

7 November 2024

Senate Legal and Constitutional Affairs Committee
PO Box 6100,
Parliament House ACT 2600

Submission on ***The Criminal Code Amendment (Hate Crimes) Bill 2024***

Who are we?

1. This submission is from the combined church leaders of:
 - Australian Baptist Ministries
 - Australian Christian Churches
 - Anglican Church Diocese of Sydney
 - Presbyterian Church of Australia
 - Seventh-day Adventist Church
 - Christian Schools Australia
 - Australian Association of Christian Schools
2. The submission was coordinated by Freedom for Faith, a Christian legal think tank that exists to see religious freedom for all faiths protected and promoted in Australia and beyond.
3. We welcome the opportunity to make this submission and we give consent for this submission to be published. For further information, please contact Freedom for Faith.

Freedom for Faith

Chair:	The Right Reverend Dr Michael Stead
Executive Director:	Mr Mike Southon
Email address:	info@freedomforfaith.org.au
Postal Address:	PO Box H92 Australia Square NSW 1215

Executive Summary

4. Our concern arises from the interaction between adding new protected categories, the lowered bar of the existing and new offences, and uncertainty as to whether the definition of “force or violence” includes psychological harms.
5. We strongly affirm that all people are equally valuable and that no person should suffer physical force or violence, or the threat of it, for any reason – including their religion, sex or sexuality.
6. However, in some of these areas, strong disagreement has been interpreted as psychological harm or violence. The lowered bar of offence, particularly the subjective nature of the test in the new sections 80.2BA and 80.2BB, introduce the possibility that claims of psychological harm from robust debate will criminalise those discussions.
7. We urge the Government to clarify that the definition of “force or violence” in these sections is limited to physical harm only.

Psychological “force or violence” and protected attributes

8. We are concerned that “force or violence” are not defined in the sections addressed by this Bill, and could lend themselves to a broader interpretation than intended – notably that it could include psychological injury.
9. Other provisions in the Commonwealth Criminal Code 1995 make a distinction between physical and non-physical forms of harm, protecting only the former (see for example subsections 100.1(2)(a), (3) and section 146.1).
10. However, sections 80.2A and 80.2B do not make the same distinction. Our concern is that this failure, in the context of that deliberate exclusion elsewhere in the criminal code, can be read by courts to imply that the “force or violence” in this Bill does encompass psychological injury.
11. This is not an unreasonable possibility. Courts have upheld the proposition that criminally unlawful violence or force against a person includes actions that give rise to psychological injury. In New South Wales, “actual bodily harm”, which traditionally was understood to flow from physical force or violence, can now include harm flowing from force or violence to one’s mental health. For example, the New South Wales Court of Criminal Appeal stated in *Shu Qiang Li v R*:

A further matter is that, if the victim had been injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind, that would be likely to have amounted to “actual bodily harm” (see *R v Lardner*, unreported, NSWCCA, 10 September 1998.)

12. The distinction between physical and psychological harm becomes particularly significant because the protected attributes already include religion, and are expanded to include “sex, sexual orientation, gender identity and intersex status”.
13. We strongly affirm that no person should suffer physical force or violence, or the threat of it, for any reason – including their religion, sex or sexuality.
14. However, the protected attributes include some of the most controversial topics in modern society, including the ethical debates on the nature of gender or the correct expression of sexuality, and the truth claims of different religions and the eternal consequences of disbelief or disobedience. These are areas with strongly held opposing beliefs, where claims and counter-claims of psychological harm are common.
15. For example, a recent paper, *Mechanisms of religious trauma amongst queer people in Australia’s evangelical churches*, claims that “Christian communities teaching traditional theology and ethics, which treat diverse sexualities and gender expansive identities as sinful, can be places where faithful LGBTQIA+ people are subject to spiritual abuse”.¹ The paper argues that LGBTQIA+ people in traditional churches inherently suffer from “pervasive psychological damage resulting from religious messages, beliefs and experiences”.
16. Equally, many world faiths teach that they are the only way to eternal salvation, and that adherents of other faiths will face eternal consequences. These claims have frequently been accused of being harmful.
17. If the definition of force or violence is not restricted to physical harm, and is allowed to extend to psychological harm, then the Bill will risk encompassing legitimate debate and disagreement in our pluralist society.
18. Take for example a main-stream Christian church who teaches the historical Biblical understanding regarding sexuality and gender. They believe that the only appropriate expression of human sexuality is within heterosexual marriage, and will teach it from time to time from the pulpit or in small group studies. They also have a policy that people holding leadership positions must live out this restriction. In some interpretations of psychological harm, this teaching is inherently harmful to LGBTQIA+ people. In that case, the teachings and policy themselves could be interpreted as “force or violence”.
19. In this context, if the minister of the church teaches this policy, and urges others to follow it, they are “urging another person, or a group, to use force or violence against a group” identified by their sexuality.

