Law Council
OF AUSTRALIA

Criminal Code Amendment (Hate Crimes) Bill 2024

Senate Legal and Constitutional Affairs Legislation Committee

29 November 2024

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Table of contents

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- 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
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- Law Institute of Victoria
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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.

Acknowledgements

The Law Council gratefully acknowledges the contribution of the Law Institute of Victoria, Law Society of New South Wales. We also acknowledge the guidance provided by our National Criminal Law Committee and our National Human Rights Committee.

Executive summary

1. The Law Council welcomes the opportunity to comment on the Criminal Code Amendment (Hate Crimes) Bill 2024 (the **Bill**). We are mindful of the need to reevaluate Australia's legislative framework, at Commonwealth, state and territory levels, to better address the harm caused by hate speech, especially that which involves calls to force or violence.

2. In 2006, the Australian Law Reform Commission[1] (**ALRC**) in its *Fighting Words: A Review of Sedition Laws in Australia*[2] provided a blueprint for reform of sedition offences and defences in sections 80.2 and 80.3 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**), directed to urging the use of force or violence. In its inquiry, the ALRC asked whether this part of the Criminal Code 'is well-articulated as a matter of criminal law and strikes an acceptable balance in a tolerant society'.[3] That blueprint was substantially adopted.[4]

3. We agree with the ALRC that the central challenge is ensuring that there is a bright line between freedom of expression—even when exercised in a challenging or unpopular manner—and the reach of the criminal law, which should focus on urging, and threatening to urge, the unlawful use of force or violence against vulnerable groups or members of vulnerable groups.[5]

4. In light of recent events, we acknowledge the need to preserve social cohesion in our multicultural society. Preserving that cohesion requires reflection about the legal framework by which we navigate entrenched disagreement with respect and tolerance.

5. As we have previously warned—while the criminal law has a legitimate function to denounce and deter wrongdoing, and to protect the community from dangerous offenders—there are significant limitations on the role of criminal law an instrument of social policy.[6] 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.

6. A key difficulty with this Bill, and the offences recently established by the *Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Act 2023* (Cth) (**Hate Symbols Act**), is that the combined effect of the amendments is to unravel the ALRC's framework for criminal offences in sections 80.2A and 80.2B without providing an alternative conceptual framework. This Bill also has the potential to exacerbate uncertainty caused by the complex structure and potentially wide scope of prohibited hate symbols offences.

7. This expansion of the offences in section 80.2A, 80.2B and new offences in new sections 80.2BA and 80.2BB poses risks to freedom of political speech. This is especially the case when existing offences—assault, inflicting serious injury and threats to inflict harm or death, damage to property, coupled with incitement,

[1] The review was conducted by an eminent panel of commissioners including Professor David Weisbrot, Justice Susan Kenny and, as she was then, Justice Susan Kiefel.
[2] Australian Law Reform Commission, Fighting Words: A Review of Sedition Laws in Australia Report 104 (Report, July 2006). ('***ALRC's Fighting Words***')
[3] ALRC's Fighting Words, 13.
[4] *National Security Legislation Amendment Act 2010* (Cth)
[5] ALRC's Fighting Words, 10.
[6] Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into extremist movements and radicalism in Australia (Submission, 22 January 2021), 3 [10].

conspiracy and attempts to commit these offences—already exist at both Commonwealth, State and Territory levels.[7]

8. As a result, while we appreciate the intent of the measures, we are concerned that the Bill introduces inconsistencies into Division 80 and undermines its coherence as a whole. As the New South Wales Law Reform Commission recently warned '[t]here is also a need to be cautious of any reforms that might over-complicate the law and cause further uncertainty or litigation'.[8]

9. We are concerned that the perception of inconsistent enforcement of broadened urging violence and threatening to urge violence offences regarding expression of offensive social or political views could undermine social cohesion.

10. To address these issues, our long-term recommendation is that the entire division be reviewed afresh by the Australian Law Reform Commission in light of recent developments and the important fundamental freedoms and human rights at stake. There is a need to review the necessity and proportionality of Commonwealth offences afresh in this area afresh given existing offences against the person laws and developments in serious vilification offences across states and territories.

11. Should the Bill progress, the Law Council makes the following recommendations to improve the proportionality of its operation:

- The Statement of Compatibility should be amended to:
  - address the proportionality of limitations on the rights of the child; and
  - strengthen the discussion of the proportionality of limitation on the right to freedom of religion, freedom of expression in the context of the proposed removal of the good faith defence.
- The Commonwealth Government should increase resourcing for community-based countering violent extremism programs. The component of funding under the Federal funding agreement for the Living Safe Together Intervention Program should be increased.
- The Commonwealth should provide additional, long-term resourcing for the initiatives identified in the report '*An Anti-Racism Framework: The Perspectives of Multicultural Australia'*.
- Should the Bill proceed, there should be a culturally informed public awareness campaign explaining the scope of conduct prohibited by offences in Division 80 of the Criminal Code.
- Law enforcement agencies should issue a guidance document with practical examples of forms of speech that will fall within the offences in Division 80 of the Criminal Code.
- There should be targeted consultations with media, journalism and arts organisations to improve certainty about how these offences will be applied.
- Division 80 of the Criminal Code should be referred to the ALRC for review to ensure consistency and coherence.
- Legal advice establishing the compatibility of the Bill with the implied freedom of political communication should be published.

[7] See for example, s. 83.4; 100.4 and 147.2, Criminal Code and ss.15 - 21 *Crimes Act 1958* (Vic) (causing, threatening or endangering persons).
[8] New South Wales Law Reform Commission, Serious Racial and Religious Vilification Report No 151 (Report, September 2024), 9 [1.44].

- The Explanatory Memorandum should be amended to clarify that the term ‘use of force’ is not intended to apply to threatening or urging damage to property, except where that damage to property would also involve violence or force against a person.
- There should be strengthened justification for items 3, 6, 11, 14 of Schedule 1 to the Bill.
- Further clarification should be sought regarding the rationale for retaining ‘political opinion’ as a protected attribute in urging, and threatening to urge, violence against group offences.
- Should the scope of protected attributes be expanded, consideration should be given to:
  - reducing the maximum penalties; and
  - introducing a public interest exception.
- If the good faith defence is switched off for the existing ‘urging force or violence’ offences and the new proposed offences, a public interest exception should be incorporated into these provisions as an element of the offence. Consideration should be given to the matters we have set out at paragraph 93.
- Consideration should be given to the development of consistent and clear protections for journalists across the Criminal Code. However, the importance of free speech for people generally is the central concern.
- The words ‘member of the targeted group’ should be removed from new section 80.2BA(1)(c), 2(c) and 80.2BB(1)(d) and 2(d) and replaced with ‘person’.
- Should Item 20 be retained in the Bill, there should be administrative guidance issued by the CDPP and law enforcement agencies providing certainty as to how these expanded offences will be enforced.
- Consideration should be given to simplifying the effects-based threshold employed in section 80.2H (public display of prohibited Nazi symbols or giving a Nazi salute) and section 80.2HA (public display of prohibited terrorist organisation symbols).
- The offences contained in Division 80 should not be applied to children. In the alternative, the written consent of the Attorney-General and Commonwealth Director of Public Prosecutions should be obtained prior to commencing such a prosecution.
- There should be greater resourcing for countering violent extremism early intervention and diversionary programs with a specific focus on children and young people (aged between 10 and 25).
- There should be periodic review of applicable maximum penalties with a view to ensuring consistency between jurisdictions.
- There should be further consultation with state and territory law enforcement agencies towards a national definition of hate crimes.
- The Standing Council of Attorneys-General should consider measures to improve data collection in relation to the prosecution of general offences relating to hate crime. Consideration should be given to the proposal advanced by the New South Wales Law Reform Commission.

Outline of the Bill

12. Schedule 1 to the Bill would amend Chapter 5 “The Security of the Commonwealth” Part 5.1, Treason and Related Offences of the Criminal Code in these ways:

- items 3, 6, 11, 14 amend existing offences for urging force or violence against groups or members of groups with protected attributes (in sections 80.2A and 80.2B of the Criminal Code) to reduce the fault element with respect to the consequence of the urging conduct;
- items 4, 7, 12, 15 would expand the list of protected attributes for existing offences in sections 80.2A and 80.2B to ‘sex, sexual orientation, gender identity, intersex status, disability’;
- item 19 would establish new offences (new sections 80.2BA and 80.2BB), punishable by up to five years imprisonment, for threatening force or violence against protected groups and members of groups. It would also be an offence punishable by seven years’ imprisonment to do the same conduct with the added requirement that the threat, if carried out, would threaten the peace, order and good government of the Commonwealth;
- item 21 of the Bill would disapply the good faith defence (in section 80.3 of the Criminal Code) with respect to the two existing urging force or violence offences as well as the two new proposed offences (see above); and
- item 20 would amend the public display of prohibited hate symbols offences in sections 80.2H, 80.2HA and 80.2K to protect an expanded list of protected attributes including ‘sexual orientation, gender identity, intersex status’.

International human rights law

13. We acknowledge that the measures contained in the Bill are intended to promote several human rights, including the rights to life and security of person, the right to equality and non-discrimination, and the prohibition against inciting national, racial or religious hatred in the *International Covenant on Civil and Political Rights* (**ICCPR**).[9] In this regard, the United Nations Human Rights Committee has expressed its view that the duty to protect life requires that State parties should 'enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in the deprivation of life'.[10]

14. We recognise submitters to this inquiry, with perspectives informed by lived experience, have provided evidence that the amendments contained in the Bill will enhance the rights to life and security of person.[11]

15. By making certain forms of expression, including communicating information or ideas publicly (where it amounts to urging or threatening force or violence or the

[9] *International Covenant on Civil and Political Rights* (entry into force 23 March 1976, except art 41 which came into force generally on 28 March 1979; entry into force for Australia 13 January 1980 except art 41 which came into force for Australia on 28 January 1993), art 6 (right to life) and 9 (right to security of person), 20 (prohibition against racial and religious discrimination and hatred) and art 26 (equality and non-discrimination) (‘***ICCPR***’); *Convention on the Elimination of All Forms of Racial Discrimination*, art 4.
[10] United Nations Human Rights Committee, General Comment No. 36: art 6 (right to life) UN Doc CCPR/C/GC/36 (2019), [20].
[11] See for example, People with Disability Australia, Submission to Senate Legal and Constitutional Affairs Committee, Inquiry into the Criminal Code Amendment (Hate Crimes) Bill 2024 (Cth) (Submission, 4 November 2024).

display of prohibited symbols) subject to criminal sanction, the measures also engage and limit the right to freedom of expression and freedom of religion.

