



**Law Council**  
OF AUSTRALIA

# **Review of the Counter-terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023**

**Parliamentary Joint Committee on Intelligence and Security**

**14 August 2023**

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## About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is [www.lawcouncil.au](http://www.lawcouncil.au).

## Acknowledgements

The Law Council gratefully acknowledges the contribution of the Law Society of New South Wales as well as the Law Council's National Criminal Law Committee and National Human Rights Committee. The Law Council also acknowledges its Constituent Bodies, which have at various points contributed input to submissions considering similar provisions.

## Executive Summary

1. The Law Council is grateful for the opportunity to respond to the Parliamentary Joint Committee on Intelligence and Security's (the **Committee's**) review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (**the Bill**).
2. The Law Council acknowledges that Australia's current 'National Terrorism Threat Level' is 'possible'.<sup>1</sup> This means that, while Australia remains a potential terrorist target, 'there are fewer violent extremists with the intention to conduct an attack onshore'.<sup>2</sup> This assessment also notes that ideologically motivated violent extremism, and in particular nationalist and racist violent extremism, 'remains a threat to Australian security' and 'its adherents will continue to engage in offensive behaviours'. However, there is a shift in focus of these groups towards 'recruitment and radicalisation' rather than 'attack planning'.<sup>3</sup>
3. The Law Council is mindful of the profound impact of hateful speech, including the display of Nazi symbols, on affected individuals and groups, including the Australian Jewish community and the community at large. The Law Council agrees that public display of these symbols continues to cause adverse impacts including 'threats and menace conveyed to communities who are targeted by hate-ideology, and an undermining of their sense of security, and of social cohesion'.<sup>4</sup> Furthermore, the Law Council acknowledges the evidence before this Committee of the prevalence of antisemitism in Australia<sup>5</sup> and the connection between Nazi symbols and hate incidents.<sup>6</sup>
4. With that context in mind, the Law Council shares the view of many submitters to this inquiry that there should be ongoing reflection on the operation of Australia's laws, policies and practices as the domestic and global security environment evolves. It also acknowledges the view of the Attorney-General's Department that 'reforms are needed to strengthen current legal settings to protect the community by preventing radicalisation, violence and activities that incite hatred'.<sup>7</sup> The Law Council's position is that, while robust and fair legal responses, including criminal justice responses, are an important component of any national counter-terrorism

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<sup>1</sup> Commonwealth of Australia, [Australian National Security – National Threat Level](#) (Webpage, 28 November 2022).

<sup>2</sup> Ibid.

<sup>3</sup> The Law Council accepts that particularly in the context of lone-wolf attacks, radicalisation remains a security concern in relation to 'individuals who then go on to undertake attacks, potentially without any warning.' Ibid.

<sup>4</sup> Executive Council of Australian Jewry, Submission to Parliamentary Joint Committee on Intelligence and Security, Submission No. 83, Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (20 July 2023), 1.

<sup>5</sup> The Executive Council of Australian Jewry note an increase of 6.9% in the overall number of reported antisemitic incidents compared to 2021. And, in 2021 a 35% increase over the number of recorded incidents in 2020: Executive Council of Australian Jewry, [Report on Antisemitism in Australia](#) 2022: 1 October 2021-30 September 2022 (12 December 2022), 26. See further, Australian Human Rights Commission, Submission to the Senate Standing Committee on Legal and Constitutional Reform, Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (18 April 2023), 3-4.

<sup>6</sup> The Executive Council of Australian Jewry notes:

*Overall, from 2021 to 2022, there were substantial increases in the number of reported incidents in two categories: posters/stickers (up 70% from 72 to 123) and graffiti (up 18% from 106 to 125).*

Executive Council of Australian Jewry, [Report on Antisemitism in Australia](#) 2022: 1 October 2021-30 September 2022 (12 December 2022), 26.

<sup>7</sup> Attorney-General's Department, Submission Number 97, Submission to Parliamentary Joint Committee on Intelligence and Security Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023, 3 [4]. ('**Attorney-General's Department July 2023 Submission**')

strategy, they are often not the most effective tool to prevent such conduct in the first place.

5. The Law Council has previously considered similar proposals to amend Australia's counter terrorism framework to respond to the threat posed by the re-emergence of far-right extremism, in its submission to this Committee's inquiry into extremist movements and radicalism in Australia in 2021.<sup>8</sup>
6. The Law Council has concerns that a number of measures contained in the current Bill have not been demonstrated to be effective, necessary or proportionate, and, therefore, the Bill should not proceed in its current form, at least without further justification. The Law Council considers that the justification for the measures contained in the Bill would be strengthened by the following:
  - The Attorney-General's Department should provide a justice impact assessment, in terms of both the impact on services and principles underpinning the justice system, to determine whether the enactment of these offences at the Commonwealth level is reasonable, necessary and proportionate.
  - A review of the proposed measures, including data on enforcement action taken, should occur three years after commencement.
  - Consideration should be given to reforms directed to strengthening civil racial and religious vilification laws instead of criminal prohibition in relation to hate symbols and insignia.
  - The Explanatory Memorandum should be amended to address the issue of Australia's reservation to Article 20 of the ICCPR and whether the reservation has any effect on its domestic implementation. Similarly, the Explanatory Memorandum should also address Australia's Declaration concerning Article 4(a) of the ICERD.
7. Should the Bill progress, the Law Council makes the following recommendations to improve the proportionality of its operation:
  - Proposed paragraph 80.2E(d) should be amended to exclude the Islamic State flag.
  - This Committee should inquire into the experience of law enforcement, prosecution and justice agencies in New South Wales and Victoria with respect to the effectiveness (or otherwise) of these jurisdictions' differing approach to defining prohibited symbols.
  - The Committee should consider whether the proposed thresholds for the offences for public display of prohibited symbols, and directions to cease public display of prohibited symbols, are appropriate.
  - Culturally sensitive training for law enforcement bodies should be required to ensure that the directions power contained within proposed section 80.2K is applied appropriately.
  - Paragraph 80.2H(9)(a) should only require that a person's public display of a prohibited symbol is engaged in reasonably and in good faith, such as for a purpose that is 'religious, academic, educational, artistic, literary or scientific'.

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<sup>8</sup> Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, [Inquiry into extremist movements and radicalism in Australia](#) (22 January 2021) ('**Law Council January 2021 Radicalism Submission**'); Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, [Supplementary Submission: Inquiry into extremist movements and radicalism in Australia](#) (25 May 2021) ('**Law Council May 2021 Radicalism Submission**').

- Further consideration should be given to whether the proposed ‘purposes’ in this and similar exceptions appropriately address ‘grey situations’—e.g., where persons with a genuine interest in history and antiques collect stamps and coins.
- Paragraph 80.2H(9)(b) should be extended to capture a broader range of conduct associated with news reporting and apply to a wider range of individuals involved in the process of news reporting.
- Consideration should be given to the use of examples in the note to offence provisions.
- The Australian Government should develop and provide guidance material for journalists, media organisations and public agencies responsible for enforcement and prosecution to improve clarity about how subsection 80.2H(9) will be applied.
- The Committee should assess the justifications for the inclusion of proposed section 80.2J and consider whether they outweigh the risks of unintended consequences. Should section 80.2J proceed:
  - consideration should be given to amending subsection 80.2J(6) to remove the onus on the accused to establish the defence; and
  - there must be public guidance that clearly articulates how the exclusions will operate in practice.
- In the absence of further justification for its necessity, Schedule 2 should be removed, as existing offences in the Criminal Code sufficiently cover the targeted conduct.
- Should Schedule 2 proceed, greater regard should be had to ensuring the offences do not capture inadvertent possession or access, by:
  - ensuring the definition of violent extremist material does not include legitimate matters of political dissent or struggle; and
  - placing greater emphasis on the subjective knowledge of the person accessing or possessing the material.
- The Bill should be amended to include a transitional provision to the effect that any criminal sanction under Schedules 1 and 2 to the Bill does not take effect until 12 months after the commencement date.
- There should be further targeted consultation with the Australian Muslim community regarding the new criminal offences for the public display of Islamic State symbols and the scope for discretion to influence enforcement.
- In the absence of further justification as to its necessity, the expansion of subsection 80.2C(3) to praising terrorism should be removed.
- Schedule 4 to the Bill should be severed from the Bill and be subject to further review by this Committee. The Committee should seek detailed information from security agencies establishing the necessity for these changes.

## Justice impact assessment prior to legislative intervention

8. The Bill would amend the *Criminal Code Act 1995* (Cth) (the **Criminal Code**) to:
- establish new criminal offences for the public display of prohibited Nazi and Islamic State symbols; and trading in goods that bear a prohibited Nazi or Islamic State symbol (**Schedule 1**);
  - establish new criminal offences for using a carriage service for violent extremist material; and possessing or controlling violent extremist material obtained or accessed using a carriage service (**Schedule 2**);
  - expand the offence of advocating terrorism in section 80.2C of the Criminal Code to include instructing on the doing of a terrorist act and praising the doing of a terrorist act in specified circumstances;
  - increase the maximum penalty for the advocating terrorism offence from five to seven years imprisonment (**Schedule 3**); and
  - remove the sunseting requirement for instruments that list terrorist organisations and bolster safeguards (**Schedule 4**).
9. As a general point, the Law Council maintains<sup>9</sup> its view that proposals to amend counter-terrorism legislation, particularly criminal and quasi-criminal laws, such as rules governing listing of terrorist organisations, should be routinely accompanied by a comprehensive assessment of their impacts on the justice system and the principles underpinning it. In other contexts, it is well-accepted that regulatory intervention should always be informed by consideration of impacts, including analysis of costs and benefits to ensure that a proposed regulatory intervention delivers the intended objective without unduly causing adverse effects.<sup>10</sup> These considerations apply with equal force to the justice impacts of proposed expansions to coercive and intrusive counter-terrorism and security-related powers.
10. It is especially important that the foreseeable impacts on legal assistance funding for criminal defendants and respondents to applications for quasi-criminal orders (such as control orders and post-sentence orders) are considered routinely, as part of any proposals to enact or amend applicable laws. As the Law Council has commented in the Committee's other current and recent inquiries into extraordinary counter-terrorism powers, it should not be assumed that the additional need and associated costs can simply be absorbed by existing legal assistance funding.<sup>11</sup> Close engagement with the legal assistance sector, in particular, legal aid commissions, is essential to a clear understanding of resource implications.
11. Consideration should be given to impacts on legal assistance funding, judicial workload and case management; principles of open justice in criminal trials of persons accused of the new offences;<sup>12</sup> the exercise of intrusive investigative and preventive powers; rehabilitation programs and facilities; and the conditions of detention of persons serving sentences of imprisonment, or who are held on remand pending trial or sentence.

<sup>9</sup> Law Council January 2021 Radicalism Submission, 6 [25]. On justice impact assessments, see more generally, Law Council of Australia, [Policy Statement – Justice Impact Assessments](#) (September 2013).

<sup>10</sup> See generally, Department of Prime Minister and Cabinet, The Office of Impact Analysis, [Regulatory Impact Analysis Guide for Ministers' Meetings and National Standard Setting Bodies](#) (June 2023).

<sup>11</sup> Law Council January 2021 Radicalism Submission, 6 [25] – [27].

<sup>12</sup> For example, because of the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) which regulates, among other things, the use of national security information in federal criminal proceedings.



### Recommendations

- **Prior to passage of the Bill, the Attorney-General's Department should provide a justice impact assessment, in terms of both the impacts on relevant services and the principles underpinning the justice system, to assist in determining whether the enactment of these offences at the Commonwealth level is reasonable, necessary and proportionate.**
- **A review of the proposed measures, including data on enforcement action taken, should occur three years after commencement.**

## Schedule 1- Prohibited symbols

### The need to ensure that criminalisation is the least restrictive means of achieving the Bill's objects

12. It may be preferable in the first instance for the Australian Government to consider ways to strengthen civil racial and religious vilification laws in relation to hate symbols and insignia, as opposed to criminalising such conduct—that is, to strengthen and establish greater harmonisation<sup>13</sup> across the State and Commonwealth anti-discrimination and anti-vilification frameworks to ensure protections for those individuals and groups in the community who are vulnerable to discrimination and vilification. Criminalisation will not fully address the highly complex and nuanced issues around radicalisation and violent extremism nor respond fully to the discrimination faced by certain communities.
13. The Law Council makes further observations below regarding the proportionality of adopting a civil versus criminal approach to the issues addressed by the Bill.
14. However, as a starting point, it cautions against the piecemeal expansion of criminal offences to secure the objectives of demarcating certain hateful or violent expression on religious or racial vilification grounds, without consideration of the broader available frameworks and the need for federal human rights legislation. Instead, these judgements, which reflect the tension between protecting the community against vilification and permissible limitations on human rights, may be better articulated in the context of the National Human Rights Framework<sup>14</sup> and a Federal Human Rights Charter.<sup>15</sup>

<sup>13</sup> The Law Council notes that the Queensland Law Society in its submission to the Senate Standing Committee on Legal and Constitutional Affairs review of the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 observed: (the Queensland Law Society '...has previously advocated for the harmonisation of procedures across different State and Federal frameworks in response to vilification and hatred.'