¹ Hollier, J., Clifton, S. & Smith-Merry, J. Mechanisms of religious trauma amongst queer people in Australia’s evangelical churches. *Clin Soc Work J* 50, 275–285 (2022). <https://doi.org/10.1007/s10615-022-00839-x>

Lowered bar of offence

20. This concern is further exacerbated by the lowering of the bar of offense in sections 80.2A and 80.2B, and the newly created sections 80.2BA and 80.2BB.
21. In sections 80.2A and 80.2B, the Bill replaces the requirement that the urger *intend* that violence or force will occur with a test that the urger be *reckless* as to whether violence or force will occur.
22. If the Bill is addressing physical harm and the threat of physical harm, this bar is not concerning to us. However, if introducing the concept of psychological harm, it becomes conceivable that the church described above has been “reckless” as to whether their teachings cause psychological harm.
23. Sections 80.2BA and 80.2BB create the new prohibitions on “threatening force or violence” against groups and their members. The test for this offense is whether “a reasonable member of the targeted group would fear that the threat will be carried out.”
24. The Explanatory Memorandum states that “fear” arising from a threat of force of violence under sections 80.2BA and 80.2BB can involve psychological harm:

Subsection 80.2BA(8) would clarify that ‘fear’ includes apprehension. This is intended to recognise that fear can manifest in various forms, including the anticipation of harm. This subsection is intended to ensure that the new offences not only capture immediate and tangible ‘fear’, but also anticipatory or psychological apprehension.

25. The Explanatory Memorandum also clarifies the “reasonable member” test:

The reference to a reasonable member of a targeted group is designed to direct the court to consider the experiences, perspectives and characteristics of a person with the lived experience of a person with the relevant protected attribute in determining whether it would be reasonable to fear that the threat would be carried out. This is intended to acknowledge the experiences, which may include historical oppression and the experience of being a marginalised community, of members of relevant groups.

26. And:

The reasonable person test in paragraph 80.2BB(1)(d) means that it would not be necessary for the prosecution to prove that the threat actually had the effect of causing a member of the targeted group to fear the force or violence will be carried out. The fact that the threat would have this effect on a reasonable member of a targeted group would be sufficient.

27. Again, if the Bill is addressing physical harm and the fear and apprehension of physical harm, then our concerns are reduced. However, if the Bill can be interpreted so that the “force or violence” that is being urged or feared could be psychological, we again have a situation that risks criminalising traditional religious teaching on gender and sexuality.
28. Indeed, by adding the subjectivity of the “reasonable member” test in the new offenses, the Bill raises the possibility that the same “reasonable member” of a group determines not only whether they are fearful of harm, but what things are harmful. Could it be argued that any teaching that limits sexuality to heterosexual marriage is perceived as harmful

and violent by a “reasonable” member of the LBGTIQ+ community, and therefore criminally threatening?

29. It could be further argued, in the language of the Explanatory Memorandum, that LBGTIQ+ people have suffered “historical oppression and the experience of being a marginalised community” within faith communities. Therefore, the teachings and practice of the church described above are inherently violent, and promoting those teachings is “threatening force or violence”.
30. These concerns can be extended to a range of areas where debate about religion, ethics and values extends into protected categories. For example, many world faiths teach that their faith is the only true path to salvation and there are eternal consequences for failing to believe or obey. In a community where one faith is the majority, could non-adherents see themselves as the marginalised minority and perceive those teachings as harmful or violent towards them – and hence criminally threatening?

Conclusion and recommendation

31. Both the lowered bar of “recklessness” in sections 80.2A and 80.2B, and the new “reasonable member” test in 80.2BA and 80.2BB create scenarios where legitimate debate about religion or sexuality can be considered psychologically “violent” and hence illegal.
32. This represents an unacceptable limitation on the fundamental human rights of freedom of speech, thought and religion.
33. The most effective approach to remedying the problem is to clarify that sections 80.2A, 80.2B, 80.2BA and 80.2BB only refer to *physical* force or violence.
34. This would limit the offences to the objective measure of physical harm, and the comparatively objective measure of fear of physical harm. It would avoid applying serious criminal sanctions to the far more subjective measures of psychological harm, or fear of psychological harm.

35. We thank the Committee for the opportunity to submit, and welcome any further opportunity to contribute to deliberations.



Rev Mark Wilson
National Ministries Director
Australian Baptist Ministries



Rev Mark Edwards OAM
Australian Christian Churches



The Right Rev Dr Michael Stead
Chair, Religious Freedom Reference Group
Anglican Church Diocese of Sydney



Rev David Burke
Moderator-General
Presbyterian Church of Australia



Kojo Akomeah
Director Public Affairs & Religious Liberty
Seventh-day Adventist Church



Dr Rachel Carling
Director of Public Policy
Christian Schools Australia



Vanessa Cheng
Executive Officer
Australian Association of Christian Schools



Mike Southon
Executive Director
Freedom for Faith