

# **Submission to Inquiry into Criminal Code Amendment (Hate Crimes) Bill 2024**

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# About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions. We work across five focus areas:

**Disability rights:** challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

**Justice for First Nations people:** challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

**Homelessness:** reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

**Civil rights:** defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQ+ equality and advocating for open and accountable government.

**Energy and water justice:** working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

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# Recommendations

## ***Recommendation 1 – Inclusion of disability as a relevant attribute***

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*The Committee should consult with organisations representing people with disability to determine whether disability should be added as a relevant group for the purposes of offences under sections 80.2H, 80.2HA and 80.2K of the Criminal Code.*

## ***Recommendation 2 – Expansion of Commonwealth civil vilification protections***

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*The Hate Crimes Bill should be amended to expand the range of groups protected against civil vilification under Commonwealth law. This should include, at a minimum:*

- *Religious belief*
- *Disability*
- *Sex, and*
- *LGBTI people.*

## ***Recommendation 3 – Gender identity and expression as a protected attribute***

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*The Hate Crimes Bill should be amended to ensure that its provisions cover gender identity and expression. This could be achieved by the inclusion of a definition drawing on the Tasmanian Anti-Discrimination Act 1998, and gender identity and expression should also be the relevant protected attribute for any new Commonwealth civil vilification protections.*

## ***Recommendation 4 – Sex characteristics as a protected attribute***

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*The Hate Crimes Bill should be amended to replace the protected attribute of intersex status with sex characteristics, drawing on the definition in the Queensland Anti-Discrimination Act 1991. The same protected attribute should also be used in any new Commonwealth civil vilification protections.*

# 1. Introduction

The Justice and Equity Centre (formerly the Public Interest Advocacy Centre) welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Criminal Code Amendment (Hate Crimes) Bill 2024 ('the Hate Crimes Bill').

We do so as an organisation with a long history of advocacy on discrimination and vilification law reform. This includes contributions to public debates and inquiries supporting the retention of existing prohibitions against racial vilification in s 18C of the *Racial Discrimination Act 1975* (Cth),<sup>1</sup> as well as calling for the expansion of anti-vilification coverage under Commonwealth, state and territory law to protect religious belief,<sup>2</sup> people with disability,<sup>3</sup> and lesbian, gay, bisexual, transgender and intersex (LGBTI) people.<sup>4</sup>

Drawing on the positions we have expressed over many years, we welcome many elements of the Hate Crimes Bill, including the expansion of existing criminal offences, such as urging violence against groups or members of groups, to cover women, LGBTI people and people with disability. These elements are discussed under heading 2, below.

However, we also believe that the Bill as drafted fails to meet the moment confronting the country, because it does not address the serious challenges presented by the ongoing rise of prejudice and hate speech against people of minority faiths, LGBTI people and other groups.

In his second reading speech, the Attorney-General stated:

No one in Australia should be targeted because of who they are or what they believe. The legislation I am introducing to the parliament today responds to the increasing prevalence of hate speech and hateful conduct in our society. This conduct cannot, and will not, be tolerated.

In our view, however, the Bill does not adequately tackle the problem of widespread hate speech against members of minority communities, because it only prohibits a much narrower range of behaviours (urging violence against groups or members of groups, threatening force of violence against groups or members of groups, or publicly displaying prohibited symbols where it is likely to offend, humiliate or intimidate a member of a group).

Broader hate speech – or vilification – is left largely unregulated. This is a significant shortcoming that should be rectified.

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<sup>1</sup> See for example Public Interest Advocacy Centre, 'Protecting people from racism and ensuring freedom of speech: Submission in relation to Exposure Draft of Freedom of Speech (Repeal of s18C) Bill 2014', 30 April 2014, available at: <https://jec.org.au/resources/protecting-people-from-racism-and-ensuring-freedom-of-speech/>

<sup>2</sup> PIAC, 'Submission to the Religious Freedom Review', 14 February 2018, available at:

<https://jec.org.au/resources/submission-to-the-religious-freedom-review/>

<sup>3</sup> PIAC 'Submission to the NSW Law Reform Commission inquiry into Serious racial and religious vilification', 19 April 2024, available at: <https://jec.org.au/resources/submission-to-the-nsw-law-reform-commission-inquiry-into-serious-racial-and-religious-vilification/>

<sup>4</sup> PIAC, 'Submission to Australian Human Rights Commission Free & Equal Anti-Discrimination Law Reform Discussion Paper', 8 November 2018, available at: <https://jec.org.au/resources/australian-human-rights-commission-free-equal-anti-discrimination-law-reform-discussion-paper/>

We therefore submit that the Hate Crimes Bill should be amended to ensure Commonwealth civil vilification provisions, currently limited to those in s 18C of the *Racial Discrimination Act*, are expanded to also explicitly cover religious belief, disability, sex, sexual orientation, gender identity and expression and sex characteristics. This issue is discussed in section 3, below.