Queensland Law Society, Submission No. 26 to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023, (19 April 2023).

<sup>14</sup> In 2009, the National Human Rights Consultation Committee led by Father Frank Brennan SJ AO, produced a report which led to the adoption of the first National Human Rights Framework. Most recently, on 15 March 2023, the Attorney-General referred to the Parliamentary Joint Committee on Human Rights to inquire into, and report on, Australia's Human Rights Framework. The Law Council has submitted to that inquiry: Law Council of Australia, Submission to Parliamentary Joint Committee on Human Rights, [Inquiry into Australia's Human Rights Framework](#) (3 July 2023) ('**Law Council Human Rights Framework Submission**'). See more generally, the Hon Mark Dreyfus KC MP, [Review into Australia's Human Rights Framework](#) (Media Release, 22 March 2023).

<sup>15</sup> For example, the Law Council considers that a Federal Human Rights Act should recognise, in the form of a general limitation clause, that many rights may be subject to reasonable and proportionate restrictions if these are clearly demonstrated to be necessary for the achievement of a legitimate purpose such as protecting the rights of others: Law Council of Australia, [Policy Position – Federal Human Rights Charter](#) (November 2020).

## Effectiveness, necessity and proportionality

15. The Law Council supports the adoption of measures in response to ideologically and religiously motivated violent extremists within the community who are seeking to promote hatred, instilling fear and harassing others. However, there are concerns that insufficient evidence has been advanced to establish that the approach adopted by Schedule 1, as it relates to the display and trading in prohibited symbols, is effective, necessary or proportionate.

### Effectiveness and necessity

16. The Law Council accepts part of the rationale for new criminal offences for the public display and trading in prohibited Nazi and Islamic State symbols. The Law Council acknowledges that:
- Conduct intended to discriminate and vilify has a profound impact on affected individuals and communities. Further, wider societal harm results from the display of and trading in hate symbols because of the way such imagery is used by nationalist and racist groups to raise their profile, recruit new members, and intimidate vulnerable groups.
  - Security agencies advise that Nationalist and Racist Violent Extremists (**NRVE**), including neo-Nazis, 'adopt specific imagery and terminology to indicate and perpetuate their ideology'.<sup>16</sup> Furthermore, '(s)ymbology is also a powerful tool to build in-group belonging which is critical to NRVE movements, and to intimidate or threaten ideological opponents'.<sup>17</sup>
17. However, in this submission the Law Council raises some questions about the interaction of these offences with civil vilification / incitement laws, and the thresholds proposed.
18. Further, the Law Council is concerned that the rationale for the introduction of new Commonwealth criminal offences rests on three unsubstantiated assumptions, namely that:
- the display or dissemination of hateful symbols and insignia is a reliable precursor to a person's engagement in violent extremism;
  - criminal prohibition in this area will not have unintended consequences; and
  - enactment of criminal offences, which enlivens investigative powers, serves as an appropriate trigger point for law enforcement to engage in disruptive and early intervention activities to disrupt extremist networks and prevent the radicalisation of extremists at an even earlier stage of the attack-planning continuum.

### *Display, possession or trade in prohibited symbols as a precursor to violent extremism*

19. The Law Council queries whether the display or dissemination of hateful symbols and insignia is a reliable precursor to a person's engagement in violent extremism for the following reasons.

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<sup>16</sup> Explanatory Memorandum, 23 [17].

<sup>17</sup> Ibid.

- As a general point, the Law Council notes that there is reason to carefully scrutinise statements suggesting such a link because of the inherent limitations of the empirical literature considering the motivations of violent extremists. The need for more careful and nuanced discussion regarding the drivers of violent extremism has been reinforced by the limitations of risk assessment tools utilised by the Commonwealth in relation to post-sentence detention orders under Division 105A. Notably, in that context, the Independent National Security Legislation Monitor, Mr Grant Donaldson SC, has also expressed doubt that there could ever be a valid quantitative method to evaluate the risk of a person engaging in extremist violence because ‘within the pool of offenders, the variety of extremist violence and its causes is so diffuse that prediction of future acts is impossible’.<sup>18</sup>
- The basic difficulty with mere possession or display offences, such as those contained in this Bill, is that such offences do not require proof of the person’s ulterior intent (or their actual motive) for possessing or disseminating proscribed symbols. As currently drafted, the laws could criminalise people who are neither advocates of violent extremism nor historians, journalists or educators, but have an interest in history and antiques, including (for example) stamps and coins.
- From a democratic perspective, it is important to maintain the distinction between holding extreme opinions and committing to take violent actions to pursue them. Criminal liability is appropriately targeted to the latter scenario. In this respect, Mr Mike Burgess, Director-General of Security recently underlined the importance of nuanced analysis to elicit the connection between holding extreme views and being committed to violence as a means to realise those views:

*Speaking more generally, I’m also concerned that all too often commentators fail to distinguish between extreme views and violent extremism. One can lead to the other, but that does not mean they are the same thing. It takes careful, nuanced work to disentangle groups and individuals that will engage in violence, from groups and individuals that may have views that are awful—but still lawful.*<sup>19</sup>

### Unintended consequences

20. The Law Council is concerned that enactment of the offences contained in Schedule 1 to the Bill may be at odds with its stated objectives of disrupting violent extremist networks and creating earlier opportunities for law enforcement intervention to counteract an individual’s radicalisation pathway towards acts of violent extremism. These matters are summarised briefly below.
- The Law Council is concerned that the prohibition of extremist symbols may not have the desired effect because of the adaptability of these symbols. Crucially, some commentators have identified the risk of a ‘whack-a-mole’ approach to prohibition risks, incentivising extremist groups to make adaptations to prohibited symbols and test the borderlines of a prohibition in the public arena.<sup>20</sup> In this context, it is likely that extremist groups may derive

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<sup>18</sup> Commonwealth of Australia, Independent National Security Legislation Monitor, Mr Grant Donaldson SC, Review of Division 105A (and related provisions of the Criminal Code (Report, 2022), 74 [253].

<sup>19</sup> Mike Burgess, Australian Security Intelligence Organisation, Director General’s Annual Threat Assessment (Speech, 21 February 2023).

<sup>20</sup> Lydia Khalil, Lowy Institute–Commentary, [“Banning the Nazi salute opens a Pandora’s box”](#), (Webpage, 29 March 2023)

increased media attention and publicity. In this regard, Lydia Khalil has noted:<sup>21</sup>

*Any symbol or gesture can be turned into one of hate. Extremist groups understand this all too well and will often use signs and gestures that also have an anodyne or double meaning to troll efforts to counter their expression. White supremacists neo-Nazis have done this most recently with the “OK” hand gesture.*

- Framing early intervention as a function of criminal law enforcement could unintentionally heighten the sense of grievance and marginalisation felt by disaffected individuals and their associates, and isolate them from positive influences in their communities.
- It may also have broader social impacts on law-abiding members of the person’s family and community and weaken their willingness to engage with authorities out of fear that their family or community member will be prosecuted and imprisoned.
- The Law Council is concerned that the prohibition of the Islamic State flag, which consists of the Arabic text of the Shahada—a central declaration of faith significant to the religious life of Muslims—may unnecessarily stigmatise Islam and the Arabic language. There is a risk that ‘Non-Arabic speakers will not be able to meaningfully distinguish the writing on the ISIS flag from any other example of Arabic text’.<sup>22</sup> This concern, in reference to the power of police officers to issue directions to cease display of prohibited symbols in public and the implementation of these provisions, is discussed further below.

#### Criminal offences to prevent radicalisation and extremism

21. The Law Council accepts that a key rationale for the measures contained in the Bill is to ensure that there are appropriate opportunities for intervention with individuals who are engaging in the illegitimate use of prohibited symbols, and may be in the early stage of radicalisation. This is to be done<sup>23</sup> in order to reduce the risk of violence posed by those individuals.
22. The Law Council acknowledges the benefits of early intervention, and supports greater resourcing for the co-ordinated delivery of rehabilitation and prevention programs across Commonwealth and state governments. However, the Law Council considers that early, community-based identification, intervention and rehabilitation of ‘at-risk’ individuals is more likely to occur without the threat of criminal sanction.
23. The Law Council maintains that criminalisation should not be conceived as the primary tool through which to prevent radicalisation and extremism from propagating, or to facilitate behavioural change by disaffected individuals. It is concerned that criminal prohibition of the public display of violent extremist symbols may not be an effective means to disrupt violent extremism.

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid, 5-6 [17](2).

<sup>23</sup> Explanatory Memorandum, 55 [207], 57 [217].

### Proportionality

24. In general, the Law Council's previous advocacy has identified the need to balance the perceived value of a proposed offence as a tool for enabling police to exercise powers of intervention against its subsequent impacts (both individual and systemic): exposing individuals to arrest, charge, prosecution, conviction, and sentence (and potentially post-sentence detention).
25. Given that the Bill and Explanatory Memorandum refer specifically to Australia's international human rights obligations, it is appropriate to consider whether the measures in the Bill are consistent with those obligations. In addition, the following discussion canvasses the question whether the measures in Schedule 1 may be supported by the external affairs head of power in section 51 (xxxix) of the Constitution.
26. The **Statement of Compatibility** with Human Rights contained in the Explanatory Memorandum to the Bill identifies the human rights that are engaged by the Bill. Most notably, the Bill seeks to promote the right to security of the person in Article 9 of the ICCPR to promote the right to protection from advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence in Article 20 of the ICCPR; and to condemn propaganda and organisations that attempt to justify discrimination or are based on racial supremacism in Article 4 of the ICERD.
27. It has not been possible to include a comprehensive human rights analysis of every measure in the Bill in the time available. The following discussion focusses on the most significant issues identified by the Law Council.

### Articles 19 and 20, ICCPR

28. The most significant potential restriction on human rights imposed by the Bill is to freedom of expression under Article 19 of the ICCPR. Restrictions on the display of designated Nazi or Islamic State symbols would, as the Statement of Compatibility notes, limit 'a person's ability to communicate or impart certain information and ideas publicly through prohibited ... symbols'. There is little doubt that the symbols proposed to be prohibited are symbols of hatred and may be used as 'tools of vilification and radicalisation' as noted in the Statement of Compatibility. However, even controversial expression may be protected by Article 19, subject to permissible limitations—most relevantly where restrictions are necessary for the protection of the rights or reputations of others.<sup>24</sup>
29. The Law Council notes the observation of the Law Society of New South Wales that, in the context of European human rights jurisprudence, the display of hateful symbols does not attract the protections of Article 10 of the European Convention on Human Rights (**ECHR**)<sup>25</sup> (freedom of expression). Cases on the issue have been dismissed under the abuse clause of Article 17 of the ECHR—see, for example the European Court of Human Rights (**European Court**) case of *Norwood v The UK*.<sup>26</sup> In *Norwood* the applicant displayed a slogan specifically targeting Muslims

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<sup>24</sup> ICCPR, article 19(2). See further Human Rights Committee, *Rabbae et al v The Netherlands*, Communication 2124/2011 (UN Doc CCPR/C/117/D/2124/2011, 15 November 2011), paragraph 9.8.

<sup>25</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, opened for signature 4 November 1950, ETS 5 (entry into force 3 September 1953).

<sup>26</sup> European Court of Human Rights, App. No. 23131/03 (2004).



alongside offensive symbols, and the inadmissibility ruling in the case was based on Article 17 ECHR, for which there is no direct equivalent in the ICCPR.