- **Freedom of expression**—paragraph 2 of article 19 of the ICCPR requires States to guarantee the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. The scope of paragraph 2 encompasses 'even expression that may be regarded as deeply offensive although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20'.[12] The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. These limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate. We agree with the Australian Human Rights Commission that '[t]here is a risk that individuals engaging in expressive or critical speech and certain public gatherings or protests could be viewed as sources of incitement or threats against protected groups, limiting the rights to freedom of expression and freedom of assembly'.[13]
- **Freedom of religion**—article 18 of the ICCPR requires States parties to protect 'personal conviction and the commitment to religion or belief, whether manifested individually or in community with others' and adds that '[t]he freedom to manifest religion manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts'.[14] We agree with the Parliamentary Joint Committee on Human Rights that, depending on how offences in sections 80.2A and 80.2B and prohibited symbols offences are enforced, there is the risk that restricting the ability of people of certain religious groups to worship, practise or observe their religion, would engage and limit the right to freedom of religion, particularly the right to demonstrate or manifest religious or other beliefs.
- **Equality and non-discrimination**—the risk highlighted above, in relation to freedom of religion, also apply to potential limitations on the right to equality and non-discrimination, which provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law.[15] Additionally, broadening the offence and removing the good faith defence may have a disproportionate impact on communities that are overpoliced, particularly First Nations people.[16]

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[12] United Nations Human Rights Committee, General Comment No. 34: art 19 (freedom of opinion and expression) UN Doc CCPR/C/GC/34 (12 September 2011), 3 [11]; UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27 (2011) [37].

[13] Australian Human Rights Commission, Submission no 8 to Senate Legal and Constitutional Affairs Legislation Committee, Criminal Code Amendment (Hate Crimes) Bill 2024 (Submission, 7 November 2024), 6 [20].

[14] ICCPR, art 18. See UN Human Rights Committee, General Comment No. 22: art 18 (Freedom of thought, conscience or religion) UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993), [4].

[15] ICCPR, art 26.

[16] New South Wales Law Reform Commission, Serious Racial and Religious Vilification Report No 151 (Report, September 2024): ' [t]here is a particular risk that expanded vilification offences could capture interactions between Aboriginal people and the police. Analogies were drawn with the disproportionate impact of offensive language offences'. 44 [3.73]. See further, ALRC, Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Report No 133 (2017), [12.173] – [12.175]:

> The high incidence of Aboriginal and Torres Strait Islander offensive language offending has been ascribed to the likelihood of Aboriginal and Torres Strait Islander people being out in public, amounting to an increased likelihood of police interaction.

- **The rights of the child**—under the United Nations Convention on the Rights of the Child (**CRC**),[17] which Australia ratified on 17 December 1990,[18] Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[19] Because these offences would apply to children (from the age of 10),[20] the measures would engage and limit the rights of the child.[21]

16. Our starting point is the Rabat Plan of Action which sets out a test for when expression should be criminalised. One element of that test is that there should be a reasonable probability that the speech would succeed in inciting actual action against the target group.[22] The Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression stated that, applying this test, there should be a real and imminent danger of violence resulting from the expression.[23]

17. We generally agree with the assessment of the Parliamentary Joint Committee on Human Rights that the measures in the Bill broadly seek to realise legitimate objectives and are rationally connected with those objectives. However, there is a risk that the proposed limitations on the rights to freedom of expression, religion and equality and non-discrimination would be disproportionate.[24]

18. We reiterate our long-standing view that articulating a rigorous proportionality justification of these limitations on multiple rights could be navigated in a more coherent way through a federal Human Rights Act and Human Rights Framework.[25] In the absence of a Human Rights Act, and also of rigorous, evidence-based justifications for rights-limiting measures in explanatory materials, proportionality assessments for Bills such as these are being conducted in a legislative vacuum.

19. The combined effect of reducing certain mental elements, establishing new offences in relation to threatening conduct and removing the good faith defence increases the risk that it will 'capture a greater range of conduct that may be offensive and insulting but the prohibition of which may constitute an impermissible limit on the rights to freedom of expression and religion'.[26]

20. We note with concern that the Statement of Compatibility with Human Rights contained in the Explanatory Memorandum is deficient in providing a rigorous proportionality analysis in a number of ways.[27]

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[17] Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). ('***CRC***')
[18] [1991] ATS 4 (entered into force for Australia 16 January 1991).
[19] CRC, art 3(1).
[20] *Crimes Act 1914* (Cth), s. 4M and 4N.
[21] See further section Children below.
[22] Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence in Human Rights Committee, Annual Report of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/22/17/Add 4 (11 January 2013) [29].
[23] F La Rue, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc A/67/357 (7 September 2012) [46].
[24] Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report: Report 9 of 2024 (Report, 10 October 2024), 100 [1.215]. The Committee also noted that its concerns were heightened by the failure to implement the recommendations it made to improve the human rights compatibility of offences relating to public display of prohibited hate symbols: 101, [1.219].
[25] Law Council of Australia, Federal Human Rights Charter (Policy Position, November 2020).
[26] Ibid, 100 [1.215].
[27] We refer to the list of factors articulated by the Parliamentary Joint Committee on Human Rights:
- whether there are other less restrictive ways to achieve the same aim;

- At paragraph 21, the Statement fails to include limitation on the rights of the child as a human rights implication. Consequently, there is no discussion of proportionality of that limitation.
- At paragraph 37, the discussion with respect to the right to freedom of thought, conscience and religion does not substantively address why potential limitations on public manifestations of religion or belief—including freedom to worship, observe, practice and teach that religion in public or private, individually or with others—is proportionate. For example, there is limited consideration of less restrictive alternatives to criminal sanction or the ways in which the Bill significantly broadens the reach of existing criminal offences, noting that the greater the interference the less likely it is to be considered proportionate.
- Paragraphs 13, 19, 27, 77 and 78 seek to address the proportionality of removing the good faith defence. However, in essence, these paragraphs reiterate the contention that there are no circumstances in which threatening force or violence can truly be done 'in good faith'. But the risk of reducing the fault element to recklessness is that it will catch people who did *not* intend to urge or threaten violence. There is no substantive discussion justifying proportionality including addressing the implications of removing a safeguard on the potentially over-broad reach of the offence, increasing the scope of any interference with human rights and limiting flexibility to treat different cases differently.

Recommendation

- **The Statement of Compatibility should be amended to:**
  - **address the proportionality of limitations on the rights of the child; and**
  - **strengthen the discussion of the proportionality of limitation on the right to freedom of religion, freedom of expression in the context of the proposed removal of the good faith defence.**

Context for the Bill

Two types of harm the Bill is seeking to mitigate

21. Hateful rhetoric in public discourse aimed at attacking vulnerable groups has profound psychological impacts and undermines the dignity and standing of affected persons in our society. We are cognisant of the historic and specific harms of hateful speech on vulnerable groups.

22. As a general point, we note the importance of distinguishing between two types of harms this Bill is seeking to mitigate:

- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;
- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Parliamentary Joint Committee on Human Rights, Guide to Human Rights (Guide, June 2015), 8.

- First, that prevalence of hate speech involving calls to force or violence poses a physical and psychological threat to vulnerable groups in our society and undermine the wellbeing of the entire Australian community.
- Second, the national security risk that increases in violent rhetoric through threats against vulnerable groups may lead to violent extremism.

23. As set out below, we express some degree of caution about the second aspect outlined above.

The harm caused by hate crimes

24. We acknowledge the profound harms arising from hateful speech on vulnerable groups in Australia. For example, in relation to the LGBTIQA+ community, we note compelling evidence that 'experiences of discrimination, stigma, isolation, exclusion, harassment, bullying and violence and other forms of victimisation impact directly on mental health leading to stress, psychological distress, suicidality and self-harm'.[28]

25. We also acknowledge evidence that the prevalence of antisemitism in Australia is increasing, and the worsening trend regarding assaults, vandalism and verbal abuse.[29] There is a specific historical connection between antisemitic language and violence that must not be ignored. We further note with concern the severity and prevalence of incidents of Islamophobia, which includes verbal intimidation.[30]

26. As we explain below in Implementation Concerns, maintaining the bright line between freedom of expression—even when exercised in a challenging or unpopular manner—and the reach of the criminal law is critical to ensuring that enforcement is not, and is not seen to be, partisan.

27. As we recently explained to the Parliamentary Joint Committee on Intelligence and Security in its review of the Hate Symbols Act, 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 speech.[31] However, we accept that proportionately framed criminal offences do have a legitimate role in the context of a wider civil scheme addressing serious vilification supported by public education and awareness. Where they are applied, penalties for criminal offences should be calibrated according to offenders' culpability and the objective seriousness of the offending conduct.

The risk that violent rhetoric will lead to violent extremism

28. The Attorney-General's Department (**AGD**) has emphasised that the Bill responds to the increase in Australia's national terrorism threat level to PROBABLE on 5 August 2024.[32] We further note the Department of Home Affairs submission that: '[c]riminalising threats of force or violence remains crucial to combating broader

[28] Rainbow Families, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Criminal Code Amendment (Hate Crimes) Bill 2024 (Cth), (Submission, 7 November 2024).
[29] Executive Council of Australian Jewry, Report on Antisemitism in Australia 1 October 2022 to 30 September 2023 (Report, 2023).
[30] See for example, Islamophobia Register Australia, Islamophobia in Australia IV (2014 – 2021) (Report, 2023). In particular, the report notes verbal intimidation was the most usual form of abuse (45%), followed by graffiti and vandalism (12%).
[31] Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (Submission, 14 August 2023), 9 [12].
[32] Attorney-General's Department, Submission to Senate Legal and Constitutional Affairs Committee, Review of Criminal Code Amendment (Hate Crimes) Bill (Submission, November 2024), 4 [6].

attacks on Australia's values through an increase in anti-government and anti-authority violent extremism'.[33]

29. As we have previously explained, there is no reliable, validated indicator of who will transition from exposure to extremist ideology (which, especially with the online world, is commonplace) to violence (which is very rare).[34] In other words, as Liberty Victoria observe, the underlying assumption that supports these types of changes to criminal frameworks is that there is a 'radicalisation process' often described as a 'conveyer belt' in which individuals become 'increasingly entrenched in their radical ideas and ultimately transition from cognitive extremism to behavioural (violent) extremism'. However, this transition is 'not linear or predictable'.[35]

30. In evaluating the national security rationale for extending the offences contained in sections 80.2A and 80.2B, and introducing new offences for threatening force or violence, the Committee should have regard to the extensive range of existing coercive tools, including criminal offences dealing with preparatory conduct, that can be and are employed to manage the risk of violent extremism. For example, the following sections of the Criminal Code should be considered:

- Section 80.2C contains a more specific offence of advocating terrorism where a person advocates the doing of a terrorist act or the commission of a terrorism offence. The definition of 'advocates' was expanded[36] in 2023 to include instructing on the doing of a terrorist act and praising[37] the doing of a terrorist act in specified circumstances. This offence has been enforced and convictions secured, including in relation to online conduct.[38]
- Section. 83.4 contains the offence of threats to interfere with any person's political right or duty.
- Section 147.2 contains the offence of threatening harm or serious harm to any public official.
- Division 101 contains offences proscribing various terrorism related acts that are engaged by preparatory conduct. For example, possessing things connected with terrorist acts, collecting or making documents likely to facilitate terrorist acts and it is an act done in preparation for, or planning, terrorist acts is an offence.
- Division 102 contains offences dealing with terrorist organisations. It is an offence to be a member of a terrorist organisation, recruit for a terrorist organisation, getting funds to, from or for a terrorist organisation and associating with terrorist organisations.

