

LAW SOCIETY SUBMISSION



**SUBMISSION TO THE PUBLIC CONSULTATION ON A NEW NATIONAL
ACTION PLAN AGAINST RACISM FOR IRELAND**

ANTI-RACISM COMMITTEE

JULY 2021

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1 Introduction

- 1.1. The Law Society of Ireland (‘the **Society**’) welcomes the opportunity to contribute to the public consultation on a National Action Plan Against Racism (‘the **Plan**’) in Ireland which is being undertaken by the Anti-Racism Committee (‘the **Committee**’).
- 1.2. The Society is the educational, representative and co-regulatory body for the solicitors’ profession in Ireland. This submission is based on the views of members of the Society’s Human Rights & Equality Committee which is comprised of solicitors with extensive experience and expertise in national and international human rights.
- 1.3. The Society commends the Committee for its approach in consulting with relevant stakeholders to develop the Plan. It also supports the Committee’s commitment to human rights values, democracy and the rule of law in developing actions to combat racism in Ireland.
- 1.4. The Society has previously made a number of submissions in relevant areas which are encompassed within the current consultation which will inform part of this submission.
- 1.5. These include the Society’s responses to consultations on:
 - 1.5.1. Online harassment, harmful communications and related offences;
 - 1.5.2. Review of the Prohibition of Incitement to Hatred Act 1989; and
 - 1.5.3. General Scheme of the Online Safety and Media Regulation Bill.
- 1.6. In preparing this submission, the Society notes the expanse of issues to be addressed in the Committee’s work which span a number of legal areas. As such, the Society has chosen to focus on areas which are most particularly within our knowledge and expertise, namely the legal framework relevant to combating racism, identifying where law reform may be appropriate and also addressing broader issues in relation to access to justice.

2 Executive Summary

The Society makes the following recommendations:

- 2.1 That the State considers and reviews the operation of Article 40.1 of the Constitution to ensure that it provides a robust constitutional guarantee of equality that is more closely aligned to the State's international human rights obligations.
- 2.2 That a mechanism, similar to the Regulatory Impact Analysis ('**RIA**') currently carried out in respect of proposed legislation, should be introduced to examine and identify any potentially discriminatory impacts of proposed legislation, which should be published and made available publicly.
- 2.3 That the efficacy of the Equal Status Acts and Employment Equality Acts from the perspective of compliance with EU Law and the State's international obligations to combat racism more generally should be reviewed and recommendations for legislative reform brought forward (also having regard to the recently announced [review of the Equality Acts](#)).
- 2.4 That the institutional framework for providing redress for instances of racial discrimination should be strengthened to provide greater visibility to those mechanisms and that the procedural aspects of bringing complaints under the Equal Status Acts to the WRC be streamlined and made more accessible and user friendly.
- 2.5 That specific resources be allocated to increase awareness of the remedies under the Equality Acts targeted at ethnic and racialised minorities and that civil society organisation should be resourced to support victims of racial discrimination in reporting, making individual complaints and seeking redress.
- 2.6 That effective legal aid should be made available to victims of racial discrimination.
- 2.7 Enactment of the [Criminal Justice \(Hate Crime\) Bill 2021](#) to be prioritised.
- 2.8 That the Criminal Justice (Hate Crime) Bill should address some key weaknesses in the 1989 Act and, in particular, reducing the evidential threshold for prosecuting incidents of hate speech, including those which occur online;
- 2.9 That Gardaí are trained in identifying instances of hate speech and hate crime and a robust reporting system is developed to record such incidents.

- 2.10 That racial profiling by An Garda Síochána should be defined and prohibited in legislation and remedies provided for victims of such profiling.
- 2.11 That the Criminal Injuries Compensation Scheme should be amended to ensure that victims of hate speech and other hate crimes can access financial compensation.
- 2.12 That the Online Safety and Media Regulation Bill should include specific provision for individual complaints regarding harmful content online to be made to an independent regulator and for a mechanism to ensure the swift take down of harmful material, including material with racist content.
- 2.13 That the Online Safety and Media Regulation Bill be reviewed to ensure that it complies with the requirements of EU Equality Directives, the Equality Acts and the Criminal Justice (Hate Crime) Bill 2021 (when published).
- 2.14 That a comprehensive system of legal aid, appropriately resourced to ensure access to quality legal representation, be introduced for asylum seekers and immigrants in respect of the decision-making process under the International Protection Act 2015 and the Immigration Acts.
- 2.15 That anyone detained in respect of a suspected breach of immigration law should automatically be entitled to the advice and assistance of a solicitor.
- 2.16 That the current system of Direct Provision should be brought to an end at the earliest possible date and that the new system of supports for asylum seekers should be based on the principles of human rights and should include legal guarantees as to minimum standards. It must also provide legal remedies for any failure by the State to achieve those standards.