Finally, in section 4 we raise two particular issues – about the limitations of the existing protected attribute of gender identity, and the need to update the terminology of intersex status with the best practice approach of sex characteristics.

## 2. Major elements of the Hate Crimes Bill

As indicated above, the Justice and Equity Centre welcomes many of the major elements of the Hate Crimes Bill as introduced. These include:

### 2.1 Urging violence against groups or members of groups

We support proposed reforms to sections 80.2A and 80.2B of the Criminal Code which contain the offences of urging violence against groups, and urging violence against members of groups respectively.

In particular, we support the expansion of the protected attributes covered by these offences to include women, LGBTI people<sup>5</sup> and people with disability (in addition to existing coverage of race, religion, nationality, national or ethnic origin and political opinion). These groups, and members of these groups, deserve the same protection against these behaviours as those already protected.

We also support the change to the mental element required to establish these offences from ‘intending that force or violence will occur’ to ‘reckless as to whether force or violence will occur’. We agree with the analysis in the Explanatory Memorandum that:<sup>6</sup>

The existing requirement for the prosecution to prove *intent* for this element of the offence sets the bar so high that conduct which is reprehensible enough to appropriately attract criminal liability is not captured by the offences. [emphasis in original]

We note the maximum penalties for these offences remain high (at five and seven years’ imprisonment, depending on the circumstances), but do not believe that the change to recklessness will result in these sanctions being imposed in inappropriate circumstances. Indeed, it is highly likely prosecutions for these offences will remain rare.

Finally, we support the removal of the ‘good faith’ defence for offences created by sections 80.2A and 80.2B. We concur with Attorney-General’s view expressed in his Second Reading Speech that ‘There are no circumstances in which urging force or violence against a targeted group or its members can be done in good faith.’

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<sup>5</sup> Subject to our comments about the terminology of gender identity and intersex status, discussed under heading 4 of this submission below.

<sup>6</sup> Criminal Code Amendment (Hate Crimes) Bill 2024 Explanatory Memorandum, p6.

## 2.2 Threatening force or violence against groups or members of groups

We also support the proposed new offences in sections 80.2BA and 80.2BB – of threatening force or violence against groups, or against members of groups, respectively – in the Hate Crimes Bill.

We note that these offences will appropriately apply across a broad range of protected attributes, including race, religion, sex, sexual orientation, gender identity, intersex status, disability, nationality, national or ethnic origin or political opinion.

We recognise that threats of force or violence are already prohibited in a range of contexts under Commonwealth, State and Territory law in ways that may overlap with these new offences.

Nevertheless, the creation of these offences recognises a particular harm to individuals and our community and carries normative importance, by specifically condemning threatening force or violence against (members of) groups that experience disadvantage, discrimination and marginalisation.

## 2.3 Publicly displaying prohibited symbols

We support the Bill's amendments of the existing offences in sections 80.2H, 80.2HA and 80.2K of the Criminal Code – which apply in relation to publicly displaying prohibited Nazi symbols or giving Nazi salutes, publicly displaying prohibited terrorist organisation symbols and breaching directions to cease displaying prohibited symbols in public, respectively.

These amendments ensure that these offences apply in circumstances where display of the symbol or use of the gesture is likely to offend, humiliate or intimidate members of groups distinguished by sexual orientation, gender identity or intersex status (noting that race, colour, sex, language, religion, political or other opinion or national or social origin are already covered).

This is appropriate given both the historical persecution of LGBTI minority groups in Nazi Germany, as well as the contemporary targeting of LGBTI people, and especially trans and gender diverse people, by neo-Nazi groups in Australia.<sup>7</sup>

We question, however, why disability has been omitted as a protected attribute for the purposes of these offences. As with LGBTI groups, people with disability have a long history of persecution by Nazis and neo-Nazis, including but not limited to Nazi Germany. Including disability as a relevant group here would also create greater alignment with the offences discussed under headings 2.1 and 2.2 above, which are proposed to cover disability.