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[33] Department of Home Affairs, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Criminal Code Amendment (Hate Crimes) Bill 2024 [Provisions], (November 2024).
[34] Law Council of Australia, Submission no 14.1 to Parliamentary Joint Committee on Intelligence and Security, Supplementary Submission: Review of post-sentence terrorism orders: Division 105A of the *Criminal Code Act 1995* (Cth) (Submission, 8 April 2024), 19 [59].
[35] Joint Submission by Muslim Collective and Liberty Victoria, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into Extremist Movements and Radicalism in Australia (Submission, 19 February 2021) 8 [30].
[36] Counter-terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Act 2023, Schedule 3.
[37] The Explanatory Memorandum referred to the example, following the March 2019 Christchurch attacks, of numerous individuals using the internet to share video footage of the atrocity, and the perpetrator's manifesto - idealising the perpetrator and his actions and ideologies.
Explanatory Memorandum, Counter-terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Act 2023, [267].
[38] See for example, online conduct involving sharing videos exhorting violence against targeted groups and glorifying right-wing perpetrators of racially motivated mass killings: *R v Homewood* [2023] NSWDC 3 (the sentence was later appealed in *Homewood v R* [2023] NSWCCA 159).

- Division 119 include offences in relation to foreign incursions and recruitment. It is an offence to recruit persons to join organisations engaged in hostile activities against foreign governments.
- There are a range of restrictive post-sentence orders that can be made in relation to terrorism offenders.
- Control Orders can be applied for in relation to a person (without requiring any criminal conviction) to allow conditions to be imposed on a person to protect the public from a terrorist act, prevent the provision of support for or the facilitation of a terrorist act; preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.[39]

31. We reiterate our view that criminalisation should not be conceived as a primary tool through which to prevent radicalisation and extremism from propagating, or to facilitate behavioural change by disaffected individuals.[40] The imposition of serious criminal sanctions for a person's expression of views—even those which are deeply divisive—can readily entrench division and conflict. Criminalisation should not be conceived as a primary tool to facilitate behavioural change by disaffected individuals. Incarceration may increase the profile of offenders, foster recidivism,[41]and isolate individuals from supports essential to rehabilitation.

Early intervention to prevent radicalisation and extremism

32. 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.[42] We support greater resourcing for the co-ordinated delivery of rehabilitation and prevention programs across Commonwealth and state governments.[43]

33. In a recent submission to the Parliamentary Joint Committee Intelligence and Security, we explained our support for increased funding for community-based wrap-around programs (that can provide case-managed assistance in areas like education, health, mental health, and housing) similar to the NSW Engagement and Support Program.[44] The program is described as taking a 'strengths-based and trauma-informed approach to their work, helping to divert people who are vulnerable to violent extremism, others that support or advocate violent extremism, and others who have engaged in violent extremism'.[45] We note that referrals may be made by government and non-government agencies in relation to individuals who are assessed to be vulnerable to engaging in violent extremism.

[39] Criminal Code, Division 104.
[40] Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into Extremist Movements and Radicalism in Australia (Submission, 22 January 2021), 3 [10]-[11].
[41] See for example, Queensland Productivity Commission, *Final Report: Inquiry into Imprisonment and Recidivism* (August 2019): <https://s3.treasury.qld.gov.au/files/Imprisonment-Volume-1-final-report.pdf>.
[42] The Law Council recently considered international literature on countering violent extremism related rehabilitation programs: Law Council of Australia, Submission no. 14.1 to the Parliamentary Joint Committee on Intelligence and Security, Supplementary Submission: Review of post-sentence terrorism orders: Division 105A of the *Criminal Code Act 1995* (Cth) (Submission, 8 April 2024).
[43] Refer to Justice Project findings?
[44] Law Council of Australia, Submission no 14.1, Supplementary Submission to Parliamentary Joint Committee on Intelligence and Security, Supplementary Submission to Parliamentary Joint Committee on Intelligence and Security (Supplementary Submission, 8 April 2024), 18.
[45] NSW Government, NSW Engagement and Support Program (ESP) A Different Pathway (Online, 2024) accessed at: https://dcj.nsw.gov.au/documents/resource-centre/nsw-engagement-and-support-program/esp-referral-form.pdf

34. We reiterate our view that the component of funding under the Federal funding agreement for the Living Safe Together Intervention Program should be increased.[46]

Long term resourcing for an anti-racism framework

35. We underline the importance of the Australian Government continuing to pursue other strategies, such as educational programs to promote inter-communal harmony and understanding.[47] In this regard, we highlight the important findings and recommendations of the recently released report by the Federation of Ethnic Communities' Councils of Australia (**FECCA**) commissioned by the Australian Human Rights Commission: *An Anti-Racism Framework: The Perspectives of Multicultural Australia*.[48]

36. In particular, we highlight FECCA's recommendations calling on the Australian Government to support a whole-of-society anti-racism agenda, enhance preventative and redress mechanisms to tackle racism in schools, and introduce a federal human rights act to address the intersections of discrimination and to create national consistency around protection of human rights.

Recommendations

- **The Commonwealth Government should increase resourcing for community-based countering violent extremism programs. The component of funding under the Federal funding agreement for the Living Safe Together Intervention Program should be increased.**
- **The Commonwealth should provide additional, long-term resourcing for the initiatives identified in the report '*An Anti-Racism Framework: The Perspectives of Multicultural Australia*'.**

Implementation concerns

37. As the Explanatory Memorandum acknowledges, it is state and territory law enforcement agencies who will most often be first responders in a majority of circumstances to which these offences will apply.[49] Section 80.6 of the Criminal Code states that Division 80 does not apply to the exclusion of a law of a state or territory, meaning that the expanded range of Commonwealth criminal offences in Division 80 will operate alongside existing criminal offences at state and territory levels. For example, the New South Wales offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.[50]

38. We underline the risk that given the complex drafting of the offences within Division 80, there is the risk of inconsistent application of the Commonwealth offences across jurisdictions. This risk is amplified by the evolving landscape of state and territory offences covering substantially similar conduct. As is explained at

[46] Law Council of Australia, Submission no 14.1, Supplementary Submission to Parliamentary Joint Committee on Intelligence and Security, Supplementary Submission to Parliamentary Joint Committee on Intelligence and Security (Supplementary Submission, 8 April 2024), Recommendation 7.
[47] ALRC's Fighting Words, Recommendation 10—5.
[48] Federation of Ethnic Communities' Councils of Australia, An Anti-Racism Framework: Experiences and Perspectives of Multicultural Australia Report on the National Community Consultations (Report, October 2024).
[49] Explanatory Memorandum, 3 [6].
[50] *Crimes Act 1900* (NSW), s. 93Z.

paragraph 118, differences in applicable maximum sentences between relevant offences may result in inconsistent outcomes.

39. In our scrutiny of the Hate Symbols Bill, we emphasised the unnecessary complexity of the drafting of these offences (including complexity arising from the inclusion of an effect-based threshold). We warned that this may impact public understanding and awareness, cause difficulties in policing, and ultimately reduce the intended deterrent effect of the legislation.[51] This uncertainty about the scope of prohibited conduct should have been addressed by clear education and guidance material to accompany the passage of these reforms. A number of our recommendations pertained to providing greater guidance to affected groups, including religious communities more likely to be affected by the prohibition on display of listed terrorist organisation symbols.[52]

40. On 1 October 2024, following public commentary about the application of the offence in Section 80.2HA proscribing display of prohibited terrorist organisation symbols, we issued a media release emphasising the importance of the independent functions of law enforcement agencies in enforcing the law, and the independence of prosecutors in deciding when to commence prosecutions.[53]

41. In our assessment, the perception of selective enforcement of poorly understood Commonwealth criminal offences, in politically heated circumstances, may risk law enforcement agencies being criticised for partisanship and undermine confidence in the rule of law. Given the objective of these measures is to promote social cohesion, it would be counter-productive if one community were to perceive that these laws are being enforced selectively.

42. Should the Bill proceed, we underline the importance of public facing communication explaining the ambit of the offences and the approach that will be taken to enforcing them. There should be specific regard to increasing awareness in communities that are more likely to be affected by these offences. For example, the Parliamentary Joint Committee on Intelligence and Security received cogent submissions from the Muslim community that proscribing terrorist organisation symbols including the Islamic State flag (which contains the Shahada, that is the Islamic creed and oath of faith) risks criminalising the public profession of faith by Muslims.[54]

43. While we accept that the general considerations outlined in the Commonwealth Director of Public Prosecutions' (**CDPP**) Prosecution Policy[55] would apply to decision-making about commencing prosecutions in relation to Division 80 offences, given the impacts on freedom of speech and freedom of religion there is need for more specific and practical guidance. We suggest that the AFP, state and territory police, with the input of the CDPP, issue a joint guidance document with examples of forms of speech that will fall within the ambit of the offence. Given the dominant role

[51] Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (Submission, 14 August 2023), 19 [61].
[52] Ibid, [99] – [100].
[53] Law Council of Australia, Freedom of expression crucial to democracy (Media Release, 1 October 2024).
[54] We refer to the extensive evidence before the Parliamentary Joint Committee on Intelligence and Security that proscribing the central article of faith for Muslims may have unintended consequences
[55] See for example the description of public interest considerations: Commonwealth Director of Public Prosecution's Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process, (Guide, 19 July 2021), [2.8] – [2.10].

that will be played by state and territory police agencies in enforcing these offences, there is a need to promote national consistency in relation to enforcement.[56]

Measures must be taken to encourage reporting from marginalised groups

44. Persons who are likely to bring a complaint to police about urging violence against group conduct may experience barriers to reporting because of their marginalisation and other structural barriers. For example, the New South Wales Law Reform Commission found 'victims may fear they will not be taken seriously or will be further victimised, or both. For many victims, including those from Aboriginal and/or LGBTIQA+ communities, these fears are grounded in long-standing experiences of marginalisation and discrimination from law enforcement authorities'.[57]

45. Again, this reinforces the importance of public-facing community education reassuring members of vulnerable communities that they will be able to report conduct in a culturally safe and trauma informed environment. There is also a need for culturally informed training for police officers to recognise, record and investigate potential instances of serious vilification in a sensitive manner.

