



Australian
Human Rights
Commission

Criminal Code Amendment (Hate Crimes) Bill 2024

Australian Human Rights Commission

Submission to the Senate Legal and Constitutional Affairs
Legislation Committee

7 November 2024

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

Australian Human Rights Commission
Criminal Code Amendment (Hate Crimes) Bill, 7 November 2024

Contents

1	Introduction	3
2	Recommendations.....	3
3	Expanded protection of targeted groups	4
4	New offences of threatening force or violence	5
5	Removal of safeguards.....	5

1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to make this submission to the Inquiry of the Senate Legal and Constitutional Affairs Legislation Committee on the Criminal Code Amendment (Hate Crimes) Bill 2024.
2. The Commission is Australia's National Human Rights Institution. It provides independent and impartial services to promote and protect human rights and fundamental freedoms.
3. The Commission undertakes a range of policy development and research tasks that aim to promote compliance with Australia's human rights obligations, while also investigating and conciliating complaints of unlawful discrimination and breaches of human rights.
4. The Commission plays an important national role in the promotion of core human rights principles in Australia.

2 Recommendations

5. The Commission makes the following recommendations:

Recommendation 1

The proposed amendments to ss 80.2H, 80.2HA and 80.2K of the *Criminal Code Act 1995* (Cth) include 'disability' as a protected group.

Recommendation 2

Sections 80.2A, 80.2B, 80.2BA and 80.2BB of the Act be amended to require the consideration of the context in which the conduct occurred in order to determine whether the elements of the offence have been made out, including whether the conduct was done:

- (a) in the development, performance, exhibition or distribution of an artistic work
- (b) 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
- (c) in connection with an industrial dispute or an industrial matter, or
- (d) in the dissemination of news or current affairs.

3 Expanded protection of targeted groups

1. The Commission welcomes the expansion of the existing offences in ss 80.2A, 80.2B, 80.2H, 80.2HA and 80.2K of the Act to include protections for additional targeted groups.
6. Sections 80.2A and 80.2B of the Act would be expanded to criminalise the urging of violence against groups or members of groups that are distinguished by sex, sexual orientation, gender identity, intersex status, and disability.
7. Sections 80.2H, 80.2HA and 80.2K of the Act would be expanded to criminalise the public display of prohibited Nazi symbols, including giving the Nazi salute, and terrorist organisation symbols that are likely to offend, insult, humiliate or intimidate members of a group distinguished by sexual orientation, gender identity, and intersex status.
8. These amendments recognise that these targeted groups are also increasingly subjected to behaviours that expose them to risks of force and violence and require additional protections. The amendments also recognise the intersectionality of protected attributes and that individuals may identify with a combination of the attributes protected under these provisions. The Commission notes the preferred terminology of ‘innate variations of sex characteristics’, rather than ‘intersex status’, but acknowledges the alignment of these provisions with terminology of the *Sex Discrimination Act 1984* (Cth).
9. Significantly, the amendments to ss 80.2H, 80.2HA and 80.2K of the Act do not propose to include persons with disability as a protected group. Persons with disability are a group that have been specifically targeted in conflict, for example, the Nazi T4 Program which involved experimentation on, and the execution of, persons with disability. The public display of prohibited Nazi symbols, the Nazi salute, and terrorist organisation symbols are likely to offend, insult, humiliate or intimidate persons with disability, in addition to being exposed to risks of violence. Persons with disability are equally entitled to protections under these provisions.
10. The proposed amendments, with the addition of ‘disability’ as a protected attribute in ss 80.2H, 80.2HA and 80.2K of the Act, would support and promote equality, inclusion and respect, and would align more closely with Australia’s anti-discrimination laws.

Recommendation 1

The proposed amendments to ss 80.2H, 80.2HA and 80.2K of the Act include ‘disability’ as a protected group.

4 New offences of threatening force or violence

11. The Bill would introduce two new offences in ss 80.2BA and 80.2BB of the Act, which criminalise threatening force or violence against groups and their members that are distinguished by race, religion, sex, sexual orientation, gender identity, intersex status, disability, nationality, national or ethnic origin or political opinion. These amendments also acknowledge that individuals may identify with a number of those attributes in combination.
12. The Commission welcomes the criminalisation of threatening force or violence, in addition to the existing offences of urging others to use force or violence. This amendment recognises that, in addition to urging violence, threats of force or violence against protected groups or individuals are not accepted in Australian society and emphasises that everyone has the right to safety and physical security.
13. As set out in the Statement of Compatibility with Human Rights, this will also allow law enforcement to intervene before threats are actualised and individuals are physically harmed.¹
14. These new offences, along with the expansion of protections for the targeted groups under the provisions discussed above, recognise the profound harm that hateful conduct and vilification inflict on the physical and psychological wellbeing of individuals and communities.

5 Removal of safeguards

15. The Bill seeks to amend one of the fault elements for the offences ss 80.2A and 80.2B of the Act (urging of force or violence against particular groups and their members) from the person ‘intending that force or violence will occur’ to committing the act ‘reckless as to whether force or violence will occur’.
16. This amendment would broaden the scope and applicability of the offence and remove the requirement to prove intent.² Instead, the offence would apply where the person ‘is aware of a substantial risk’ that the force or violence will occur and, ‘having regard to the circumstances known to him or her, it is unjustifiable to take the risk’.³
17. While the lowering of this threshold would promote certain human rights, including the right to life and security of the person, the right to equality and non-discrimination, the right to protection from exploitation, violence and abuse, the lower culpability standard and subjective interpretation of whether a person is ‘reckless as to whether force or violence may occur’

Australian Human Rights Commission

Criminal Code Amendment (Hate Crimes) Bill, 24 October 2024

and its broader application has the potential to impose limitations on other human rights, including the right to freedom of expression. It may also be possible that the offence could be applied in a way that infringes on the rights to freedom of assembly. The current requirement to prove intent serves as a safeguard to preserve these other human rights and ensure that the offence is only charged and prosecuted in circumstances appropriate to warrant a penalty of up to 7 years imprisonment.