30. In *Rabbae et al v The Netherlands*, the Human Rights Committee observed that ‘a prohibition that is justified on the basis of article 20 must also comply with the strict requirements of article 19(3) [including] tests of necessity and proportionality.’<sup>27</sup> The Committee noted further that:<sup>28</sup>

*... article 20(2) does not expressly require the imposition of criminal penalties, but instead requires that such advocacy be “prohibited by law”. Such prohibitions may include civil and administrative as well as criminal penalties.*

31. The Committee concluded that Dutch legislation criminalising hate speech constituted a proportionate measure to prohibit acts in violation of article 20(2), that was capable of providing victims with an effective remedy.<sup>29</sup>
32. Assuming Article 19 is applicable to the measures in this Bill, the nature of the limitation must be considered carefully. A proportionate limitation on article 19 must not only conform to paragraph 3 of that article (in that it must be for a permitted purpose), but also be appropriate to its protective function, and the least restrictive measure that would be effective to achieve the intended end.<sup>30</sup> As argued throughout this submission, criminalisation of the display of the symbols in question is of doubtful efficacy, not least because similar symbols with equally sinister intent may be excluded from the operation of the Bill. In the Law Council’s view, measures other than criminalisation would be more proportionate to the legitimate aim of protecting targets of Nazi and Islamic State propaganda.
33. There is also the complicating factor of Australia’s reservation to Article 20 of the ICCPR.<sup>31</sup> This Article underpins proposed subsection 80.2H(4) (and subsection 80.2K(3)).<sup>32</sup> The reservation is couched in the following terms:

*Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters.*

<sup>27</sup> Human Rights Committee, *Rabbae et al v The Netherlands*, Communication 2124/2011 (15 November 2011), paragraph 9.8.

<sup>28</sup> Ibid, paragraph 10.4.

<sup>29</sup> Ibid, paragraph 10.7. See further paragraphs 48-52 of Human Rights Committee, *General Comment 34 on Article 19: Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34 (12 September 2011). The CCPR is generally wary of criminal prohibition in this context, unless it falls within Article 20(2).

<sup>30</sup> Human Rights Committee, *General Comment 34 – Article 19: Freedom of opinion and expression*, UN Doc CCPR/C/GC/34, 12 September 2011, [35].

<sup>31</sup> UNTC Chapter IV: Human Rights (ICCPR), *Declarations and Reservations*: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en#EndDec).

<sup>32</sup> See Note to s 80.2H(4) of the Bill, and Explanatory Memorandum, 18. See also Note to s 80.2K(3).

34. The effect of such a reservation at international law is contested.<sup>33</sup> However, assuming it is effective, it could relieve Australia from its obligation to introduce relevant offences after the date of ratification of the ICCPR (13 August 1980).<sup>34</sup> The Law Council recommends that the Committee seek (or ask the Government to seek) advice on whether the reservation has any effect on domestic implementation of Article 20 of the ICCPR before the Bill proceeds. The Explanatory Memorandum should also clarify that Australia has made a reservation to Article 20 of the ICCPR and the effect of this reservation.

#### Article 4, ICERD

35. Proposed subsection 80.2H(3) includes a note stating that its 'object ... is to give further effect to Article 4 of the [ICERD]'.
36. Article 4 provides that States Parties:
- (a) *shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;*
  - (b) *shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;*
  - (c) *shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.*
37. Australia made an interpretive declaration in relation to Article 4(a) of the ICERD on ratifying the treaty in 1975.<sup>35</sup> Most of the discussion regarding Articles 19 and 20 of the ICCPR above is also applicable to Article 4 of the ICERD. However, the wording of the declaration in relation to Article 4(a) is different from that of the reservation to Article 20 ICCPR:

*The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to*

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<sup>33</sup> See eg Mendelsohn, 'Reservations to Treaties: International Legal Implications' (1955) 4(2) *Buffalo Law Review* 218; cf Neumayer, 'Qualified Ratification: Explaining Reservations to International Human Rights Treaties' (2007) 36(2) *Journal of Legal Studies* 397. Neumayer states: 'Reservations, understandings, and declarations (RUDs) allow a country to become a state party to an international treaty in a qualified and contingent manner, exempting itself from certain obligations with which state parties are normally expected to comply.' The Vienna Convention on the Law of Treaties (23 May 1969, 1155 UNTS 331) is unhelpful in this regard, defining a reservation as a statement that 'purports to exclude or to modify the legal effect of certain provisions of the treaty (at 2(1)(d)).

<sup>34</sup> Support for this proposition may be found in eg the *Religious Freedom Review: Report of the Expert Panel*: <<https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf>>, 19-20, 31-32 and 84-86.

<sup>35</sup> UNTC Chapter IV: Human Rights (ICERD), *Declarations and Reservations*: <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=en#EndDec)>.

*seek from Parliament legislation specifically implementing the terms of article 4(a).*

38. Again, the Explanatory Memorandum should clarify that Australia has made a Declaration in relation to Article 4(a) of the ICERD, and the effect of this reservation.
39. This Bill may also present an opportunity for Australia to consider withdrawing its reservation to Article 20 of the ICCPR and the interpretative declaration to Article 4(a) of the ICERD.
40. The Law Council notes that the approach it has taken in this submission, emphasising the importance of a 'justice impact assessment' and consideration of whether intervention is reasonable, necessary and proportionate, is consistent with General Recommendation No 35 of the UN Committee of the Elimination on Racial Discrimination:

*The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.<sup>36</sup>*

41. As discussed elsewhere in this submission, the Law Council considers it would have been prudent to review Commonwealth, State and Territory anti-discrimination and anti-vilification regimes to ensure protections for those individuals and groups in the community who are vulnerable to discrimination and vilification prior to considering criminalisation of select symbols. Such endeavours would be consistent with giving proper effect to Australia's obligations under the ICERD and would be a necessary step in evaluating whether the proposed criminal offences constitute the least restrictive means of achieving the legitimate end sought by the Bill.

## **Civil versus criminal reform context**

42. Racial vilification is prohibited in Commonwealth law as a civil wrong.
43. It is also notable that intentionally urging another person to use force or violence against a targeted group where the targeted group is distinguished by race, religion, national or ethnic origin or political opinion may already constitute a criminal offence.<sup>37</sup>
44. Religious vilification is not prohibited in Commonwealth law as a civil wrong. There is currently no existing federal religious discrimination law that could be adapted for the purpose. However, the Australian Government has indicated its intention to enact federal anti-discrimination law which protects against discrimination on the basis of religion.<sup>38</sup> It has further committed to including anti-vilification protections in

<sup>36</sup> General Recommendation No. 35: Combating Racist Hate Speech, UN Doc. CERD/C/GC/35, 26 September 2013 (adopted by CERD at its 83rd session (12–30 August 2013)), also in UN Doc. A/69/18, annex VIII.

<sup>37</sup> Criminal Code, s. 80.2A(1), (2) and 80.2B (urging violence against members of groups).

<sup>38</sup> The Hon Mark Dreyfus QC MP, Attorney-General, 'Restoring a human rights-based approach – Castan Centre Speech', Annual Castan Centre for Human Rights Law Conference, Via Zoom, 22 July 2022, <[Restoring a human rights-based approach - Castan Centre Speech - Mark Dreyfus QC MP](#)>.



the legislation to ensure that no one can be the target of hate on the basis of their faith.

45. There is partial protection against racial vilification as a civil wrong in the *Racial Discrimination Act 1975* (Cth) (**RDA**). Section 18C of the RDA provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people and is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group. This is a civil protection. Redress for a purported breach of section 18C of the RDA may be sought pursuant to Part IIB of the *Australian Human Rights Commission Act 1986* (Cth)—by way of complaint to the Australian Human Rights Commission and, potentially, civil proceedings in the Federal Court and the Federal Circuit and Family Court of Australia.
46. There are some similarities in the language employed in proposed section 80.2H of the Criminal Code (drawing on the circumstances in proposed section 80.2H(3))<sup>39</sup> and section 18C of the RDA. A key difference is that:
- the former is directed towards the *incitement* of another person or a group of persons to offend, insult, humiliate or intimidate a person, or members of a group of persons, because of the race (and only comes into play with respect to a person causing a prohibited symbol to be displayed in a public place);
  - the latter is directed to the *act* of offending, insulting, humiliating or intimidating itself.
47. While section 18C of the RDA could conceivably capture displays of prohibited symbols as acts done because of race, etc and cause offence, insult, humiliation or intimidation, it is not directed at incitement.<sup>40</sup>
48. Section 17 of the RDA does make it unlawful to incite other behaviour that is unlawful under the Act, such as racial discrimination (section 9 of the RDA). However, section 17 is restricted in its application to Part II of the RDA, which does not include section 18C.
49. As a result, proposed section 80.2H would seem to render a criminal offence conduct that does not currently constitute a civil wrong. The Explanatory Memorandum for the Bill does not address whether consideration was given to prohibiting the conduct rendered unlawful by proposed section 80.2H as a civil wrong.
50. In terms of the broader approach adopted in the States and Territories, the Religious Freedom Review Report, dated 18 May 2018, noted that, at that time, the Australian Capital Territory, Queensland, Tasmania and Victoria had civil vilification protections on the grounds of religion, religious belief or activity, or religious conviction (and New South Wales on the grounds of ethno-religious origin), and the Australian Capital Territory, New South Wales and Queensland had criminal offences that apply

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<sup>39</sup> For example, section 80.2H will apply if (inter alia) a reasonable person would consider that the conduct mentioned in paragraph 1(a) (causing a thing to be displayed in a public place) could incite another person or group of persons to offend, insult, humiliate or intimidate a person (or members of a group of persons) because of the race of the targeted person.

<sup>40</sup> *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207; 235 ALR 750 ; [2006] VSCA 284 at [140] (*Catch the Fire*) per Neave JA.

to serious vilification.<sup>41</sup> The *Racial and Religious Tolerance Act 2001* (Vic) (the **Victorian Act**) does provide for offences of serious racial and religious vilification.<sup>42</sup>

51. The Law Council notes that those State and Territory laws have not relevantly changed since 2018,<sup>43</sup> and also prohibit vilification on racial grounds in the same way.<sup>44</sup> The Law Council has not for the purpose of this submission examined all racial and religious vilification laws in States and Territories.
52. As a comparison, however, it notes that the Victorian Act provides, generally, for a graduated approach to racial and religious vilification (which is specifically focused on incitement).
53. Sections 7 and 8 of the Victorian Act prohibit, on the grounds of race and religion (respectively) conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, a person or class of persons. This is a civil wrong.
54. Sections 24 and 25 provide for offences of serious racial and religious vilification.<sup>45</sup> These provide that a person must not, on the ground of the race (or religion) of another person or class of persons, intentionally engage in conduct that the offender knows is likely:
  - to incite hatred against that other person/class of persons; *and* [emphasis added]
  - to threaten, or incite others to threaten, physical harm towards that other person or class of persons or property of that other person or class of persons (applicable penalty is imprisonment for 6 months or 60 penalty units or both).
55. While the Law Council recognises that the public display of Nazi symbols has recently been made an offence under Victorian law, this offence is not linked to racial or religious vilification or incitement.<sup>46</sup>
56. It also notes that, under the Bill, it is proposed that it would be a criminal offence to publicly display a prohibited symbol in circumstances where a reasonable person would consider that the conduct mentioned *could* incite another person (or group) to *offend* a person because of the race of the targeted person (or group)<sup>47</sup> [emphasis added].
57. By reference to the Victorian example above, this appears to be a low threshold for a criminal offence directed towards racial vilification (and incitement). If passed, it would also appear that:
  - under section 18C of the RDA, a public act *which is reasonably likely* to offend another person or group of people, which is done because of race etc of a person or group is a civil wrong; and
  - under section 80.2H of the Bill, the public display of a prohibited symbol, which *could incite* another person or group of persons to *offend or insult* a person or

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<sup>43</sup> *Discrimination Act 1991* (ACT) s 67A(1)(e); *Criminal Code 2002* (ACT) s 750(1)(v); *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Anti-Discrimination Act 1998* (Tas) s 19(d); *Racial and Religious Tolerance Act 2001* (Vic) s 8; *Anti-Discrimination Act 1977* (NSW) ss 4 (definition of 'race'), 20C.

<sup>44</sup> *Discrimination Act 1991* (ACT) s 67A(1)(d); *Criminal Code 2002* (ACT) s 750(1)(iv); *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Anti-Discrimination Act 1977* (NSW) ss 4 (definition of 'race'), 20C.

<sup>46</sup> *Summary Offences Act 1966* (Vic), s 41K.

<sup>47</sup> The Bill, s 80.2H, in particular having regard to the circumstances set out in s 80.2H(3)(b).

group of people because of race, is an offence punishable by 12 months imprisonment [emphasis added].

58. The Law Council queries whether this is the intended outcome of the Bill. The thresholds of these proposed offences are further discussed below.
59. The Law Council suggests that the Committee inquire into whether reforms to strengthen civil racial and religious vilification laws instead of criminal prohibition in relation to hate symbols and insignia were considered by the Australian Government. Any reforms in this area would need to have regard to resolving the question of the effect of Australia's reservation to article 20 of the ICCPR and Declaration in relation to article 4(a) of the ICERD, as discussed in this submission.
60. In the RDA that may be done, for example, by enabling section 17 to apply to section 18C. With respect to religious vilification, it is likely that a new Act would be required—however, as noted, this is anticipated to occur having regard to the Australian Government's announcements.