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<sup>7</sup> For example, the attendance of neo-Nazis at an anti-trans rally in Melbourne in March 2023, including the display of a banner stating 'Destroy paedo freaks', as reported in 'What's behind the 'terrifying' backlash against Australia's queer community?', *Guardian Australia*, 25 March 2023, available at: <https://www.theguardian.com/australia-news/2023/mar/25/whats-behind-the-terrifying-backlash-against-australias-queer-community>



We therefore suggest that the Committee consider the issue of whether disability should also be added as a relevant group for the purposes of these offences, in consultation with organisations representing people with disability.

### ***Recommendation 1 – Inclusion of disability as a relevant attribute***

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*The Committee should consult with organisations representing people with disability to determine whether disability should be added as a relevant group for the purposes of offences under sections 80.2H, 80.2HA and 80.2K of the Criminal Code.*

## **3. The need for Commonwealth civil vilification protections**

The Justice and Equity Centre supports the major elements of the Hate Crimes Bill as far as they go. Unfortunately they do not go far enough.

Despite discussion of this legislation as being targeted at ‘hate speech’ both in the lead-up to its introduction,<sup>8</sup> and during the Attorney-General’s Second Reading Speech, the Bill is, as the title suggests, a much more narrowly-crafted Hate *Crimes* Bill.

The amendments made by the Bill only relate to threatening force or violence against people or groups distinguished by the characteristics of race, religion, sex, sexual orientation, gender identity, intersex status, disability, nationality, national or ethnic origin or political opinion .

The Bill does not address the broader problem of public vilification against people because of the characteristics of religion, disability, sex, or because they are LGBTI. This is a missed opportunity to provide protection for these groups, in terms similar to those in section 18C of the *Racial Discrimination Act 1975* (Cth), which states:

#### **Offensive behaviour because of race, colour or national or ethnic origin**

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

The prohibition of racial vilification in section 18C has operated effectively for almost 30 years, offering an avenue for civil redress against harmful racist public statements that fall short of inciting or threatening violence or other criminal acts.

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<sup>8</sup> See for example discussion in ‘Green light for hate-speech ban as Albanese comes under fire on religious discrimination’, *Sydney Morning Herald*, 20 March 2024, available at: <https://www.smh.com.au/politics/federal/green-light-for-hate-speech-ban-as-albanese-comes-under-fire-on-religious-discrimination-20240320-p5fdse.html>

Importantly, the *Racial Discrimination Act* includes a range of exemptions in s18D to ensure that legitimate public debate is not constrained, applying to

anything said or done reasonably and in good faith:

(a) in the 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 the making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

The lack of protection under Commonwealth law against vilification on grounds other than race is in contrast to the approach adopted in most states and territories, in which vilification provisions protect a much broader range of groups.

For example, vilification protections in Queensland apply to all of race, religion, sexuality, sex characteristics and gender identity,<sup>9</sup> while in NSW civil vilification prohibitions cover race, religious belief, homosexuality, transgender status and HIV/AIDS status.<sup>10</sup> The ACT approach is even broader, covering disability, gender identity, HIV/AIDS status, race, religious conviction, sex characteristics and sexuality.<sup>11</sup>

Tasmanian vilification provisions are not only drafted more broadly in terms of the type of behaviours captured – ‘any conduct which offends, humiliates, intimidates, insults or ridicules another person’<sup>12</sup> – as well as who is covered:<sup>13</sup>

- Gender
- Race
- Age
- Sexual orientation
- Lawful sexual activity
- Gender identity
- Sex characteristics
- Disability
- Marital status
- Relationship status
- Pregnancy

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<sup>9</sup> Section 124 *Anti-Discrimination Act 1991* (Qld).

<sup>10</sup> While a criminal offence of publicly threatening or inciting violence covers race, religious belief, sexual orientation, gender identity, intersex status or HIV/AIDS: s 93Z *Crimes Act 1900* (NSW).

<sup>11</sup> Section 67A(1) *Discrimination Act 1991* (ACT).

<sup>12</sup> Section 17(1) *Anti-Discrimination Act 1998* (Tas).

<sup>13</sup> *Ibid.*

- Breastfeeding
- Parental status, and
- Family responsibilities.