3 Access to Justice

- 3.1 Access to justice is vital to ensuring that people's rights are safeguarded and vindicated. Central to this is a legal framework that is accessible and effective. In this submission, the issue of access to justice will take account, not only the legislative context, but the broader constitutional framework which underpins the legal protection from discrimination in the State.
- 3.2 At a constitutional level, the equality guarantee contained in Article 40.1 is the primary legal statement of the State's obligations to protect individuals and groups from discrimination, including racial discrimination. The State also has obligations to protect against racism as a result of various EU Directives, its Charter of Fundamental Rights ('the **Charter**') and the European Convention on Human Rights ('**ECHR**').
- 3.3 In stark contrast to flourishing equality-related jurisprudence in other jurisdictions, Ireland has lagged behind. The constitutional guarantee of equality is limited in its scope and application. The characteristics protected by Article 40.1 are limited and the scope of the discrimination which might be constitutionally impugned is limited to those found in law. Overall, Article 40.1 does not reflect the evolving scope and reach of equality law more generally.¹ In summarising the development of the constitutional guarantee of equality, the authors of Kelly on the Irish Constitution gave the following striking summation of Article 40.1 as being wholly underdeveloped:

*"In contrast to comparative and international jurisprudence, jurisprudence on the guarantee of equality in the Irish Constitution is remarkably underdeveloped and, to date, the debate about the differing conceptions of equality has, to a large extent, passed Article 40.1 by."*²

- 3.4 Article 14 of the ECHR protects against discrimination on a wide range of grounds, including race, but it is also recognised as being limited in so far as the protection only extends to the enjoyment of other rights protected under the ECHR and it is not a stand-alone protection from discrimination. This has led to quite an uneven approach to protection from discrimination on the part of the European Court of Human Rights with many issues concerning minorities being considered under Article 8 (rather than Article 14) leaving any discriminatory aspect of State's action largely unexamined. Conversely, Protocol 12 of the ECHR provides stand-alone protection from discrimination which is not dependent on being within the scope of another

¹ This is despite some recent case law that would suggest the judiciary are willing to give Article 40.1 a more expansive application where merited in certain cases. See for example *N. H.V. v Minister for Justice and Equality*, [2017] IESC 35. In that case the equality guarantee was accepted in certain circumstances to apply to non-citizens (in the particular case an asylum seeker) and the ability to work was found to be an aspect of the human personality protected under Article 40.1.

² *JM Kelly: The Irish Constitution*, Hogan, Whyte, Kenny and Walsh, 2018 Bloomsbury professional, at para. 7.2.01.

right (which is protected under the ECHR). Ireland has signed, but has not ratified, Protocol 12 which is yet to come into effect here.³

- 3.5 Articles 20 to 26 of the Charter address equality. Article 21 provides broad protection against discrimination, including discrimination on the basis of race and ethnicity, subject to being within the scope of the Charter as set out in Article 51.⁴ The Charter reflects a progressive approach to equality and encompasses articles dealing with the unique situation of older people, disability and children.
- 3.6 Returning to consideration of Article 40.1 of the Constitution, the case of the *Equality Authority v Portmarnock & Ors.*⁵ is illustrative of the limitations of Article 40.1. In considering whether Portmarnock Golf Club was a “discriminating club” for the purpose of the Equal Status Acts (as it refused full membership to women) the Supreme Court considered that the Equal Status Acts fell to be interpreted in light of the constitutional protection of the right to freedom of association, but did not consider the equality guarantee in Article 40.1 to be relevant in that context. Similarly, when the Employment Equality Bill 1996 and Equal Status Bill 1997 were referred to the Supreme Court under Article 26 of the Constitution, both were found to be unconstitutional in light of countervailing constitutional rights, such as the protection of private property.
- 3.7 Ultimately, the equality guarantee in the Constitution is a relatively weak foundation on which the Irish legal framework protecting equality is balanced. While EU law has provided a more solid basis on which to legislate, it does not supplant or obviate the need to consider whether the constitutional equality guarantee needs to be made more reflective of a society where equality and diversity are core values.⁶
- 3.8 While the legislature has a legitimate interest in protecting groups and individuals from discrimination, the protection of other constitutional rights should not be seen as a barrier to robust equality legislation, but the present narrow formulation of Article 40.1 stands in direct contrast to the expansive protection of equality under the Charter and other, more modern, formulations of the right to equality. Article 40.1 is also considerably narrower than the protection from discrimination which is mandated by the UN Convention on the Elimination of All Forms of Racism (**‘UNCERD’**).⁷