Recommendations

- **Should the Bill proceed, there should be a culturally informed public awareness campaign explaining the scope of conduct prohibited by offences in Division 80 of the Criminal Code.**
- **Law enforcement agencies should issue a guidance document with practical examples of forms of speech that will fall within the offences in Division 80 of the Criminal Code.**
- **There should be targeted consultations with media, journalism and arts organisations to improve certainty about how these offences will be applied.**

The need for a holistic review of Division 80

46. Division 80 of the Criminal Code contains offences relating to treason, urging violence, advocating terrorism or genocide, prohibited symbols and Nazi salutes. The Bill would make amendments to Subdivision C of Division 80 which contains offences prohibiting urging violence in the following manner:

- section 80.2(1) makes it an offence to urge the overthrow of the Constitution or Government by force or violence;
- section 80.2(3) makes it an offence to urge interference in Parliamentary elections or constitutional referenda by force or violence;
- section 80.2A contains an aggravated[58] and a simple[59] offence relating to urging violence against groups;

[56] The AFP provided evidence to the Parliamentary Joint Committee on Intelligence and Security that similar training and guidance materials were produced internally by AFP for circulation to relevant law enforcement agencies in states and territories to support consistent enforcement of the prohibited hate symbols offences. Our point is that some of the high level principles articulated in those documents should be released in public and would support greater certainty. See further:
[57] New South Wales Law Reform Commission, Serious Racial and Religious Vilification Report No 151 (Report, September 2024), 39 [3.50].
[58] Criminal Code, s. 80.2A(1).
[59] Criminal Code, s. 80.2A(2).

- section 80.2B contains an aggravated[60] and a simple[61] offence relating to urging violence against members of groups;
- section 80.2C contains offences related to advocating terrorism; and
- section 80.2D contains an offence related to advocating genocide.

47. The context for the evolution of the offences in 80.2(1), (3), 80.2A and 80.2B at the Commonwealth level is set out at Appendix A to this submission.

48. In our assessment, the cumulative effect of the Bill in reducing the intent requirement to recklessness, expanding protected attributes and removing the good faith defence has the potential to significantly enlarge the scope of conduct caught by Subdivision C of Division 80. We are aware of concerns expressed by media and journalist groups that the Bill may lead to a chilling effect on the work of journalists reporting on contentious public events and other people speaking about highly contentious issues.

Consistency

49. Should this Bill proceed, we note that a number of concerning inconsistencies would result in relation to the treatment of similar offending behaviour. For example:

- Offences that may entail greater objective seriousness and harm but carry similar penalties in Division 80 (e.g. advocating terrorism in section 80.2C and advocating genocide in section 80.2D), would retain the good faith defence in section 80.3. However, a person charged with the offence of threatening force or violence against groups would not have a similar defence.
- A person charged with public display of a prohibited Nazi symbol or giving Nazi salute under section 80.2H (subject to a maximum penalty of imprisonment for 12 months), would have the benefit of a public interest exception integrated as an element of the offence by subsection 80.2H(1)(d). However, a person charged with the aggravated offence of urging violence against groups, subject to a maximum penalty of 7 years, would not have a similar defence.

Constitutional validity

50. All the offences contained in Division 80 raise similar issues related to constitutional validity. We note that there is a limitation on the legislative power of the Commonwealth Parliament to make laws that infringe the implied freedom of political communication. The test for whether a law infringes the implied freedom of political communication has been developed in a series of High Court decisions, most recently in *McCloy v New South Wales*[62] and *Brown v Tasmania*.[63] The third limb of the structured proportionality test outlined in *McCloy* and refined in *Brown* asks if the law is reasonably appropriate and adapted to advance that legitimate object.[64] We are concerned that lowering the fault element to recklessness and the removal of the good faith defence, in circumstances where offences with lower maximum penalties retain similar defences or more generous public interest

[60] Criminal Code, s. 80.2B(1).
[61] Criminal Code, s. 80.2B(2).
[62] (2015) 257 CLR 178. ('*McCloy*')
[63] (2017) 261 CLR 328. ('*Brown*')
[64] *McCloy v New South Wales* (2015) 257 CLR 178, 193−5; *Brown v Tasmania* (2017) 261 CLR 328, 362 [104]

exceptions as an element of the offence, may be relevant to the assessment of this proportionality assessment.

51. While we understand the usual reasons for not publishing legal advice received by Government, given the importance of the limitations on human rights, we suggest that any advice on the compatibility of the amendments in the Bill with the implied freedom of political communication be published. Again, this reinforces the benefit from the ALRC reviewing the entirety of Division 80 of the Criminal Code.

Uncertainty in definitional concepts

52. The definitional concepts underpinning offences amended and established by this Bill should be reviewed to ensure greater clarity. The scrutiny of this Bill has highlighted uncertainty about the clarity of definitional concepts employed in Division 80, including the definition of 'urges' and 'use of force or violence'.[65]

53. We note that the ALRC's rationale for leaving these key terms undefined was based on two assumptions: first, the ALRC described inclusion of the intent requirement (which the Bill would remove)[66] as addressing '… in an indirect way, concerns about the need for a closer connection between the urging and an increased likelihood of violence eventuating' and second, its recommendation that the trier of fact be required to have regard to the context in which the conduct occurred.[67] The amendments made by the Bill, including removing the good faith defence, make uncertainty in definitional concepts an urgent issue for consideration.

54. We welcome the clarification provided by the AGD that 'use of force' will be interpreted restrictively to only apply to conduct threatening or urging damage to property where it would also involve violence or force against a person.[68] However, we express concern that this restriction on the ordinary meaning of 'use of force' is not expressed in primary legislation or the explanatory memorandum. We recommend it be included in the Explanatory Memorandum.

Recommendations

- **Division 80 of the Criminal Code should be referred to the ALRC for review to ensure consistency and coherence.**
- **Legal advice establishing the compatibility of the Bill with the implied freedom of political communication should be published.**
- **The Explanatory Memorandum should be amended to clarify that the term 'use of force' is not intended to apply to threatening or urging damage to property, except where that damage to property would also involve violence or force against a person.**

[65] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 12 of 2024 (Digest, 18 September 2024), 14 [1.40].
[66] ALRC's Fighting Words, 185 [8.75].
[67] Ibid.
[68] Attorney-General, The Hon Mark Dreyfus KC MP Response to Senate Standing Committee on the Scrutiny of Bills Scrutiny Digest 12 of 2024 (Letter, 8 October 2024). Accessed online: https://www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2024/ministerial_correspondence_d14_24.pdf?la=en&hash=EC1218E5650A24CAD630A23A6FEB7A1D42D8C57F

Specific measures in the Bill

Intent requirement for urging violence offences in Sections 80.2A and 80.2B

55. Items 3, 6, 11, 14 of Schedule 1 to the Bill amend offences contained in sections 80.2A and 80.2B, in Division 80 of the Criminal Code, which cover urging force or violence against a group or a member of a group. The effect of these amendments is to reduce the fault element, with respect to the result of the urging conduct, to recklessness.[69]

56. The Explanatory Memorandum notes that the existing requirement of intent for this element 'sets the bar so high that conduct which is reprehensible enough to appropriately attract criminal liability is not captured by the offences'.[70] There has been insufficient evidence advanced to substantiate this point.

57. Both the Law Society of New South Wales and the Law Institute of Victoria do not, in principle, oppose the removal of the second intent requirement in offences contained in sections 80.2A and 80.2B. However, they express concern about the combined effect of this change with other amendments in the Bill (including removal of the good faith defence).

58. Members of the Law Council's National Criminal Law Committee opposed items 3, 6, 11, 14 of the Bill and reiterate the importance of retaining intention as the mental element in respect of both the urging conduct and knowledge with respect to the result of the urging conduct. Consequently, the relevant person may not intend but does know that there is a substantial and unjustifiable risk that some other person might use force or violence because of what he or she said. The definition of recklessness in section 5.4 of the Code provides 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.

Resulting anomalies in Division 80

59. Should items 3, 6, 11, 14 of Schedule 1 to the Bill be implemented, it is unclear why similar intent requirements should be retained in comparable offences in Division 80 of the Criminal Code. For example, the similar offence in section 80.2 of urging violence against the Constitution would still require the person committing the urging conduct does so intending that force or violence will occur.[71]

60. The offence in section 80.2 has the same maximum penalty as the offences in section 80.2A(1) and 80.2B(1) of 7 years. Similarly, the offence of urging interference in Parliamentary elections or constitutional referenda by force or violence (punishable by a maximum penalty of 7 years) retains the second intent

[69] For example, while a person must still intentionally urge another person/s to use force or violence, instead of doing so intending the force or violence will occur, the bill would amend this mental element to provide that it is sufficient that they are reckless as to whether the force or violence will occur.
[70] Explanatory Memorandum, 24 [12].
[71] Criminal Code, s. 80.2(1)(b).

requirement that the force or violence occur.[72] We note that the Explanatory Memorandum does not provide any justification for this anomaly. These anomalies provide further support for thew above recommendation that the ALRC review Division 80 as a whole.

61. For the reasons outlined above, members of the National Criminal Law Committee concluded that items 3, 6, 11, 14 of Schedule 1 to the Bill should be removed.

Recommendations

- **There should be strengthened justification for items 3, 6, 11, 14 of Schedule 1 to the Bill.**
- **Should items 3, 6, 11, 14 of Schedule 1 to the Bill proceed and the good faith defence is removed, a public interest exception should be inserted into the relevant offences as an element of the offence (as set out below).**

Scope of protected attributes

62. Items 4, 7, 12, 15 would expand the list of protected attributes for existing offences in sections 80.2A and 80.2B to 'sex, sexual orientation, gender identity, intersex status, disability'.

63. The AGD provided evidence that the expansion to gender is '… particularly important in light of a rise in ideologies of increasing concern, such as those relating to the misogynistic involuntarily celibates (or 'incels') who promote extreme forms of misogyny and violence against women'.[73]

64. In principle, the Law Council does not oppose this change, however, for the reasons outlined above, we reiterate the limitations of ad hoc expansion of these criminal offences to address the rise of harmful ideologies including ideologies that seek to justify extreme forms of misogyny and violence against women.

65. While we generally support reviewing and updating criminal law frameworks to ensure compliance with Australia's international obligations, we express concern that the combined effect of the amendments contained in this Bill is to remove existing safeguards and broaden the reach of sections 80.2 A and 80.2B. In this regard, the Parliamentary Joint Committee on Human Rights argued persuasively:[74]

> *… expanding the offences to cover more groups with protected attributes, expands the scope of conduct which may be criminalised … there may be a risk that the amended offence could capture a broader range of conduct in a manner which impermissibly limits the rights to freedom of expression and religion.*

[72] Criminal Code, s. 80.2(3)(b).
[73] Attorney-General's Department, Submission to Senate Legal and Constitutional Affairs Committee, Review of Criminal Code Amendment (Hate Crimes) Bill (Submission, November 2024), 6 [20]
[74] Parliamentary Joint Committee on Human Rights, Human rights scrutiny report (Report 9 of 2024, 10 October 2024), [1.211] 98.

