



**AUSTRALIA'S RIGHT TO KNOW SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE INTO  
INTELLIGENCE AND SECURITY INQUIRY INTO *COUNTER-TERRORISM LEGISLATION AMENDMENT  
(PROHIBITED HATE SYMBOLS AND OTHER MEASURES) BILL 2023***

**24 JULY 2023**

Australia's Right to Know coalition of media organisations (**ARTK**) appreciates the opportunity to make this submission to the Parliamentary Joint Committee into Intelligence and Security (**the Committee**) inquiry into the *Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (the Bill)*.

As the Committee is aware, the media plays a significant role in exposing and keeping the Australian public informed including regarding supremacist and terrorist organisations. The Bill should ensure the media is able to continue that reporting and commentary without risk of criminal liability.

ARTK welcomes the aspects of the Bill that recognise the importance of progressing and protecting media freedom in ensuring the Australian public's right to know by including a journalism exception within the elements of the offence, rather than as a defence.

Having said that, the Bill contains inconsistencies that require amendment.

**Schedule 1 – Prohibited symbols – contains inconsistencies that require amendment**

While the public display offence (sections 80.2H) and the trading offence (section 80.2J) take this approach, other offences in the Bill do not, only offering journalists a defence. We propose this be addressed by amending the other offences in the Bill so they mirror the structure of these sections.

Further, all of the provisions should cover both news reporting and commentary to ensure the public interest in being informed about supremacist and terrorist organisations is maintained; and the protections should extend to all parties involved in the journalistic process including but not limited to journalists, editors, producers and others involved in the creation of the of content.

Additionally, ARTK recommends that an exception should be included in Schedule 2 for the possession (and internal transmission) of violent extremist material or material advocating terrorism, as this material may come into journalists' possession in the usual course of news gathering and reporting. It may also be necessary to display at least parts of this material or to refer to it in reporting.

These amendments are vital to ensure that the Bill does not prevent reporting on issues including keeping the public aware and informed of activities of supremacist and terrorist organisations. The role of the media in shining a light on matters such as these helps keep the Australian public informed and safe. In shining this light, journalists and others involved in bringing these matters to light must not risk prosecution.

The amendments discussed above are in more detail below.

## **Schedule 1 – Prohibited symbols – significant concerns regarding police direction powers that require amendment**

ARTK is also deeply concerned about the proposed police direction powers set out in Schedule 1. These powers have the capacity to undermine, or at least operate inconsistently with, the primary provision of the Bill, exposing the media and journalists to criminal liability based on the "reasonable" suspicion of an individual police officer. The temptation for the police to use these direction powers, and the subsequent offence for non-compliance – which does not include the journalism exception as part of the offence – rather than going through the process of charging the primary offence is likely to make the latter a dead letter.

An important role as the effective arbiter of the conduct of the media and journalists should not be delegated to individual police officers. As is often the case, the lowest denominator will become the de facto standard: the police power provisions will be used instead of the primary offence. These provisions need to be amended to be consistent with the primary offence to prevent the circumvention of the protections in the primary offences.

## **Schedules 2 & 3 – Use of carriage service for violent extremist material; & Advocating terrorism**

ARTK also has concerns regarding Schedules 2 and 3 of the Bill which are detailed further in this submission, and require amendment.

## **SCHEDULE 1 – PROHIBITED SYMBOLS**

### **SECTION 80.2H – PUBLIC DISPLAY OF PROHIBITED SYMBOLS**

ARTK welcomes the progress in the construction of the section 80.2H offence. It is important that the relevant activities *not* being in aid of journalism purposes is an element of the offence, such that the onus is on the prosecution, rather than the defendant.

This structure provides better protection to journalists, as they do not have to wait until after charges have been filed and the matter has proceeded to trial before having the opportunity make out a journalism defence, and in the meantime suffer the anxiety and uncertainty of being investigated and prosecuted in perverse circumstances of the reversed of the onus of proof.

Notwithstanding this progress ARTK has concerns about the limitations placed on the elements of the offence. As currently drafted, section 80.2H(9)(b) only extends to: conduct engaged in for the purposes of making a news report, or a current affairs report; and a person working in a professional capacity as a journalist. The scope of both elements is insufficient for contemporaneous reporting and requires amendment. Specifically:

- **The conduct covered should extend** to making other commentary associated with news reporting (including opinion pieces, editorials, cartoons and satire). These other forms of commentary play an important role in assisting media and journalists to educate the public about supremacist and terrorist organisations and the risks they pose. Such commentary should be protected.

