



12 December 2024

Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
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Dear Committee Secretary

Inquiry into the *Criminal Code Amendment (Hate Crimes) Bill 2024* (“the Bill”) – Reply to Questions on notice from Senator Paul Scarr

Further to our appearance at the Inquiry on 2 December 2024, we provide the following responses to questions on notice from Senator Paul Scarr.

Question 1:

The Australian Human Rights Commission in its submission proposed that ‘consideration be given to the context in which the conduct occurred, including whether or not it was part of some artistic work, or 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 in the dissemination of news or current affairs. Can I ask you to take that on notice? I'm interested in any initial view you've got.’ (pp. 25)

Response:

The question arises because the Bill proposes to remove the defences that are currently available under section 80.3 of the *Criminal Code* to the offences in sections 80.2A and 80.2B. The proposed new offences in sections 80.2BA and 80.2BB would also expressly not be subject to any of the section 80.3 defences.

Those defences protect an accused person from criminal liability for acts done in good faith, for example “for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest”.

The Australian Human Rights Commission is concerned that if the section 80.3 defences are not available to a person charged under sections 80.2A or 80.2B or proposed sections



80.2BA and 80.2BB, it would be unjust to convict the person if a defence under section 80.3 could have been established if such a defence had been available.

In our view, that concern is unfounded because in the circumstances in which a good faith defence could be established, the mental elements of the offences could not be made out in the first place. In any particular case, in considering whether those mental elements have been proved to the criminal standard, a court would as a matter of course look at all the circumstances in which the alleged conduct occurred.¹ This would include *any* kind of circumstance that would tend to negative an allegation of an intention to urge violence or recklessness in urging violence, for example evidence that an impugned act was done for a genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest.

Nevertheless, out of abundant caution, and as a way of aiding public understanding of the law, we believe there would be value in making express and non-exhaustive provision for the full breadth of circumstances to which a court might have regard.

To assist the Committee, we have taken the liberty of preparing a draft Code of provisions that would address this specific requirement as well as the other matters we have dealt with in our written submission. A copy of that draft Code appears as an Appendix at the end of this letter. Subsection (4) of our draft would provide a court with the discretion to consider a broad range of contextual and other circumstantial matters in assessing the evidence.

Question 2:

Some previous witnesses, from Equality Australia, raised an issue around expanding the scope of the offence to include threats of damage against property owned by people who have the attribute. It might be a business premises. We've seen awful, despicable acts in the eastern suburbs of Sydney recently. I'm interested in your view in respect to that, which is a manifestation of hate crime which is occurring today—we're seeing it today. Secondly, there is the idea of potentially expanding the scope of the offence to include people who are providing support to a community or are associated with a community. They might not have the particular attribute themselves, but it might be a leader who's giving support to the community and is receiving threats because they're giving that support. It might be someone who's potentially hosting an event for the community and receiving threats of violence or

¹ For example, please refer to 'Criminal Trial Courts Bench Book', Suggested Direction 3-210, *Judicial Commission of NSW*, available at: <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/intention.html>, accessed on 9/12/2024.

force because they're hosting that event. I'm interested in your views on those two issues.' (pp. 25 – 26)

Response:

We have no difficulty with the principle underlying the **first recommendation** by Equality Australia. If a threat of violence against people on the basis of a protected attribute is to be proscribed, then a threat of damage to property on that basis should also be proscribed.

By way of illustration, in May 2024, the words 'Jew Die' were spray painted on the outside wall of a Jewish school in Melbourne.² This damage to property directed at a group of people on the basis of their Jewish identity, was clearly done with the intention of promoting hatred towards, or harassing them for being Jewish, and it had the intended effect.

Where an act of damage to property cannot be demonstrated to have had the effect of promoting, or being reasonably likely to promote, such hatred or harassment directed at the person or group of people, there remain provisions in the criminal law such as section 195 of the *Crimes Act 1900* (NSW) that would apply to intentional damage of property.

The draft Code which we have prepared (see Appendix) would set a high evidentiary bar for proving the mental element (ie intention) of the offence but would broaden the scope of conduct that would be captured if that evidential requirement is satisfied (ie promoting hatred towards, or harassing, another person or group of people on the basis of a protected attribute). This would be broad enough to include a threat of damage to property on such a basis.

We also have no difficulty with the **second recommendation** by Equality Australia for the protection of associates.

As an illustration, since the massacre committed by Hamas in Southern Israel on 7 October 2024, several people who are friends with or married to members of the Jewish community have spoken publicly against antisemitism and have been targeted in various ways as a consequence of their show of solidarity, even though they are known not to be Jewish. In such instances the only recourse for the targets of such conduct has been to take private action under defamation and anti-harassment laws or to pursue a complaint under relevant

² 'Melbourne community in shock over Mount Scopus Daubing', *J-Wire*, available at: [Melbourne community in shock over Mount Scopus daubing – J-Wire](#), 26/06/2024



codes of conduct in workplaces. Even when the targeting is intentional and can be proved to the criminal standard, the criminal law almost never provides them with protection.

The draft Code which we have prepared makes specific provision for the protection of associates – see paragraphs (3)(a)(iii) and (3)(b) in the Appendix.

We would be more than happy to discuss the draft Code in more detail with the Committee if that is their wish.

Yours sincerely

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President

Peter Wertheim AM
Co-CEO

Simone Abel
Head of Legal

[Appendix follows on next page]

APPENDIX

(For insertion in the *Criminal Code* (Cth)).