³ Protocol 12 was opened for signature in 2000, and entered into force in 2005 on receiving 10 ratifications.

⁴ Article 21 provides: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

⁵ *Equality Authority v Portmarnock Golf Club* [2010] 1ILRM 237.

⁶ It is noted that the Citizens’ Assembly recently recommended that a new clause should be inserted into Article 40 to refer explicitly to gender equality and non-discrimination.

⁷ Article 2 of the UN Convention on the Elimination of All Forms of Racial Discrimination, sets out a comprehensive set of actions for each signatory State to take to combat and eliminate racial discrimination.

- 3.9 Separately, Protocol 12 of the ECHR remains to be ratified by the State. This Protocol, while focusing on protection from discrimination in the context of rights set out in law, more broadly prohibits discrimination by any public body. This is significant as it goes beyond present protections against acts of public bodies as provided for under the Equal Status Acts (see below).
- 3.10 The Employment Equality Act 1998 and the Equal Status Act 2000 (together ‘the **Equality Acts**’) are at the core of the State’s legal response to discrimination across nine grounds, which include race, nationality, ethnicity and membership of the Traveller community.⁸ The Equality Acts define discrimination and what is prohibited conduct under the Acts and provide adjudication and redress mechanisms. The Society is aware that the Minister for Children, Equality, Disability, Integration and Youth has announced a review of the Equality Acts, and is presently consulting on same. Clearly, that exercise intersects considerably with the work of the Committee, and no doubt one will inform the other. Noting the Minister’s consultation, the Society wishes to highlight some barriers to accessing remedies under the Equality Acts for present purposes.
- 3.11 Firstly, it is useful to consider the number of complaints made to the Workplace Relations Commission (**‘WRC’**) under the Equality Acts on an annual basis since its establishment to understand the extent to which the current infrastructure is dealing with such complaints⁹:

Equal Status Complaints	2016	2017	2018	2019	2020
Member of Traveller Community	416	408	124	97	51
Race	462	363	292	159	76
Employment Equality Complaints	2016	2017	2018	2019	2020
Membership of the Traveller Community	5	7	6	2	6
Race	154	189	213	183	201

⁸ An additional ground referred to as the “Housing Assistance Ground” which was inserted by the Equality (Miscellaneous Provisions) Act 2015 only relates to the provision of accommodation i.e. it is not relevant in the context of this submission.

⁹ The WRC was established by the Workplace Relations Commission Act 2015 and took over the functions of a number of quasi-judicial bodies including the specialised Equality Tribunal. The figures are taken from the WRC’s Annual Reports, 2016 to 2020, with 2016 being its first full year of operation.