#### **Recommendation**

- **The Explanatory Memorandum should be amended to address the effect of Australia's reservation to Article 20 of the ICCPR and Australia's Declaration to Article 4(a) of the CERD.**
- **Consideration should be given to reforms to strengthen civil racial and religious vilification laws instead of criminal prohibition in relation to hate symbols and insignia.**

### **Further comments on Schedule 1**

61. As a general observation, the Law Council considers the drafting of the offence provisions within Schedule 1 to be overly complex. Importantly, this may impact public understanding and awareness, cause difficulties in policing, and ultimately reduce the intended deterrent effect of the legislation. It also heightens the need for clear education and guidance material to accompany the passage of the reforms, should they proceed.
62. Given the Law Council's expressed reservations about Schedule 1 to the Bill, the following comments are made with the view to improving the measures, should they proceed.

#### **Scope of section 80.2E—Meaning of prohibited symbol**

63. Offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct and are thus overly dependent on police and prosecutorial discretion to determine, in practice, what type of conduct should or should not be subject to sanction.<sup>48</sup>
64. Proposed section 80.2E is narrow in scope as it refers only to the Islamic State flag, the Hakenkreuz, and the double-sig rune. The Law Council accepts that modern Nazi organisations use a wide variety of symbols, from the historical (such as the Sonnenrad) to the coded-numerical (such as 1488). Further, they have been shown to be adept at moving quickly to new symbols when old ones are outlawed. In addition, such extremist groups do not limit themselves to the use of hateful insignia,

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<sup>48</sup> Law Council of Australia, Policy Statement—Rule of Law Principles (March 2011) 1(b)

but also adopt salutes and phrases associated with historical, extremist organisations (e.g., the Nazi party) to further discriminate against and vilify vulnerable groups.

65. A foundational issue with seeking to proscribe the ISIS flag<sup>49</sup> arises from the fact that the ISIS flag is not a unique symbol and consists of the Arabic text of the Shahada, which is a profession of faith entailed by the first of the five pillars of Islam, upon a black background.
66. The definition of prohibited symbol includes, both under proposed section 80.2E(a) the Islamic State flag, and under proposed section 80.2E(d), 'something that so nearly resembles a thing to which paragraph (a), (b) or (c) applies that it is likely to be confused with, or mistaken for, that thing'. The Law Council notes that the extension of criminal sanction to symbols that 'so nearly resembles' the Islamic State flag creates ambiguities in the definition of the criminal offence because the Islamic State flag is not a unique symbol.
67. The Law Council is concerned by the evidence already before the Committee regarding the potential for criminal liability to apply to sincere professions of faith by Muslims in Australia, who deplore the hateful ideology of Islamic State.<sup>50</sup> In particular, given that 'there are many commonly used Islamic flags and symbols that bear resemblances to the Islamic State flag and could be confused with, or mistaken for, the flag';<sup>51</sup> the definition of prohibited symbol 'could inadvertently extend to symbols that Muslims use every day, merely because those innocuous symbols could be confused with, or mistaken for, the Islamic State flag'.<sup>52</sup> Commentators note that 'many Muslims display the Islamic creed in its Arabic wording within their homes, as stickers on their cars, in mosques, or as artwork in various forms'.<sup>53</sup> The practical difficulties of enforcing such a prohibition are explored further below.
68. The Law Council notes that differing approaches to the definition of prohibited symbols have been taken in New South Wales, Victoria and Queensland. In New South Wales, 'Nazi symbol' is left undefined.<sup>54</sup> This means that it is up to the trier of fact to determine whether a particular symbol is a 'Nazi symbol'. However, crucially, the offence in New South Wales does not apply to the Islamic State flag. In contrast, in Victoria, the definition of 'Nazi symbol' in section 41J of the *Summary Offences Act 1966* (Vic) (the **Vic Act**) contains an extended application in relation to a symbol that 'so nearly resembles' the Hakenkreuz that it is likely to be confused with or mistaken for that symbol. Again, in Victoria, the offence in section 41K of the *Vic Act* only applies to defined Nazi symbols and does not apply to the Islamic State

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<sup>49</sup> Additional confusion arises from the fact that there are multiple versions of the Islamic State flag.

<sup>50</sup> See further, Australian Federation of Islamic Councils, Submission No. 106, Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (July 2023).

<sup>51</sup> Dr Raihan Ismail, Submission No. 15, Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (23 June 2023) 2 [9].

<sup>52</sup> *Ibid.*

<sup>53</sup> Zuleykha Keskin, Charles Sturt University News, '[The Islamic State flag hijacks Muslim words of faith](#),' (Webpage, 11 July 2023). Furthermore, Dr Raihan Ismail in his submission to this Committee (Dr Raihan Ismail, Submission No. 15, Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (23 June 2023) notes that:

*For both Sunni and Shia Muslims, the colour black is also used as the background for Islamic wall art containing Arabic script, often in different calligraphic styles. The colour black as a background is popular for artistic purposes. Black backgrounds helps accentuate Arabic calligraphy. Wall art of this kind is displayed in homes, mosques and other public places.*

<sup>54</sup> *Crimes Act 1900* (NSW), Division 9.

flag. Therefore, the issues discussed above in relation to the Bill's application to the Islamic State flag would not apply in New South Wales or Victoria.

69. Notably, in Queensland, the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023<sup>55</sup> (the **Queensland Bill**) is currently before the Legislative Assembly. The Queensland Bill would permit the Minister to recommend<sup>56</sup> a prohibited symbol to be prescribed by regulation<sup>57</sup> and also includes symbols that 'so nearly resemble' a prescribed symbol that it is likely to be confused with that symbol.<sup>58</sup> Notably, that Bill requires that the Minister consult with certain persons prior to making a recommendation that a certain symbol be prescribed, for example, the Human Rights Commissioner<sup>59</sup> and the Commissioner of the Police Service.<sup>60</sup> It is envisaged that the Queensland Bill will prohibit display of the Islamic State flag.<sup>61</sup>
70. Given that the application of criminal sanctions to the display of the Islamic State flag remains a novel development within Australia, the Law Council suggests that a narrow and precisely limited definition should be preferred. Accordingly, the Law Council suggests that the extended definition of prohibited symbol contained in proposed paragraph 80.2E(d) be removed.
71. More broadly, the Law Council notes that consideration of the effectiveness of prohibiting the Islamic State flag may have been enhanced by reference to the experience of like-minded jurisdictions that have employed similar prohibitions.<sup>62</sup>
72. In that context, the Law Society of New South Wales (**LSNSW**) notes that any definition that proscribes specific individual symbols will likely cause difficulty in the situations identified above. The LSNSW considers that the approach taken by NSW in section 93ZA of the *Crimes Act 1900* (NSW) not to define 'Nazi symbol' goes some way to addressing this problem by leaving the question of whether a particular symbol is a 'Nazi symbol' to the trier of fact. The undefined approach may also reduce the risk of legitimate use of certain symbols and insignia from being caught

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<sup>55</sup> Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (Qld) (Introduced into Parliament on 29 March 2023).

<sup>56</sup> The Minister may recommend the Governor make a regulation proscribing a symbol only if the Minister is satisfied:

- the symbol or image is widely known by the public as being solely or substantially representative of an ideology of extreme prejudice against a relevant group; or
- is widely known by members of a relevant group as being solely or substantially representative of an ideology of extreme prejudice against that group.

Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023, s. 52C(3).

<sup>57</sup> Ibid, s. 52C(1)(a).

<sup>58</sup> Ibid, s. 52C(1)(b).

<sup>59</sup> Ibid, s. 52C(4)(b).

<sup>60</sup> Ibid, s. 52C(4)(c).

<sup>61</sup> The Queensland Bill seeks to implement Recommendation 16 of the Inquiry into serious vilification and hate crimes which recommended that the Queensland Government establish a criminal offence that prohibits the display of hate symbols, including those relating to Nazi and **ISIS ideology** (emphasis added), with considered exceptions to the prohibition: Queensland Parliament, Legal Affairs and Safety Committee, Inquiry into serious vilification and hate crimes, Report No. 22, 57<sup>th</sup> Parliament (January 2022), 55 Recommendation 16. See more generally, [Explanatory Notes](#), Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (Qld), 1.

<sup>62</sup> As well as the discussion of the Victorian and New South Wales jurisdictions above, the Law Council notes in this context that such prohibitions have been in place for some time in some European jurisdictions such as Germany. In Germany, section 86 and 86a of the German Criminal Code prohibit dissemination of propaganda material of unconstitutional and terrorist organisations and use of symbols of unconstitutional and terrorist organisations: German Criminal Code, s. 86 and 86a (English translation) accessed online: [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/)



by the ‘so nearly resembles’ test as the prosecution would be required to prove beyond reasonable doubt that a symbol is, in fact, a hate symbol.

### Recommendations

- **Proposed paragraph 80.2E(d) should be amended to exclude the Islamic State flag.**
- **This Committee should inquire into the experience of law enforcement, prosecution and justice agencies in New South Wales and Victoria with respect to the effectiveness (or otherwise) of these jurisdictions’ differing approach to defining prohibited symbols.**

### Thresholds of offences

73. As set out above, some of the thresholds that apply in the Bill’s proposed offences appear to be relatively low. For example:

- Under section 80.2H of the Bill, it is an offence to publicly display a prohibited symbol in a public place (punishable by 12 months imprisonment) in circumstances including where:
  - a reasonable person would consider that this conduct *could incite* another person or group of persons to *offend or insult* (or humiliate or intimidate) a person because of their race<sup>63</sup> [*emphasis added*]; or
  - the conduct *is likely to offend, insult* (or humiliate or intimidate) a person who is a reasonable person, and a member of a group of persons distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin, because of the reasonable person’s membership of that group<sup>64</sup> [*emphasis added*].
- Under section 80.2K of the Bill, a police officer may direct a person to cease display of a prohibited symbol in a public place<sup>65</sup>, in accordance with section 80.2L, in certain circumstances. Failure to comply with these directions is an offence punishable by 20 penalty units.<sup>66</sup> The circumstances in which a police officer may direct a person include that:
  - the police officer reasonably suspects that the display *could incite* another person/group to *offend, insult* (or humiliate or intimidate) the members of a group of persons because of their race;<sup>67</sup>
  - the police officer reasonably suspects that the display involves advocacy that the display *is likely to offend, insult* (or humiliate or intimidate) a person who is a reasonable person and a member of group of persons distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin, because of the reasonable person’s membership of that group.<sup>68</sup>

74. The Law Council notes that, with respect to section 18C of the RDA, the language of “offend, insult, humiliate or intimidate” denotes profound and serious effects, not be

<sup>63</sup> The Bill, ss 80.2H(1)(a), (b), (c) and (3)(b).

<sup>64</sup> The Bill, ss 80.2H(1)(a), (b), (c) and (7).

<sup>65</sup> The Bill, s. 80.2F (meaning of displayed in a public place).

<sup>66</sup> The Bill, s 80.2M(1).

<sup>67</sup> The Bill, s 80.2K(1), (2)(b).

<sup>68</sup> The Bill, s 80.K(1), (6).

likened to mere slights.<sup>69</sup> It considers that these thresholds are appropriately set in the RDA.

75. However, it raises for the Committee's consideration the question whether the thresholds set out in sections 80.2H and 80K of the Bill are appropriate.
76. With respect to the summary offence of offensive behaviour, conduct or language to be offensive has been characterised by reference to whether it is 'calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person'.<sup>70</sup>
77. The Law Council also refers to the general guidance provided by relevant UN treaty bodies, discussed above, that the criminalisation of forms of racist expression should be reserved for serious cases, while less serious cases should be addressed by means other than criminal law.

#### **Recommendation**

- **The Committee should consider whether the proposed thresholds for the offences for public display of prohibited symbols, and directions to cease public display of prohibited symbols, are appropriate.**

#### **Section 80.2K—Directions to cease display of prohibited symbols in public**

78. As noted above, proposed subsection 80.2K(1) provides a police officer with a new power to direct a person to cease display of a prohibited symbol in a public place.<sup>71</sup> The police officer issuing the direction is required to suspect, on reasonable grounds, that the display:
  - either involves dissemination of ideas based on racial superiority or racial hatred;<sup>72</sup> or could incite person/s to offend, insult, humiliate or intimidate a targeted person<sup>73</sup> or targeted group;<sup>74</sup> or
  - involves advocacy that is advocacy of hatred of a group of persons<sup>75</sup> distinguished by race, religion, or nationality or advocacy of hatred towards a member of a targeted group<sup>76</sup> that constitutes incitement to offend, insult, humiliate, intimidate, or use force or violence;<sup>77</sup> or
  - is likely to offend, insult, humiliate or intimidate a person who is a reasonable person<sup>78</sup> and a member of a group of persons<sup>79</sup> distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin because of the reasonable person's membership of that group.

