



5A Submission to the
Senate and Constitutional Affairs Legislation Committee
Inquiry into the
Criminal Code Amendment (Hate Crimes) Bill 2024

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1. Summary

The Australian Academic Alliance Against Antisemitism (5A) is pleased to have the opportunity to make this submission to the 2024 Senate Inquiry into the Bill for an amendment to the hate crimes provisions of the Commonwealth Criminal Code.

This submission argues for a new federal crime of incitement to racial hatred, in addition to the currently proposed amendments. Part 1 of this submission provides background to our organization and seeks to share our knowledge of antisemitic hate crime on campus. Part 2 argues that our proposed changes are consistent with norms on freedom of speech and academic freedom. Part 3 outlines the approach and scope of this submission, including distinctions between hatred, incitement to hatred, incitement to violence, and expressions of academic freedom. Part 4 sets out the 5A proposal for incitement to racial hatred as a new provision in the Criminal Code. Part 5 comments on amendments currently proposed in the Bill, suggesting points of clarification. Part 6 suggests additional amendments to hate crimes provisions in the Criminal Code, particularly the removal of good faith defences and the expansion of the prohibition on terrorist act advocacy to include prohibition of glorification of terrorism. Part 7 summarizes this submission's conclusions.

5A is keen to see improvements in Australian hate crimes legislation that will clarify its application. However, there is no need to improve laws that are never implemented. Excellent legislation can often be found in dark illiberal places, where it is ignored. In Australia, the recent rapid breakdown of social cohesion has been facilitated by a concerning decline in the rule of law concerning hate crimes. Rigorous, consistent and predictable enforcement of the law is necessary to ensure that law can help to prevent hateful behavior. The neglect of enforcement against recent hate crimes is a cause for anxiety not only among members of 5A but also all members of the Australian community reliant upon the rule of law and social cohesion.

2. Who we are and credentials for making this submission

The Australian Academic Alliance Against Antisemitism (5A) is a non-profit organisation born in the aftermath of the brutal Hamas attack on Israel on 7 October 2023. The organisation has grown very quickly, and today consists of 290 academics and professional staff from across 29 Australian universities. 5A acts as the main body representing the voice of both Jewish and non-Jewish staff who are concerned with the emergence of antisemitism on their campus in the Australian tertiary sector.

Our functional structure, from individual universities to state and federal representatives, has enabled the executive to be informed quickly of incidents and to take appropriate action. The organization's reach includes activities in education, outreach, academic advisor and peer support, anti-Israeli and BDS activity, responding to the media, supporting the legal and medical groups, advocating for Jewish academics and professionals in their sectors, responding to media misinformation, strategy and policy, including advocating with the sector regulators and individual University executives, as well as tertiary sector membership bodies, and supporting individual students across all levels in responding to their own adverse experiences of antisemitism and bias in the classroom, publications and professional trajectories.

Our members are on campus every day and are actively immersed in the campus culture and understanding of the intersections between academic freedom and hate crimes. 5A is in the box seat to comment on antisemitic hate crimes on campus from first-hand expert knowledge. Among our members are legal academics, some of whom are also legal practitioners with professional experience in drafting or litigating hate laws in Australia (under the federal Racial Discrimination Act section 18C, and in Australian state jurisdictions).

3. Approach and scope of submission

In accordance with the 5A mission, our focus in this submission is on the hatred of Jews (antisemitism) as experienced in academia. Therefore, this submission does not address proposed changes to the Criminal Code on issues other than antisemitism.

Antisemitism

The definition of antisemitism used in this submission is that adopted by the Commonwealth of Australia, namely the International Holocaust Remembrance Association (IHRA) working definition, which states that:

“Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”

The IHRA working definition has been adopted by Australia. The IHRA engaged in far-reaching negotiation and consultation to develop the working definition, which is accepted by the vast majority of Jews and by many of the world’s democracies. It would be desirable to incorporate this into the law in Australia, such that cases do not deteriorate into debates about whether the action in question is in fact antisemitism.