- 3.12 The above table illustrates that, while complaints made under the Employment Equality Acts have fluctuated somewhat between 2016 and 2020, there has been no significant reduction in such complaints. It is also notable that complaints on the Race and Traveller Community ground have reduced year on year and have effectively collapsed. While empirical research will be needed to understand the reduction, the Society considers it likely that a number of causes will have contributed to same.
- 3.13 The focus for the creation of the WRC was to establish a one-stop-shop forum for the resolution of employment-based disputes. Incidents of discrimination in the provision of goods and services (as provided for under the Equal Status Acts) simply lost visibility within the new structure. This difficulty is further compounded where the complaint form and procedures promulgated by the WRC are largely based on workplace disputes and do not properly provide for complaints under the Equal Status Acts. At the same time as the WRC was established, the Irish Human Rights and Equality Commission Act 2014 was passed which amalgamated the functions of the previous Irish Human Rights Commission and Equality Authority into a new single entity; the Irish Human Rights and Equality Commission ('IHREC'). It can only be speculated that this fundamental change in the architecture which was designed to support victims of discrimination may be linked to a loss of understanding of the redress and support mechanisms around complaints of racial discrimination (including in respect of the Traveller community ground).¹⁰
- 3.14 Added to this alteration in the institutional framework for addressing complaints of discrimination is the fact that there is no State-funded system of legal aid available to victims of racial discrimination, other than through the limited legal resources of IHREC.¹¹ While lodging a complaint with the WRC is not necessarily procedurally complex, there is an added layer of difficulty in terms of bringing forward complaints under the Equal Status Acts, in that there is a requirement to provide notification of the alleged incident(s) of discrimination within two months of same before a complaint may be lodged, noting again that the WRC complaint form is not designed for complaints of discrimination in relation to goods and services. Even if the process for making a complaint is relatively accessible (which, as noted, is open to dispute), equality law itself is often far from straightforward or accessible for the lay litigant. For instance, cases may engage with complex definitions of what constitutes discrimination, the scope of services including public services under the Acts, the nature of the employment relationship and vicarious liability and indeed, the broader requirements of employment law. Each of these issues has the potential to trip up a complainant where they do not have the benefit of legal representation. The Society accepts that few of its own members specialise in the area of equality, outside the sphere of employment law, and this is largely because this area of law, with

¹⁰ See for instance *Reports of Racism in Ireland*, Dr Lucey Michael, 2020 which recorded that many victims of racist discrimination do not know where to report such incidents or how to seek redress.

¹¹ Representation before Tribunals is excluded from the remit of the Civil legal Aid Act, 1995 save with limited exceptions.

its low level of financial awards, does not present a financially viable area of practice. Taking the above into account it is notable that the United Nations Committee on the Elimination of Racial Discrimination (**'UNCERD'**) made the following recommendation in its Concluding Observations on Ireland in 2020:

“The Committee recommends that the State party extend the scope of the Legal Aid Board to the areas of law that are particularly relevant to Travellers and other ethnic minority groups, including by designating the Social Welfare Appeals Office and the Workplace Relations Commission as prescribed tribunals under section 27 (2) (b) of the Civil Legal Aid Act 1995.”¹²

- 3.15 Article 47 of the Charter also provides for the possibility of legal aid where rights provided for under EU law (such as those which derive from the EU Race Directive) are violated and where it is necessary to ensure effective access to justice. The jurisprudence in relation to this Article is not expansive but what does appear evident is that the complete exclusion of the possibility of legal aid for claims of discrimination fails to meet the test set out in Article 47.¹³
- 3.16 While the Society supports the UNCERD recommendation and agrees that a comprehensive system of legal aid is required for complaints of discrimination, it considers that if the remit of the Legal Aid Board is to be expanded in accordance with the recommendation, sufficient resources need to be made available to deal with this additional work within the time limits set out in the Equality Acts. In particular, the Society has previously called for the need for greater investment in legal aid infrastructure and, in particular, expressed concern in the context of criminal legal aid where payment per case is so low as to threaten the ability of the practitioner to provide an appropriate professional service. Alternatively, consideration might be given to whether the institutional capacity of IHREC should be increased to provide an effective legal aid system for victims of racial discrimination which would ensure that all the expertise and acquired knowledge of that organisation could be brought to bear in relevant cases before the WRC.
- 3.17 It is also relevant to consider the role of the Equality Acts in transposing and giving effect to the Race Equality Directive.¹⁴ It is notable that sanctions are required to be “effective, proportionate and dissuasive”¹⁵ however, pursuant to the Equal Status Acts, the limit of the jurisdiction of the WRC is aligned with that of the District Court i.e. €15,000. This link follows from the fact that

¹² Committee on the Elimination of Racial Discrimination, Concluding Observations on the combined fifth to ninth reports of Ireland, CERD/C/IRL/CO/5-9, 23 January 2020, at para. 44.

¹³ Whether the provision of legal assistance to victims of discrimination by IHREC on a discretionary basis would mitigate the blanket exclusion of such cases from the remit of the Legal Aid Board remains an open question but, on balance, it is unlikely that the basis on which IHREC would grant legal assistance would ensure effective access to justice in every case where legal representation is required.

