

Criminal Code Amendment (Hate Crimes) Bill 2024³⁷³

Purpose	The bill seeks to amend the <i>Criminal Code Act 1995</i> (the Criminal Code) by restructuring offences related to urging or threatening violence by replacing 'intent' with 'recklessness' to lower the threshold of prosecution. At the same time, the bill introduces new offences for threatening force or violence against groups or members of a group while expanding the definition of those groups to gender and disability-based identities. Finally, the bill removes the good faith defence for urging or threatening violence in relation to these offences.
Portfolio	Attorney-General
Introduced	House of Representatives on 12 September 2024
Bill status	Before the House of Representatives

Undue trespass on rights and liberties³⁷⁴

2.199 The bill seeks to amend two existing offences in the Criminal Code³⁷⁵ that make it an offence to urge violence against groups or members of groups with specified attributes. Currently it is an offence to target a group or member of a group as 'distinguished by race, religion, nationality, national or ethnic origin or political opinion'. This bill seeks to expand the list of protected attributes to also include 'sex, sexual orientation, gender identity, intersex status and disability'.³⁷⁶ It also seeks to lower the fault element to provide that while a person must have intentionally urged another person or group to use force or violence, instead of doing so *intending* the force or violence will occur, the bill would amend this to provide that they be *reckless* as to whether the force or violence will occur.³⁷⁷

2.200 The bill also seeks to insert a new offence, punishable by up to five years imprisonment, of threatening to use force or violence (rather than urging) against a group on the basis of the expanded protected attributes (as set out above), where a reasonable member of the group would fear the threat would be carried out. It would also be an offence punishable by seven years imprisonment to do the same conduct

³⁷³ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Criminal Code Amendment (Hate Crimes) Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 226.

³⁷⁴ Schedule 1, item 21. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

³⁷⁵ See Criminal Code, sections 80.2A and 80.2B

³⁷⁶ Schedule 1, items 4, 7, 12 and 15.

³⁷⁷ Schedule 1, items 3, 6, 11 and 14.

with the added requirement that the threat, if carried out, would threaten the peace, order and good government of the Commonwealth.³⁷⁸

2.201 Currently, section 80.3 provides defences to the existing urging force or violence offences, if the person who took the action, in good faith:

- tries to show that the Sovereign, Governor-General, State Governors, their advisers or a person responsible for the government of another country are mistaken;
- points out, with a view to reforming, errors or defects in the government, the Constitution, legislation or administration of justice;
- urges a person to attempt to lawfully procure a change in law, policy or practice in Australia or internationally;
- points out matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to remove that;
- does anything in connection with industrial dispute or matter; or
- publishes a report or commentary about a matter of public interest.

2.202 Item 21 of the bill seeks to remove this defence for the two existing offences and the proposed two new offences.

2.203 By removing this defence, this removes an existing safeguard that aims to ensure the offences are not overly broad, noting the potential impact of these offences on freedom of expression.

2.204 In *Scrutiny Digest 12 of 2024* the committee requested the Attorney-General's advice on:

- why is it necessary to seek to remove the application of the good faith defences in section 80.3 to these offences (noting the explanatory materials provide that no relevant speech could ever be made in good faith);
- why it is proposed to remove the defences in section 80.3 entirely without implementing the other part of the ALRC recommendation to reframe the criminal offences so that the court, in determining whether a person intends the urged force or violence will occur, must have regard to the context in which the circumstance occurred;
- what conduct would 'use of force' include and would it include use of force against property; and

³⁷⁸ Schedule 1, item 19, proposed new section 80.2BA.

- what type of groups or members of a group would be captured by the attribute of ‘political opinion’, and why the inclusion of this attribute is appropriate in the context of freedom of expression.³⁷⁹

Attorney-General’s response³⁸⁰

2.205 In response to the committee’s query on the removal of the good faith defence and consideration of the context in which the conduct occurred, the Attorney-General reiterated that it is the government’s view that threatening or urging violence is not part of good faith discourse and that the removal of the defences in section 80.3 reflect that view. The Attorney-General advised that the urging violence offence requires it to be proven that the person intended to use force or violence, and in the absence of direct evidence, such as an admission, intent would need to be proved as a matter of inference from the facts and surrounding circumstances which would require consideration of the context of the conduct.