This working definition provides relevant contemporary examples to assist in its application. While it is clear that it is not antisemitic to criticise the state of Israel, its government or policies, criticism easily becomes hatred in the public domain. The simplest litmus test for antisemitic responses to Israel is to consider if the same standard that is being used to judge Israel is used to judge other states. If our condemnation of Israel is based on our belief that Jews are money-hungry, then this is not fair criticism. If we proclaim as facts only that information provided by Palestinians, or ignore the legitimate right of a state to defend itself, we are engaging in antisemitism.

Antisemitism has been called “the longest hatred” because Jews have been singled out for unsavoury treatment throughout time. Not that long ago, Jews were victims of genocide in the Nazi Holocaust. Many Australians still suffer from trauma and PTSD from the embedded experience. This means that Jews are very attuned to calls for their genocide (“From the River to the Sea” and “Palestine will be Free [of Jews]”). They know that slogans do not take long to turn into violence. Allowing these statements at universities and elsewhere, poses a clear threat of violence directed at a specific target – Australian Jews.

The recent events in the Middle East, particularly the pogrom on Jews on October 7th 2023, saw an unprecedented level of brutality in its killing, raping, maiming of over 1200 Israeli civilians (peaceniks, babies, children, the elderly and others in between) and the taking of over 250 hostages, 101 of whom are held in custody today. Instead of garnering the support and sympathy that one would expect that the Jewish community would be in need of, in some quarters the terrorists were cheered. People at Sydney Opera House heard “gas the Jews” or “where are the Jews”. Threatening to kill Jews, as well as others, or seeking them out for special mistreatment, is a clear example of race hatred.

Conforming to the scope of the inquiry concerning changes to provisions of the federal Criminal Code, our submission does not address other legal provisions against racial hatred beyond those encompassed in the Criminal Code. Therefore, it does not address police failures to implement

existing federal criminal laws. Nor does it address non-criminal breaches of federal legal obligations by universities failing to discharge their administrative and educational duties, other than in relation to their duties to prevent crime.

An area of hate crime law included in the Criminal Code but not addressed in this submission is online hate crime. The power of online platforms lies in their reach - a single piece of harmful content can quickly circulate to thousands, inciting mass harassment or targeted attacks. It can have immediate, tangible consequences, disrupting individuals' daily lives and sense of security, inciting actual violence, affecting livelihoods, reputations, and loved ones. Thus, online hate can have the same damaging effects as advocacy, incitement or threats made in person. Nevertheless, Australian law in this space is fragmented, complex and confused. Therefore we have not addressed its relationship to the currently proposed Hate Crimes Bill.

Antisemitic hate in academia

As this committee noted in its report on 4 October 2024, upon concluding its inquiry into antisemitism on university campuses, Australian universities are experiencing a steep rise in antisemitism. This was exacerbated by the anti-Israel university encampments. People at university encampments argued that their acts were not intended to do harm towards Jews but, nonetheless, those who urged exclusion of Jews were inciting hatred. They forced many students and staff to stay away from the universities because they did not feel safe. Barging into classrooms and addressing students, or harassing Jewish staff as they are lecturing, is extremely threatening behaviour. Many reported feeling that they were being forced out of the university or that they were unable to perform properly as students or staff. Although the quantum of actual violence was low, the incidents were of sufficient frequency that every Jewish person and many non-Jewish students and staff felt unprotected and that they could be a serious victim of violence at any point.

Governmental interventions in response to antisemitism on campus can be conceived of across a range of measures from criminal law to educational training, illustrated in the Table 1 according to a hierarchy of legal consequences, from criminal penalties to remedial education. Australian federal law does not yet include criminal consequences.

Table 1. Matrix of hate speech legal categories and consequences.

<i>Category</i>	<i>Criminal</i>	<i>Civil</i>	<i>Administrative</i>	<i>Educational</i>
<i>Consequence</i>	Sanction incitement	Reconcile parties	Resolve complaints	Train to understand
<i>Legislation</i>	-	Racial Discrimination Act	Institutional standards	Institutional policies

Each of these interventions could be applicable within academia. However, in accordance with the constraints of this inquiry's focus on the Federal Criminal Code, our submission deals only with the first intervention, i.e. criminal prohibitions and sanctions upon incitement to antisemitism as a form of racial hatred.

