Committee Secretary

Senate Legal and Constitutional Affairs Committee

PO Box 6100

Parliament House

Canberra ACT 2600

11 November 2024

Dear Officer,

RE: Criminal Code Amendment (Hate Crimes) Bill 2024 [Provisions]

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Legal and Constitutional Affairs Reference Committee.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

If further information is required, please contact us at anulrsjresearchhub@gmail.com.

On behalf of the ANU LRSJ Research Hub,
Authors: Bridie Liu, Angus Kerr, Addie Toohey
Editors: Jae Brieffies

New threat offences

Recommendation 1: That the Committee consider not creating the new threat offences but rather amend the *Racial Discrimination Act 1975* (Cth) such as by extending the section 18C hate speech provision to the new protected groups.

Against the currently highly charged contemporary political context, there has been an elevation in concerns of vilification and discrimination. In the proposed *Criminal Code Amendment (Hate Crimes) Bill 2024*, protections will be extended to a larger group of minority groups on the basis of a diverse set of attributes. The new provisions in sections 80.2BA and 80.2BB create the offences of threatening to use force or violence against groups, or members of groups distinguished by race, religion, sex, sexual orientation, gender identity, intersex status, disability, nationality, national or ethnic origin or political opinion, where a reasonable person who is a member of the targeted group would fear that the threat will be carried out. In his second reading speech, Attorney-General Mark Dreyfus stated that these offences aim to 'address a gap in Commonwealth law by criminalising conduct that involves a direct threat from one person to another' where sections 80.2A and 80.2B are offences involving urging a third party to use force or violence against a protected group.[1] Although, the new threat offences attract the same criminal penalties as the existing urging offences. Ultimately, the measures intend to 'combat the increasing prevalence of hate speech involving calls to force or violence' through serious instances such as threats of force or violence.[2]

However, there is a concern with the regulation of the vilification and threats captured under the amendment through criminal penalties. Some have commented that the 'use of criminal laws has been seen as too great an infringement on the right to freedom of expression' as an international human right enshrined in Article 19 of the International

[1] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 2024, 19 (Mark Dreyfus, Attorney-General).
[2] Explanatory Memorandum, *Criminal Code Amendment (Hate Crimes) Bill 2024* 2.

Covenant on Civil and Political Rights and a common law right.[3] A maximum penalty of seven years of imprisonment for sections 80.2BA(1) and 80.2BB(1) and five years for 80.2BA(2) and 80.2BB(2) may also be seen as too great, especially compared to the criminal offences of a similar nature in most states and territories. For example, the offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status in the section 93(Z)(1) of the NSW *Crimes Act 1900* carries a maximum penalty of 100 penalty units and/or 3 years imprisonment. In this way, criminalising hate speech through the amendments is also unable to provide any effective remedy to the victims through adequate remedies, having little regard to the desired outcomes of victims. It also has the ability of elevating political and social tensions, potentially creating martyrs and increased hatred or violence towards protected groups. Additionally, the creation of the new criminal threat offences is likely to restrict freedom of speech in terms of having a negative effect on more constructive community dialogue and robust political discussion.[4] For example, Peter Dutton and other members of the Coalition's recent comments demanding the cancellation of visas for non-Australians waving Hezbollah flag at protests[5] exemplifies the highly politically-charged nature of characterising certain actions as "threats" or "hate speech" that would have chilling effects if it were to actually be criminalised such as under the proposed amendments. The threat offences would provide an avenue for stifling any sort of political expression that is contrary to any opposing view holders.

Additionally, there is uncertainty surrounding the success of the threat amendments in addressing hate speech. While there may be some deterrent or symbolic effect, prosecutions for forms of vilification are very rare in Australia. For example, there have

[3] Luke McNamara, 'Does the Albanese government's proposed "hate speech" law give us what we need?', *UNSW Newsroom* (Web Page, 13 September 2024) <https://www.unsw.edu.au/newsroom/news/2024/09/does-the-albanese-government-s-proposed--hate-speech--law-give-u>.
[4] Australian Law Reform Commission, 'Traditional Rights and Freedoms - Encroachments by Commonwealth Laws' (Final Report No 129, Australian Law Reform Commission, December 2015) 91-92.
[5] Josh Butler and Jordyn Beazley, 'Burke accuses Dutton of trying to "throw kerosene" on public debate over Middle East', *The Guardian* (Web Page, 1 October 2024) <https://www.theguardian.com/australia-news/2024/oct/01/peter-dutton-tony-burke-hezbollah-flags-middle-east-visas-israel-lebanon-gaza-war>.