Limiting the conduct also limits the scope of genuine attempts to inform the public through visual imagery, commentary and satire. As the saying goes, a picture is worth a thousand words, and sometimes a cartoon can cut through in a way a detailed article or report cannot. Equally, a good satirist can use their work to point out the absurdity of the beliefs held by terrorist organisations, while also showing the danger of such beliefs; and

- **The protection should extend** to other individuals involved in making the report or commentary, not only professional journalists. The existing drafting does not provide protection for support staff, editors, commentators, cartoonists and other contributors (whether on staff or freelance), including experts.

The addition of the concept of public interest in the primary sections (section 80.2H and 80.2J, discussed further below) is otiose and should be deleted. A report about terrorism, white supremacism or any related issue is, by its very nature, a matter of public interest. The addition of that term to the elements of the offence only serves to potentially confuse its interpretation and that element should be deleted.

ARTK recommends the following amendments to section 80.2H(9):

- (9) For the purposes of paragraph (1)(d), this subsection applies if a reasonable person would consider that:
  - (a) the conduct mentioned in paragraph (1)(a) is engaged in for a purpose that is:
    - (i) a religious, academic, educational, artistic, literary or scientific purpose; and
    - (ii) not contrary to the public interest; or
  - (b) the conduct mentioned in paragraph (1)(a) is engaged in ~~or~~ for the purposes of ~~making a reporting news, report, or a~~ presenting current affairs ~~report, or~~ expressing editorial or other content in news media ~~that~~:
    - ~~(i) — is in the public interest; and~~
    - (ii) ~~is made~~ by a person working in a professional capacity as a journalist, ~~commentator or editor; or~~
      - (A) was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing commentary or other content in news media; and
      - (B) acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity.

We also note that despite the provisions of section 80.2H, the definition of "displayed in a public place" at section 80.2F(2)(a) provides newspapers and magazines as examples of documents. Given the exclusion of journalism from the remit of the offence, these two forms of journalism should be removed from the definition.

## SECTION 80.2J – TRADING IN PROHIBITED SYMBOLS

ARTK is also concerned that the proposed definition of "trades" under section 80.2G would capture the sale of various forms of journalistic material. Examples include, but are not limited to, newspapers, and subscription news content and programs. This risks legitimate public interest journalism falling within the relevant offences.

The journalism element of section 80.2J is drafted in a similar way as the element of section 80.2H and, as a result, the same concerns as in relation to section 80.2H apply to section 80.2J.

Though 80.2J contains a defence for commentary, this should be included as part of the element of the offence.

Further, ARTK recommends that sections 80.2H and 80.2J be harmonised, and amended such that all forms of journalism and commentary, and all those individuals involved in their production and trade/distribution, are protected. Given this, we do not think there needs to be a separate exception for trade as it's the nature of the goods that affects whether it's a crime or not, and that is dependent on the journalists. If it's journalism, then trade/distribution is not an issue.

ARTK suggests the following amendments to section 80.2J(5), and suggests that section 80.2J(6) be deleted:

- (5) For the purposes of paragraph (1)(e), this subsection applies if:
- (a) the goods that are traded contain one or more news reports, ~~or~~ current affairs reports, editorials or other news media content; and
  - (b) each prohibited symbol that the goods depict or contain appears in such a report and only appears in such a report; and
  - (c) in relation to each such report in which a prohibited symbol appears—a reasonable person would consider that the report was made:
    - (i) ~~the report was made~~ by a person working in a professional capacity as a journalist, commentator or editor; ~~and~~ or
    - (ii) by a person who:
      - (A) was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing commentary or other content in news media; and
      - (B) acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity.
- ~~(ii)—disseminating the report is in the public interest.~~

~~(6) Subsection (1) does not apply to a person's trading in goods if:~~

~~(a) the goods that are traded contain commentary on public affairs; and~~

~~(b) each prohibited symbol that the goods depict or contain appears in the commentary and only appears in the commentary; and~~

~~(c) in relation to commentary in which a prohibited symbol appears—making the commentary is in the public interest.~~

~~Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).~~

## SECTION 80.2K – DIRECTIONS TO CEASE DISPLAY OF PROHIBITED SYMBOLS IN PUBLIC

ARTK is deeply concerned with the proposals set out in the Bill in relation to the new police powers to direct individuals to cease display under section 80.2K. The provisions surrounding this new power are the most problematic provisions in the Bill. These provisions are highly likely to be utilised, are open to abuse, and undermine the other sections of the Bill that, with appropriate amendments, work to provide appropriate protections to reporting and journalism.

