a public place of material which is threatening, abusive, insulting or obscene (within the meaning of section 7 of this Act) that was motivated by prejudice on the part of the perpetrator against a protected characteristic within the meaning of section 2 of the Hate Crime Act 2021.

A person guilty of distribution or display in a public place of material which is threatening, abusive, insulting or obscene aggravated by prejudice shall be liable on summary conviction to a [Class C fine] or imprisonment for a term not exceeding six months, or both.

A person prosecuted for distribution or display in a public place of material which is threatening, abusive, insulting or obscene aggravated by prejudice may, if the evidence does not warrant a conviction for

distribution or display in a public place of material which is threatening, abusive, insulting or obscene aggravated by prejudice but warrants a conviction for distribution or display in a public place of material which is threatening, abusive, insulting or obscene under section 7, may be found guilty of an offence under that section.

(3) To insert a new section 11A after section 11 as follows:

Entering building, etc. with intent to commit an offence, aggravated by prejudice

In this Act, trespass with intent to commit an indictable offence, aggravated by prejudice, means trespass with intent to commit an indictable offence (within the meaning of section 11 of this Act) that was motivated by prejudice on the part of the perpetrator against a protected characteristic within the meaning of section 2 of the Hate Crime Act 2021.

A person guilty of trespass with intent to commit an indictable offence, aggravated by prejudice, shall be liable on summary conviction to a [Class B fine] or imprisonment for a term not exceeding nine months, or both.

(4) To insert a new section 18A after section 18 as follows:

Assault with intent to cause bodily harm or commit an indictable offence, aggravated by prejudice

In this Act, assault with intent to cause bodily harm or commit an indictable offence, aggravated by prejudice, means assault with intent to cause bodily harm or commit an indictable offence (within the meaning of section 18 of this Act) that was motivated by prejudice on

the part of the perpetrator against a protected characteristic within the meaning of section 2 of the Hate Crime Act 2021.

A person guilty of assault with intent to cause bodily harm or commit an indictable offence, aggravated by prejudice, shall be liable –

(a) on summary conviction to a [Class B fine] or imprisonment for a term not exceeding twelve months, or

(b) on conviction on indictment to a fine or imprisonment for a term not exceeding seven years, or both.

A person prosecuted for assault with intent to cause bodily harm or commit an indictable offence, aggravated by prejudice may, if the evidence does not warrant a conviction for assault with intent to cause bodily harm or commit an indictable offence, aggravated by prejudice, but warrants a conviction for assault with intent to cause bodily harm or commit an indictable offence under section 18, may be found guilty of an offence under that section.

Note

Head 6 contains a series of four amendments to the Criminal Justice (Public Order) Act 1994. Each amendment creates a new, aggravated form of an existing offence under that Act. These aggravated offences carry an increased penalty, compared to the 'ordinary' form of the offence. In each new offence, there is provision for an alternative verdict, whereby the jury can find the person guilty of the ordinary form of the offence, if they find that the 'aggravation' aspect has not been proven.

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

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

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

Note

Head 7 is a general provision, designed to ensure that where an existing criminal offence is aggravated by prejudice against a protected characteristic, this aggravating factor is considered by the court in determining the appropriate sentence. It will also ensure that, where the court finds this aggravation was present, this is placed on the formal record. This will result in better recording of hate crimes, and will help with the management of prisoners and convicted persons who are motivated by prejudice against a protected characteristic, for example if they are released on parole, or need careful management while in prison.

Head 8 – determining whether an offence was motivated by prejudice

In addition to any other relevant evidence, any or all of the following factors may be considered in seeking to determine whether an offence was motivated by prejudice for the purposes of this Act:

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.

None of the above 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 on the part of the perpetrator, which must be demonstrated beyond a reasonable doubt.

In determining motivation by prejudice for the purposes of this Act, it shall not be necessary to show that prejudice was the only, or the principal motivation for the offence.

Note

Head 8 is intended to assist the court or the jury in assessing whether a particular offence was motivated by prejudice. The factors listed here are based on the list of internationally accepted 'bias indicators' published by the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE.

Bias indicators are objective facts, circumstances or patterns connected to a criminal act that, alone or in conjunction with other indicators, suggest that the offender's actions may have been motivated in whole or in part by prejudice. None of these factors are probative in themselves, but the head provides that they may be given weight in deciding whether the motive of the perpetrator was one of bias or prejudice against a protected characteristic.

Head 9 – denial or gross trivialisation of crimes of genocide

A person commits an offence who publicly condones, denies or grossly trivialises any act falling within the definition of a “genocide” in Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).

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

Note

Head 9 creates a new offence of condoning, denying or grossly trivialising a genocide. The definition of genocide used here taken from the Genocide Convention and is the same one used in the Genocide Act 1973. The requirement to make genocide denial a criminal offence is a requirement under EU Council framework decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, and has also been highlighted by the Council of Europe Commission against Racism and Intolerance on a number of occasions, including in its country report on Ireland in 2019.

Head 10 Repeal

Provide that:

The Prohibition of Incitement to Hatred Act 1989 is repealed.

Head 11 Consequential Amendments to other Acts

Provide that:

The Criminal Law Jurisdiction Act is amended at paragraph 7 of the Schedule to add the above offences

The Extradition Act 1994 is amended at paragraph 6 of the Schedule to add the above offences

The Bail Act 1997 is amended at paragraph 7 of the Schedule to add the above offences where appropriate.

Note

Head 11 adds offences under this Act to various schedules other Acts, including the Bail Act 1997, enabling a court to refuse bail where a person is charged with such an offence if reasonably considered necessary to prevent the commission of a serious offence by that person. The remainder are consequential amendments to add the new, aggravated offences to schedules where the ordinary forms of these offences already appear.