¹⁴ Council Directive 2000/43/EC

¹⁵ Ibid. Article 15.

the vehicle for enforcement of WRC decisions under the Equal Status Act is through the District Court. Even within this limited jurisdiction, the actual awards made by the WRC tend to be significantly lower. It is questionable whether this financial limit on compensation properly fulfils the requirements of EU law in being dissuasive but there is presently no clarification from the Court of Justice of the European Union on this point. What it does indicate, however, is the view of the State that incidents of race motivated discrimination (and discrimination on other grounds) sit at the lowest level of 'wrong' in the civil scheme of remedies which the State provides and, on that basis, compliance with the Race Directive is certainly open to question.

- 3.18 Finally, the scope of the Equal Status Acts as it relates to the actions of the State is unduly limited. Section 14(1)(a) of the Act provides

'Nothing in this Act shall be construed as prohibiting—

(a) the taking of any action that is required by or under—

(i) any enactment or order of a court,

(ii) any act done or measure adopted by the European Union, by the European Communities or institutions thereof or by bodies competent under the Treaties establishing the European Communities, or

(iii) any convention or other instrument imposing an international obligation on the State...'

- 3.19 This formulation presents a two-pronged problem. The first is that the State can simply legislate its way around the Equality Acts which, as observed, is not counterbalanced by a sufficiently robust constitutional protection in respect of equality. The second is that the scope of the exemption may also be so wide as to bring the legislation outside the requirements of the EU Race Directive. In this regard, one author came to the following conclusion:

*"The Racial Equality Directive does not envisage any blanket exemption for discriminatory measures required by law. Nor is such an exemption provided for under the Gender Goods and Services Directive. Although the material scope of both Directives is uncertain, the exemption is manifestly too broad since it covers any action required by law across all fields and grounds. On its face, then, the Oireachtas should remove or qualify the exemption at least for the race, Traveller community and gender grounds."*¹⁶

- 3.20 It is notable that in a recent case supported by IHREC, It is notable that in a recent case supported by IHREC, reliance on section 14 allowed the State to successfully defend a case brought by an asylum seeker, challenging the

¹⁶ *Primacy of national law over EU law? The application of the Irish Equal Status Act*, European Equality Law Review, 2019/2, at p.35.

refusal to grant her a driver's license premised on her residency status, despite the fact that the applicant in the case was also a worker in the State.¹⁷ The case was determined on the basis of the underlying legislation governing the issuing of driver licenses, and there was no consideration of whether the exclusion of an asylum seeker from access to a driving license was justified. The broad section 14 exemption would not appear merited in so far as it excludes consideration of the discriminatory impact of legislation, and the Society suggests that a means by which the impact of section 14 might be mitigated would be that in the context of preparing an RIA in respect of proposed legislation, that the RIA process would be adapted to also assess the State's compliance with equality obligations both at international and European level. This would assist to avoid any outcomes that reduce equality of opportunity or cause a directly discriminatory outcome on foot of legislation.

RECOMMENDATIONS

That the Plan includes the following:

1. That the State considers and reviews the operation of Article 40.1 of the Constitution to ensure that it provides a robust constitutional guarantee of equality that is more closely aligned to the State's international human rights obligations.
2. That a mechanism, similar to the Regulatory Impact Analysis ('**RIA**') currently carried out in respect of proposed legislation, should be introduced to examine and identify any potentially discriminatory impacts of proposed legislation, which should be published and made available publicly.
3. That the efficacy of the Equal Status Acts and Employment Equality Acts from the perspective of compliance with EU Law and the State's international obligations to combat racism more generally should be reviewed and recommendations for legislative reform brought forward (also having regard to the recently announced [review of the Equality Acts](#)).
4. That the institutional framework for providing redress for instances of racial discrimination should be strengthened to provide greater visibility to those mechanisms and that the procedural aspects of bringing complaints under the Equal Status Acts to the WRC be streamlined and made more accessible and user friendly.

¹⁷ *A.B v The Road Safety Authority* [2021] IEHC 217

5. That specific resources be allocated to increase awareness of the remedies under the Equality Acts targeted at ethnic and racialised minorities and that civil society organisation should be resourced to support victims of racial discrimination in reporting, making individual complaints and seeking redress.
6. That effective legal aid should be made available to victims of racial discrimination.