Intentional promotion of hatred on prohibited ground

- (1) In this section:
- (a) “attribute” means any one or more of the following:
 - (i) race, colour, descent or national, ethnic or ethno-religious origin;
 - (ii) religious affiliation or belief;
 - (iii) sexual orientation;
 - (iv) gender identity;
 - (v) illness or disability.
 - (b) “harassing” includes threatening, severely ridiculing or seriously and substantially abusing, and “harass” has a corresponding meaning;
 - (c) “hatred” includes detestation, enmity, ill-will, revulsion, serious contempt and/or malevolence;
 - (d) “person” means a natural person or a corporation;
 - (e) “promoting” includes
 - (i) publicising, advocating or glorifying; or
 - (ii) eliciting or stirring up (whether effectively or ineffectively) a feeling or feelings in another person, or in or among other persons;and “promote” and “promotes” have corresponding meanings; and
 - (f) “public place” includes any physical place or cyberspace to which the public have access as of right or by invitation, whether express or implied, and whether or not a charge is made for admission thereto.
- (2) It is an offence for a person to do an act, otherwise than in private, if that act:
- (a) is done with the intention of promoting hatred towards, or harassing, another person or group of people because of an actual or presumed attribute of the other person, or of some or all of the members of the group; and

- (b) promotes, or is reasonably likely to promote, such hatred, or harasses that other person or group.

Note: The fault element for paragraph (2)(a) is intention.

Maximum penalty:

In the case of an individual – 250 penalty units or imprisonment for 2 years or both.

In the case of a corporation – 1250 penalty units.

- (3) (a) A reference in subsections (2), and (7) to the actual or presumed attribute of a person or group of people is a reference to that person or some or all of the people in the group:
- (i) having that attribute; or
 - (ii) being thought to have that attribute, whether or not that is in fact the case; or
 - (iii) having an association or presumed association with the person or group.
- (b) For the purposes of subparagraph (iii) of paragraph (a), two people have an association with each another if:
- (i) they are near relatives of each another; or
 - (ii) they live with each other on a genuine domestic basis; or
 - (iii) they have a formal business or employment relationship with each other,
- and they have a presumed association if they are thought to have an association with each other. whether or not that is in fact the case.
- (4) Whether or not an act is done by a person with an intention of the kind referred to in paragraph (a) of subsection (2), or promotes or is reasonably likely to promote hatred as referred to in paragraph (b) of subsection (2), may be inferred in whole or in part from, among other factors, any one or more of the following:
- (a) the conduct of the person;
 - (b) the person or persons or classes of persons who become aware, or are likely to become aware, of the act;
 - (c) the nature of the act;
 - (d) any of the circumstances in which the act is done;
 - (e) any consequences of the act, including harm to persons or damage to property;
 - (f) if the act includes the use, communication or display of words, sounds, symbols, apparel, gestures, images or writing, the meaning of the words, sounds, symbols,

apparel, gestures, images or writing in the context in which they were used, communicated or displayed.

- (5) For the purposes of subsection (2), an act is taken to be done otherwise than in private if it:
- (a) causes words, sounds, symbols, uniforms, images or writing to be communicated or displayed to the public; or
 - (b) is done in a public place; or
 - (c) is done in the sight or hearing of people who are in a public place.
- (6) (a) In this sub-section, “interim order” means an order by a court that a person charged with an offence under sub-section (2) do, or cease to do, or refrain from doing, any act or thing, pending the final determination of the charge by a court, or pending the final disposal of any appeal from that determination.
- (b) On the application of the prosecutor or on its own motion, a court may make an interim order at any time after a person is charged with an offence under sub-section (2), if the court is satisfied that:
- (i) (A) there is sufficient evidence to establish prima facie that the person committed the offence; and
 - (B) the making of the interim order is reasonably necessary to prevent the person from continuing to commit the offence or committing further offences;
- or
- (ii) the making of the interim order is reasonably necessary to preserve or secure any matter or thing that may be or become evidence in any proceedings relating to the charge.
- (b) It is an offence for a person to fail to comply with an interim order.

Maximum penalty:

In the case of an individual – 250 penalty units or imprisonment for 2 years or both.

In the case of a corporation – 1250 penalty units.

- (7) (a) In this sub-section:

- (i) “circumstances aggravated by prejudice” means circumstances in which immediately before, during or immediately after the commission of an offence, the offender demonstrates hostility to the victim or victims because of an actual or presumed attribute of the victim or victims; and
- (ii) “specified offence” means an offence under the provisions of any of the following divisions and parts of the *Criminal Code*:
 - (A) *[List relevant divisions of the Code which deal with offences of a kind that may be aggravated by prejudice related to the actual or presumed possession of an attribute].*
- (b) If a specified offence is committed in circumstances aggravated by prejudice, the maximum penalty for the offence is increased as follows:
 - (i) To the extent that the maximum penalty includes a period of imprisonment, the duration of that period is increased by one-third; and
 - (ii) To the extent that the maximum penalty includes a monetary penalty expressed in penalty units, the number of penalty units is increased by one-third, rounded up (if not a whole number) to the nearest whole number.

[Note: The constitutional basis is the external affairs power. See below.

Insofar as the section protects people on the basis of an attribute described in ss.(1)(a)(i) – see ICERD art. 4 para (a), and ICCPR art. 20 para 2.

Insofar as the section protects people on the basis of an attribute described in ss.(1)(a)(ii) – see ICCPR art. 20 para 2.

Insofar as the section protects people on the basis of an attribute described in ss.(1)(a)(iii) or (iv) – see ICCPR art. 26.

Insofar as the section protects people on the basis of an attribute described in ss.(1)(a)(v) – see CRPD.]