Limits on free speech

Freedom of speech stands as a cornerstone of democratic societies, facilitating the exchange of ideas, engagement in robust debate, and the accountability of governments. As John Stuart Mill argued, in "On Liberty," the unimpeded exchange of ideas is crucial for intellectual and social progress. Mill posited that even erroneous or unpopular opinions carry inherent value, as they challenge prevailing dogmas and stimulate critical thinking. By safeguarding freedom of speech, societies cultivate a marketplace of ideas where truth is discerned through rigorous discussion. This liberty underpins other fundamental rights, empowering citizens to advocate for social change and justice. Thus, erosion of free speech imperils the very foundation of democracy.

Despite its paramount importance, freedom of speech has never been unlimited. The classic example, articulated by Justice Oliver Wendell Holmes, posits that falsely shouting "fire" in a crowded theatre is not protected speech, as it poses a clear and present danger to public safety. This principle underscores that speech inciting violence or panic is justifiably restricted in order to prevent harm.

Hate speech, which fosters discrimination and violence, presents a significant regulatory challenge. Regulating hate speech entails a delicate balance; excessive restrictions risk a chilling effect, deterring individuals from expressing legitimate views and stifling open discourse. In drafting regulation there needs to be clear attention to the impact of the law. There is a risk that prosecuting an individual will turn that person into a martyr – a hero of the cause. The greatest haters have claimed simultaneously through multiple platforms that they are constantly prosecuted by the target group. They do so to gain sympathy and additional followers. They and their cause become far more significant than they would have been without prosecution. On the other hand, the victims of unregulated free speech are silenced if we do not regulate their detractors.

Permissible limits on speech unquestionably include the regulation of violence, of the threatening of violence and of serious vilification. It is our view that the proposed Bill will enhance not detract from freedom of speech.

Legal limits on academic freedom

Academic freedom is an extension of freedom of speech within educational institutions. It allows scholars to pursue knowledge without interference or censorship. This freedom is vital for the advancement of knowledge, fostering an environment where ideas can be rigorously tested and debated. As set out in our mission statement, 5A champions academic freedom and honest enquiry.

The definition of academic freedom used in this submission is that adopted by the Commonwealth also, namely that set out in the Model Code proposed by former High Court Chief Justice Robert French as modified. It defines "academic freedom" in the following terms:

- the freedom of academic staff to teach, discuss and research and to disseminate and publish the results of their research;
- the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
- the freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled;

- the freedom of academic staff to participate in professional or representative academic bodies;
- the freedom of students to participate in student societies and associations;
- the autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which these are taught and the choices of research activities and the ways in which they are conducted.

The Model Code also states that “Every member of the academic staff and every student enjoys academic freedom subject only to prohibitions, restrictions or conditions:

- imposed by law;
- imposed by the reasonable and proportionate regulation necessary to the discharge of the university’s teaching and research activities;
- imposed by the reasonable and proportionate regulation necessary to discharge the university’s duty to foster the wellbeing of students and staff;
- imposed by the reasonable and proportionate regulation to enable the university to give effect to its legal duties;
- imposed by the university by way of its reasonable requirements as to the courses to be delivered and the content and means of their delivery.”

Thus, the Model Code indicates that Australian universities are not allowed by ruse of Academic Freedom to shirk legal responsibility. Implementation of the Model Code is reported in the annual reports of all Australian universities under a statutory obligation.

Prohibitions imposed by law, as referred to in the Model Code, are the first restraint upon exercise of academic freedom. When proscribed under criminal law, transgression of prohibitions can carry consequences of criminal sanctions. They would fall within the scope of this Committee’s enquiry.

Restrictions imposed by law, as referred to in the Model Code, that are not criminal in nature, are beyond the scope of the Criminal Code. Under the *Racial Discrimination Act*, it is unlawful to say or do something reasonably likely to offend, insult, humiliate or intimidate another person or group if the thing is done because of the race, colour or national or ethnic origin of the person or group. The consequences of doing so entail civil law procedures seeking to reconcile the parties or award civil compensation.

Conditions imposed by law, as referred to in the Model Code, would include tertiary education quality standards that require universities to ensure a safe academic environment for staff and students. In terms of the matrix above, these comprise administrative and educational measures.