As discussed above, the section 80.2H display offence recognises the importance of journalism by making it an element of the offence that the conduct *not* be journalism. However, a police officer does not need to consider this when issuing a notice to cease under section 80.2K.

There are important differences between certain conduct being included as an element of an offence or as a defence. When considering whether to deploy powers, and whether to investigate or prosecute an offence, police and prosecutors will consider whether the defendant meets all the elements of the offence, but will not consider whether the defendant's conduct falls within the scope of a defence. Inclusion as an element of the offence, rather than as a defence, is a deterrent to overzealous policing.

Under the current drafting of the directions to cease display, any consideration of whether the conduct was in aid of news reporting only comes in as a defence at section 80.2M(3)(b). This means that a police officer can make a direction to cease to display without giving any thought or consideration as to whether the conduct and reporting may be permitted under section 80.2H. Such a pre-emptive step can have the effect of censoring news reporting of journalists without any proper review of the decision. The onus is on the journalist to defend themselves in court, rather than on the police officer to demonstrate that the conduct was not part of legitimate reporting.

Having a protection for journalism incorporated as an element of the offence rather than as a defence is also important from a policy perspective – it clearly flags that the importance of journalists' work is understood, and should be protected on that basis.

Individual police officers are granted a broad remit to stop conduct, and there is very little recourse for any journalist until the matter proceeds to court and the journalist has an opportunity to prove the defence. In the meantime, important reporting will be delayed and potentially quashed.

Under these provisions, the media is exposed to risk based on an individual's "reasonable suspicion". This is inconsistent with the drafting of the primary provisions, and the stated aim of the legislation not to impact reporting.

If a police officer issues a direction, a journalist must comply or risk committing an offence under section 80.2M. Given the ease of issuing a warning, and the fact it only requires the officer to have a "reasonable suspicion", police officers are likely to issue directions (and then rely on the offence of failing to comply), rather than going through the section 80.2H process to prosecute an alleged offence: the easiest route will always be taken.

These provisions are likely to have a chilling effect on reporting of supremacist and terrorist activities, and must be amended to require police officers to consider whether the conduct would be permissible under section 80.2H prior to issuing a direction under section 80.2K.

ARTK suggests the following amendments to section 80.2K:

#### *Directions*

- (1) A police officer may, in accordance with section 80.2L, direct a person to cause a prohibited symbol to cease to be displayed in a public place if:
  - (a) the prohibited symbol is displayed in a public place as mentioned in subsection 80.2F(1) (other than by being made available on the internet); ~~and~~
  - (b) subsection (2), (3) or (6) of this section applies; *and*
  - (c) *subsection (9) does not apply.*

...

#### *Journalism*

- (9) *For the purposes of paragraph (1)(c), this subsection applies if the conduct is being undertaken:*
  - (a) *by a person:*
    - (i) *in their professional capacity as a journalist, commentator or editor; or*
    - (ii) *by a person who:*
      - (A) *was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing commentary or other content in news media; and*

- (B) acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity; and
- (b) for the purposes of reporting news, presenting current affairs or expressing editorial or other content in news media.

#### *Definitions*

(910) In this section:

**police officer** means:

- (a) a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); or
- (b) a special member of the Australian Federal Police (within the meaning of that Act); or
- (c) a member (however described) of a police force of a State or Territory.

## **SCHEDULE 2 – USE OF CARRIAGE SERVICE FOR VIOLENT EXTREMIST MATERIAL**

ARTK is concerned that the new offences under Schedule 2, as currently drafted, could mean journalists and other editorial and support staff risk prosecution and imprisonment for the possession and internal transmission of violent extremist material used for journalistic purposes. Journalists and their editorial and support staff may receive violent extremist material as part of their work, for example in the form of footage of an extremist rally sent by a source, and this should not give rise to liability.

It is apparent that the intention of the changes proposed under Schedule 2 is to prevent the promotion of violent extremism, but, as drafted, the provisions go beyond this, so that even use that attempts to counteract extremism may be affected. Material referred to in order to describe the horrors of extremist acts may inadvertently provide instruction in engaging in such crimes, despite that not being in any way the intention of the journalist in using or transmitting the material. Journalists need to be protected where their reporting is in the public interest.