<sup>69</sup> *Jones v Scully* (2002) 120 FCR 243, [102].

<sup>70</sup> *Ibid*, [106], citing R Watson, A M Blackmore and G S Hosking, *Criminal Law (NSW)*, LBC Information Services, Sydney, 1996, at [9.7990].

<sup>71</sup> The Bill, s. 80.2F (meaning of displayed in a public place).

<sup>72</sup> The Bill, ss. 80.2K(2)(a).

<sup>73</sup> The Bill, ss. 80.2K(2)(b)(i) (the conduct could incite another person or a group of persons to offend, insult, humiliate or intimidate a person because of the race of the targeted person).

<sup>74</sup> The Bill, ss. 80.2K(2)(b)(ii) (the conduct could incite another person or a group of persons to offend, insult, humiliate or intimidate the members of a group of persons because of the race of some or all of the members of the targeted group).

<sup>75</sup> The Bill, ss. 80.2K(3)(a)(i).

<sup>76</sup> The Bill, ss. 80.2K(3)(a)(ii).

<sup>77</sup> The Bill, ss. 80.2K(3)(b).

<sup>78</sup> The Bill, ss. 80.2K(6)(a).

<sup>79</sup> The Bill, ss. 80.2K(6)(b).

79. There is the potential for these provisions to give rise to misunderstandings, most particularly in relation to the Islamic State flag. As stated above, the Law Council is concerned that the flag's colour (black) and text (Shahadah), which has been co-opted by the terrorist organisation for its purposes, are of cultural and religious significance to many people of the Muslim faith, who may choose to display similar symbols.<sup>80</sup> For the reasons set out above, police officers without relevant language skills and cultural competency may unintentionally target members of the Muslim community in their expression of culture and religious observance in giving directions of this nature.
80. To minimise the risk of this occurring, the Law Council reiterates the need for appropriate, culturally sensitive training for law enforcement bodies, to ensure that the directions power contained within proposed section 80.2K is applied appropriately.
81. Section 80.2M makes it an offence if a person is given a direction (under section 80.2K(1)) and the prohibited symbol specified in the direction does not cease to be displayed in the specified time. Given the risk of disproportionate enforcement highlighted above, the Law Council expresses concern that a person relying on a defence under section 80.2M(3)(a) to establish that their display was genuinely engaged in for a purpose that is 'religious, academic, education, artistic, literary or scientific' must show that their purpose is 'not contrary to the public interest'. The Law Council expresses caution regarding requiring a defendant to prove a negative proposition.
82. For the reasons outlined above, the Law Council does not consider the defence set out in section 80.2M(3)(b) for a person engaged in a news report or a current affairs report should place the evidential onus on the journalist.

#### **Recommendation**

- **Culturally sensitive training for law enforcement bodies is required to ensure that the directions power contained within proposed section 80.2K is applied appropriately.**

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<sup>80</sup> See generally, *supra* no. 30 and 31.



### General comments regarding public interest criterion

83. The Law Council notes that the concept of public interest is referred to in the Bill as a criterion to establish the elements of the offence<sup>81</sup> as well as a condition for offence-specific defences.<sup>82</sup> Under the Criminal Code, the prosecution must prove each element of an offence beyond reasonable doubt,<sup>83</sup> however, words of exception, exemption, excuse, qualification or justification will place an evidential burden<sup>84</sup> of proof on the defendant<sup>85</sup> unless the offence provision provides differently.<sup>86</sup>
84. As a general comment, the intended scope and operation of offence provisions should aspire to be unambiguous, including defining key terms where appropriate, and avoiding overly broad terminology that may inadvertently capture a wide range of benign conduct.<sup>87</sup>
85. The concept of public interest is a useful criterion that has historically informed 'judicial discretions and evaluative judgments at common law,' and is also invoked in a variety of statutory contexts where the term 'derives its content from the subject matter and the scope and purpose' of the statute.<sup>88</sup> However, the reference to public interest introduces significant uncertainty in the context of defining the ambit of a criminal offence.<sup>89</sup> The Law Council has addressed some of the most significant resulting uncertainties below, given that 'public interest' tests currently arise throughout the Bill.

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<sup>81</sup> See for example, to establish the offence of public display of prohibited symbols contained in section 80.2H one of the elements of the offence is to establish that 80.2H(9) does not apply. Subsection 80.2H(9) lists circumstances where display is for a permitted purpose, for example, under paragraph 80.2H(9)(a) where a reasonable person would consider that the conduct is engaged in for a purpose that is a 'religious, academic, educational, artistic, literary or scientific purpose' and 'not contrary to the public interest.' Public interest is also invoked as an element of the offence in paragraph 80.2(H)(9)(b). In relation to the offence of trading in prohibited symbols contained in section 80.2J, subsection 80.2J(4) requires that the prosecution prove as an element of the offence that where goods are traded are intended to serve a religious academic, educational, artistic, literary or scientific purpose' and the 'person's trading in the goods is not contrary to the public interest.'

<sup>82</sup> See for example, for offence-specific defences that invoke 'public interest': ss. 80.2J(6)(c) (trading in prohibited symbols) and ss. 80.2M(3)(a)(ii) and (b)(i) (directions to cease display of prohibited symbols in public-offence).

<sup>83</sup> Criminal Code, s. 13.1.

<sup>84</sup> Criminal Code, s. 13.3(6) (evidential burden is defined as 'the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist').

<sup>85</sup> Criminal Code, s. 13.3.

<sup>86</sup> See for example, Criminal Code, ss. 474.46 (2A).

<sup>87</sup> Law Council of Australia, Policy Statement—Rule of Law Principles (March 2011).

<sup>88</sup> (Citations omitted) *Hogan v Hinch* (2011) 243 CLR 506, [31] (French CJ). A similar point was made by Mason CJ, Brennan, Dawson and Gaudron JJ in *O'Sullivan v Farrer* (1989) 168 CLR 210, [13] citing *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 (Dixon J):

*Indeed, the expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be (pronounced) definitely extraneous to any objects the legislature could have had in view."*

<sup>89</sup> The Law Council acknowledges that the concept of public interest is invoked as a criterion of certain defences, for example, in respect of the offence of failing to remove abhorrent violent material contained in section 474.34(1) of the Criminal Code. At the time these laws were proposed, the Law Council noted the lack of appropriate consultation: Law Council of Australia, '[Livestream laws could have serious unintended consequences, chilling effect on business](#),' (Media Release, 4 April 2019).

### **Subsection 80.2H(9)**

#### **Conduct engaged in for stated purpose**

86. Proposed paragraph 80.2H(9)(a) states that it will not be an offence where the public display of a prohibited symbol is such that a reasonable person would consider the display is for a purpose that is 'religious, academic, educational, artistic, literary or scientific purpose' and not contrary to the public interest.
87. As noted elsewhere in this submission, areas of uncertainty exist with respect to these stated purposes. For example, these laws could, on their face, criminalise people who are neither advocates of violent extremism nor historians, journalists educators, but have an interest in history and antiques—including, for example, stamps and coins.
88. The Law Council encourages close consideration of these potential grey areas by the Committee, with respect to exceptions proposed for this offence and others in the Bill.

#### **Public interest**

89. Having regard to the comments above, the second Public Interest requirement is also apt to lead to confusion.
90. As a general comment, the Law Council considers that the imposition of a public interest requirement to enliven exceptions that are intended to protect display of prohibited symbols for a legitimate purpose raises certain challenges. As with similar state offences in New South Wales and Victoria, the Law Council recommends that exceptions protecting display for legitimate purposes can be more precisely expressed by only requiring that the display be in good faith<sup>90</sup> and reasonable in the circumstances.<sup>91</sup>

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<sup>90</sup> The Law Council accepts that the interpretation of 'good faith' in the context of criminal offences introduces some difficulties. The Law Council has previously submitted that good faith does not require further elaboration when it is used in civil penalty and offence provisions:

*'Courts have consistently held that they can make a determination about what constitutes good faith in diverse contexts. The determination of good faith is highly contextual, and further attempts at definition will restrict just decisions. Court decisions alluding to good faith are, in the Law Council's view, sufficient guidance and should not be supplanted by regulation or policy.'*

Law Council of Australia, Submission to Attorney-General's Department, [Use of the term 'good faith' in civil penalty and criminal offence provisions in Commonwealth legislation](#) (28 July 2021), 4; See more generally, *Bropho v Human Rights & Equal Opportunities Commission* (2004) 204 ALR 761, [93] (noting that this decision was in relation to s 18D of the *Racial Discrimination Act 1975* (Cth), which is an exception to s 18C, which is a civil prohibition, not a criminal offence):

*In a statutory setting a requirement to act in good faith, absent any contrary intention express or implied, will require honest action and fidelity to whatever norm, or rule or obligation the statute prescribes as attracting the requirement of good faith observance. That fidelity may extend beyond compliance with the black letter of the law absent the good faith requirement. In ordinary parlance it may require adherence to the 'spirit' of the law. This may attract the kind of penumbral judgments by courts of which Professor Stone wrote. That is not necessarily a matter for concern in the case of civil proscriptions. They are evaluative judgments which the courts are authorised and required by the legislature to make. A good faith provision offers a warning that game playing at the margins of a statutory proscription or obligation may attract a finding of liability. There is nothing in principle to prevent the legislature protecting a rule by attaching an uncertain risk of liability to conduct in the shadow of the rule.*

<sup>91</sup> The defence of reasonable excuse is recognised in a number of federal offences. It is uncontroversial that the assessment of reasonable excuse requires an objective assessment of the particular facts of each case, that assessment requires consideration not merely of a defendant's state of mind, it also requires the application of community standards. *Henshaw v Mark* (1997) 95 A Crim R 115

91. The determination of whether particular forms of artistic expression are 'not contrary to the public interest' would be fraught with difficulty because reasonable minds may differ on the boundaries of artistic expression. Notably, significant public controversy has been generated by the application of criminal defences that required examining whether particular artistic expression has 'artistic merit'.<sup>92</sup> As a result, this difficulty increases the risk that prosecutorial and law enforcement discretion to enforce these provisions may be applied in an inconsistent and arbitrary manner.
92. Instead, the Law Council suggests that the exception should only require that a person's public display of a prohibited symbol is engaged in reasonably and in good faith, such as for a purpose that is 'religious, academic, educational, artistic, literary or scientific'.<sup>93</sup>
93. By way of illustration, subsection 41K(2) of the Vic Act provides an exception in relation to a display that was 'engaged in reasonably and in good faith' for a 'genuine academic, artistic, religious or scientific purpose';<sup>94</sup> for a genuine cultural or educational purpose;<sup>95</sup> in making or publishing a fair and accurate report of any event or matter of public interest<sup>96</sup> and in opposition to fascism, Nazism, neo-Nazism or other related ideologies.<sup>97</sup> In order to guide interpretation, that section includes reference to certain examples of conduct that falls within the ambit of that defence, for instance:
- academic, artistic, religious or scientific purpose<sup>98</sup>—a person of Hindu faith displays a swastika in the front window of the person's shop as a symbol of good luck;
  - a genuine cultural or educational purpose<sup>99</sup>—a bookshop displays for sale an educational textbook on World War II, which has a Hakenkreuz on the cover;
  - in opposition to fascism, Nazism, neo-Nazism or other related ideologies<sup>100</sup>—a person who displays a flag of Nazi Germany with a marking through it to signal the person's opposition to Nazism.
94. Proposed paragraph 80.2H(9)(b) of the Bill states that it will not be an offence where the public display of a prohibited symbol is conducted for the purposes of making a news report, or a current affairs report, that is 'in the public interest' and is made by a person 'working in a professional capacity as a journalist.'
95. The Law Council suggests that consideration be given to including examples in the notes to offence provisions to illustrate paradigm cases where the exceptions will be

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<sup>92</sup> Without expressing a view on the merits of either prosecution, the Law Council refers to the unsuccessful prosecution of Paul Yore in relation to a controversial art installation containing images of child pornography. Notably, in that trial, the defence raised, but the court did not determine, the issue of the defence of 'artistic merit' then contained in section 70(2)(b) of the Crimes Act. See further, Rowena Orr SC and Georgie Coleman, Arts + Law, ['Collage as child pornography and the limits to the right to freedom of expression—Case note.'](#) (23 February 2015).

<sup>93</sup> See, Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022 (Vic), 41K(2). See also, *Crimes Act 1900* (NSW), ss. 93ZA(3)(a) which provides a reasonable excuse includes the display of a Nazi symbol 'done reasonably and in good faith' for an academic, artistic, or educational purpose.

<sup>94</sup> *Summary Offences Act 1966* (Vic), ss. 41K(2)(a).