Inciting hatred on campus as a criminal act

Returning to the issue of prohibitions on incitement under criminal law, there is an unfortunate gap in Commonwealth law. There is nothing in the Criminal Code that prohibits incitement to antisemitism or other forms of racial or group hatred. Within Australian universities, harms caused by teaching, communications or statements based on antisemitic lies, fabrications or distortions carry no criminal responsibility. 5A notes that universities are public places and that acts of incitement to hatred within university spaces are acts that occur in public.

Legal or policy restraints on antisemitism are sometimes posed as contradictory to academic freedom. However, like free speech, academic freedom is justifiably subject to limitations to

prevent harm. Incitement of antisemitic hatred is one such harm to be prevented by appropriate limits to academic freedom.

Antisemitic acts can be identified by reference to the IHRA working definition. Its intersection with academic freedom sets the limits of purported exercises of academic freedom. The identification of individual cases of incitement to antisemitism under Commonwealth jurisdiction can be guided by application of the IHRA working definition, as adopted by the Commonwealth.

Most Australian universities have not adopted the IHRA working definition, although some have done so autonomously, in whole or in part (inc. Latrobe, Macquarie, Melbourne, Monash, UNSW, Wollongong). Publication of a Commonwealth guidance document on academic freedom and antisemitism would assist Australian university managers to understand the intersection of these concepts.

We recognise that a distinction must be drawn between legitimate academic discussion on controversial topics, and speech that constitutes incitement of hatred or violence. 5A understands that the IHRA is about to produce a document on academic freedom and antisemitism. Examples of specific incidents on Australian university campuses that could constitute incitement to hatred are discussed below, as examples of antisemitism and hate crimes over the past 13 months since 7 October 2023.

CAMPUS CASE STUDY 1 - Gaza Genocide

A class on Genocide in Gaza could entail an examination of the meaning of genocide, an assessment of the various elements of genocide and a discussion of whether this is an appropriate way to describe Gaza. That would be unproblematic. Equally, if we taught about governance, or economy or culture in Gaza, with reference to specific Israeli policies and well as Arab ones, this would be quite acceptable.

However, were the discussion to centre around the false accusations about genocide in the public arena, of a famine and the wholesale murder of thousands of babies, without examining these claims, then this would constitute hatred of Jews. If we teach or write about Gaza relying only on revisionist histories, with the objective of recruiting students to our cause, this would be antisemitic.

Another way of understanding whether a matter is antisemitic is to consider how people in the room are made to feel. Do they all equally feel empowered to question the lecturer or are some students silenced? Do some students feel like they are being accused of misconduct or even treachery even if they have never been overseas? Are some students scared to submit work for fear that it won't be marked fairly?

CAMPUS CASE STUDY 2 - Zionism is Nazism

Take the example of a situation of an academic who believes that the Israeli government is equivalent to a Nazi regime and shares PowerPoint slides with an Israeli flag, combined with a Nazi flag with a swastika on it. Israel is, of course, the Jewish state, and the Nazi regime killed over 6 million Jews in the Holocaust, so many Jewish people would find the image offensive. The image is shared in online classes and publicly on social media by the academic.

If the academic gave a reasoned academic talk in a conference setting in which he argued that certain aspects of Israeli government policy shared commonalities with some policies of the National Socialist regime, as long as he provided clear and adequate

justification for that argument, and he engaged in reasoned scholarly discussion not polemics, he would be within his academic freedom to do this, notwithstanding that others may disagree strongly or find his views offensive. Academic freedom requires other scholars to rebut his views in an academic manner, using evidence and scholarly method, rather than to silence him.

A more difficult question would arise if the academic were teaching a class on genocide and chose to show the image of the juxtaposed Israeli flag and swastika. The question would arise as to whether the academic is teaching in an objective and fair way. It is always possible for teachers to have strong private views, but harder to put aside biases and teach material in an objective and fair way that allows for differing opinions. The presence of such a polemical contentious and offensive image without extensive discussion and contextualization would perhaps suggest to students that the teacher was incapable of being challenged or of allowing different opinions to be discussed in an objective and fair way on this topic.