The Northern Territory approach is broader again. The prohibition on ‘offensive behaviour’<sup>14</sup> in s 20A(1) applies to *all* protected attributes covered by the *Anti-Discrimination Act 1992* (NT).

Of the other jurisdictions, while Victoria currently only prohibits racial and religious vilification, the Government recently engaged in public consultation on proposals to expand coverage to also include disability, gender identity, sex, sex characteristics, and sexual orientation.<sup>15</sup> While the Western Australian Law Reform Commission has also recommended the introduction of vilification provisions in their *Equal Opportunity Act 1984* (WA), covering disability, gender identity, sex, sex characteristics, race, religious conviction and sexual orientation.<sup>16</sup>

The current Commonwealth approach is therefore out of step with the laws of the states and territories.

To adequately address hate speech against minority communities, the Hate Crimes Bill should be amended to also prohibit civil vilification on the basis of, at a minimum, religious belief, disability, sex and against people who are LGBTI.

We will make more detailed points about each of these protected attributes, or groups of protected attributes, below.

### 3.1 Religious belief

While section 18C of the *Racial Discrimination Act* uses the terms ‘race, colour or national or ethnic origin’ – and does not include any explicit reference to religion or religious belief – it has been legally established that some ‘ethno-religious groups’ in Australia nevertheless fall within this definition and therefore attract its protections. This includes Jewish people,<sup>17</sup> and Sikhs.

The protection offered by s 18C for other religious groups, including Muslim people, has been unclear. This was recently considered by the Federal Court in *Faruqi v Hanson* [2024] FCA 1264, in which Stewart J discussed the arguments and evidence in favour of including Muslim people within the scope of 18C. His Honour suggested that

there is a case to be made that Muslims in Australia are an ethno-racial group within the meaning of s 18C(b) identified above and not merely a religious group.<sup>18</sup>

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<sup>14</sup> ‘An act that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people and is done because of an attribute of the other person or of some or all of the people in the group.’

<sup>15</sup> ‘Overview of proposed anti-vilification protections for all Victorians’, Victorian Department of Justice and Community Safety, October 2024, available at: <https://engage.vic.gov.au/anti-vilification-reforms>

<sup>16</sup> Recommendation 114, Review of the Equal Opportunity Act 1984 (WA), WA Law Reform Commission, May 2022, available at: [https://www.wa.gov.au/system/files/2022-08/LRC-Project-111-Final-Report\\_0.pdf](https://www.wa.gov.au/system/files/2022-08/LRC-Project-111-Final-Report_0.pdf)

<sup>17</sup> *Jones v Scully* (2002) 120 FCR 243.

<sup>18</sup> *Faruqi v Hanson* [2024] FCA 1264, at 278.

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca1264>

Given the lack of submissions by the parties on this issue, Stewart J declined to resolve the issue, but went on to note:

I do not read the para [18C(1)] (b) requirements to *necessarily* be met if it is established that the relevant act was done because a person or a group of people is Muslim. However... in a particular case it may be established that by the act being done because a person (or a group of people) is Muslim, the act was also done because of the race or colour or ethnic origin of the person (or group). That will depend on the intersectionality between their identity as Muslim and their identity with reference to race, colour or national or ethnic origin. Thus, the role played by a person or a group of people's Muslim identity will be fact dependent in each case.<sup>19</sup>

These observations are important. First, it establishes that vilifying a person because a person or group of people are Muslim *may* constitute racial vilification for the purposes of 18C, depending on the circumstances. But second, not all forms of vilification of Muslims will fall within 18C, because of the limitations of the terminology which it employs.

Therefore, the only way to ensure that civil vilification against Muslims – and other religious minorities, including Hindus, atheists and others – is effectively prohibited is to ensure religious belief (including a lack of belief) is explicitly protected under Commonwealth law.

This would be consistent with the intention of the Attorney-General in his Second Reading Speech, including references to both 'antisemitic and Islamophobic rhetoric', as well as with the emerging consensus of state and territory approaches to this issue. It would also better reflect international human rights law.<sup>20</sup>

### 3.2 Disability

We also support the inclusion of disability as a protected attribute for the purposes of Commonwealth civil vilification protections, because people with disability should not be exposed to harmful ableist rhetoric in public life.

We note the Attorney-General referred to 'the testimonies of those who appeared before the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability' in the Second Reading Speech as context for the introduction of the Hate Crimes Bill.