<sup>95</sup> *Summary Offences Act 1966* (Vic), ss. 41K(2)(b).

<sup>96</sup> *Summary Offences Act 1966* (Vic), ss. 41K(2)(c).

<sup>97</sup> *Summary Offences Act 1966* (Vic), ss. 41K(2)(d).

<sup>98</sup> *Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022* (Vic), ss. 41K(2)(a).

<sup>99</sup> *Ibid*, ss. 41K(2)(b).

<sup>100</sup> *Ibid*, ss. 41K(2)(d).

engaged. This will provide further certainty in the interpretation and enforcement of these provisions.

96. The Law Council acknowledges the concern expressed by Australia's Right to Know Coalition regarding the unduly restrictive scope of the public interest exception to capture the realities of the contemporary media context. In particular, the Law Council agrees that the public interest exception should be extended in the following two ways:<sup>101</sup>
- the conduct covered should extend to making other commentary associated with news reporting (including opinion pieces, editorials, cartoons and satire); and
  - the protection should extend to other individuals involved in making the report or commentary, including not only professional journalists but also support staff, editors, commentators, cartoonists and other contributors (whether on staff or freelance).
97. If the public interest exception is retained for journalistic content, consideration should be given to the framing of subsection 122.5(6) of the Criminal Code which provides a defence to prosecutions under the secrecy provisions in Division 122 of the Criminal Code for public interest reporting. This Committee has positively considered the framing of that defence in the context of its broader review of law enforcement powers and media freedom.<sup>102</sup> Notably, that defence is expressed more widely and applies to a person 'engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media'.<sup>103</sup> However, this expression is also liable to uncertainty. The Law Council has recently submitted that this defence should be expressed more broadly in order to clarify its application in respect of freelance or self-employed commentators including internet bloggers, who may be remunerated for intermittent reporting work.<sup>104</sup>
98. In previous reviews by this Committee of law enforcement powers, the Law Council has identified the risk that the media is often impacted to a greater extent by the powers granted to law enforcement and intelligence agencies than other types of sectors due to the social and political purposes with which it is charged.<sup>105</sup> In this regard, the Law Council has noted that the media's role 'in protecting Australia's rights and freedoms through public interest reporting and protecting and maintaining an open government must not be understated, nor undermined'.<sup>106</sup>

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<sup>101</sup> Australia's Right to Know Coalition, Submission No. 125, Parliamentary Joint Committee Into Intelligence and Security Inquiry into Counter-terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (24 July 2023).

<sup>102</sup> Parliamentary Joint Committee on Intelligence and Security, [Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press](#) (August 2020) Recommendation 7 [3.198]

<sup>103</sup> Criminal Code, ss. 122.5(6).

<sup>104</sup> Law Council of Australia, Submission to Attorney-General's Department, Commonwealth Secrecy Provisions (22 May 2023) 25-28 [87]-[97].

<sup>105</sup> See more generally, Law Council of Australia, Submission to Parliamentary Joint Committee on Security and Intelligence, [Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press](#) (7 August 2019).

<sup>106</sup> *Ibid*, 5 [2].

### Guidance on operation of subsection 80.2H(9)

99. In light of the high degree of uncertainty associated with the application of proposed subsection 80.2H(9), and noting that it will largely depend on the circumstances of each particular case, the Government should develop and provide guidance materials for public agencies responsible for enforcement and prosecution. These guidance materials should incorporate public-facing fact sheets addressing the community at large<sup>107</sup> and targeted guidance to groups disproportionately affected by the exceptions, for instance, journalists<sup>108</sup> and religious groups.
100. The Law Council is supportive of the inclusion of examples within the primary legislation to provide practical guidance on the operation of subsection 80.2H(9), as currently occurs in the Victorian context.<sup>109</sup> Notably, in some cases the Criminal Code already includes references to examples in the note to an offence provision.<sup>110</sup> The publication of law enforcement and prosecutorial guidance to coincide with the Bill's implementation, which includes examples of how subsection 80.2H(9) will be applied, may also be useful in this regard.

#### **Recommendations**

- **Paragraph 80.2H(9)(a) should only require that a person's public display of a prohibited symbol is engaged in reasonably and in good faith, such as for a purpose that is 'religious, academic, educational, artistic, literary or scientific'.**
- **Further consideration should be given to whether the proposed 'purposes' in this and similar exceptions appropriately address 'grey situations'—e.g., where persons with a genuine interest in history and antiques collect stamps and coins.**
- **Paragraph 80.2H(9)(b) should be extended to capture a broader range of conduct associated with news reporting, and apply to a wider range of individuals involved in the process of news reporting.**
- **Consideration should be given to the use of examples in the notes to offence provisions.**
- **The Australian Government should develop and provide guidance material for journalists, media organisations and public agencies responsible for enforcement and prosecution to improve clarity on how subsection 80.2H(9) will be applied.**

<sup>107</sup> By way of illustration, the Victorian Government clarify in a succinct fact sheet intended to address members of the public: 'the offence does not ban the public display of the swastika for genuine religious or cultural purposes.'

Victorian Government, [Fact sheet: Nazi symbol prohibition](#) (Webpage, 5 July 2023).

<sup>108</sup> The need for specific guidance to be developed to ameliorate the risk that public interest journalism will be stifled has been previously identified, for example, in the context of secrecy offences, the Senate Environment and Communications References Committee recommended: '...the Australian Government, in consultation and collaboration with relevant stakeholders, develop guidance material to assist journalists and media organisations to comply with secrecy and unauthorised disclosure provisions in Commonwealth law...' Senate Environment and Communications References Committee, *Inquiry into Press Freedom* (May 2021) Recommendation 5 [3.40]. The Law Council has submitted to this Committee in support of such guidance in the context of recent reviews: Law Council of Australia, *Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (7 August 2019) 21 [73].

<sup>109</sup> See, for example, *Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022* (Vic), s.41K(2).

<sup>110</sup> See for example, Criminal Code, s. 104.11A(1) (an example is provided in the note to the provision of a situation where an application to vary an interim control order under s. 104.11A may be made).



### Section 80.2J—Trading in prohibited symbols

101. The Law Council accepts that the objective underpinning an offence of trading in prohibited symbols is to prevent the public harm engendered by commercial profiting from the sale of these goods,<sup>111</sup> and acknowledges attempts within the Bill to ensure that offences will not apply to prohibited symbols traded for a legitimate purpose that is not contrary to the public interest.
102. The Committee will no doubt wish to consider the extensive concerns put forward by entities and individuals dealing with war memorabilia and other similar historical interests. The Law Council does not take a position on the merits of each of these objections, however there are clear concerns about the potential for the measures to apply to activities that lack any significant degree of malicious intent.
103. Trading in goods that depict or maintain a prohibited symbol associated with Nazi ideology or jihadist ideology may occur for all sorts of reasons well beyond the endorsement, promotion or advancement of such ideologies. Allowances for religious, academic, educational, artistic, literary or scientific purposes (combined with the public interest)<sup>112</sup> and defences<sup>113</sup> are welcome. However there are many areas of uncertainty that demonstrate the difficulty in applying such carveouts.
104. An excellent example of this uncertainty is the submission of the Interactive Games and Entertainment Association currently before the Committee,<sup>114</sup> which highlights the confusion as to whether video games set during World War II and depicting historical uniforms and symbols, would gain the benefit of the artistic exception. Further examples relate to the trading of historically accurate models and other collectible items that may depict a prohibited symbol.
105. Another concern, as flagged at the outset of this submission, involves persons with a genuine interest in history and antiques, who may be trading stamps and coins. It is unclear that the purposes outlined above would address this scenario.
106. In attempting to capture the range of activities associated with the trading of prohibited symbols, the Bill has the potential to apply to activities beyond its intended objectives. In the absence of the Bill referring to a nefarious purpose or intent in connection with the trading of a prohibited symbol, or to harm caused as a result of such activities, the Law Council submits that the proposed offence should be further limited in its scope to ensure that there is clarity and certainty for those that may fall within its reach.

### Public interest defence

107. As stated above in relation to the public interest exception contained in paragraph 80.2H(9)(b), the Law Council expresses concern regarding the adequacy of subsection 80.2J(6), which is framed as an offence-specific defence. The Law Council acknowledges the concern expressed by Australia's Right to Know Coalition that the broad definition of 'trades' under section 80.2G<sup>115</sup> carries the risk of capturing sale of journalistic material including newspapers and subscription news

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<sup>111</sup> Explanatory Memorandum, [120].

<sup>112</sup> The Bill, s 80.2J(4), see also s 80.2J(5) (news reports).

<sup>113</sup> The Bill, s 80.2J(6)-(8).

<sup>114</sup> Interactive Games and Entertainment Association, *Submission to the Parliamentary Joint Committee on Intelligence and Security* (Submission 110, July 2023).

<sup>115</sup> The Bill, s. 80.2G (meaning of 'trades').

content.<sup>116</sup> The Law Council does not consider that sufficient justification has been provided for putting the onus of establishing this defence on the accused. For example, the Explanatory Memorandum notes that the accused would be better placed to adduce evidence ‘that the commentary contained in goods, and in which a prohibited symbol appears, is in the public interest, given the defendant’s likely exposure to the community and context in which the commentary is circulated’.<sup>117</sup>

108. However, the Explanatory Memorandum does not engage with the weight of reasoning across recent parliamentary reviews that have generally supported removing evidential onuses on journalist defendants to establish public interest defences in order to reflect the importance of the freedom of the press.<sup>118</sup> Significantly, the Senate Environment and Communications References Committee has positively considered the model taken in the Criminal Code Amendment (Agricultural Protection) Bill 2019 and now contained in section 474.46 of the Criminal Code, which puts the onus on the prosecution.<sup>119</sup>
109. As stated above, the Law Council expresses concern that the framing of subsection 80.2J(6) fails to capture the realities of the contemporary media context and should be expanded in the way suggested above.

#### Jurisdictional requirements

110. Proposed subsection 80.2J(3) sets out the jurisdictional requirements for an offence of trading in prohibited symbols to occur. While this approach is clearly directed to ensuring that there is a sound constitutional basis for the offence, the resulting drafting is highly complex and is likely to lead to difficulties for individuals attempting to understand what falls within and outside the scope of the offence. In this regard, the Law Council’s *Rule of Law Policy Statement* states that the law must be both readily known and available, and certain and clear.<sup>120</sup>
111. In particular, individuals must be able to know in advance whether their conduct might attract criminal sanction or a civil penalty, and the intended scope and operation of offence provisions should be unambiguous. The Law Council queries whether the approach adopted at proposed subsection 80.2J(3) meets this threshold, and again emphasises the need for educative guidance material to be developed prior to the implementation of the new offences.

#### Transportation of goods

112. Proposed paragraph 80.2G(1)(c) would include in the definition of trades in goods where ‘the person transports the goods with the intention of selling the goods or believing that another person intends to sell the goods’.

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<sup>116</sup> Australia’s Right to Know Coalition, Submission No. 125, Parliamentary Joint Committee Into Intelligence and Security Inquiry into Counter-terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (24 July 2023) 3.

<sup>117</sup> Explanatory Memorandum, 41 [127]

<sup>118</sup> Senate Environment and Communications References Committee, Inquiry into Press Freedom (May 2021) [3.73] Recommendation 7. Noting that the Parliamentary Joint Committee on Intelligence and Security did not recommend an exemption, with the onus put on the prosecution to disprove, in relation to public interest journalism in the context of secrecy offences on the basis of evidence from ASIO that ‘exemption for journalists would incentivise the use of media credentials as cover for hostile foreign actors to utilise.’ Parliamentary Joint Committee on Intelligence and Security, Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press (August 2020) 99 [3.189]; see further the additional comments of Labor members at 153.

<sup>119</sup> Senate Environment and Communications References Committee, Inquiry into Press Freedom (May 2021) 46 [3.72].

<sup>120</sup> Law Council of Australia, ‘*Policy Statement: Rule of Law Principles*’ (March 2011), 2.

113. The Explanatory Memorandum confirms that this is intended to apply to the delivery of goods by any means, including by hand.<sup>121</sup> Importantly, the offence provision requires a person who is transporting the good to know, or be reckless as to whether, the prohibited symbol is associated with Nazi ideology or global jihadist ideology.<sup>122</sup>
114. Section 5.4 of the Criminal Code sets out that a person is reckless with respect to a circumstance if:
- a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
  - b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
115. Under the proposal, a third party asked to transport commercial goods will likely be required to weigh up, at every request for transportation, whether there is a substantial risk that the goods being transported depict or contain a prohibited symbol. This has the potential to be problematic for transport services that deliver high volumes of commercial goods at any one time, and the Law Council queries whether this is an outcome intended by the proposed measures.