18. The Bill also proposes to exclude the operation of the defence for acts done in good faith in s 80.3 of the Act for the existing offences in ss 80.2A and 80.2B (urging force or violence) and the proposed new offences in ss 80.2BA and 80.2BB (threatening force or violence). This is because, as stated in the Explanatory Memorandum, ‘there are no circumstances in which urging [or threatening] force or violence can truly be done “in good faith”’.⁴
19. As noted by the Australian Law Reform Commission (ALRC) in its 2006 report, the defence of good faith in s 80.3 was intended to apply to offences of sedition and was introduced at a time when the offence did not require proof of intention.⁵ In the Commission’s view, s 80.3 does not easily reconcile with the offences in ss 80.2A, 80.2B, 80.2BA and 80.2BB. While limited in scope and effect, the disapplication of this defence for these offences removes an avenue for the court to consider the circumstances and context of the conduct and may result in further limitations on the rights of freedom of expression and freedom of assembly in ways that could inhibit legitimate debate, critique and expression.
20. There 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. This 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. Limitations on these rights are permissible where provided by law and when necessary to protect the rights or reputations of others, national security, public order, or public health or morals. However, limitations on human rights must be reasonable, necessary and proportionate.
21. The Commission is also concerned that children as young as 10 years old may find themselves caught by the operation of these offences.⁶ 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

Australian Human Rights Commission
Criminal Code Amendment (Hate Crimes) Bill, 7 November 2024

inconsistent with the best interests of the child being a primary consideration.⁷

22. In the Commission's view, it is important for clarity in the interpretation and application of these laws, with sufficient scope for the courts to consider the context and circumstances of the conduct. The Commission would support amendments consistent with those proposed by the ALRC in its 2006 report to then s 80.2 that would require consideration of:

the context in which the conduct occurred, including (where applicable) whether the conduct was done:

- (a) in the development, performance, exhibition or distribution of an artistic work; or
- (b) 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
- (c) in connection with an industrial dispute or an industrial matter; or
- (d) in the dissemination of news or current affairs.⁸

23. The Commission reiterates the importance of considering harm-based, community-centric approaches when determining whether action is taken against hateful conduct.

24. The Commonwealth Director of Public Prosecution (CDPP) will have regard to the *Prosecution Policy of the Commonwealth* to satisfy themselves that there is sufficient evidence to justify a prosecution.⁹

25. A key consideration of the Policy is that, once the prosecutor is satisfied there is sufficient evidence to justify a prosecution, they then determine whether 'the public interest' requires the prosecution be pursued.¹⁰ A non-exhaustive list of public interest factors to be considered is contained in the Prosecutions Policy, including the effect on community harmony and public confidence in the administration of justice,¹¹ and the actual or potential harm, occasioned to an individual.¹²

26. Clause 2.10 of the Prosecution Policy indicates that the applicability of, and weight to be given to, these and other factors will depend on the particular circumstances of each case.

Recommendation 2

Sections 80.2A, 80.2B, 80.2BA and 80.2BB of the Act be amended to require the consideration of the context in which the conduct occurred in

Australian Human Rights Commission

Criminal Code Amendment (Hate Crimes) Bill, 24 October 2024

order to determine whether the elements of the offence have been made out, including whether the conduct was done:

- (a) in the development, performance, exhibition or distribution of an artistic work; or
- (b) 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
- (c) in connection with an industrial dispute or an industrial matter; or
- (d) in the dissemination of news or current affairs.

¹ Statement of Compatibility with Human Rights [24]

<https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7240_ems_5018e217-732d-4cdc-8c9d-45c46fd58bd1/upload_pdf/JC014036.pdf;fileType=application%2Fpdf>.

² *Criminal Code Act 1995* (Cth), s 5.2.

³ *Criminal Code Act 1995* (Cth), s 5.4.

⁴ Explanatory Memorandum [10], [16]

<https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7240_ems_5018e217-732d-4cdc-8c9d-45c46fd58bd1/upload_pdf/JC014036.pdf;fileType=application%2Fpdf>.

⁵ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC Report 104, 2006) 256-257 <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC104.pdf>

⁶ *Criminal Code Act 1995* (Cth), s 7.2.

⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 171 (entered into force 2 September 1990), article 3 <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>>.

⁸ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC Report 104, 2006) 261 <<https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC104.pdf>>.

⁹ Commonwealth Director of Public Prosecution, *Prosecution Policy of the Commonwealth - Guidelines for the Making of Decisions in the Prosecution Process* (as updated 19 July 2021), [2.4] <<https://www.cdpp.gov.au/system/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf>>.

¹⁰ Commonwealth Director of Public Prosecution, *Prosecution Policy of the Commonwealth - Guidelines for the Making of Decisions in the Prosecution Process* (as updated 19 July 2021), [2.8] <<https://www.cdpp.gov.au/system/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf>>.

¹¹ Commonwealth Director of Public Prosecution, *Prosecution Policy of the Commonwealth - Guidelines for the Making of Decisions in the Prosecution Process* (as updated 19 July 2021), [2.10(g)] <<https://www.cdpp.gov.au/system/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf>>.

¹² Commonwealth Director of Public Prosecution, *Prosecution Policy of the Commonwealth - Guidelines for the Making of Decisions in the Prosecution Process* (as updated 19 July 2021), [2.10(p)] <<https://www.cdpp.gov.au/system/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf>>.