4 Hate Crime and Hate Speech

- 4.1 The Society has previously responded to the Department of Justice's consultation on reforming Ireland's legal framework on issues of hate crime and hate speech. The Society made a number of recommendations in relation to reforming legislation in the area which are relevant to the current consultation. The Society is mindful that the Department of Justice has recently published heads of bill in this respect, which is welcome.¹⁸
- 4.2 In its recommendation, the Society has urged that the protected characteristics under the Prohibition of Incitement of Hatred Act 1989 ('the **1989 Act**') should be broadened to include those based on gender, disability, civil status, family status and age, whether actual or perceived. The Society recommended that gender should be separately and specifically defined to cover acts targeted at individuals based on actual or perceived sex, having multiple protected characteristics, gender identity and gender expression. This aspect of intersectionality of discrimination is crucially important to provide comprehensive protection from acts of hate speech and hate crime, where perpetrators may not necessarily confine the acts to a particular group, but may target a person's multiple identities, including race or ethnicity.
- 4.3 The definition should also be expanded to include perceived or actual membership of specific marginalised groups, such as asylum seekers or refugees.
- 4.4 Further, the key term of 'hatred' within the 1989 Act should be clearly defined in line with that employed by the European Commission Against Racism and Intolerance ('ECRI') and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.¹⁹ Other key terms should also have clear definitions. The new legislation should be applicable to an individual on the basis of their protected characteristics and the intention to 'stir up' should be capable of being established without the need for actual proof that a third party responded to, or was incited by, the impugned behaviour.
- 4.5 While it falls more within the media and technology theme, the Society also recommended that any review or reform of the legal framework around hate speech must also address the issue of online incidents of same. Where it reaches sufficiently serious levels, there should be criminal measures in place to deal with such offences. Further dissemination of material through re-

¹⁸ General Scheme Criminal Justice (Hate Crime) Bill 2021.

¹⁹ The ECRI in its General Policy Recommendation No. 15 on Combating Hate Speech states that "hatred" shall mean a state of mind characterised as intense and irrational emotions of opprobrium, enmity and detestation towards the target group. This is the definition also utilised by the UN Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression in Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357, 7 September 2012, para. 44.

tweeting and sharing should be treated as equally culpable to original dissemination. Civil, as well as criminal, measures are required to provide protection from online hate speech.

- 4.6 The Society also considers that the mental element in the 1989 Act (of ‘intention to stir up’) is too high a threshold. It is submitted that the requirement to prove the offence of incitement to hatred should be lowered to recklessness.
- 4.7 Finally, the Society urged the Department of Justice to move forward with bringing the previously referenced general schemes to Bill stage so that they can be progressed through the Oireachtas.
- 4.8 While legislation to combat hate speech and hate crime is fundamentally important, the Society considers that legislation alone is not sufficient as its enforcement will depend on the ability of An Garda Síochána to investigate, recognise, record and prosecute such crimes. This will require significant training and sensitisation to instances of racism within An Garda Síochána. In addition, victims of racism will need to have confidence in An Garda Síochána to come forward and report such crimes. At present there is significant underreporting of hate speech and hate crime and unfortunately, it is unlikely that legislation alone will reverse this trend.²⁰
- 4.9 This under-reporting of hate crime is linked to a lack of confidence amongst ethnic minority groups in An Garda Síochána and, in particular and as we have highlighted previously, there is no specific prohibition on racial profiling by An Garda Síochána although it may be regarded as a breach of discipline.²¹ It is noted in this regard that UNCERD has made the following recommendations to protecting individuals from racial profiling by An Garda Síochána and providing a remedy where it occurs:

- “(a) Introduce legislation prohibiting racial profiling;*
- (b) Put in place an independent complaints mechanism to handle racial profiling;*
- (c) Review the policy, practices and training of the police, in collaboration with the communities most affected by racial profiling;*
- (d) Incorporate racial profiling issues into the training curriculum of police officers;*
- (e) Fully implement the Garda Diversity and Integration Strategy 2019–2021;*
- (f) Collect disaggregated data on racial profiling, publish it regularly and provide the data in its next periodic report.”*

²⁰ See for instance *Report of Racism in Ireland 2020*, Dr Lucy Michael, at p.13 where, in 27 incidents of racist crime recorded, only 5 were reported to An Garda Síochána

²¹ See for instance, Report on Policing Performance by the Garda Síochána during the Covid 19 Health Crisis, The Policing Authority, 19 April 2021, which reported that : “Migrants’ confidence to report crime or confidence that the Garda Síochána will keep them safe was described as low”

- 4.10 The Society would support these recommendations and, in particular, defining racial and ethnic profiling in legislation as well as prohibiting same and providing a remedy where it occurs.²²
- 4.11 The added injury of being a victim of a hate crime should not only be reflected in criminal sentencing, it should also carry over into the State's Criminal Injuries Compensation Scheme and should count as an injury, either in its own right or as an additional injury.