Rationale for retaining political opinion as a protected attribute

66. The Law Council queries the retention of 'political opinion' as a protected attribute in Division 80 of the Criminal Code. We share the concern expressed by the Scrutiny of Bills Committee.[75] We are concerned that there is uncertainty about what is meant by 'political opinion' in the sense of a protected attribute and what would be required for a group to be considered to be distinguishable on the ground of this attribute.

67. We query whether sufficient consideration has been given to why a group distinguishable on the ground of this attribute warrants protection under hate crime laws, considering the paramount importance of upholding freedom of expression in the relation to political opinion (subject, of course, to appropriate limitations). We are not persuaded that the Attorney-General's response to the Scrutiny of Bills Committee that including '… political opinion as a protected attribute would assist individuals and groups in expressing their political opinions without fear of force or violence' provides sufficient certainty.[76]

68. We note the example provided by the Scrutiny of Bills Committee highlighting the over-breadth produced by including political opinion as a protected attribute combined with the removal of the good faith defence:[77]

> *For example, there may be circumstances where a person may encourage others in their group to use force in self-defence if they are aware another group (such as, for example neo-Nazis, who would have the protected attribute of 'political opinion') may seek to harm them at a protest or rally.*

69. Again, in our assessment, this reinforces the need for the ALRC to review Division 80 in its entirety to ensure it remains fit for purpose and does not disproportionately limit freedom of expression.

Recommendations

- **Further clarification should be sought regarding the rationale for retaining political opinion as a protected attribute in urging, and threatening to urge, violence against group offences.**
- **Should the scope of protected attributes be expanded, consideration should be given to:**
  - **reducing the maximum penalties; and**
  - **introducing a public interest exception (as set out below).**

Removal of the good faith defence

70. Item 21 of the Bill would disapply the good faith defence (in section 80.3 of the Criminal Code) with respect to the two existing urging force or violence offences as well as the two new proposed offences.

[75] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 14 of 2024 (Digest, 20 November 2024), [2.208] – [2.211].
[76] Ibid, [2.208].
[77] Ibid, [2.211].

71. The good faith defence captures a range of disparate matters including matters identifying particular elements of article 19 of the ICCPR which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. Specifically, section 80.3 seeks to provide defences for:

- forms of political communication: where a person tries in good faith to show that any of the following persons are mistaken in any of his or her counsels, policies or actions including the Sovereign or an advisor of the Sovereign or a person responsible for the government of another country;[78] pointing out in good faith errors or defects in—for example, the Government of the Commonwealth, a State or a Territory; legislation of the Commonwealth or another country—with a view to reform those errors or defects.[79]
- speech related to freedom of assembly and association: there is a defence for a person who 'does anything in good faith in connection with an industrial dispute or an industrial matter'.[80]
- media freedom: there is a defence for a person who 'publishes in good faith a report or commentary about a matter of public interest'.[81]

72. We agree that the disparate range of matters captured by the defence and its label as a 'good faith' defence does not promote clear messaging. As we explain below, there would be greater certainty and clarity by replicating the approach taken in subsection 80.2H(1)(d) which is to integrate a public interest exception as an element of the offence.

73. We agree with the Australian Human Rights Commission that there is the risk that 'individuals engaging in expressive or critical speech in the context of unpopular or divisive public gatherings or protests could be viewed as sources of incitement or threats against protected groups'. In particular, the Commission compellingly refer to the risk that '[t]his may disproportionately impact on particular groups that engage in protest to have their voices heard, such as First Nations people, exposing them to criminal penalties'.[82]

74. International human rights law also emphasises the importance of flexibility to assess context to the threshold defining restrictions on freedom of expression, incitement to hatred, and for the application of article 20 of the ICCPR. The draft principles for a six part threshold test in the Rabat Plan of Action include:[83]

> *Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated*

[78] Criminal Code, s. 80.3(1)(a).
[79] Criminal Code, s. 80.3(1)(b).
[80] Criminal Code, s. 80.3(1)(e).
[81] Criminal Code, s. 80.3(1)(f).
[82] Australian Human Rights Commission, Submission no 8 to Senate Legal and Constitutional Affairs Legislation Committee, Criminal Code Amendment (Hate Crimes) Bill 2024 (Submission, 7 November 2024), 6 [20].
[83] Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence in Human Rights Committee, Annual Report of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/22/17/Add 4 (11 January 2013), 11 [29(a)].

ALRC's consideration

75. While the ALRC has previously recommended that the good faith defence should be amended so that it does not apply to the offences in section 80.2,[84] this recommendation was made in the context of the ALRC's preferences for a more narrowly drawn offence that does not risk picking up innocuous conduct. In this regard, the ALRC said:[85]

> *Rather than attempt to protect freedom of expression through a 'defence' that arises after a person has been found to satisfy all the elements of the offence, the ALRC believes it would be better in principle and in practice to reframe the criminal offences in such a way that they do not extend to legitimate activities or unduly impinge on freedom of expression in the first place.*
>
> *In other words, the focus should be on proving that a person intentionally urges the use of force or violence (in the specified circumstances), with the intention that the force or violence urged will occur … The ALRC remains of the view that reforms to ensure adequate protection for freedom of expression should focus on intent and context in the application of the offences, rather than on elaborate new or amended defences.*

76. To that end, the ALRC recommended that the Criminal Code should be amended to provide that in determining whether a person intends that the urged force or violence will occur for the purposes of s 80.2(7), the trier of fact must have regard to the context in which the conduct occurred, including (where applicable) whether the conduct was done:[86]

- in the development, performance, exhibition or distribution of an artistic work; or;
- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- in connection with an industrial dispute or an industrial matter; or
- in the dissemination of news or current affairs.

This recommendation was not accepted.

77. The Explanatory Memorandum provides limited justification for this change, simply asserting that 'urging force or violence against people on the basis of their protected attributes can never be done in 'good faith'.[87] However, as the Scrutiny of Bills Committee observed, 'it has not been established why it is necessary to remove the defences entirely from these provisions without providing the court any discretion to consider the circumstances in which the speech was made'.[88]

[84] ALRC's Fighting Words Report, 261 Recommendation 12—1.
[85] ALRC's Fighting Words Report, 259 [12.70] – [12.71].
[86] ALRC's Fighting Words, 12—2.
[87] Explanatory Memorandum, 9 [27].
[88] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 12 of 2024 (Report, 18 September 2024), 14 [1.39].

78. As the ALRC observed, what is critical in the context of urging violence offences is that 'the trier of fact should have regard to the context in which the conduct occurred'.

79. We note with concern that the withdrawal of the good faith defence is apt to lead to inconsistent treatment of similar behaviour depending on which Commonwealth, state or territory offence is charged. This is inconsistent with the rule of law requirement that the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds.[89]

80. For example, a person could be charged, in relation to more serious and culpable conduct, of advocating the commission of a terrorism offence under section 80.2C(1)(a)(ii)—subject to a maximum penalty of imprisonment for 7 years—but still retain the defence for acts done in good faith in section 80.3.[90]

Media freedom

81. We are concerned about the insufficient consideration that has been given to the implications of removing paragraph 80.3(1)(f) in the good faith defence which pertains, in a limited way, to media freedom.

82. This approach is inconsistent with similar offences in the Criminal Code and requires strong justification.[91] In relation to new specific secrecy offences, the 2024 edition of the Guide to Framing Commonwealth Offences requires consideration of offence specific defences to protect public interest journalism (Principle 11).[92]

83. We share the concerns expressed by Australia's Rights to Know Coalition (**ARTK**) that removal of the good faith defence and the failure to 'adopt a single clear exemption for journalism' results in the risk that the Bill will have a 'serious chilling effect on reporting of and commentary'.[93]

84. In particular, the reduction of the mental element in respect of the consequence element to recklessness raises the risk journalists and media workers will have 'cause to fear working on pieces about controversial issues' because they are concerned that 'unrelated third party commenters will user their story as a platform to urge violence'.[94] In this regard, we note the concern expressed by the ARTK:[95]

> *In the ordinary course, journalists and editorial decision makers will weigh this risk against the importance of reporting on public interest issues, and will determine that the public interest outweighs the risk of a reader taking things too far. There are many cases where a "knowing" or "reckless" publication is appropriate, despite the risks, for example, showing footage of a racially charged attack.*

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[89] Law Council of Australia, Policy Statement: Rule of Law Principles (Policy Statement, March 2011), Principle 2.
[90] Criminal Code, s. 80.2C(1)(b)(ii) Note.
[91] See for example, the public interest journalism defence for using a carriage service for inciting trespass on agricultural land, Criminal Code, s. 474.46(2) and s. 474.47(2).
[92] Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Guide, 2024), 99.
[93] Australia's Right to Know Coalition, Submission to Senate Legal and Constitutional Affairs Committee, Inquiry into the Criminal Code Amendment (Serious Vilification and Other Hate Crimes) Bill 2024 (Cth) (Submission, 5 November 2024), 1.
[94] Ibid, 3.
[95] Ibid, 4.

85. We also share the concern expressed by the ARTK regarding uncertainty around the application of these offences to republishing a third party's comments.[96]

86. We note that similar media freedom restricting criminal offences in the Criminal Code are subject to a public interest exception addressing media freedom. This is discussed further below.

Public interest exception

87. For the reasons outlined above, we recommend that the Bill be amended to include a public interest exception as an element of the offences. Namely, it should be an element of the offences in sections 80.2A, 80.2B and the new offences in sections 80.2AA and 80.2BB that the relevant urging conduct is not in the public interest. The Criminal Code states that the prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.[97] While our discussion focusses on the potential chilling effect on journalists, we note that the right to freedom of expression is a right enjoyed by all Australians, and the public interest exception has an important role in that regard.

88. This approach would replicate the approach already taken in Subdivision CA of Division 80 of the Criminal Code established by Parliament under the Hate Symbols Act. We also suggest two refinements outlined below.