The Bill substantially implements Recommendation 4.30 of that Royal Commission, including that the Commonwealth make it

unlawful for a person (the first person) to do an act otherwise than in private, if:

(a) the act involves threats by the first person to perpetrate or encourage violence or serious abuse directed at another person or group of people;

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<sup>19</sup> Ibid, at 280.

<sup>20</sup> For example, Article 20(2) of the *International Covenant on Civil and Political Rights*, that provides: 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

(b) the act is reasonably likely, in all the circumstances, to incite hatred towards another person or a group of people; and

(c) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.

However, the Bill does not address Recommendation 4.29, which also proposes that the Commonwealth make it

unlawful for a person (the first person) to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.

The Bill should take this opportunity to ensure Commonwealth civil vilification laws cover disability consistently with this recommendation.

### **3.3 Sex**

The Justice and Equity Centre also supports the inclusion of sex as a protected attribute for the purposes of Commonwealth civil vilification law. Misogynist hate speech that may fall short of urging or threatening violence nevertheless contributes to undermining the safety of Australian women, and should therefore be made unlawful. The inclusion of sex in civil vilification provisions would also be consistent with its inclusion in the offences that are amended or created by the Hate Crimes Bill.

### **3.4 Lesbian, gay, bisexual, transgender and intersex (LGBTI) people**

The Justice and Equity Centre has consistently advocated for the protection of all members of the LGBTI community against vilification, at Commonwealth level and also in NSW. Earlier this year, we made the following observations in a submission to the NSW Law Reform Commission, considering the issue of serious racial and religious vilification in state law:<sup>21</sup>

While much public attention has been focused recently on racial and especially religious hate speech, lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people, and especially trans and gender diverse people, have also experienced a disturbing increase in vilification.

In the past 12 months this has included:

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<sup>21</sup> PIAC 'Submission to the NSW Law Reform Commission inquiry into Serious racial and religious vilification', 19 April 2024, available at: <https://jec.org.au/resources/submission-to-the-nsw-law-reform-commission-inquiry-into-serious-racial-and-religious-vilification/>

- A widely-reported Neo-Nazi demonstration against transgender rights on the steps of Victorian Parliament in March 2023;<sup>22</sup>
- A less-well reported violent attack against LGBTIQ rights protesters and NSW Police in Sydney in March 2023;<sup>23</sup> and
- Repeated threats of violence and other forms of intimidation against LGBTIQ community events, such as Drag Story Times at local libraries, most recently involving the cancellation of a planned ABC event in the lead-up to the 2024 Sydney Gay & Lesbian Mardi Gras following death threats against staff involved in its organisation.<sup>24</sup>

These examples are just as relevant in relation to the Hate Crimes Bill currently being considered by the Committee, and make the case both for the provisions proposed by the Government and the need for additional civil vilification provisions.

### ***Recommendation 2 – Expansion of Commonwealth civil vilification protections***

*The Hate Crimes Bill should be amended to expand the range of groups protected against civil vilification under Commonwealth law. This should include, at a minimum, cover:*

- *Religious belief*
- *Disability*
- *Sex, and*
- *LGBTI people.*

## **4. Modernisation of terminology**

While we welcome the Hate Crimes Bill's expansion of three existing Criminal Code offences to cover LGBTI people, as well as the inclusion of LGBTI people in the proposed new offences of threatening groups or members of groups, there are issues with the use of the terminology 'gender identity' and 'intersex status' that should be addressed.

### **4.1 Gender identity**

First, the Hate Crimes Bill refers to 'gender identity' as the relevant protected attribute in relation to trans and gender diverse people. However, the Bill itself does not define this term, nor does the Criminal Code currently include a definition.

