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Australian Parliamentary Joint Committee on Intelligence and Security
Online submission

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Review of the Exposure Draft Legislation: Combatting Antisemitism, Hate and Extremism Bill 2026

1. Introduction

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism[1] welcomes the opportunity to provide a brief submission to this inquiry. The office of the Special Rapporteur was established in 2005 and is mandated by resolutions of the United Nations Human Rights Council and General Assembly to make recommendations to States on the promotion and protection of human rights while countering terrorism.[2] The present Special Rapporteur is Professor Ben Saul.

Over the past twenty years the mandate has frequently made recommendations on the intersection of freedom of expression and counter-terrorism, including in relation to laws addressing incitement, promotion, advocacy and glorification of terrorism and hate speech. The Special Rapporteur supports efforts to prevent and counter hate speech in accordance with international human rights law, including the test for restrictions on the right to freedom of expression under article 19(3) of the International Covenant on Civil and Political Rights and the dedicated prohibition on hate speech under article 20(2) of the ICCPR. Pillar I of the General Assembly's 2006 Global Counter-Terrorism Strategy identifies the dehumanisation of victims of terrorism as a condition conducive to the spread of terrorism.

The Special Rapporteur is concerned, however, that elements of the Bill appear to be inconsistent with Australia's international human rights law obligations. In addition, the Special Rapporteur regrets the haste with which this Bill is being progressed, with only three days allowed for public consultations before this Committee on a far-reaching bill of 144 pages, with an explanatory memorandum of 319 pages, during the summer break of the legal profession. It is the experience of the Special Rapporteur's mandate worldwide that hasty law-making is prone to lead to over-reach, unintended consequences, and violations of human rights law, which does not well serve the victims of terrorist attacks or protect society.

The Special Rapporteur's comments are necessarily very brief in view of the lack of time available. Lack of comment on a particular provision of the Bill does not imply approval of it.

[1] https://www.ohchr.org/en/special-procedures/sr-terrorism.
[2] https://www.ohchr.org/en/special-procedures/sr-terrorism/about-mandate-special-rapporteur-terrorism.

2. Racial vilification offence

The Special Rapporteur welcomes, in principle, the long-overdue criminalisation of racial hatred in federal law. However, the proposed offence exceeds the permissible limits on the human right to freedom of expression as enshrined in article 20(2) of the ICCPR, which provides that: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." The proposed offence lowers that standard by:

- Referring to merely "promoting" (not solely the higher test of "inciting") hatred. The explanatory memorandum indicates that promote is intended to mean conduct that encourages, advocates or endorses hatred even if it does not directly urge others to act, and includes "normalising or legitimising hateful attitudes in public discourse" and material that "glorifies" hatred or presents racist ideologies as acceptable. Such an approach could even capture legitimate criticism of serious violations of international law committed by particular groups abroad, including in conflicts situations, particularly when the offence depends on the subjective fear of the target group. The office of the Special Rapporteur has also repeatedly warned States about the vagueness and overbreadth of terms such as "glorification", which are not consistent with the obligation to protect freedom of expression;
- Referring to the vague and overbroad standards of a mere "fear of harassment" or fear for "safety" (in addition to intimidation or fear of violence), rather than the higher international standard of discrimination, hostility or violence – which can encompass fears of harassment or safety but only when they are sufficiently serious;
- Imposing a subjective requirement that the conduct would cause such fears or consequences to a "reasonable person who is the target, or a member of the target group", rather than requiring an objective standard. The emotive perceptions of a particular group, or members of a particular group, may not always provide a reasonable assessment of the existence of harassment, intimidation, violence, or fear for safety, particularly where disagreeable political criticisms are conflated with attacks on the group rather than the political causes with which they may closely identify. Examples include perceiving legitimate criticism of Israel or Zionism, or support for Palestinian self-determination or statehood, as promoting hatred for Jews that causes some Jewish people to feel fear of harassment, fear for their safety, or intimidation.

Further, the defence for publishing in good faith a report or commentary on a matter of public interest is too narrow to cover other legitimate forms of participation in public discussions in the lawful exercise of freedom of expression.