89. For example, the offence of public display of prohibited Nazi symbols or giving Nazi salute in section 80.2H of the Criminal Code includes - as an element of the offence - establishing that a reasonable person would consider that certain public interest related matters do not apply.[98] The public interest exception applies if a reasonable person would consider that the relevant conduct is engaged in for a specified purpose that is for a religious, academic, education, artistic, literary or scientific purpose; and not contrary to the public interest.[99] It also applies if a reasonable person would consider that the relevant conduct is engaged in 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 journalistic capacity.[100]

90. In that context, the inclusion of the public interest requirement was justified in the following terms:[101]

> *Read together with new paragraph 80.2H(1)(d), new paragraph 80.2H(9)(b) would have the effect that the offence in new subsection 80.2H(1) does not apply if a reasonable person would consider that a person caused a prohibited symbol to be displayed in a public place for the purpose 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. This paragraph would exempt bona fide journalism from the offence, recognising the critical role that the dissemination of news plays in our democratic society. For example, if a news programme was live broadcasting at a protest at which people*

[96] Ibid, 8: For example, public reporting in 1989, republishing the terms of fatwa calling for the assassination of the novelist Salman Rushdie as a result of Rushdie's allegedly blasphemous novel The Satanic Verses. The ARTK note that '[m]any journalists reported on the Ayatollah's declaration: it was a matter of public interest that such a bold threat had been made by the leader of a country against such a public figure'.
[97] Criminal Code, s. 13.1(1).
[98] Criminal Code, s. 80.2H(1)(d) read alongside s. 80.2H(9).
[99] Criminal Code, s. 80.2H(9)(a).
[100] Criminal Code, s. 80.2H(9)(b).
[101] Explanatory Memorandum, 34 [88].

held signs publicly displaying the Nazi hakenkreuz, it would be inappropriate for journalists and broadcasters reporting fairly and accurately on this event to have to censor their report in order to avoid criminal liability under section 80.2H.

91. If the public interest ground was included as an element of the offence on the basis of '*the critical role that the dissemination of news plays in our democratic society*' in relation to an offence subject to a maximum penalty of 12 months, it is difficult to understand why a similar element should not be included in the context of the more serious urging violence offences.

92. Importantly, the public display of prohibited Nazi symbols or giving Nazi salute in section 80.2H offence also includes an offence specific defence directed to protecting legitimate criticism, that is available if the person genuinely engages in the conduct for the purpose of opposing Nazi ideology, fascism or a related ideology.[102] This covers similar ground to paragraph 80.3(d) in the good faith defence: where a person 'points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters'.[103]

93. Additionally, consideration should be given to making certain amendments to the public interest exception outlined above.

- First, we agree with the Australian Human Rights Commission that there should be greater scope for consideration of the context in which conduct occurred.[104] Noting that section 80.2H(9) already covers public interest conduct pertaining to religious, academic, education, artistic, literary or scientific purposes, we suggest that the listed purposes in section 80.2H(9) be defined non-exhaustively to include:
  - whether the conduct occurred in the course of any statement, publication, discussion or debate made or held for any genuine religious, academic, education, artistic, literary or scientific purpose or any other genuine purpose in the public interest; and
  - in connection with an industrial dispute or an industrial matter.
- Second, as we have previously explained the framing of 'professional journalistic capacity' is unduly restrictive and should be broadened to capture the realities of modern media organisations.[105] In particular, we suggest the following amendments:
  - 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).

[102] Criminal Code, s. 80.2H(10)(f).
[103] Criminal Code, s. 80.3(1)(d).
[104] Australian Human Rights Commission, Recommendation 2.
[105] Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (Submission, 14 August 2023), 28, [96].

Recommendation

- **If the good faith defence is switched off for the existing 'urging force or violence' offences and the new proposed offences, a public interest exception should be incorporated into these provisions as an element of the offence. Consideration should be given to the matters we have set out at paragraph 93.**

New offences for threatening to use force or violence against groups, or members of groups

94. Item 19 would establish new offences (new sections 80.2BA and 80.2BB), punishable by up to five years imprisonment, for threatening force or violence against protected groups and members of groups. It would also be an offence punishable by seven years' imprisonment to do the same conduct with the added requirement that the threat, if carried out, would threaten the peace, order and good government of the Commonwealth.

95. The Law Council's National Human Rights Committee, the Law Society of New South Wales did not oppose, in principle, the introduction of these new offences.

96. The Law Council's National Criminal Law Committee did not support the introduction of these new offences on the basis that they have not been established to be necessary.

Mental element

97. Referring to the discussion above regarding removing the second intent requirement in the existing offences in , we note with concern that—while there is a mental element of intention with respect to the threatening conduct—the mental element in relation to the remaining three elements is unjustifiably low:

- **Recklessness**—the targeted group is distinguished by race, religion, sex, sexual orientation, gender identity, intersex status, disability, nationality, national or ethnic origin or political opinion; and
- **Strict liability**—A reasonable member of the targeted group would fear that the threat will be carried out; and
- **Recklessness**—(for the aggravated offence punishable by 7 years imprisonment) the threat, if carried out, would threaten the peace, order and good government of the Commonwealth.

98. Again, members of the National Criminal Law Committee consider that maintaining intention provides an important protection for the right to freedom of expression in practice and enables consideration of the context in which the communication is made. This would also be consistent with the ALRC's reasoning about maintaining the mental element of intention to ensure a closer connection between the urging conduct and an increased likelihood of violence eventuating.

99. While the Victorian Government has recently announced proposals to amend the *Racial and Religious Tolerance Act 2001* (Vic) to incorporate an effects-based test,[106] we note that currently the Victorian offence in section 24(1) refers to *intentional* conduct that the offender *knows* is *likely to threaten*, or incite others to threaten, physical harm towards that other person or class of persons or the

[106] Victorian Government, Response to the Inquiry into Anti-Vilification Protections (Online, 15 October 2024).

property of that other person or class of persons. The Committee considers this to be more consistent with the principle that an accused person's state of mind is a key aspect of criminal responsibility and crucial to expressing the offence in a clear manner.

A reasonable member of the targeted group would fear that the threat will be carried out

100. We express reservations about the introduction of a test into the offences proposed under new ss 80.2BA and 80.2BB, which require consideration of whether 'a reasonable member *of the targeted group* would fear that the threat will be carried out' (emphasis added).[107]

101. While it would be expected for an inchoate offence pertaining to threats to require, as an element of the offence, that a reasonable person would fear that the threat would be carried out—it is unnecessary to require that a reasonable person of the targeted group hold that fear. In our assessment this may needlessly overcomplicate the offence. We query the justification for applying strict liability to this element.[108]

102. We note that in contentious circumstances there is not always agreement on what words or acts amount to a threat that a reasonable member of the targeted group would fear would be carried out. There may be a wide range of views held by members of the targeted group and limited objective markers to assist in identifying what a reasonable member of the targeted group believes. As a result, establishing a reasonable person's view, as a member of a targeted group, may be difficult to assess and apply to the particular circumstances of the offence. This confusion may be avoided by simply requiring a reasonable person would fear that the threat will be carried out.

[107] The Bill, 80.2BA(1), (2) and 80.2BB(1) and (2).
[108] The Guide to Framing Commonwealth Offences describes narrow circumstances where applying strict liability to a particular physical element is appropriate: Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Guide, 2024) [2.2.6] 25.

103. We note that submitters to this inquiry have made similar observations. Rainbow Families observed that this approach 'unduly places focus on the way an act is perceived, taking away the focus from the act itself' and that this introduces uncertainty 'as the court must assess a hypothetical reaction for a diverse group, which could vary widely based on individual experiences or vulnerabilities'.[109] The Australian Jewish Democratic Society observes:[110]

> *We have concerns about the "reasonable member" standard as a way of considering certain speech or actions as constituting incitement to violence or terrorism. Taking the Jewish community as an example, there a variety of opinions over the prosecution of the war in Gaza and elsewhere by the Israeli government. This in term affects how statements from people in the Muslim community, or other groups are understood by "a reasonable member" of the Jewish community.*

Recommendations

- **Consideration should be given to strengthening the mental elements applicable to the offences contained in new sections 80.2BA and 80.2BB.**
- **The words 'member of the targeted group' should be removed from new section 80.2BA(1)(c), 2(c) and 80.2BB(1)(d) and 2(d) and replaced with 'person'.**

Amendments to offences of publicly displaying hate symbols

104. Item 20 would insert the words 'sexual orientation, gender identity, intersex status,' into sections 80.2H(7)(b), 80.2HA(7)(b), and 80.2K(6)(b) of the Criminal Code. These sections are offence provisions criminalising, respectively:

- the public display of prohibited Nazi symbols and the giving of a gesture that is a Nazi salute in a public place in relevant circumstances;
- the public display of prohibited terrorist organisation symbols in relevant circumstances; and
- the failure to comply with directions to cease display of prohibited symbols in public.

105. As a result, the effect of these amendments would be to expand the protected attributes protected by the provisions, which broadens the scope of the offences themselves and the range of conduct that will be criminalised.

106. Our concern is that Item 20 would worsen existing uncertainty about the breadth and unnecessarily complex drafting of the public display of prohibited symbols offences.

[109] Rainbow Families, Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Criminal Code Amendment (Hate Crimes) Bill 2024 (Submission, 7 November 2024), 4.
[110] Australian Jewish Democratic Society, Submission no 24 to Senate Legal and Constitutional Affairs Committee, Criminal Code Amendment (Hate Crimes) Bill 2024 [Provisions] (Submission, 6 November 2024), 3.

Retaining the effect-based test

107. The rule of law requires that the intended scope and operation of offence provisions should be unambiguous and key terms should be defined.[111] 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.

108. We reiterate our concern that the elements of the effect-based test are not sufficiently certain to define the ambit of a criminal offence.[112] For example, one of the elements of the offence of public display of prohibited Nazi symbols is that a reasonable person would:

- consider that the display 'involves dissemination of ideas based on racial superiority or racial hatred' or
- 'could incite another person or a group of persons to offend, insult, humiliate or intimidate:' a person because of their race or the members of a group because of their race.[113]

109. As the New South Wales Law Reform Commission has recently concluded:[114]

> *It is not always possible to objectively determine whether conduct is reasonably likely to insult, humiliate, intimidate and/or ridicule. Similar to "hatred", these terms can be subject to interpretation, and community members do not always agree on their meaning. This uncertainty could make it difficult to determine a reasonable person's view to the criminal standard (that is, beyond reasonable doubt) and apply it to the circumstances of the offence.*

[111] Law Council of Australia, Policy Statement: Rule of Law Principles (Policy Statement, March 2011), Principle 1(b).
[112] Law Council of Australia, Review of the Counter-terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (Submission, 14 August 2023), [73] – [77].
[113] Criminal Code, s. 80.2H(1)(c) read alongside s. 80.2H(3).
[114] New South Wales Law Reform Commission, Serious Racial and Religious Vilification Report No 151 (Report, September 2024), 57 [4.65].

110. The Law Council maintains reservations previously expressed about the assumptions underpinning a criminal offence of prohibiting display, possession or trade in prohibited symbols.

- 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 intent (or their actual motive) for possessing or disseminating proscribed symbols.[115]
- 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.[116]
- 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.[117]

Recommendations

- **Should Item 20 be retained in the Bill, there should be administrative guidance issued by the CDPP and law enforcement agencies providing certainty as to how these expanded offences will be enforced.**
- **Consideration should be given to simplifying the effects-based threshold employed in section 80.2H (public display of prohibited Nazi symbols or giving a Nazi salute) and section 80.2HA (public display of prohibited terrorist organisation symbols).**

Children

111. As the measures in the Bill seek to apply criminal offences to children (from the age of 10), the Bill engages and limits the rights of the child.