RECOMMENDATIONS

That the Plan includes the following:

1. Enactment of the Criminal Justice (Hate Crime) Bill 2021 to be prioritised.
2. That the Criminal Justice (Hate Crime) Bill should address some key weaknesses in the 1989 Act and, in particular, reducing the evidential threshold for prosecuting incidents of hate speech, including those which occur online;
3. That Gardaí are trained in identifying instances of hate speech and hate crime and a robust reporting system is developed to record such incidents.
4. That racial profiling by An Garda Síochána should be defined and prohibited in legislation and remedies provided for victims of such profiling.
5. That the Criminal Injuries Compensation Scheme should be amended to ensure that victims of hate speech and other hate crimes can access financial compensation.

²² It is noted that the ECRI Report on Ireland, adopted on 2 April 2019, made similar recommendations at para.54.

- 5 All forms of media and communications, including new technologies
- 5.1 In the context of combating harmful content online, including hate speech, the Society has previously recommended (in its submission on the General Scheme of the Online Safety and Media Regulation Bill and the consultation on Online Harassment, Harmful Communications and Related Offences) that any fixed definition of communication needs to be sufficiently broad to encompass changing technologies. We also suggested that focus should be placed on the harm inflicted as well as consideration given to defining ‘harmful content’. This is also of particular relevance to the current consultation and in order to ensure that racism, in whatever form it is experienced, can (ideally) be prevented but, if not, it can be appropriately addressed wherever it arises. A suggested definition might incorporate the following – “any content that seriously interferes with the peace or privacy of another person or causes alarm, distress or harm to that other person”.
- 5.2 The Society notes that balancing the right to freedom of expression with the right to privacy is delicate. While criminal legislation is vital in deterring harmful activity, education is also important in creating safer online spaces and empowering users while regulatory oversight also plays a significant role. Criminal law needs to be nuanced and responsive to technological developments and any reform needs to consider the proportionality of the response, as well as the harm being caused.
- 5.3 In this regard, the Society is also mindful of the State’s obligations under European law, calling for legal protection against incitement to hatred online. Article 9(2) of Council Framework Decision 2008/913/JHA on combatting certain forms and expressions of racism and xenophobia by means of criminal law requires that:
- (a) Member States take effective measures to ensure that laws prohibiting incitement to hatred extend to cases where the conduct is committed through an information system and the offender is within the territory of the Member State, even if the content hosted is not, and;*
- (b) to cases where the material is hosted within the territory of the Member State whether or not the offender commits the conduct when physically present in its territory.*
- 5.4 The Society considers that necessary legislative measures – both civil and criminal – are required in order to safeguard and adequately regulate the online sphere. In this context, the Society welcomed the General Scheme of the Online Safety and Media Bill but considered that failure to provide for individual remedies in the Bill as well as a mechanism to ensure the rapid take down of harmful material, including quarantining of such material for checking against regulatory standards (including racist content), is a serious flaw in the General Scheme that should be remedied.

- 5.5 In particular, the Society recommended that the General Scheme should be reviewed against other legislation which provides protections from discrimination including, but not limited to, the Equal Status Acts and the Prohibition of Incitement to Hatred Act 1989 to ensure that standards in those other pieces of legislation are not undermined by anything contained in the proposed Bill.
- 5.6 More specifically, in relation to hate speech, the Society highlighted the potential shortcoming in framing 'harmful content' so broadly as to risk it proving problematic to regulate, due either to it being under or overly inclusive. We noted that the proposal in the General Scheme appeared to fall immediately short of what is required by the *Audiovisual Media Services Directive 2010/13/EU* and recommended that the term 'harmful content' should be made substantially clearer to ensure that all forms of hate speech are adequately captured.

RECOMMENDATIONS

That the Plan includes the following:

1. That the Online Safety and Media Regulation Bill should include specific provision for individual complaints regarding harmful content online to be made to an independent regulator and for a mechanism to ensure the swift take down of harmful material, including material with racist content.
2. That the Online Safety and Media Regulation Bill be reviewed to ensure that it complies with the requirements of EU Equality Directives, the Equality Acts and the Criminal Justice (Hate Crime) Bill 2021 (when published).