2.206 Additionally, the bill provides that the urging of violence offence would also require it be proven that the person was reckless as to whether force or violence will occur. In referencing the Criminal Code’s definition of reckless,³⁸¹ the Attorney-General advised that establishing whether a person is reckless regarding conduct that may urge violence will necessarily require consideration of the context in which the conduct occurred.

2.207 In relation to the term ‘use of force’, the Attorney-General advised it is intended to take its ordinary meaning, which includes strength or power exerted on an object and physical coercion. In particular the Attorney-General noted that the offences apply where the force or violence is urged or threatened against a group or member of a group. The Attorney-General stated:

It 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.

2.208 Finally, on the inclusion of ‘political opinion’ as a protected attribute, the Attorney-General advised that the term is intended to take its ordinary meaning and it could include beliefs, judgements, attitudes and views that relate to government, governance, and political parties. The Attorney-General stated that the inclusion of

³⁷⁹ Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 12 of 2024](#) (18 September 2024) pp. 11–15.

³⁸⁰ The minister responded to the committee’s comments in a letter dated 8 October 2024. A copy of the letter is available on the committee’s [webpage](#) (see correspondence relating to *Scrutiny Digest 14 of 2024*).

³⁸¹ Subclause 5.4(2) of the *Criminal Code Act 1995* states that a person is reckless with respect to a result 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.

‘political opinion’ as a protected attribute would assist individuals and groups in expressing their political opinions without fear of force or violence.

Committee comment

2.209 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General’s advice in relation to the ordinary meaning of use of force, and that it is not intended to apply to threatening or urging damage to property, except where that would also involve violence or force against a person, and makes no further comment on this matter.

2.210 In relation to the removal of the defences in existing section 80.3, the committee retains some concerns that the defences are proposed to be removed in their entirety without expressly allowing the court to consider the context in which the conduct occurred. While noting the Attorney-General’s advice that in proving the fault element for this offence the court will consider the circumstances of the offending, the committee remains concerned that there may be a small risk the offence provisions could capture behaviour that is not intended to be criminalised. This is particularly the case noting that the bill also proposes lowering the existing fault element, so that a person need not intend that force or violence will occur, only that they are reckless as to whether it would occur, which is a lower threshold to satisfy than intention.

2.211 The committee reiterates that it is unlikely there are many circumstances where a person could threaten the use of force or violence against a particular group in ways that would be considered legitimate. However, it is not possible for the committee, or the Parliament, to understand the full range of possibilities that could be captured by these provisions. 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. In this example, the committee considers it is possible the elements of the offence, that is, threatening the use of force against a group (reckless as to whether the force or violence will occur) would likely satisfy the elements for conviction for this offence, but this context does not appear to accord with the intention of this legislation. In contrast, the inclusion of the defence for actions done in good faith may assist the court to consider the circumstances of the offending outside of the context of the fault element.

2.212 The committee’s concerns are heightened in this instance as the offence carries a maximum penalty of five years imprisonment (or seven years if it would threaten the peace, order or good government of the Commonwealth). Although the committee accepts, in general, the Attorney-General’s argument that violence or the use of force cannot be urged in good faith, the committee still considers that there may be circumstances where that may be possible (noting again that the legislature is unable to predict all instances in which this offence could occur). The committee

considers it has not been established why it is necessary to remove the defences entirely from these provisions, or why the Australian Law Reform Commission's approach of repealing the defence but incorporating it as an element of the offence was not adopted.

2.213 While the committee acknowledges that generally it is not possible to urge or threaten the use of force or violence in good faith, the committee remains concerned that completely removing existing defence provisions may result in unintended consequences, particularly in circumstances where the threshold for intending that the force or violence will occur has been lowered to recklessness.

2.214 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of removing the defence of good faith provided in relation to the offences under sections 80.2A and proposed section 80.2B of the *Criminal Code Act 1995*, in conjunction with lowering the fault element associated with both offences from intention to recklessness.