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<sup>22</sup> 'Nazi salutes performed on steps of Victorian parliament as protesters clash over trans rights', *SBS News*, 18 March 2023: <https://www.sbs.com.au/news/article/nazi-salutes-performed-on-steps-of-victorian-parliament-as-protesters-clash-over-transgender-rights/yr7gzkevn>

<sup>23</sup> 'Two arrested as mob sets upon protesters outside Mark Latham event in Sydney', *Guardian Australia*, 22 March 2023: <https://www.theguardian.com/australia-news/2023/mar/21/two-arrested-after-mob-charges-rights-activists-outside-mark-latham-event-in-sydney>

<sup>24</sup> 'ABC boss details abuse staff received over Drag Queen Storytime event', *OutinPerth*, 14 February 2024: <https://www.outinperth.com/abc-boss-details-abuse-staff-received-over-drag-queen-storytime-event/>

In practice, courts are likely to be informed by existing definitions of this attribute in other Commonwealth laws, including the *Sex Discrimination Act 1984* (Cth), which provides:

gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.<sup>25</sup>

Such an interpretive approach would ensure transgender, non-binary or otherwise gender diverse people are protected by the relevant sections of the Hate Crimes Bill (a view reinforced by the recent Federal Court decision in *Tickle v Giggle*).<sup>26</sup>

However, it is less clear whether the use of the term 'gender identity' would be able to be applied where urging or threatening violence, or displaying prohibited symbols, were targeted at groups or members of groups because of their gender expression rather than identity *per se*.

In particular, the past 18 months has seen a disturbing phenomenon of violence, threats of violence and public hate speech against drag performers, including in the context of Drag Story Times. As noted above, this included the cancellation of a planned ABC event in the lead-up to this year's Sydney Gay & Lesbian Mardi Gras, following death threats against public servants.

However, given drag performers are distinct from and not necessarily limited by sexual orientation and/or gender identity, it is possible that federal courts would find the provisions of the Hate Crimes Bill may not apply in these circumstances.

There is a precedent for this concern under state law, with a 2023 QCAT decision finding that alleged hate speech against drag queens was outside the scope of the Queensland *Anti-Discrimination Act 1991* at least in part because drag queens were not necessarily gay or transgender. The decision included the following observation:<sup>27</sup>

there is further difficulty that any such reaction would be because the performers were drag queens. On the evidence I have heard and seen, some drag queens are transgender persons and some are persons with homosexual sexual orientation, but a substantial proportion of drag queens are neither. Hence I do not think it follows that an attack on drag queens is also an attack on transgender persons and persons with homosexual sexual orientation. *The group of persons known as 'drag queens' is too wide and too diverse for that to be the almost inevitable consequence.* [emphasis added]

This issue can be avoided by ensuring the protected attribute covered by the Hate Crimes Bill (and any civil vilification laws) covers gender identity including gender expression.

This is the approach adopted in the Tasmanian *Anti-Discrimination Act 1998*, which includes gender identity as the protected attribute, defined as:

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<sup>25</sup> Section 4(1) *Sex Discrimination Act 1984* (Cth).

<sup>26</sup> *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960.

<sup>27</sup> *Valkyrie and Hill v Shelton* [2023] QCAT 302, at 307, available at: <https://www.queenslandjudgments.com.au/caselaw/qcat/2023/302/pdf>

The gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual including gender expression (whether by way of medical intervention or not), with or without regard to the individual's designed sex at birth, and may included being transgender or transsexual.<sup>28</sup>

Gender expression then has its own definition, as 'any physical expression, appearance (whether by way of medical intervention or not), speech, mannerisms, behavioural patterns, names and personal references that manifest gender or gender identity.'<sup>29</sup>

The Victorian *Equal Opportunity Act 2010* also explicitly includes references to 'other expressions of gender, including dress, speech, mannerisms, names and personal references' as part of its definition of gender identity.<sup>30</sup> On this basis, during its recent consultation on proposed expansion of civil vilification protections, the Victorian Department of Justice and Community Safety wrote that 'the definition of 'gender identity' would protect drag performers'.<sup>31</sup>

### ***Recommendation 3 – Gender identity and expression as a protected attribute***

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*The Hate Crimes Bill should be amended to ensure that its provisions cover gender identity and expression. This could be achieved by the inclusion of a definition drawing on the Tasmanian Anti-Discrimination Act 1998, and gender identity and expression should also be the relevant protected attribute for any new Commonwealth civil vilification protections.*

## **4.2 Intersex status**

The other issue of terminology warranting the Committee's attention is the use of the out-dated terminology of 'intersex status' in the Hate Crimes Bill as the relevant protected attribute intended to protect people with innate variations of sex characteristics (intersex people).

As with gender identity above, the term intersex status is not defined in the Bill itself, nor is there an existing definition in the Criminal Code, leaving courts to interpret this terminology based on those contained in other statutes, especially the *Sex Discrimination Act*, which defines intersex status as:<sup>32</sup>

the status of having physical, hormonal or genetic features that are:

- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male; or
- (c) neither female nor male.