#### **Recommendation**

- **The Committee should assess the justifications for the inclusion of proposed section 80.2J, and consider whether they outweigh the risks of unintended consequences. Should section 80.2J proceed:**
  - **consideration should be given to amending subsection 80.2J(6) to remove the onus on the accused to establish the defence; and**
  - **there must be public guidance that clearly articulates how the exclusions will operate in practice.**

## **Schedule 2—Violent extremist material**

116. Schedule 2 to the Bill proposes new offences for using a carriage service for ‘violent extremist material’, as well as possessing or controlling such material through a carriage service. As noted in the Explanatory Memorandum, the new offences have a focus on the nature of the material, rather than the intentions of the person dealing with it.<sup>123</sup>

### **Existing offences**

117. It is currently an offence under sections 101.4 and 101.5 of the Criminal Code to possess things connected with terrorist acts and to collect or make documents likely to facilitate terrorist acts. The proposed offences are designed to address a perceived gap by criminalising access to violent extremist material without it

<sup>121</sup> Explanatory Memorandum, [54].

<sup>122</sup> Paragraph 80.2J(1)(c).

<sup>123</sup> Explanatory Memorandum, [9].



necessarily being connected to the facilitation of a specific terrorist act. The Attorney-General's Department describes this gap as follows:

*While it is a crime to possess material that is connected with a terrorist act (for example, sections 101.4 to 101.6 of the Criminal Code) it is not currently a crime to deal with violent extremist material where, for example, planning or preparation for a terrorist act has not yet begun.*<sup>124</sup>

118. It is worth noting, however, that offences at sections 101.4 to 101.6 of the Criminal Code will apply despite material not being connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act.<sup>125</sup> In this regard, the High Court stated in *The Queen v Khazaal*.<sup>126</sup>

*By virtue of s 101.5(3) it is not necessary that the document the subject of the offence be connected with a specific terrorist act. It is sufficient, for present purposes, to say that a document which purports to justify terrorist acts and instructs in methods of carrying them out, and identifies potential targets, is capable, as a matter of law, of answering the description "connected with ... assistance in a terrorist act".*<sup>127</sup>

119. The Law Council is of the view that existing provisions within the Criminal Code, namely sections 101.4 and 101.5, are sufficient to capture the type of conduct against which the Bill seeks to introduce new offences.

## Offences relating to access or possession

120. Schedule 2 to the Bill would insert a new Subdivision HA into the Criminal Code to establish new offences in relation to use of carriage services for violent extremist material<sup>128</sup> and possessing or controlling violent extremist material obtained or accessed using a carriage service.<sup>129</sup>

121. Under the Bill, material will be deemed to be 'violent extremist material' if:

(a) *the material:*

- i. describes or depicts serious violence; or*
- ii. provides instruction on engaging in serious violence; or*
- iii. supports or facilitates serious violence; and*

(b) *a reasonable person would consider that, in all the circumstances, the material is intended to directly or indirectly advance a political, religious or ideological cause; and*

<sup>124</sup> Attorney-General's Department, Submission to the Parliamentary Joint Committee on Intelligence and Security's Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023, [45].

<sup>125</sup> *Criminal Code Act 1995* (Cth), s.101.4(3)(b), and 101.5(3)(b).

<sup>126</sup> *The Queen v Khazaal* [2012] HCA 26 (10 August 2012).

<sup>127</sup> *Ibid*, 14 [34]. The Law Council notes that there are examples of high-profile violent extremists being disrupted at an early stage because of the successful enforcement of these offences. Notably, Mr Galea was charged, convicted and sentenced for two charges, relevantly, this included contravention of section 101.5 of the Criminal Code. This charge related to Mr Galea's conduct in attempting to make, but not completing, a document entitled 'The Patriot's Cookbook' intended to further his anti-leftist ideological beliefs including material directed to using explosive devices and committing violent acts against Muslims and 'lefties.' Mr Galea intended to distribute that cookbook to others to incite further acts of violence. Mr Galea was convicted of this offence and sentenced to six years imprisonment in respect of this conduct. Overall, Mr Galea was sentenced to twelve years imprisonment, with a non-parole period of nine years: *CDPP v Galea* [2020] VSC 750.

<sup>128</sup> The Bill, s. 474.45B.

<sup>129</sup> The Bill, s. 474.45C.

*(c) a reasonable person would consider that, in all the circumstances, the material is intended to assist, encourage or induce a person to:*

- i. engage in, plan or prepare for an intimidatory act; or*
- ii. do a thing that relates to engaging in, planning or preparing for an intimidatory act; or*
- iii. join or associate with an organisation that is directly engaged in the doing of any intimidatory act, or that is preparing, planning, assisting in or fostering the doing of any intimidatory act.*

122. 'Serious violence' is defined as action that falls within subsection 100.1(2) of the Criminal Code. This in turn includes action which 'causes serious damage to property'.<sup>130</sup>
123. The Law Council has previously commented on the need to proceed with caution in relation to the creation of offences for simply accessing or possessing material.<sup>131</sup> Such offences, without requiring proof that a person viewed or accessed content for nefarious purposes, are highly extraordinary measures, normally reserved for material that has a very low likelihood of being accessed unwittingly, and involves the infliction of significant harm upon vulnerable persons (for example, child abuse material).<sup>132</sup>
124. With an increasing trend towards consumption of online material via social media and short-form video platforms, there is a noticeable shift towards diverse content being accessed through the 'scrolling' of digital platforms, rather than systemic searching for material. The Law Council suggests that there is likely to be a much broader range of circumstances in which a person may unwittingly come across material that engages with extremist ideology that may meet the proposed definition of 'violent extremist material'. In this regard, the Law Council notes evidence of intelligence agencies to previous enquiries from the Committee which identify the extensive and sophisticated use of propaganda via social media platforms by groups and individuals of security concern.<sup>133</sup>
125. With that context in mind, the Law Council expresses concern that the broad definition of violent extremist material<sup>134</sup> may inadvertently capture persons who access or view so-called 'manifestos' which are directed to legitimate matters of political dissent or struggle. This might include, for example, writings which call for the overthrow of oppressive governmental regimes in foreign countries; or the efforts of particular groups or regions in foreign countries to achieve independence as sovereign nations.
126. As drafted, the offence in section 474.45B only requires intention in respect of the physical element of accessing material,<sup>135</sup> but recklessness is the fault element for the use of the carriage service and the circumstance that the material is violent extremist material. A similar approach is taken in the offence contained in section 474.45C where intention is the fault element for the conduct referred to in

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<sup>130</sup> Criminal Code, s 100.1(2).

<sup>131</sup> Law Council May 2021 Radicalism Submission, 23-24.

<sup>132</sup> See for example, the offence of using a carriage service for child abuse material contained in Criminal Code, s. 474.22.

<sup>133</sup> See, for example, ASIO, Submission to the PJCIS Inquiry into Extremist Movements and Radicalism in Australia, (February 2021), 2 at [4] and 4-5 at [20]-[22].

<sup>134</sup> Section 474.45A(1) contains a three-pronged test.

<sup>135</sup> Noting that section 474.45B(1)(a) includes a number of circumstances relating to access, for example, when a person accesses material, causes material to be transmitted, transmits, makes available, publishes, distributes or solicits material.

section 474.45C(1)(a), however, recklessness is the fault element in respect of the circumstance that the material is violent extremist material.

127. In commenting on this approach, the Explanatory Memorandum states that:

*By operation of this fault element, a person who accidentally comes across violent extremist material on the internet without any warning from the context would not be caught by the offence, because they would not have been reckless as to the nature of the material.*<sup>136</sup>

128. While noting this view, the Law Council submits that, due to the severity of the penalties associated with the new offences, together with the potential for this type of material to be inadvertently accessed, greater regard should be had to the intent of the person to access or possess violent extremist material. Such a shift would see the proposed offences move from a focus solely on the content of the material, towards consideration of the subjective knowledge of the person accessing or possessing it.

#### Recommendations

- **In the absence of further justification for its necessity, Schedule 2 should be removed, because existing offences in the Criminal Code sufficiently cover the targeted conduct.**
- **Should Schedule 2 proceed, greater regard should be had to ensuring the offences do not capture inadvertent possession or access, by:**
  - **ensuring the definition of violent extremist material does not include legitimate matters of political dissent or struggle; and**
  - **placing greater emphasis on the subjective knowledge of the person accessing or possessing the material.**

## Implementation of Schedules 1 and 2

129. Relying on executive discretion to address overly broad offence provisions carries the risk that error or misjudgement by law enforcement agencies may result in the arbitrary exposure of individuals to investigation and prosecution, and may undermine the practical effectiveness of the offences, social cohesion and public trust in law enforcement. If a law has the capacity for unintended application beyond its purpose, it is a flawed law. It is no answer to point to the possibility of administrative discretion not to enforce such a law in all circumstances. Laws should only go so far as is necessary and proportionate to their purpose.

130. The rule of law requires that the law must be both readily known and available, and certain and clear. Most significantly it is essential that people know in advance whether their conduct might attract criminal sanction.<sup>137</sup> If this Bill is passed, the Law Council considers it critical that adequate resources be provided to support public awareness raising and education initiatives to support the implementation of these measures.

<sup>136</sup> Explanatory Memorandum, [212].

<sup>137</sup> Law Council of Australia, [Policy Statement: Rule of Law Principles](#) (March 2011).

131. The combined operation of the broad definition of prohibited symbol and the provisions that prohibited symbol includes a symbol that so nearly resembles the Islamic State flag that it is likely to be confused with, or mistaken for, an Islamic State flag (new paragraphs 80.2E(a) and (d)) mean that there will be a high degree of discretion when determining the ambit of what is proscribed by the offence.
132. The Law Council acknowledges the concerns expressed by representatives of the Australian Islamic community with respect to the deprivation of practising Muslims, who strongly condemn ISIS ideology, of the use of widely accepted Islamic and historical symbols. For example, as has been noted by several submissions, the Islamic State flag includes the words of the Muslim declaration of faith, the Shahada. In this regard, the Canberra Islamic Centre notes: 'these words are the creed of our faith, representing the essence of Islam, pure monotheism, and the belief in Prophet Muhammad (Peace be Upon Him) as the last prophet'.<sup>138</sup> Additionally, the script design replicates an historical seal used by the Prophet Muhammad in his correspondence.
133. Furthermore, the Law Council notes that the Australian National Imams Council hold concerns regarding the practical operation of the directions powers in relation to the removal of prohibited symbols from public display:<sup>139</sup>

*Law enforcement agencies facing difficulties distinguishing and interpreting these symbols, particularly due to their Arabic script, leading to confusion amongst the general public, pre-judgment and prejudice in the conduct of any enforcement procedures and actions ...*

134. For the reasons outlined above, there is an evident need to conduct further targeted consultation with the Australian Muslim community to ensure that these offences are well-understood and to address concerns regarding the scope for misuse of administrative discretion in the enforcement of these offences.
135. With that context in mind, the Law Council strongly supports amendment of the Bill to establish a transitional provision that provides that any criminal sanction under Schedules 1 and 2 not take effect for 12 months after the commencement of the Bill.

#### **Application to past conduct**

136. Transitional provisions within the Bill set out that, both for an offence of displaying a prohibited symbol, and of possessing or controlling violent extremist material, it will not matter whether the display, possession or control occurred prior to the implementation of the Bill.
137. In explaining that this approach is not retrospective in its effect, the Explanatory Memorandum clarifies that the offences will only apply if the display, possession or control continues after the commencement of the provisions.
138. Nevertheless, the proposals may have the practical effect of criminalising the actions of an individual for an act undertaken in the past if steps are not taken to rectify those actions. The Law Council considers that this approach reinforces the need for a strong education and awareness campaign to coincide the passage of

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<sup>138</sup> Canberra Islamic Centre, Submission No. 11, Submission to Parliamentary Joint Committee on Intelligence and Security Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (18 June 2023) 1.

<sup>139</sup> Australian National Imams Council, Submission Number 77, Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (20 July 2023) 3.

the reforms should they proceed. This will be critical to ensure that individuals have an opportunity to understand the application of the proposed measures, and where necessary, to take steps to ensure they are not falling foul of new offences as a result of past conduct.