been zero prosecutions in NSW in the three decades after the state criminalised threats of physical harm or property damage.[6] With the high burden of proof for criminal offences and the complex composition of the proposed offences, it seems unlikely that there will be many, if any, convictions. To this end, it is recommended that the law reform efforts in this area should be directed towards amending the existing civil statute of the *Racial Discrimination Act 1975* (Cth) and extending it to the same protected groups identified in the amendments, including religious groups and groups distinguished by sexual identity. The civil remedy by the Act provided for complaints allows for conciliation and meaningful apology (such as in *Jones v Toben* [2000] HREOCA 39 where a claim was made on the basis of a violation of section 18C as the "hate speech provision"), is more amenable to victims by making it easier and less intimidating to seek redress, and is generally more flexible in achieving a positive outcome addressing the victim's needs. For example, from 2015-16 the Race Discrimination Commissioner received 77 complaints under section 18C where 52% of racial vilification complaints were resolved at conciliation and only one complaint of racial hatred proceeded to court.[7]

Focusing the bill on instead amending the *Racial Discrimination Act 1975* would include ensuring that it combats Islamophobia. Section 18C in the *Racial Discrimination Act 1975* which serves as one of the most significant federal protections against hate speech makes it unlawful for a person to publicly 'offend, insult, humiliate or intimidate a group of people' because of race. However, while this has been held to apply to Jewish and Sikh people in the interpretation of a group of a group with a shared ethnic origin,[8] it has not been applied to Muslims 'whose identity is not tied to race'.[9] Therefore, it is evident that at a federal level, Australian Muslims are not sufficiently protected from

[6] McNamara (n 3).
[7] Australian Human Rights Commission, 'Race hate and the RDA' (Web Page, 8 September 2016) <https://humanrights.gov.au/our-work/race-discrimination/projects/race-hate-and-rda>.
[8] Australian Human Rights Commission, 'Sharing Stories of Australian Muslims' (Report, 2021) 35.
[9] Natassia Chrysanthos, 'Labor's hate speech bill to outlaw vilification' *The Sydney Morning Herald* (Web Page, 26 May 2024) <https://www.smh.com.au/politics/federal/labor-s-hate-speech-bill-to-outlaw-vilification-20240524-p5jgdw.html>.

vilification - which has been held as the ‘biggest gap in Australia’s hate speech laws’.[10] Especially given the increased tensions over Palestine and Israel, it seems that antisemitism is currently more protected than Islamophobia. The Bill does not deliver on commitments to multiculturalism and diversity in this way.

Fault element

The Criminal Code Amendment (Hate Crime) Bill 2024 reduces the fault standard to recklessness, expanding the scope of harm that falls under sections 80.2A and 80.2B. While in the previous Act, a level of intention must have been present, Attorney General Mark Dreyfuss introduces the amended fault element by clarifying that the “effect of these amendments would be that the offences would apply where a person is reckless as to whether the force or violence urged against a group, or member of a group, will occur”.

This follows the approach of the New South Wales Crimes Act 1900 Section 932, which also includes provisions against persons who “intentionally or recklessly threatens or incites violence towards a person” on discriminatory grounds. This widens the scope of the fault element considerably compared to the limited fault element of intention and permits a wider scope for prosecutors when reviewing evidence. A direct intention is no longer required, but the message is still seriously considered.

However, by lowering the standard of fault only to recklessness, the law will not encompass all forms of speech that might lead to violence. Many hate crimes are unreported. By lowering the standard of fault to recklessness nationwide, there could be greater consensus and public understanding of the nature of incidents that would warrant prosecution. Lowering the standard too far, however, to negligence, could result in an inundation of cases of a less serious nature than intentional hate crimes. A failure

[10] McNamara (n 3).

to exercise reasonable care under negligence could set the bar to meet the definition of a hate crime too low.

This group agrees with the direction of the hate crime bill, and considers recklessness the appropriate fault approach for hate crimes across Australia.