Suppose that the image was shown as a shocking and provocative image to demonstrate the psychological effect of shocking and offensive images, but not to express any view about Israel. This would be entirely different to a situation where the academic displayed the image and then said, “all Israelis are Nazis.” In between those two extremes, there are a range of possibilities.

We have been told by students of classes where a lecturer told the students that it is entirely clear that genocide is being committed in Gaza, and that Israel is a rogue regime which should be ostracised, and that no other views can be accepted. This can easily turn into, “Anyone who supports the existence of Israel in any way is therefore evil,” and constitute an incitement to hatred or violence. Yet many Australians support the existence of Israel and there are religious obligations that cannot be performed outside of the land of Israel which for some Jews, are important religious precepts. Therefore, to suggest that Jews are not allowed to have a state is often regarded as antisemitic.

CAMPUS CASE STUDY 3 - Boycott Divestment and Sanctions (BDS)

The campaign of various anti-Israel groups to boycott, divest from and sanction Israel (BDS) can in some circumstances constitute incitement to racial hatred. Professor Steven Praver of the University of Melbourne seems to have been targeted on the basis of his ethnicity and religion. The stated reason for the campaign against him was Prof Praver’s participation in a joint PhD program between the University of Melbourne and Hebrew University of Jerusalem. It was alleged that this made him “complicit in genocide.”

Prof Praver was one of eight to ten academics who participated in the joint program, but the only visibly observant Jewish person, because he wears a *kippah*, or skullcap. Over a series of a few months, protesters put up posters deriding him as a participant in genocide, rallied specifically against him, massed outside his office, and then finally “occupied” his office space and intimidated and harassed him when he came in to work. The university has said it was difficult to identify the protesters and the initial response of the police is that no crime was committed because the protestors vacated Professor Praver’s office when police demanded that they do so. While we question whether this is the case, there is a clear need to deter and deal with incidents such as that which affected Professor Praver. Privacy provisions have been used as a cover for not taking steps to identify the masked protestors or to demand that they identify themselves. If it

was clear that an offense may have been committed, then there would be more justification for police to demand names and addresses which may, in and of itself, have a deterrent effect.

These three case studies illustrate of the complexities involved in describing where academic freedom intersects with hateful antisemitic behaviour. The contours of hatred can be mapped out across various recurring academic scenarios. For each academic scenario, specific guidance can be prepared, drawing upon the Model Code on academic freedom and IHRA working definition of antisemitism, to distinguish incitement to hatred from bona fide academic activity. If it had been a criminal offence to engage in public incitement to racial hatred, the police might at least have had a reason to take names and addresses of the students who insulted vilified and harassed Prof Praver Case Study 3, for example.

4. In in the street the complexities racial hatred as a new Commonwealth offence

The amendments to the Criminal Code as currently proposed and published *do not proscribe race hatred* as such as a crime. Instead, they proscribe incitement to violence. In this sense, the amendments *go no further* than the existing provisions. The title of the Bill is a misnomer that should instead specify incitement to violence, which is the necessary element of the incitement.

The proposed amendments to the Criminal Code do not address the lacuna in Commonwealth law around crimes of incitement to racial hatred. There is a need for new federal criminal legislation to address contemporary antisemitism issues on campus. Many university campuses have been places where Jewish and Israeli students and staff have felt unwelcome, or unsafe. Some students and staff have been unable to come on campus. This is inappropriate in the context of a desire to host a diverse student body with diverse beliefs and backgrounds.

5A submits that the Criminal Code should be amended to introduce a new crime of such incitement to racial hatred, encompassing incitement to antisemitism. The legislation could introduce examples to reduce ambiguity and illustrate proper application, as is increasingly common in legislative drafting practice.