6 Inclusion and Participation

- 6.1 Under this heading, the Society wishes to highlight concerns it has previously expressed regarding the international protections system, immigration law and in particular, the impact of the system of Direct Provision on asylum seekers.
- 6.2 In our submission to Ireland's Third National Report to the UN Universal Periodic Review 2021 in March of this year, we emphasised the need to ensure that access to justice is enhanced by investment in key areas of the legal system, particularly in legal aid. Further, there is a pressing need to ensure that international protection applicants and immigrants have access to a solicitor. We would again note that the requirement of Article 47 CFR need to be taken into account where individuals are seeking to assert their EU treaty rights.
- 6.3 Upon arrival in the State, international protection applicants and immigrants are particularly vulnerable as they are often unaware of their rights and are in fear of deportation/detention. The provision of legal advice at an early stage is vital, particularly for asylum seekers and immigrants attempting to navigate an unfamiliar legal and regulatory system. It should be noted that there is an absence of any dedicated legal aid system for immigrants outside the asylum process. In this regard, the Society reiterates its call for adequate funding and resources to be invested in the legal system, particularly in terms of legal aid. Without such investment, concerns may arise around the effectiveness and availability of adequate representation.
- 6.4 In such circumstances, access to a solicitor would ensure the right to liberty and the ability to apply for international protection or assert EU treaty rights (if required) as well as supporting international protection applicants and immigrants in navigating any potential discrimination which they may encounter. It is also of note that people who are arrested and detained on arrival into the country under section 12 of the Immigration Act 2004 (as amended) are not entitled to legal advice or representation through the Garda Station Legal Aid Revised Scheme. In respect of the treatment of immigration detainees and international protection applicants, the Society recommended that the State should have due regard to the fundamental constitutional right of personal liberty and freedom as well as its international obligations.
- 6.5 The Society also called for an end to Direct Provision and the timely introduction of an alternative system for accommodating and supporting those seeking international protection in the State. We emphasised that any new system must be supported by legislation to ensure that it is appropriately rights-based and includes remedies where identified standards are not met. The new system must be grounded in the principles of human rights, respect for diversity and respect for privacy and family life. Further, the Society recommends that any system which is based on the principles of human rights must include certain legal guarantees as to minimum standards. It must

also provide legal remedies for any failure by the State to achieve those standards.

6.6 In its 2020 Concluding Observations on the combined fifth to ninth reports of Ireland, the UN Committee on the Elimination of Racial Discrimination urged development of an alternative reception model and the taking of concrete steps to phase out the direct provision system. As an interim measure, it also recommended the following actions:

- (a) *Improve living conditions in direct provision centres and reduce the length of stay in the centres;*
- (b) *Set up clear standards of reception conditions for direct provision centres; regulate and inspect the operation of direct provision centres; and hold those responsible accountable in case of a breach of standards;*
- (c) *Halt the emergency accommodation as soon as possible and develop a contingency planning framework with a view to effectively responding to capacity pressures;*
- (d) *Ensure transparency regarding deaths in direct provision centres and collect and publish data on such deaths.*

6.7 The Society welcomes the fact that asylum seekers may now seek work after a period of six months in the asylum system. However, we reiterate the concern (expressed in our March submission on the UN Universal Periodic Review 2021) that certain invisible barriers to work have emerged for asylum seekers such as the ability to open a bank account to receive wages, inability to apply for driving licenses and difficulties posed by the remoteness of certain Direct Provision Centres. These issues require urgent attention.

RECOMMENDATIONS

That the Plan includes the following:

1. That a comprehensive system of legal aid, appropriately resourced to ensure access to quality legal representation, be introduced for asylum seekers and immigrants in respect of the decision-making process under the International Protection Act 2015 and the Immigration Acts.
2. That anyone detained in respect of a suspected breach of immigration law should automatically be entitled to the advice and assistance of a solicitor.
3. That the current system of Direct Provision should be brought to an end at the earliest possible date and that the new system of supports for asylum seekers should be based on the principles of human rights and should include legal guarantees as to minimum standards. It must also provide legal remedies for any failure by the State to achieve those standards.

Conclusion

We hope that the Committee finds these comments and recommendations to be helpful and will be glad to further address any of the matters raised.

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