The Special Rapporteur also recommends the deletion of the defence for directly quoting from, or otherwise referencing, a religious text for the purpose of religious teaching or discussion. Protecting individuals from racial hatred is a permissible restriction on freedom of religion. It is never acceptable to invoke any doctrinal religious texts to incite racial hatred.

The Special Rapporteur further recommends widening vilification offences, whether under this Bill or in subsequent laws, to include other core prohibited grounds of discrimination.

3. Prohibited hate groups

The proposed power of the Federal Police Minister to list organisations as "Prohibited Hate Groups" should be amended for the following reasons:

- The grounds for listing groups are overbroad. The Minister may list a group where: (a) it may have been involved engaging or assisting in engaging in, or preparing or planning for, a single hate crime (regardless of its severity in the circumstances), or advocating such crime, in the absence of any criminal conviction or procedural fairness relating to such crime accorded by the Minister when making his or her decision, and (b) it is reasonably necessary to prevent such harms. There is accordingly no requirement that the organisation must be substantially or regularly involved in hate crime. There is further no proportionality assessment expressly required, so as to consider the severity of the underlying conduct, the extent to which it represents the conduct of a few "bad apples" or organisational policy, and to weigh this against the consequences of banning the whole group, including as regards the freedoms of association, assembly, expression and religion, and the right to take part in political affairs, of its individual members. A listing could therefore result in unnecessary and disproportionate restrictions on human rights.
- The office of the Special Rapporteur and the United Nations Human Rights Committee have consistently warned that terms such as "advocates" and "praises" in counter-terrorism contexts are vague and overbroad and prone to arbitrary application and abuse, resulting in unjustified restrictions on freedom of expression and other rights. "Incitement" is the appropriate concept to use.
- The Minister is not required to observe procedural fairness. This not only raises concerns about the right to due process, particularly in the absence of any requirement of a criminal conviction, but also substantially increases the risk of incorrect decisions, since the affected organisation does not have an opportunity to refute the allegations and establish the truth. Erroneous listing would accordingly result in unnecessary, disproportionate or discriminatory restrictions on the exercise of fundamental rights related to the group, including, in the event of criminal prosecution of individuals for engaging with such groups, freedom from arbitrary detention. It would further be preferable to repose the power to list a group in a court not a minister.
- The wisdom of any power to list hate groups should also be reconsidered in the light of a fuller public consultation, given the real risks of driving such ideas "underground", which can have the effects of both intensifying violent ideologies and making it much more difficult for intelligence and law enforcement authorities to detect and prevent.

4. Hate symbols

The Special Rapporteur opposes:

- The reversal of the burden of proof requiring the defendant to prove that the public display of a prohibited hate symbol was for a legitimate purpose. Reverse burdens should be exceptional. It would not be unduly difficult for the prosecution to demonstrate that there was no legitimate purpose to the display and knowledge of a legitimate purpose would not normally be peculiarly with the defendant.
- Amending the offences for the public display of, or trade in, prohibited organisation symbols in sections 80.2HA and 80.2JA to enable the offence to be proven by showing a person was reckless as to whether the symbol was a prohibited organisation symbol.

Given the seriousness of the offence and the stigmatisation accompanying it, the ordinary high fault element of intention is appropriate.

- Replacing the reasonable person test in section 80.2H and 80.2HA with a new test that considers the perspectives of a reasonable person who is a member of a group of persons distinguished by race, religion or nationality. Such changes renders the test far too subjective and uncertain in a pluralistic community and thereby infringes the requirement of legality under article 15 of the ICCPR, since an individual may be unaware of, or unable to foresee, how their conduct may be perceived by a particular group. What one group may subjectively perceive as hateful may not reasonably be so.

5. Aggravated offences for religious officials and spiritual leaders

The Special Rapporteur acknowledges that aggravated offences may be justified where individuals in positions of religious authority commit offences that may influence those under their influence. However, such rationale may also apply to other authority figures, as the experience of certain far-right political parties in other countries attests; and national political figures may have more influence among a larger number of followers than fringe religious leaders. Limiting the offence to religious figures and not other similarly-situated authority figures may also contribute to the unjustified stigmatisation of certain religious communities. It is recommended to reconsider the aggravated offence. An alternative would be to treat the person's religious position as an aggravated sentencing factor rather than a distinct offence.