112. Through its ratification of the United Nations Convention on the Rights of the Child, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[118]

113. We share the concern expressed by the Australian Human Rights Commission that 'children as young as 10 years old may find themselves caught by the operation of these offences' and that the 'lack of adequate safeguards means that the court would have limited ability to consider the circumstances and context of the conduct, which would be inconsistent with the best interests of the child being a primary consideration'.[119] Penalties of imprisonment should only be a last resort for children.[120]

[115] Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (Submission, 14 August 2023), 11.
[116] Ibid.
[117] Ibid, 12.
[118] CRC, art 3.
[119] Australian Human Rights Commission, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Criminal Code Amendment (Hate Crimes) Bill 2024 (Submission, 7 November 2024), 6 – 7 [21].
[120] CRC, art 37.

114. We are aware of examples where the advocating terrorism offence has been charged in relation to children. There are cases of Control Orders being confirmed in relation to subjects who are children.[121] As a result, we consider there to be a real risk that the offences contained in sections 80.2A and 80.2B to be applied in relation to children. In this regard, we cite the observations of the previous Independent National Security Legislation Monitor, Dr James Renwick SC in his 2018 report: *The Prosecution and Sentencing of Children for Terrorism*:[122]

> *Since 2014, the risk of children committing terrorism offences has emerged as a significant issue, as reflected in the marked increases in intelligence interest and police investigations, as well as the number of charges and convictions concerning children. Significantly, over 10% of the total number of persons convicted of terrorism offences since 2014 were under 18 at the time of offending, and a further 25% were between 18 and 25 (meaning that over a third of the total group of federal terrorism offenders were under the age of 25). Significant sentences have also been imposed on children, most seriously, a term of 13 years and 6 months imprisonment for an offender just 14 years of age at the time of the offence.*

115. Again, we reiterate our comments at paragraph 33 regarding the effectiveness of community based early intervention pathways similar to the NSW Engagement and Support Program. In particular, we are aware that this program currently is available to, and accessed by, children (over the age of 10).[123] Crucially, the program is not a 'de-radicalisation' program because it does not seek to alter beliefs of an individual. Instead, it provides a range of tailored support services that address their vulnerabilities and build positive connections to help the client.

116. We note the 2020 positive evaluation of an online program designed reduce the impact of psychosocial risk factors for extremism by bolstering resilience and wellbeing in young people (aged 14-25 years).[124] The key focus of the program was to 'validate feelings of powerlessness, reduce loneliness, promote positive attitudes towards self-help and social support, increase self-awareness and knowledge of self-help'.[125]

[121] A control order cannot apply to children under 14 years old. For people aged at least 14 but under 18, it can apply for a maximum of three months. See for example,
[122] Independent National Security Legislation Monitor, [1.10].
[123] See further, New South Wales, Department of Communities and Justice, ESP Information Sheet (Online, 19 January 2024).
[124] Hilary Miller, Rawan Tayeb, Louisa Welland, Kathryn Cairns, Neal Kriete, Jackie Hallan, Claire Smith, Annie Wylie Preventing violent extremism through mental health promotion: an evaluation of a public health approach (Report, 2020) Sydney: ReachOut Australia.
[125] Ibid.

117. More generally, we refer to a rigorous five year evaluation of initiatives adopted in NSW under the Countering Violent Extremism Program compiled in the report commissioned by NSW Department of Communities and Justice regarding similar early intervention and diversionary pathways.[126] For example, the COMPACT initiative was found to demonstrate 'strong evidence of impact on social cohesion and resilience within NSW communities'.[127] This program provided grant funding to locally based projects focussed on engaging with young people to build community resilience to the impacts of extremist hate and violence on social cohesion and community harmony and address and resolve issues and tensions in NSW arising from overseas conflicts.[128]

Recommendations

- **The offences contained in Division 80 should not be applied to children. In the alternative, the written consent of the Attorney-General and Commonwealth Director of Public Prosecutions should be obtained prior to commencing such a prosecution.**
- **There should be greater resourcing for countering violent extremism early intervention and diversionary programs with a specific focus on children and young people (aged between 10 and 25).**

The risk of inconsistent treatment of offenders

118. We note with concern the potential for inconsistent drafting of comparable offences at Commonwealth and state and territory levels to result in arbitrary outcomes in sentencing. For example,

    - In New South Wales, the offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status under section 93Z of the *Crimes Act 1900* (NSW) is punishable by a maximum penalty of up to 100 penalty units or imprisonment for 3 years (or both).
    - In Victoria, while we acknowledge recently introduced proposals for significant reform, the *Racial and Religious Tolerance Act 2001* (Vic) criminalises inciting and threatening conduct against a person based on their race and religion and imposes a maximum sentence of 6 months imprisonment.[129]

119. It is well-established that Parliament's calibration of the maximum penalty functions as a 'yardstick' for judicial officers in the context of sentencing because it represents the legislature's determination of the seriousness of the offending behaviour.[130] The difficulty with maintaining discrepancies in the maximum penalties applicable to similar Commonwealth and state and territory offences is that it is likely to lead to offenders being treated inconsistently in relation to very similar offending behaviour depending on which offence is charged. This is inconsistent with the rule of law requirement that the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds.[131]

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[126] See generally, ACIL Allen Consulting Report to Department of Communities and Justice (NSW), NSW Countering Violent Extremism Program Evaluation: Final Report (Report, October 2019).
[127] Ibid, 17.
[128] Ibid.
[129] Racial and Religious Tolerance Act 2001 (Vic), s. 24.
[130] *Markarian v The Queen* (2005) 228 CLR 357.
[131] Law Council of Australia, Policy Statement: Rule of Law Principles (Policy Statement, March 2011), Principle 2.

120. In that context, it is difficult to justify the 7-year maximum penalty attached to the current aggravated offences in 80.2A and 80.2B of the Criminal Code and the 7-year maximum penalty attached to the new aggravated offences in sections 80.2BA and 80.2BB.

121. In light of developments across state and territory levels in relation to the development of serious vilification and incitement related offences that overlap with the Commonwealth urging violence offences, there should be periodic review of applicable penalties with a view to improving consistency.

Recommendation

- **There should be periodic review of applicable maximum penalties with a view to ensuring consistency between jurisdictions.**

Evaluating the prevalence of hate crimes across Australia

122. We suggest that consideration be given to the approach taken in the United Kingdom where there is regular public evaluation and reporting on hate crimes statistics.[132] This enables evidence-based assessments about the effectiveness of criminal sanctions and observations about trends in offending behaviour.

123. For example, in the United Kingdom, their annual statistical bulletin observed while there was an overall decrease in hate crime, there was a 25% increase in religious hate crimes compared with the previous year and that this increase was driven by a rise in hate crimes against Jewish people and to a lesser extent Muslims following the Israel-Hamas conflict.[133]

124. In this regard, it is important for the Committee to consider the broader context for hate speech and anti-vilification laws in Australia. In Appendix B we refer to important work done by the AGD and the New South Wales Law Reform Commission towards this objective and make some additional comments.

[132] See for example, United Kingdom Government, Home Office, Official Statistics: Hate Crime, England and Wales year ending March 2024 (Online, 10 October 2024). Accessed at: https://www.gov.uk/government/statistics/hate-crime-england-and-wales-year-ending-march-2024/hate-crime-england-and-wales-year-ending-march-2024#fn:1
[133] Ibid, Key Results.

Work towards a new Law Part Code to promote visibility of hate crimes

125. As a starting point towards achieving the UK model for evaluation, we recommend the Commonwealth consider the recommendation of the New South Wales Law Reform Commission to consider how a new 'Law Part Code' could be adopted to improve collection of data on hate crimes, including where some of the more general Commonwealth or state or territory offences have been charged. In this regard, the New South Wales Law Reform Commission observe:[134]

> *A Law Part Code is a unique code assigned to all New South Wales and Commonwealth offences. Though a Law Part Code usually refers to a specific offence, it can also be used to differentiate between different types of the same offence; for example, differentiating domestic violence offences from other personal violence offences. The Law Part Code enables the collection of data about the charging and prosecution of offences.*

126. Notably, the recently release Anti-Racism Framework highlights the importance of better systems to collect data and monitor racism, as well as to evaluate anti-racism actions.[135]

127. For the reasons outlined above, to replicate that type of public reporting in Australia there would need to be work undertaken towards a national definition of hate crimes. For example, in the United Kingdom, hate crime is defined as 'any criminal offence which is perceived, by the victim or any other person, to be motivated by hostility or prejudice towards someone based on a personal characteristic'.[136]

Recommendations

- **There should be further consultation with state and territory law enforcement agencies towards a national definition of hate crimes.**
- **The Standing Council of Attorneys-General should consider measures to improve data collection in relation to the prosecution of general offences in response to hate crime. Consideration should be given to the proposal advanced by the New South Wales Law Reform Commission.**

[134] New South Wales Law Reform Commission, Serious Racial and Religious Vilification Report No 151 (Report, September 2024), 104 [8.80].
[135] Federation of Ethnic Communities' Councils of Australia, An Anti-Racism Framework: Experiences and Perspectives of Multicultural Australia Report on the National Community Consultations (Report, 2024), 27 Recommendation 11.
[136] Crown Prosecution Service United Kingdom, Crime Info: Hate Crime (Online, undated).

Appendix A

Timeline of important developments in the evolution of sedition related offences in Division 80 of the Criminal Code

Pre 1914	Common law	There are well-established common law principles relating to sedition.[137] Some sedition related criminal offences were codified into statutory offences in states, for example, in Queensland. These provisions became a model for the development of Commonwealth criminal offences.
1914	*Crimes Act 1914* (Cth) *War Precautions Act 1914* (Cth)	The *Crimes Act 1914* (Cth), introduced a number of offences against the government, including treason and incitement to mutiny. The *War Precautions Act 1914* (Cth) empowered the Governor-General to make regulations to proscribe discussion of war aims, alliances, and conscription policy and practice.
1920	*War Precautions Repeal Act 1920* (Cth)	The first sedition offences introduced in the Commonwealth criminal law. The *War Precautions Repeal Act 1920* (Cth) introduced sections 24A to 24F into the *Crimes Act 1914* (Cth). For example, section 24C established an indictable offence for engaging in, or agreeing or undertaking to engage in, a seditious enterprise; conspire with any person to carry out a seditious enterprise; counsel, advise or attempt to procure the carrying out of a seditious enterprise. The maximum penalty was imprisonment for 3 years. The definition of 'seditious intention' included matters such as, relevantly, 'to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth'.[138] **Origin of good faith defence** The definition of seditious intention also included a good faith defence. Section 24A(2) stated that it shall be lawful for any person to, among other things, 'to endeavour in good faith to show that the Sovereign has been mistaken in any of his counsels;' 'to point out in good faith errors or defects in the Government or Constitution of the United Kingdom or of any of the King's Dominions or of the Commonwealth as by law established, or in legislation, or in the administration of justice, with a view to the reformation of such errors or defects; and 'to point out in good faith in order to their removal any matters which are producing or have a tendency to produce feelings of ill-will and hostility between different classes of His Majesty's subjects'.

