

17th November 2021

Opening Statement of Nasc, Migrant and Refugee Rights Centre to the Joint Committee on Justice on the Criminal Justice (Hate Crime) Bill, 2021

Spokesperson: Fiona Hurley, Policy & Communications Manager

1. Nasc, Migrant and Refugee Rights Centre thanks the Committee for the opportunity to participate today. Nasc, the Irish word for ‘link’ is an NGO and a registered charity working directly with migrants, refugees, asylum seekers as well as first and second-generation Irish citizens. Founded over 20 years ago in Cork City, we now work with between 1,100 and 1,300 people annually.

2. Nasc has a long history of anti-racism work, including pioneering a third-party reporting mechanism for racist incidents in Cork City as early as 2012. Further information on our anti-racism work is available in our written submission to the Committee on the 13th August 2021. We have been actively engaged in calling for Hate Crime and Hate Speech legislation for over a decade and we are pleased to see progress being made on legislation. However, legislation is only one step towards tackling racism and other prejudices in Ireland. This legislation alone will not produce societal change and we would like to reiterate the need for investment in resources particularly education and victim support resources at grassroots level throughout Irish communities.

3. Our contribution today is directly informed by the lived experiences of the people we work on a daily basis. Our own experience of working with migrant and refugee communities is that people are often reluctant to report incidents of hate crime or hate speech. This is often based on a lack of trust in authorities including An Garda Síochána and the Irish justice system. Nasc have repeatedly raised the concern that while the gardaí have a role in immigration enforcement and immigration registration for third country national migrants, undocumented migrants and migrants with precarious immigration statuses will be reluctant to report hate crimes or hate incidences to them as they have no assurance that reporting a crime will not also trigger an investigation of the victim’s own immigration status. Nasc have repeatedly raised our concerns that the lack of an ‘immigration firewall’ has the potential to undermine the efficacy of the proposed legislation.

4. Unfortunately, the public consultation which took place over October 2019 was limited to a review of the Incitement to Hatred Act 1989 (1989 Act) and did not address hate crime. We believe a public consultation would have surfaced important issues such as these, and strengthened public confidence in, and understanding of, the proposed legislation. We also believe that a public consultation would have been extremely beneficial in deciding which characteristics would be included as “protected characteristics” by the Bill. We strongly urge the government to open a public consultation on hate crime.

5. While Nasc broadly welcomes the Criminal Justice (Hate Crime) Bill, 2021, we are also concerned that some of the proposed provisions fall short of international best practice or are likely to cause uncertainty or confusion. In our written submission we make a number of specific recommendations on how to strengthen the Bill, including the following three key issues:

Definition of Hatred

6. Head 2 of the Bill provides that “**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. Nasc is concerned that the definition of “hatred” provided in Head 2 of the Bill does not reflect international standards and is insufficiently clear to provide certainty to the public, prosecutors, and judiciary. The term “significant ill will” is vague and does not have a clear meaning in law.

Nasc recommend that the definition of “hatred” be redrafted in line with definitions used by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the European Commission against Racism and Intolerance.

The defences for publishing or otherwise disseminating or broadcasting hate speech

7. Head 3 (5) (a) provides for defences for publishing or otherwise disseminating or broadcasting hate speech. The defences in this Bill are significantly more expansive than those contained in existing legislation - the 1989 Act and Nasc has serious concerns about the extension of the list of defences. Our main concern is the provision in Paragraph 5 which would provide for sweeping defences where the material concerned consisted solely of “a reasonable and genuine contribution to literary, artistic, scientific, or academic discourse.” This particular provision leaves us with many unanswered questions.

8. The Bill does not contain any guidance as to how “a reasonable and genuine contribution” may be defined. Would this be an objective or subjective test? Our belief is that if the discourse in question 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. Does a deliberately provocative contribution fall outside of these exceptions?

9. Further, what is “political discourse”? There is a separate defence for utterances in the Houses of the Oireachtas so we can infer that this refers to speech outside of the Oireachtas. Is discourse by someone who is a political figure protected by this defence? Is discourse, if carried out by a person standing for election, that would otherwise constitute incitement protected by the “political” exemption? This is particularly worrying in light of the potential for the deliberate fomenting sectarianism or racism against minority groups with inflammatory and inciting speech as an election tactic. Nasc has similar concerns with regard to the exception for contributions to ‘academic discourse’. Is all material published in an academic journal potentially covered by this defence, and if so, what would then constitute an academic journal?

Motivated by hatred

10. Heads 4 to 6 of the Bill create twelve new aggravated offences which all share the same essential elements ie that the offence was “*motivated by prejudice*”, “*against a protected characteristic...*”. Nasc disagrees with the sole inclusion of *motivation test*. We believe that the requirement to prove that the alleged perpetrator was motivated beyond a reasonable doubt is too high and would lead to very low levels of prosecution. 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 was unrelated to the reason for the offence.

11. We believe that the use of a *demonstration test* would resolve this enforceability issue. The demonstration test recognises that harm that occurs to the victim when the victim experiences the offence as a ‘hate crime’. A demonstration test would be satisfied by proof that the offender demonstrated hostility towards the victim of the offence eg use of a racist, ableist or homophobic etc slur during the commission of the offence or by proof of motive.

12. In England and Wales, Section 28 of the Crime and Disorder Act, 1998 includes both a motivation and demonstration test which allows the prosecution to prove either that the alleged perpetrator demonstrated hostility towards the victim based on their membership or presumed membership of a racial or religious group or that the offence was motivated by hostility towards members of a racial or religious group.

Nasc recommend that the Bill be amended to allow for the offence to be proved on the basis of the demonstration of hostility or motivation by prejudice.

13. We are also concerned that Heads 4 to 6 require that the offence was motivated “against a protected characteristic”. 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 wording of Head 3 is preferable as it also provides protection to those with a “real or perceived association with a protected characteristic”. Our experience of working with migrant communities has been that multi-ethnic or multi-racial families are often targeted for abuse. The addition of a “real or perceived association with a protected characteristic” would remove the onus on the victim to prove that they are a person with protected characteristic.

14. Thank you again for your time. My colleague and I are happy to take questions and address any issues you wish to raise.