While the inclusion of intersex status in Commonwealth anti-discrimination law in 2013 was both historic and welcome, this terminology is no longer considered best practice, including because of

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<sup>28</sup> Section 3 *Anti-Discrimination Act 1998* (Tas).

<sup>29</sup> Ibid.

<sup>30</sup> Section 4(1) *Equal Opportunity Act 2010* (Vic).

<sup>31</sup> 'Overview of proposed anti-vilification protections for all Victorians', Victorian Department of Justice and Community Safety, October 2024, p7, available at: <https://engage.vic.gov.au/anti-vilification-reforms>

<sup>32</sup> Section 4(1) *Sex Discrimination Act 1984* (Cth).



concerns about the potential for misinterpretation that it relates to identity rather than biological characteristics.

For this reason, many states and territories have updated their anti-discrimination laws to instead adopt sex characteristics as the relevant protected attribute.<sup>33</sup> The Queensland *Anti-Discrimination Act 1991* includes what is considered a best practice definition by intersex organisations, including Intersex Human Rights Australia (IHRA):

sex characteristics, of a person, means the person's physical features and development related to the person's sex, and includes-

- (a) genitalia, gonads and other sexual and reproductive parts of the person's anatomy; and
- (b) the person's chromosomes, genes and hormones that are related to the person's sex; and
- (c) the person's secondary physical features emerging as a result of puberty.<sup>34</sup>

IHRA has called for the Commonwealth Government to replace intersex status with sex characteristics as the relevant protected attribute federally. In 2022, when the Government was amending the *Fair Work Act 2009* (Cth) to include gender identity and intersex status as protected attributes for the purposes of adverse action and unlawful termination protections, IHRA's position was reflected in amendments moved in Parliament.

The Government did not support the amendments. However, the relevant Minister, the Hon Tony Burke, did commit the Government to updating this terminology both in the *Fair Work Act*, and across all federal legislation. He told the House of Representatives:<sup>35</sup>

In the first instance, I want to make clear the government makes no argument of principle in any way against any of the two contributions that were just made by the member for Clark and the member for Brisbane. In the second instance, the intention to get best-practice language here so that people are properly covered is a commitment that is shared by those who've spoken with the government.

Before I knew this amendment was coming—this was during the drafting stages—as soon as I hit this problem of the interaction with the Sex Discrimination Act I raised the issue personally with the Attorney-General, because it was the Attorney-General's Department that had raised it with my department. The intention was made clear to me then, by the Attorney-General, that the government does intend to bring in legislation that will deal with this issue across all relevant legislation at once. Being able to do that avoids any problems with the different parts of legislation not interacting properly.

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<sup>33</sup> S4(1) *Equal Opportunity Act 2010* (Vic); s16 *Anti-Discrimination Act 1998* (Tas); s7 *Discrimination Act 1991* (ACT); s4(1) *Anti-Discrimination Act 1992* (NT).

<sup>34</sup> Dictionary *Anti-Discrimination Act 1991* (Qld).

<sup>35</sup> Tony Burke, House of Representatives Hansard, 10 November 2022, available at: [https://www.aph.gov.au/Parliamentary\\_Business/Hansard/Hansard\\_Display?bid=chamber/hansardr/26230/&sid=0000](https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/26230/&sid=0000)

It's a strange one in terms of saying that we won't support the amendments, but it's on the basis that we accept completely the arguments that have been put and want to be able to bring forward government legislation that addresses it consistently across all relevant acts.

Disappointingly, two years on from those commitments, the Government has not only failed to introduce reforms in federal law on this issue, but continues to add new provisions utilising the now-outdated terminology of intersex status. This includes the Hate Crimes Bill, as well as the recently-introduced Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024, and the Privacy and Other Legislation Amendment Bill 2024.

We urge the Commonwealth Government to follow through on its public commitments to update terminology in this area, and call on the Committee to recommend that it do so, including in the Hate Crimes Bill and in the introduction of any new Commonwealth civil vilification protections.

#### ***Recommendation 4 – Sex characteristics as a protected attribute***

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*The Hate Crimes Bill should be amended to replace the protected attribute of intersex status with sex characteristics, drawing on the definition in the Queensland Anti-Discrimination Act 1991. The same protected attribute should also be used in any new Commonwealth civil vilification protections.*