[137] *Boucher v The King* [1951] 2 DLR 369 cited with approval in *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury* [1991] 1 QB 429, 453. See more generally, ALRC's Fighting Words Report 50 – 53.
[138] *War Precautions Repeal Act 1920* (Cth), inserting s. 24A(1)(g) into the *Crimes Act 1914* (Cth).

		Prime Minister Billy Hughes clarified that the intent of the good faith defence was modelled on similar provisions in the Queensland Criminal Code: '[t]hese provisions will give ample freedom to the citizens of this country to obtain redress of all grievances, and to secure by lawful means any reforms which they may deem to be necessary'.[139]
1986	*Intelligence and Security (Consequential Amendments) Act 1986* (Cth)	This Act made amendments to make clear that the prosecution carried the burden of proving an accused had a 'seditious intention' in relation to the offences. This Act also removed certain provisions referring to exciting disaffection in the United Kingdom or the King's Dominions.
1991	Committee of Review of Commonwealth Criminal Law 1991 Chaired by Sir Harry Gibbs (the **Gibbs Committee**)	The Gibbs Committee generally supported retaining certain sedition related offences. The Gibbs Committee's final recommendation was that it should be a crime, punishable by a maximum of seven years' imprisonment to incite by any form of communication: • the overthrow or supplanting by force or violence of the Constitution or the established Government of the Commonwealth or the lawful authority of that Government in respect of the whole or part of its territory; • the interference by force or violence with the lawful processes for Parliamentary elections; or • the use of force or violence by groups within the community, whether distinguished by nationality, race or religion, against other such groups or members thereof.
2005	*Anti-Terrorism Act (No 2) 2005* (Cth)	The Act made a number of consequential changes including establishing key planks in Australia's national security framework such as a new regime to allow for 'control orders', establishing the preventative detention order regime, establishing the regime of stop, question, search and seize powers exercisable at airports and other Commonwealth places and changes to offences of financing of terrorism. Most relevantly, Schedule 7 removed the previous sedition offences in the *Crimes Act 1914* (Cth). The new sedition related offences of sedition in the Criminal Code applies to a person who urges violence against the Constitution or Government, urges interference in Parliamentary elections, urges violence within the community or urges others to assist the enemy. This was justified on the basis of implementing the Gibbs Report.[140] Including three offences that prohibited 'urging others to use force of violence': • to overthrow the Constitution or governmental authority;

[139] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 1920, 6791 (William Morris Hughes, Prime Minister and Attorney-General).
[140] Explanatory Memorandum, Anti-Terrorism Act (No 2) 2005 (Vic), 88

		• to interfere with lawful parliamentary elections; or • to set one group in the community (distinguished by race, religion, nationality or political opinion) against another group; and • two offences that prohibited 'assisting' an enemy at war with Australia, or an entity engaged in armed hostilities against the Australian Defence Force (ADF)
2006	Attorney-General Philip Ruddock refers to ALRC	Then Attorney-General, Philip Ruddock made a reference to the ALRC to consider, among other things, whether the amendments in Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* (Cth), including the sedition offence and defences in sections 80.2 and 80.3 of the Criminal Code Act 1995, effectively address the problem of urging the use of force or violence and related matters.
2006	July 2006 Fighting Words Report: A Review of Sedition Laws in Australia	Key ALRC recommendations included that the Australian Government should remove the term 'sedition' from federal criminal law. To this end, the headings of Part 5.1 and Division 80 of the Criminal Code (Cth) should be changed to 'Treason and urging political or inter-group force or violence', and the heading of s 80.2 should be changed to 'Urging political or inter-group force or violence' The ALRC make a number of recommendations directed to establishing a more proportionate criminal offence proscribing urging inter-group force or violence, including, among other recommendations:
13 September 2006	Government Response to ALRC	The Government's in its response to the ALRC's Fighting Words Report accepted most recommendations.
2010	*National Security Legislation Amendment Act 2010* (Cth)	Schedule 1 to the *National Security Legislation Amendment Act 2010* (Cth) made a number of amendments implementing recommendations in the ALRC's *Fighting Words* Report. • the removal of references to the term 'sedition' from the Criminal Code and replacing it with references to 'urging violence offences', including in the heading to Part 5.1 and Division 80 of the Criminal Code (Cth) (Recommendation 2–1); and • Item 35 inserted new offences of 'urging violence against groups' and 'urging violence against members of groups'. Relevantly, these amendments clarified that the mental element with respect to the urging conduct is intention. It also introduced the second intent requirement recommended by the ALRC (namely, the person intend that force or violence will occur). These sections of the Act commenced on 24 November 2010.

Appendix B

Broader hate speech and anti-vilification laws in Australia

The criminal context

128. We refer to the helpful table prepared by the AGD summarising relevant civil provisions and some criminal offences.[141] We suggest that the Committee should have regarding to a broader range of criminal offences that may also encompass urging violence against groups.

129. We agree with the New South Wales Law Reform Commission that 'more could be done to improve the visibility and to track the effectiveness of the wider criminal justice response to hate crime'.[142] Governments across Commonwealth, state and territory levels should collaborate to consider measures to improve data collection in relation to the prosecution of general offences in response to hate crime.

130. In Australia, the distribution of powers under the Australian Constitution leaves responsibility in relation to criminal law, including offences against the person, with state and territory governments. The Commonwealth can only pass laws with criminal consequence as a necessary incident of some other head of power. Offences against the person in states and territories often including multi-tiered offences with proportionately calibrated penalties. For example, it is an offence in Victoria punishable by up to 10 years imprisonment to make a threat to kill another person; it is an offence to make a threat to inflict serious injury punishable by up to 5 years imprisonment.[143]

131. We recognise the special focus of the urging violence offences in the Criminal Code on conduct directed to groups or institutions. However, it should be borne in mind that there are a range of existing generally expressed offences that could overlap with the urging violence offences. For example, In NSW a range of criminal offences might be able to be prosecuted in relation to urging violence related conduct:

- *Crimes Act 1900 (NSW)*
  - Sending documents containing threats, section 31;
  - Riot, section 93B;
  - Affray, section 93C
  - Displaying Nazi symbols, section 93ZA;
  - Threatening to destroy or damage property, section 199
  - Intimidation or annoyance by violence or otherwise, section 545B;
- *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*
  - Stalking or intimidation with intent to cause fear of physical or mental harm, section 13;
- *Summary Offences Act 1988 (NSW)*
  - Offensive conduct, section 4;
  - Offensive language, section 4A;

[141] Attorney-General's Department, Submission no 28 to the Senate Legal and Constitutional Affairs Committee, Attorney-General's Department Submission (Submission, November 2024), Attachment A 11.
[142] New South Wales Law Reform Commission, Serious Racial and Religious Vilification Report No 151 (Report, September 2024), 9 [1.48].
[143] *Crimes Act 1958* (Vic), s. 20 (threat to kill) and 21 (threat to inflict serious injury).

132. More recently, some states have sought to prohibit engaging in prohibited behaviours within certain areas in proximity to premises at which abortions are provided (including communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety).[144] The High Court recently upheld the constitutional validity of this offence on the basis that the offence did not impose a disproportionate burden on the implied right to freedom of expression protected in the Australian Constitution.[145]

Racial and religious hatred may be taken into account as an aggravating factor on sentence

133. States and territories already have provisions empowering judicial officers to consider racial motivation as an aggravating factor in sentencing an offender for any crime (for example, an offence against the person).[146] In applying such provisions in the context of sentencing, Hall J said: '[i]n any multi-cultural society, criminal acts involving racial violence ought to be strongly deterred and this fact taken into account in a case such as the present when sentencing an offender in respect of such conduct …'[147]

Aggravated offences: penalty enhancement model

134. Some jurisdictions such as Queensland and WA adopt a penalty enhancement model that increases the maximum penalties applicable to certain offences if prescribed aggravated circumstances are established. These prescribed aggravated circumstances include for example, that the offence was motivated by or involved demonstration of hatred or hostility. For example, in Queensland an aggravated offence may be committed where an offender commits a prescribed general offence, such as assault, and the offender was wholly or partly motivated by hatred or serious contempt toward a person or group of persons.[148]

Laws prohibiting unlawful assembly and riot

135. We note that some submitters are concerned about displays of offensive behaviour in public spaces in the context of recent political protests.[149] Without commenting on any particular incident, with some exceptions,[150] '[m]ost legislative interferences with the right of public assembly are contained in state and territory laws including, for example, unlawful assembly and public order offences where there is some form of 'public disturbance', such as riot, affray or violent disorder'.[151]

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[144] *Public Health and Wellbeing Act 2008* (Vic), s. 185D read alongside 185B(1) definition of 'prohibited behaviour'.
[145] *Kathleen Clubb v Alyce Edwards & Anor; John Graham Preston v Elizabeth Avery & Anor* [2019] HCA 11.
[146] See for example, *Crimes (Sentencing Procedure) Act 1999* (NSW), s21A(2)(h).
[147] *Holloway v R* [2011] NSWCCA 23, Hall J, [32].
[148] *Criminal Code* (Qld) s 52B.
[149] See for example, the description of an incident in the forecourt of the Sydney Opera House on 9 October 2023 where protesters are alleged to have chanted "F**k the Jews" cited in Executive Council of Australian Jewry, Inquiry into the Criminal Code Amendment (Hate Crimes) Bill 2024 (Submission, 29 October 2024), 7.
[150] See for example for Commonwealth offences: *Public Order (Protection of Persons and Property) Act 1971* (Cth), s. 6 (assemblies involving violence or apprehension of violence in a Territory or is wholly or partly on Commonwealth premises). Or Subdivision J of the Criminal Code (Offences relating to use of carriage service for inciting trespass, property damage, or theft, on agricultural land).
[151] Australian Law Reform Commission, [6.81].

State and territory serious vilification and incitement offences

136. We refer to the helpful table of criminal vilification offences and aggravated general offences in both Australian, and selected overseas jurisdictions prepared by the New South Wales Law Reform Commission.[152]

137. As the Explanatory Memorandum acknowledges, there is likely to be a substantial overlap between the fact patterns intended to be regulated by the urging violence offences amended by the Bill, the new threatening offences and some existing state and territory offences. We note that presently there is no criminal vilification offence in either the Northern Territory or Tasmania.

138. The Law Council does not express a view on the merits of introducing any serious vilification offence at the Commonwealth level. However, we note that our Constituent Bodies are currently considering and responding to important changes in this area.

[152] New South Wales Law Reform Commission, Serious Racial and Religious Vilification Report No 151 (Report, September 2024), Appendix C, 113 – 122.