Section 18C of the *Racial Discrimination Act* 1975 does not fill the void. Limitations of relying on 18C include the high burden on victims. For example, two separate, representative complaints were filed with the Australian Human Rights Commission (AHRC) on behalf of a group of Complainants who are Jewish students and academics at the University of Sydney on 1 November 2024. The two complaints allege racial discrimination and racial vilification (i.e. antisemitism) against Jewish students and academics by Professor John Keane and the University of Sydney, and by Dr Nick Riemer and the University of Sydney, respectively. The two complaints have taken almost a year to prepare and will be considered by the President of the AHRC, who will seek conciliation between the parties. The AHRC has not demonstrated sensitivity to antisemitism and, following the likely failure of the conciliation process, the Complainants have 60 days to commence proceedings in the Federal Court of Australia. The full onus of responsibility to correct a public wrong therefore rests upon private individuals who must undertake their own defence at great expense and cost of time. The introduction into the Criminal Code of a crime of inciting hatred would shift this burden to the public prosecutor.

Criminal penalties for breaches of prohibitions on incitement to racial hate already exist within some Australian state jurisdictions, cp: WA, SA, Vic. In Western Australia, the Western Australian Criminal Code, section 77, provides that:

[a] person who engages in any conduct, other than in private, by which the person intends to create, promote or increase animosity towards or harassment of a racial group or a person as a member of a racial group, is guilty of a crime....

(Animosity is defined as “hatred or serious contempt”, without the need for intending actual violence.) This prohibition has been tested, although with limited success.

Table 2. Criminalisation of hate speech by Australian jurisdictions.

	Race	Religion	Criminal	Civil
CLTH	•		Violence - Criminal Code	Racial Discrimination Act 1975
NSW	•		Violence - Crimes Act	Anti-Discrimination Act 1977
QLD	•	•		Anti-Discrimination Act 1991
SA	•		Racial Vilification Act 1996	Racial Vilification Act 1996
TAS	•	•		Anti-Discrimination Act 1988
VIC	•	•	Racial and Religious Tolerance Act 2001	Racial and Religious Tolerance Act 2001
WA	•		Criminal Code	
ACT	•			Discrimination Act 1991
NT	•			Antidiscrimination Act 2022

5A recommends that the lacuna in the Commonwealth Criminal Code be filled by proscribing incitement to hatred. This could send a public message signaling discouragement of the inciting of hate on campus and the creation of hostile campus environments.

It is widely recognised that university administrators have failed to handle these issues through internal management. 5A recommends that university failures to prevent hate crime, in circumstances where the management clearly had knowledge of the intended or continuing offences and where the management held powers and capabilities to prevent hate crimes, should attract vicarious criminal liability and be subject to penalties.

5. Amendments to the Criminal Code proposed by the Commonwealth

Hate crime amendments to the Criminal Code set out in the current legislative proposal concern adjustments to the existing crimes of the urging of violence against a group or a member thereof, and the introduction of new crimes of threats of force or violence against a group or member thereof.

Urging violence

In relation to existing offences in the Criminal Code of urging violence, 5A supports the amendments proposed to reduce the intention element, *mens rea*, to recklessness and to remove the good faith defence. These amendments are proposed in section 80.2A of the Criminal Code, criminalising the urging of violence against groups, and in section 80.2B criminalising the urging of violence against members of groups.

The reason that 5A supports the *mens rea* amendment is that the thresholds of proof for intention are too high to be proved in almost any conceivable circumstances. Intention in this context

requires that a person means to bring about a result and is aware that it will occur in the ordinary course of events (Criminal Code section 5.2). There will always be doubt present as to the potential effects of urging an action in the minds of others. Intentionally urging (80.2A(1)(c)) and intending that force or violence will occur (80.2A(2)(c)) tend to be impossible to prove. Therefore, recklessness is the more appropriate threshold for proving *mens rea* in a prosecution for urging violence.

The reason that 5A supports removal of the good faith defence is that there is no good faith possible in inciting hatred or violence; it is oxymoronic. The defence merely adds uncertainty, confusion and obfuscation.

We note that the current existing prohibition on incitement to violence lacks a clear definition of incitement itself. A strict "immediate and likely consequences" test is used in the USA, which limits the potential circumstances for prosecution of incitement to violence. 5A suggests that a broader definition of incitement to violence would be useful to clarify potential circumstances for prosecution.