#### Recommendations

- **The Bill should be amended to include a transitional provision to the effect that any criminal sanction under Schedules 1 and 2 to the Bill does not take effect until 12 months after the commencement date.**
- **There should be further targeted consultation with the Australian Muslim community regarding the new criminal offences for the public display of Islamic State symbols and the scope for discretion to influence enforcement.**

## Schedule 3—Advocating terrorism

### Necessity

139. The Law Council queries whether it is necessary to expand the current definition of advocating terrorism at section 80C of the Criminal Code to include instructing on, and praising terrorism, as proposed by paragraphs 80.2C(3)(b) and 80.2C(3)(c) of the Bill. In this regard, the Explanatory memorandum states:

*The glorification of terrorism and violent extremism through praise has been of increasing concern to Commonwealth law enforcement and intelligence agencies in recent years, particularly in relation to young people online. For example, following the March 2019 Christchurch mosque shooting, numerous individuals used the internet to share video footage of the atrocity, and the perpetrator's manifesto - idealising the perpetrator and his actions and ideologies. New paragraph 80.2C(3)(c) recognises that conduct of this nature could lead a person to engage in terrorism, and where it occurs in circumstances where there is a substantial risk of this, it is justifiably criminal.*<sup>140</sup>

140. In an attempt to ensure that the limitation this provision may have on an individual's freedom of expression is reasonable and proportionate, proposed paragraph 80.2C(3)(c) includes a qualifier that in order to constitute advocacy, 'praising' must occur in circumstances where there is a substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence.
141. If the concern is that the praising of a terrorist act could lead a person to engage in terrorism, it would seem that the existing definition of 'advocates', which presently includes promoting, encouraging or urging a terrorist act or the commission of a terrorist offence, would sufficiently cover this activity.<sup>141</sup>

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<sup>140</sup> Ibid, [267].

<sup>141</sup> Criminal Code, subsection 80.2C(3).



### Recommendation

- **In the absence of further justification as to its necessity, the expansion of subsection 80.2C(3) to praising terrorism should be removed.**

## Schedule 4—Terrorist organisation regulations

142. By way of background, under the Criminal Code there are two mechanisms for an organisation to be identified as a terrorist organisation. The first is for the prosecution to prove beyond reasonable doubt that an organisation is a terrorist organisation in the course of prosecution for a terrorist offence.<sup>142</sup> The second allows for organisations to be proscribed by regulation on the recommendation of the AFP Minister.<sup>143</sup> This second process, referred to as “listing”, is currently subject to certain safeguards<sup>144</sup> and oversight processes.<sup>145</sup>
143. Item 3 of Schedule 4 to the Bill would repeal subsection 102.1(3) of the Criminal Code, which currently requires that regulations proscribing terrorist organisations cease to have effect on the third anniversary of the day on which they take effect. This would mean that proscribed terrorist organisations will remain proscribed unless otherwise removed from the list by the AFP Minister. For context, there are 29 organisations currently listed<sup>146</sup> as terrorist organisations under the Criminal Code. Many of those organisations have been subsequently re-listed multiple times.<sup>147</sup>
144. Section 102.1A of the Criminal Code Act provides that the Committee may review a regulation which lists an organisation as a terrorist organisation and report its comments and recommendations to each House of the Parliament before the end of the applicable disallowance period for the House. The Law Council’s longstanding position is that review of listed organisations by this Committee provides an important form of external scrutiny of the Minister’s decision to list an organisation as a terrorist organisation.<sup>148</sup> The listing regime requires careful parliamentary oversight because of the extraordinary criminal law consequences of proscribing a terrorist organisation.
145. Importantly, these safeguards are supported by, and the result of, careful deliberation and independent review.<sup>149</sup> Crucially, Recommendation 12 of the

<sup>142</sup> Criminal Code, ss. 102.1(1) (definition of ‘terrorist organisation’) limb (a)

<sup>143</sup> Criminal Code, ss. 102.1(1) (definition of ‘terrorist organisation’) limb (b). The process for listing is set out in Criminal Code, ss. 102.1(2)–(4).

<sup>144</sup> See for example, 102.1(3) provides regulations for the purpose of listing a terrorist organisation sunset in three years from the day on which they take effect.

<sup>145</sup> For example, the AFP Minister’s decision to list an organisation as a terrorist organisation or add or remove the name of an alias is publicly reviewed by the Parliamentary Joint Committee on Intelligence and Security. *Intelligence Services Act 2001* (Cth), ss. 29(baa).

<sup>146</sup> See further, Commonwealth of Australia, Australian National Security, [Listed Terrorist Organisations](#) (Webpage, 3 July 2023).

<sup>147</sup> See for example, Al-Qa’ida which was first listed in 21 October 2002, and then re-listed on 1 September 2004, 26 August 2006, 9 August 2008, 22 July 2010, 12 July 2013, 28 June 2016, 10 April 2019 and 9 April 2022.

<sup>148</sup> See for example, Law Council of Australia, Anti-Terrorism Reform Project—A consolidation of the Law Council of Australia’s advocacy in relation to Australia’s anti-terrorism measures (October 2013), 63. That submission noted the Law Council’s concern regarding broad executive discretion to proscribe terrorist organisations.

<sup>149</sup> Council of Australian Governments, Review of Counter Terrorism Legislation, [Final Report](#), (March 2013), 19–24.

Council of Australian Governments Review of Counter-Terrorism Legislation in 2013 did 'not recommend that the present method of proscription of a terrorist organisation be changed'.<sup>150</sup>

146. The ability to proscribe a terrorist organisation, by regulation,<sup>151</sup> because it is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or it advocates<sup>152</sup> the doing of a terrorist act, is an unusually permissive power. The Law Council reiterates its view that in comparison with like-minded jurisdictions grappling with similar threats, it is an unjustifiably low threshold.<sup>153</sup>

## Criminal law consequences

147. The Law Council has long maintained that the extraordinary nature and grave consequences of the approach to criminalising status-based offences in Division 102 of the Criminal Code are critical considerations in any assessment of the thresholds, criteria and process for the listing of terrorist organisations.<sup>154</sup>
148. Any proposal to change the listing regime has important consequences for the criminal law. This includes terrorism offences in Part 5.3 of the Criminal Code, as well as 'quasi-criminal' orders, such as control orders, and post-sentence orders, which have close connections with criminal offences and expose people to significant criminal liability for contravening their conditions. The Law Council has previously expressed concern about the punitive consequences of restrictions imposed by control orders, which may include requirements to wear visible tracking devices, such as ankle bracelets. These restrictions can hinder a person's re-integration and rehabilitation by exposing them to stigmatisation that may adversely affect their employment prospects, community participation and mental health.<sup>155</sup>
149. The listing of an entity as a terrorist organisation enlivens the offences in Division 102 of the Criminal Code.<sup>156</sup> Those offences cover all range of interactions with a terrorist organisation, including association, membership, participation in training, recruitment, direction, and the provision of funds and material support.

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<sup>150</sup> Ibid, Recommendation 12, 21.

<sup>151</sup> Criminal Code, ss. 102.1(2).

<sup>152</sup> Within the broad meaning of Criminal Code, ss. 102.1(1A). The Law Council has previously identified the risk that subsection 102.1(1A) of the Criminal Code defines 'advocates' (for the purpose of the listing regime) to significantly extend its ordinary meaning. Paragraph 102.1(1A)(c) deems 'advocacy' to include directly praising the doing of a terrorist act, where there is a substantial risk that such praise might have the effect of leading a person to engage in a terrorist act. Paragraphs 102.1(1A)(a) and (b) further expand the ordinary meaning of 'advocates' to cover the indirect provision of instruction on the doing of a terrorist act, and the indirect counselling, promoting, encouraging or urging of others to carry out a terrorist act: Law Council May 2021 Radicalism Submission, 8-9 [19].

<sup>153</sup> See for example the Law Council's comparison with listing thresholds in New Zealand and Canada: Law Council May 2021 Radicalism Submission, 8-9 [16]-[23].

<sup>154</sup> Law Council January 2021 Radicalism Submission, 4 [14].

<sup>155</sup> Ibid, 3 [11]. See further, D Neal SC, Law Council of Australia, Committee Hansard, PJCIS, 13 November 2020, Canberra, 4 and 5-6 (questioner: the Hon M Dreyfus QC MP).

<sup>156</sup> Criminal Code, ss. 102.1(1) (definition of 'terrorist organisation'). For further context, this definition permits two ways for an organisation to be identified as a 'terrorist organisation'. The first occurs where a person is charged with one of the terrorist organisation offences in relation to an organisation that is directly or indirectly engaged in preparing, planning, assisting or fostering the doing of a terrorist act (whether or not the terrorist act occurs). In this situation, a court will need to determine, based on the evidence before it, whether or not the organisation is a terrorist organisation. The second avenue permits proscription by regulation where certain conditions are satisfied.

These offences are variously punishable by maximum penalties that generally range from 10 to 25 years' imprisonment.<sup>157</sup>

150. It is important to recognise the extraordinary nature of 'status offences', which target the nature of the organisation with which the defendant engaged, rather than requiring proof of a defendant's specific intention to further the terrorism-related objectives of the organisation. This is compounded by the fact that, when a person is prosecuted for a terrorist organisation offence in relation to their engagement with a listed terrorist organisation, the prosecution is relieved of the requirement to prove that the organisation was, in fact, engaged in terrorism-related activities.

## Necessity

151. With that context in mind, based on the information publicly available, Item 3 of Schedule 4 to the Bill has not been established to be a necessary intervention. The Explanatory Memorandum states that:

*The purpose of this amendment is to align the terrorist organisation listing framework with the current context of largely enduring terrorist organisations that pose ongoing threats to Australia's security. Many of the terrorist organisations currently listed have been re-listed multiple times. Instruments proscribing terrorist organisations would continue to be subject to disallowance in addition to the expanded scrutiny powers of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) inserted by Part 4.*<sup>158</sup>

152. As stated above, the Law Council agrees with the findings of the Richardson Review that the administrative burden and 'barriers' resulting from parliamentary and legislative safeguards are often 'more properly characterised as a reasonable incident of the performance of functions in a liberal democracy'.<sup>159</sup>
153. The Law Council notes that the fact that some terrorist organisations have been relisted multiple times, in order to accommodate the current parliamentary safeguards, does not establish the redundancy of the parliamentary oversight. Rather, it illustrates that the existence of parliamentary oversight, where there is a compelling case for relisting, is not an undue impediment to relisting.
154. If there is new evidence contrary to the finding of the Council of Australian Governments Review of Counter-Terrorism Legislation in 2013, set out above, that evidence should be provided to this Committee.
155. For the reasons outlined above, the Law Council encourages this Committee to seek detailed information—in classified form if necessary—about the perceived barriers resulting from the current sunset requirement.

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<sup>157</sup> See for example, training involving a terrorist organisation is punishable by imprisonment for 25 years. Criminal Code, ss. 102.5.

<sup>158</sup> Explanatory Memorandum, [272].

<sup>159</sup> Richardson Review, Unclassified Report, Volume 1, (December 2019), 34-35.



## Further issues

156. Item 18 of Schedule 4 to the Bill proposes to amend paragraphs 102.1A(2)(a) and (b) of the Criminal Code, which currently allow this Committee to review a regulation specifying an organisation as a terrorist organisation and report its comments and recommendations to each House of the Parliament.
157. Instead, proposed paragraph 102.1A(2)(b) would enable this Committee to report its findings to the Minister responsible for the Australian Federal Police instead of, or in addition to, each House of the Parliament.
158. The Law Council does not consider it appropriate that parliamentary committees should report to the Minister (a member of the executive), and thereby bypass Parliament. The Law Council shares the concern set out in the submission of the Joint Clerks that parliamentary committees are accountable to Parliament reflecting the fact that they exercise their functions as an extension<sup>160</sup> of the Houses themselves.<sup>161</sup>

*The importance of committees reporting to the Parliament is clear when considering that the principal purpose of committees is to conduct inquiries on behalf of the Parliament, a function which the whole Houses themselves are not well suited to perform, and which enables the Parliament to be better informed about policy, legislative and financial measures.*

### Recommendation

- **Schedule 4 to the Bill should be severed from the Bill and be subject to further review by this Committee. The Committee should seek detailed information from security agencies establishing the necessity of these changes.**

<sup>160</sup> Odgers on Senate Practice describes the role of committees in the following terms, that description also applies to the role and function of parliamentary joint committees:

*The task most often given to committees is that of conducting inquiries: of inquiring into specified matters, particularly by taking submissions and hearing evidence, and reporting findings on those matters to the Senate. Although the Senate may conduct inquiries directly, committees are a more convenient vehicle for this activity.*

*Apart from conducting inquiries, committees may be required to perform any of the functions of the Senate, including its primary legislative function of considering proposed laws, the scrutiny of the conduct of public administration and the consideration of policy issues.*

*The Constitution recognises committees as essential instruments of the Houses of the Parliament by referring in section 49 to: "The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House ..."*

Odgers', Australian Senate Practice, 14<sup>th</sup> Edition (2016), 461.

<sup>161</sup> Joint Clerks, Clerk of the House and Clerk of the Senate, Submission No. 47, Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (12 July 2023).