6. Increased penalties

The Special Rapporteur does not support increasing the maximum penalties for the offences in subsection 80.2BA(2) (threatening force or violence against groups) and subsection 80.2BB(2) (threatening force or violence against members of groups or their close associates) from 5 years imprisonment to 7 years imprisonment. The increases are said to be justified in order to align these offences with other offences of similar gravity such as advocating terrorism or genocide. However, such increase is clearly inconsistent with the sentencing principle of proportionality under the criminal law. Threats against groups or their members are plainly not of equivalent seriousness as advocating genocide, which involves certain more serious violence or other harms intended to physically destroy a group, or terrorism, which requires certain more serious violence or other harms intended to intimidate the public or coerce or intimidate a government. Disproportionate penalties can further result in arbitrary detention contrary to international law.

7. Aggravated sentencing factor

The Special Rapporteur welcomes, in principle, judicial consideration of the aggravation of sentencing where crimes were motivated by racial hatred. However, the proposed statutory direction to the court does not define the critical terms racial "hatred" or "hostility, malice or ill-will", including by reference to the definitions of the racial hatred offences or other legal guidance, or whether hatred is an objective or subjective standard. As such, this direction could potentially operate in a vague and overbroad manner to the detriment of a defendant in circumstances where punishment for genuinely racially aggravated conduct is not warranted. In addition, the direction appears to apply to any federal offence, not only offences of specified gravity (such as by reference to physical violence to the person or other serious harms).

8. Migration amendments

The Special Rapporteur welcomes, in principle, the exercise of migration powers to exclude non-citizens on the basis of hate-motivated conduct. However, to the extent that these new powers rely on other amendments in the Bill (such as those concerning hate groups and hate crimes) that are overbroad or otherwise inconsistent with human rights law, as outlined above, the reliance on such amendments to exclude non-citizens could raise human rights concerns. Such powers must also be exercised in a proportionate manner. For instance, the Bill could permit a single public statement concerning racial superiority or hatred to result in exclusion, regardless of its seriousness or potential impact. It would accordingly be vital to ensure that due weight is also given in decision-making to the degree of gravity of the statement, evidence of remorse, and the likely hardship to the person and their family and community if excluded, particularly in cases of residency and established ties to Australia. Such considerations are particularly important given the further proposal to permit permanent exclusion from Australia.

The Special Rapporteur is also concerned that the proposal to lower the standard for exclusion under paragraph 500A(1)(c) from "would" to "might", in relation to persons presenting a risk of specified conduct, particularly since the relevant conduct already includes vague and overbroad grounds such as inciting mere "discord" in the a segment of the community, or representing a danger to the community by merely "disrupting" it.

9. Customs amendments

It is welcome that the proposed prohibitions on the import or export of goods that are "violent extremist material", prohibited hate symbols and goods that contain are subject to exceptions for religious, academic, educational, artistic, literary or scientific purposes, journalism, criminal justice and public duties. However, given the breadth of the Criminal Code definition of "violent extremist material" (s. 474.45A) – covering any serious violence to advance, inter alia, a political or ideological cause, it is also necessary to exempt material that is consistent with international law. Specifically, international law recognises the right of national self-defence against armed attack (article 51 of the United Nations Charter), collective security action under Chapter VII of the United Nations Charter, lawful law enforcement action, resistance to the forcible denial of self-determination consistent with international law,[3] and defence against serious violations of human rights as recognised in many national constitution. Thus, for example, material supporting lawful resistance to Russia's illegal aggression against Ukraine, or Israel's unlawful occupation of the State of Palestine, where such resistance is also in accordance with international humanitarian law and international human rights law.

10. Firearms amendments

The Special Rapporteur supports, in principle, stronger firearms controls in order to strengthen protection of the right to life but makes no comment on the specifics.

11. Sunset clauses and independent review

The Special Rapporteur recommends that all of the provisions in the Bill be subject to appropriately short sunset clauses and rigorous independent review of their operation and impacts on human rights.

[3] See also Human Rights Committee, General Comment No. 11: Article 20, para. 2.