Threats of force or violence

5A supports other amendments before the Senate Committee that create offences in the Criminal Code concerning threats of force or violence against groups or members thereof. Threats of force or violence against groups proposed section 80.2BA, on threatening force or violence against groups, and in section 80.2BB, on threatening force or violence against members of groups are related to incitement to hatred and to violence but entail circumstances distinct from either, (despite having some overlapping elements). The distinct circumstances are the nature of threats, targeting specific individuals or clearly identified groups. In contrast, urging violence has less specific targets and less specific intended outcomes. As noted in the Explanatory Memorandum, it criminalises conduct that involves a direct threat from one person to another.

A particular issue that requires clarification in the proposed introduction of crimes of threats of force or violence concerns whether they capture threats against property of the targeted person or group. Refugees who have a well-founded fear for their safety are often victims of property damage. History shows that destroying property — such as synagogues, mosques, Black-owned businesses, or Indigenous cultural sites — has been a recurring tactic in racist practices and genocidal campaigns. For example, during Kristallnacht (the "Night of Broken Glass") in Nazi Germany, the destruction of Jewish homes, businesses, and places of worship signalled to Jewish communities that their lives and identities were under severe threat, creating a climate of fear that triggered mass emigration and, later, enabled mass deportation and genocide. Destroying property such as a business on the internet, can be more harmful than smashing a window. Recent incidents of arson, vandalism, graffiti and doxing in Australian cities are often directed against Jewish property such as synagogues and schools, homes and businesses.

Recognizing this kind of threat, some national hate crime laws now encompass property damage. For instance, the United Kingdom's hate crime statutes include provisions on racially or religiously aggravated criminal damage. By encompassing such acts within hate crime laws, societies can acknowledge that violence isn't just physical harm to the body but includes attacks on the symbols and places that embody a community's identity, and the personal property and business property owned by members of the target group. Similarly, within several Australian

state jurisdictions, motivation by racial, religious or other forms of prejudice is considered an aggravating factor during sentencing for property damage.¹

5A therefore recommends that sections 80.2BA and 80.2BB be expanded to encompass threats to property of the group or its members.

6. Additional amendments proposed by 5A

5A recommends additional amendments to the Criminal Code that concern terrorism and genocide. Concerning terrorism, 5A recommends the insertion of a new offence of glorification of terrorism as section 80.2CA of the Criminal Code, or by an expansion of section 80.2C.

Glorification of terrorism

Under the Criminal Code Section 80.2C as currently enacted, advocating specific terrorist acts is proscribed but general glorifying of terrorist acts is not. The Islamist movement *Hizb ut Tahrir* has earned notoriety in Australia for its glorification of terrorism at the University of Sydney in 2024. It is a proscribed terrorist group in the United Kingdom, where it falls afoul of the proscription of glorification of terrorism under the UK *Terrorism Act 2006* section 1(3). Nevertheless, glorification of terrorism is not a crime under Australian law and *Hizb ut Tahrir* has not been listed as a proscribed terrorist group in Australia although various federal governments have scrutinised its activities for evidence of illegal advocacy of terrorist acts. The fact is that advocacy of specific acts of terrorism is currently required under the Criminal Code. *Hizb ut Tahrir* is careful not to advocate specific terrorist acts but can and does advocate for terrorism generally. *Hizb ut Tahrir* can and does also incite hatred without constraint in Australia. It could be constrained if glorification of terrorism was introduced as a new category of terrorist crime in the Criminal Code.

Good faith defences removal

More bizarrely, the Criminal Code section 80.3 currently permits persons charged with advocating terrorist acts to raise a defence of good faith. The availability of this defence merely adds uncertainty, confusion and obfuscation to the law as the *mens rea* element of advocating terrorism itself negates good faith. There can be no good faith when advocating terrorism. Accordingly, no good faith defence should be available to persons charged with advocating

¹ 1. New South Wales (NSW): *Crimes Act 1900* (NSW): While there isn't a specific section for racially motivated property damage, Section 195 deals with "Destroying or damaging property", and racial motivation can be considered under Section 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which states that offenses motivated by racial, religious, or other forms of prejudice are considered aggravating factors during sentencing.

