

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Criminal Code Amendments (Hate Crimes) Bill 2024

Australian Human Rights Commission

Senator Paul Scarr asked the following question on 2 December 2024:

Senator SCARR: If you could take on notice and provide examples of other sections or other laws which use this sort of approach, that would be useful? It's always useful for us to say: 'Well, here's a recommendation. This is the approach that's used in another scenario, so we think that's something that should be considered.' In terms of the qualification, if I could put it that way, would it apply to each element or each of the offences? Is that the intention? Or would it apply across all of 80.2?

The response to the honourable senator's question is as follows:

The Commission's recommendation is the model proposed by the Australian Law Reform Commission (ALRC) in recommendation 12-2 of its 2006 report, 'Fighting Words: A Review of Seditious Laws in Australia' (ALRC Report 104, 2006) 261 available at <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC104.pdf> (ALRC Report).

This approach would involve the consideration of the context as a factor in the determination of whether each element of the offence that consists of the conduct of the individual are made out. That is, the trier of fact would take account of the context of the conduct in determining:

- for ss 80.2A and 80.2B of the *Criminal Code Act 1995* (Cth), whether:
 - the person intentionally urged another person, or a group, to use force or violence against a targeted group or members of a targeted group
 - they did so reckless as to whether force or violence will occur.
- for ss 80.2BA and 80.2BB of the *Criminal Code Act 1995* (Cth), whether the person threatened to use force or violence against a targeted group or members of a targeted group.

The ALRC Report also recommended that the offence require intention that force or violence would occur. However, the ALRC stated that, even if this recommendation was not accepted, recommendation 12-2 should still apply in relation to the determination of whether the person intentionally urged force or violence.

In discussing considerations of context being embedded into the offence, instead of as part of a defence to an established offence, the ALRC stated that:

Rather than attempt to protect freedom of expression through a 'defence' that arises after a person has been found to satisfy all the elements of the offence, the ALRC believes it would be better in principle and in practice to reframe the criminal offences in such a way that they do not extend to legitimate activities or unduly impinge on freedom of expression in the first place.

In other words, the focus should be on proving that a person intentionally urges the use of force or violence (in the specified circumstances), with the intention that the force or violence urged will occur (see Recommendation 8-1). The ALRC remains of the view that reforms to ensure adequate protection for freedom of expression should focus on intent and context in the application of the offences, rather than on elaborate new or amended defences.

The Commission agrees with this position. In principle and in practice, it is preferable to provide for the consideration of context as part of the offence, rather than as part of a defence.

The ALRC, in its report, also addressed concerns raised by the Commonwealth Department of Public Prosecutions with respect to this approach, confirming that, on balance it continued to favour this approach notwithstanding those concerns. It stated that:

The CDPP's concern appears to be that, once a defendant has raised a reasonable possibility that force or violence was urged, for example, in the context of an artistic work, the prosecution would have the legal burden of proving otherwise. However, the ALRC is not convinced that this is the way the provision would interact with Division 13 of the Criminal Code. The prosecution always has the legal burden of proving every element of the offence, including the element of an ulterior intention, if the ALRC's recommendation in Chapter 8 is accepted. The fact that urging takes place in a specified context does not necessarily negative the presence of the ulterior intention. Rather, it is a factor that the trier of fact must take into account in considering whether the defendant had the required intention that force or violence occur.

Under the ALRC's recommendation, the context of the conduct helps to establish the defendant's state of mind, but is not determinative in itself and is not a separate element of the offence. Conduct urging the use of force or violence to interfere in elections (for example) with the intent that such force or violence occur would not be rendered lawful simply because the defendant chose to use poetry or street theatre to communicate his or her message of violence. The ALRC considers that juries are fully capable of sorting through conflicting accounts of motivation and intent.

Similar approaches which provide for the consideration of certain circumstances in determining whether an element of an offence is made out can be seen in ss 70.2A and 270.10 of the *Criminal Code Act 1995* (Cth), ss 61HK and 93AB of the *Crimes Act 1900* (Cth) and ss 75C and 208HE of the *Criminal Code Act 1983* (NT). While not identical to what is proposed in the Commission's recommendation, these provisions provide guidance as relevant examples of contextual approaches already being embedded in offences under the criminal law.

An alternative approach to that recommended in our submission would be to insert an additional element into the offence, similar to that in s 80.2H(1)(d) of the *Criminal Code Act 1995* (Cth), which requires that certain factors do not apply before the offence is established. However, this approach would mean that, where one of a prescribed list of contextual circumstances applies, that factor would be determinative, and the offence would not be established.

The approach recommended by the Commission would allow the context to be a relevant factor in the determination of whether the elements of the offence are established, rather than being determinative of the application of the offence.

Senator Paul Scarr asked the following question on 2 December 2024:

Senator SCARR: Could you take on notice and provide your views with respect to a number of other submissions that have been received? Is that possible?

Ms Finlay: Certainly.

Senator SCARR: Australia's Right to Know organisation has made a submission, in particular with respect to freedom of the press and reporting on issues. Your proposed words could address to some extent the concern they have. I'd be very interested in your thoughts with respect to that issue.

We've also received some submissions from faith leaders, which have raised some concerns at the intersection of people in good faith practising their religion and provisions of this nature, in terms of freedom of speech et cetera. Could you also have a look at the submissions from the combined church leaders, submission 26; the Australian Catholic Bishops Conference, submission 29; Christian Schools Australia, submission 27; and the Islamic Council of Victoria, submission 14, which touches on those issues as well. That would be useful.

Ms Finlay: Could I just clarify? Having looked at some of those submissions, I know they cover a number of issues. Is it specifically in relation to the intersection of that right balance and the recommendation we've made that you'd like some consideration to be given?

Senator SCARR: To the extent that your recommendation would alleviate concerns that have been raised. Obviously, you've read the submissions; you understand the concerns that they've raised. I'm interested to know whether or not, from your perspective, the introduction of those words of clarification—if I can put it that way—would provide the relevant comfort in that respect. That was the primary reason I raised with you, but if you've got any other comments you'd like to make in relation to their submissions I'd of course be interested to hear those.

The response to the honourable senator's question is as follows:

The concerns raised by the organisations identified would be addressed by the Commission's recommendation to the extent that the circumstances of the conduct would be a factor that must be considered in the determination of whether the person intentionally urged the use of force or violence and was reckless as to whether the force or violence would occur for ss 80.2A and 80.2B, or whether the person threatened to use force or violence for ss 80.2BA and 80.2BB.

The concerns raised by Australia's Right to Know are specifically addressed in the prescribed relevant consideration in paragraph (d) of the Commission's recommendation, being conduct done 'in the dissemination of news or current affairs'. The matters raised in submissions 14, 26, 27 and 29 would be addressed insofar as the context of the conduct would be considered as a relevant factor in the determination of the relevant elements of the offence. As set out above, this factor would not be determinative of whether the offence is made out but would form part of the determination of whether the elements discussed above are established.