An exception should be included for the possession and internal transmission of violent extremist used for journalistic purposes.

Again, journalism is only contemplated as a defence to prosecution under section 474.45D, rather than as an element of an offence, and the defence is confined to journalists and news reports, not support staff and other commentary. These provisions should be made consistent with sections 80.2H and 80.2J in the manner recommended above to ensure all of those involved in the consideration and production of a story are appropriately protected, and the burden of proof falls on the prosecution. These amendments are important to harmonise protections and reduce the risk of the Bill resulting in a chilling effect on this important journalism.

It is important to include that journalists and support staff should be protected even if the material is *not* ultimately used in reporting. However, as the defence is currently drafted it would only protect journalists where the material does become part of or contribute to reporting. Not all information provided to or collected by journalists will ultimately result in reporting, but they should still be protected.

ARTK suggests the following amendments be made to sections 474.45B and 474.45C:

### **474.45B Using a carriage service for violent extremist material**

- (1) A person commits an offence if:
  - (a) the person:
    - (i) accesses material; or

- (ii) causes material, or an electronic link that can be used to access material, to be transmitted to the person; or
- (iii) transmits, makes available, publishes, distributes, advertises or promotes material or an electronic link that can be used to access material; or
- (iv) solicits material or an electronic link that can be used to access material; and
- (b) the person does so using a carriage service; ~~and~~
- (c) the material is violent extremist material; ~~and~~
- (d) the person is not engaged in journalism.

Penalty: Imprisonment for 5 years.

- (2) To avoid doubt, the following are the fault elements for the physical elements of an offence against subsection (1):
  - (a) intention is the fault element for the conduct referred to in paragraph (1)(a);
  - (b) recklessness is the fault element for the circumstance referred to in paragraph (1)(c).
- (3) Absolute liability applies to paragraph (1)(b).
- (4) For the purposes of paragraph (1)(d), a person is engaged in journalism if the conduct is being undertaken:
  - (a) by a person in their professional capacity as a journalist, commentator or editor; or
  - (b) by a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing commentary or other content in news media; and
  - (c) for the purposes of reporting news, presenting current affairs or editorial or other content in news media.

**474.45C Possessing or controlling violent extremist material obtained or accessed using a carriage service**

- (1) A person commits an offence if:
  - (a) the person has possession or control of material; and
  - (b) the material is in the form of data held in a computer or contained in a data storage device; and
  - (c) the person used a carriage service to obtain or access the material; ~~and~~
  - (d) the material is violent extremist material; ~~and~~
  - (e) the person is not engaged in journalism.

Penalty: Imprisonment for 5 years.

- (2) To avoid doubt, the following are the fault elements for the physical elements of an offence against subsection (1):
  - (a) intention is the fault element for the conduct referred to in paragraph (1)(a);
  - (b) recklessness is the fault element for the circumstance referred to in paragraph (1)(d).
- (3) Strict liability applies to paragraph (1)(b).

- (4) Absolute liability applies to paragraph (1)(c).
- (5) If the prosecution proves beyond reasonable doubt the matters mentioned in paragraphs (1)(a), (b) and (d), then it is presumed, unless the person proves to the contrary, that the person:
  - (a) obtained or accessed the material; and
  - (b) used a carriage service to obtain or access the material.

Note: A defendant bears a legal burden in relation to the matters in this subsection: see section 13.4.

- (6) For the purposes of paragraph (1)(e), a person is engaged in journalism if the conduct is being undertaken:
  - (a) by a person in their professional capacity as a journalist, commentator or editor; or
  - (b) by a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing commentary or other content in news media; and
  - (c) for the purposes of reporting news, presenting current affairs or editorial or other content in news media.

### **SCHEDULE 3 – ADVOCATING TERRORISM**

ARTK has similar concerns in relation to Schedule 3 as it does in relation to Schedule 2. The proposed definition of "advocates" is very wide-ranging, and represents a concerning broadening of the relevant offences. As noted above, some journalism could be seen as "providing instruction", even inadvertently, when reporting on how a terrorist act was undertaken. For example, an article discussing how a terrorist group managed to bypass security or avoid detection to commit their crimes may be viewed as instructing others on how to take these steps, rather than alerting the public and authorities as to the security risks. ARTK recommends the proposed change not be made.