2. Victoria: *Crimes Act 1958* (Vic): Section 197 covers "Criminal damage", but motivation by hate (racial or religious) can be considered under Section 5(2)(daaa) of the *Sentencing Act 1991* (Vic), which allows the court to consider racial or religious motivation as an aggravating factor during sentencing.

3. Queensland: *Criminal Code Act 1899* (Qld): Section 469 deals with "Wilful damage", but racial or religious motivations can be used as an aggravating factor under general sentencing provisions outlined in the *Penalties and Sentences Act 1992* (Qld), particularly Section 9(4), which considers offenses motivated by hate as aggravating circumstances.

4. Australian Capital Territory (ACT): *Crimes Act 1900* (ACT): Section 116 deals with "Destroying or damaging property", and racial or religious motivations can be considered under Section 33(1)(o) of the *Crimes (Sentencing) Act 2005* (ACT), where racial hatred is regarded as an aggravating factor in sentencing.

terrorist acts and, similarly, no defence of good faith should be available to persons charged with glorifying terrorism.

There are intersections between inciting hatred or violence, threatening force or violence, advocacy or glorification of terrorist acts, and advocating genocide. Each of these is a speech act with potential effects of causing hatred and violence against groups or members of groups. For each, the defence of good faith is circular, introducing uncertainty and obfuscation. In this context, we note that Section 80.2D of the Criminal Code also bizarrely allows a good faith defence against prosecution for advocating genocide. As we have suggested, no defence of good faith should be available in a prosecution for advocating genocide, as the *mens rea* element of incitement itself negates good faith.

7. Conclusion

This submission has argued for the introduction into the Criminal Code of a new crime against incitement to racial hatred. This is consistent with accepted norms on freedom of speech and academic freedom as set out in the Robert French Model Code adopted by Australian universities.

The International Holocaust Remembrance Association (IHRA) working definition of antisemitism can be used to navigate the boundaries of freedom of speech and academic freedom to guide administrative authorities as to where they intersect with racial hatred against Jews. The IHRA working definition has been adopted by Australian governments and 5A recommends that it be required by law to be incorporated into Australian University regulatory and administrative suites. Australian university teachings that Gaza is experiencing genocide, Zionism is Nazism, and that Israel must be subject to boycotts divestment and sanctions were discussed in this submission, as case studies concerning where the boundaries between good-faith exercises of academic freedom and of incitement to racial hatred lie.

This submission has also commented on amendments currently proposed in the Bill, to the existing crimes of the urging of violence against a group or a member thereof, and on the introduction of new crimes of threats of force or violence against a group or member thereof. We commend the lowering of the *mens rea* element to recklessness and removal of the good faith defence for existing crimes of the urging of violence. 5A also recommends removal of the good faith defence and suggests that further clarification of the cause-and-effect relationship between incitement and violence, particularly the temporal gap between them, might be helpful.

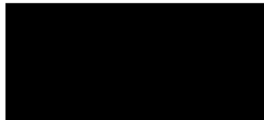
We support other amendments proposed in the Bill that would create new offences of threats of force or violence against groups or members thereof and recommend that the threats extend beyond those of force or violence against the group or person to include their property.

5A recommends additional amendments to the Criminal Code that concern terrorism. These would insert a new offence of glorification of terrorism, either as section 80.2CA of the Criminal Code or by an expansion of section 80.2C. Concerning good faith defences to crimes of inciting hatred or violence, threatening force or violence, advocacy or glorification of terrorist acts, and advocating genocide, we suggest that the defence of good faith is circular, as the intention element of the crimes negate conduct in good faith, and the good faith defence therefore merely generates uncertainty.

As noted in the introduction to this submission, a concerning decline in the rule of law concerning hate crimes has facilitated and hastened the recent rapid breakdown of social cohesion in Australia. 5A is keen to see improvements in Australian hate crimes legislation that clarify

application of the Criminal Code, but we stress the need for rigorous, consistent and predictable public sector enforcement. Should the neglect of public sector enforcement against hate crimes continue, it may be helpful to introduce private prosecutions to try to prevent hateful behavior, although private prosecutions would be only a minor impediment to accelerating social decline. This is a cause for anxiety not only among members of 5A but also all members of the Australian community reliant upon the rule of law and social cohesion.

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