

Fighting Antisemitism and Keeping Guns out of the Hands of Terrorists and Criminals Amendment Bill 2026

Submission No: 255

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Publication: Making the submission public but withholding your name

1. Executive Summary

I make this submission regarding the proposed amendments to the Criminal Code contained in the Fighting Antisemitism and Keeping Guns out of the Hands of Terrorists and Criminals Amendment Bill 2026.

This submission focuses on the proposed offence relating to “prohibited expressions” (ss 52C and 52DA). While the objective of addressing discrimination and hostility is legitimate, the mechanism adopted raises constitutional and human rights concerns.

In summary:

- The offence burdens core political communication protected by the implied freedom under the Commonwealth Constitution.
- The provision directly engages section 21 of the Human Rights Act 2019 (Qld), and its compatibility with section 13 (reasonable and demonstrably justified limits) requires careful examination.
- The drafting may be overly broad, particularly the standard of causing a person to feel “menaced, harassed or offended,” which risks uncertainty in criminal liability.
- The scope of the offence depends on expressions prescribed by regulation rather than exhaustively defined in primary legislation, raising concerns regarding legal certainty and parliamentary control over criminal law.
- The placement of an evidential burden on the accused in establishing a defence warrants scrutiny in light of the presumption of innocence.
- The offence may extend beyond the calibrated Commonwealth foreign interference framework, which criminalises covert or deceptive conduct undertaken on behalf of a foreign principal.
- Australia has binding obligations under the Genocide Convention to prevent and punish genocide, and under the ICCPR and CERD to prohibit incitement to violence and racial hatred. Australia also has binding obligations under the ICCPR to protect freedom of expression. Any criminal restriction on political expression must therefore be narrowly tailored and demonstrably proportionate to preventing incitement to violence or discrimination.
- The breadth of the provision risks creating a chilling effect on lawful political debate concerning foreign policy, international law, and Australia’s treaty obligations.

For these reasons, the Committee is invited to closely examine whether the proposed provisions are sufficiently precise, proportionate, and consistent with constitutional and human rights standards.

2. Clause in Question

Section 52DA of the proposed amendments creates an offence where a person publicly recites, distributes, publishes, or publicly displays a “prohibited expression” in a way that might reasonably be expected to cause a person to feel menaced, harassed or offended. The maximum penalty is two years’ imprisonment.

A “prohibited expression” is defined in section 52C and includes expressions prescribed by regulation, as well as expressions that closely resemble a prescribed expression. The scope of

criminal liability therefore depends on expressions identified through delegated legislation rather than exhaustively defined in the primary Act.

The provision includes certain defences, including where the conduct was engaged in for genuine artistic, educational, religious, historical, legal, law enforcement or public interest purposes. However, the defendant bears an evidential burden in raising such a defence.

3. Constitutional Analysis – Implied Freedom of Political Communication

(a) Burden on Political Communication

The implied freedom of political communication protects communication concerning governmental and political matters necessary for the system of representative and responsible government established by the Constitution (Lange v ABC (1997); McCloy v NSW (2015)).

Public debate concerning foreign policy, international conflicts, allegations of war crimes or genocide, and Australia's compliance with treaty obligations falls at the core of protected political communication. If an expression used within such debate is prescribed as a "prohibited expression," section 52DA directly burdens that communication by attaching criminal liability to its public use.

The provision therefore engages the implied freedom.

(b) Legitimate Purpose

The prevention of discrimination, hostility, and violence is a legitimate governmental objective compatible with the system of representative government. Protecting members of the community from racial hatred and incitement to violence is plainly within the scope of permissible legislative purpose.

The constitutional question is therefore not whether the objective is legitimate, but whether the means adopted are proportionate to that objective.

(c) Proportionality

Under the structured proportionality framework applied in McCloy v NSW (2015) and Clubb v Edwards (2019), the Court considers suitability, necessity, and adequacy in balance.

Suitability:

Criminalising expressions that are regularly used to incite discrimination or violence may be rationally connected to the objective of preventing hostility and protecting members of the community from harm.

Necessity:

It is less clear that criminalising the public recital or display of prescribed expressions — particularly where liability arises based on whether a person might reasonably be expected to feel "menaced, harassed or offended" — is the least restrictive means reasonably available. Existing Commonwealth and State laws already prohibit incitement to violence, serious vilification,

harassment, and related conduct. Those provisions typically require clearer thresholds of harm and, in some cases, proof of intent.

The proposed offence does not require proof of an intention to incite violence or serious discrimination. As drafted, it may extend to expressive conduct that is controversial or offensive but not inciting violence. The Committee may wish to consider whether existing incitement and vilification frameworks are sufficient to address the identified harms without extending criminal liability to prescribed expressions more broadly.

Adequacy in Balance:

The maximum penalty of two years' imprisonment for expressive conduct is significant. Where criminal sanctions attach to political expression without a requirement of intent to incite violence, the burden imposed on political communication is substantial.

In assessing balance, it is relevant that political debate — including robust, controversial, and even offensive expression — forms part of the system of representative government. Where a provision may capture lawful political advocacy alongside harmful conduct, the risk of overreach must be weighed carefully against the objective pursued.

4. Human Rights Act 2019 (Qld)

(a) Engagement of Section 21 – Freedom of Expression

Section 21(2) of the Human Rights Act 2019 (Qld) protects the right to seek, receive and impart information and ideas of all kinds, including political communication.

The public use of expressions in the context of political protest, advocacy, foreign policy debate, or discussion of alleged international crimes falls within the scope of protected expression. By attaching criminal liability to the public recital or display of prescribed expressions, section 52DA limits this right.

The provision therefore constitutes a limitation on the right to freedom of expression.

(b) Section 13 – Reasonable and Demonstrably Justified Limits

Under section 13(1), a human right may be limited only to the extent that the limitation is reasonable and demonstrably justified in a free and democratic society.

Relevant considerations include:

- The nature of the right;
- The importance of the purpose of the limitation;
- The relationship between the limitation and its purpose;
- Whether less restrictive means are reasonably available;
- The balance between the importance of the purpose and the severity of the limitation.

Freedom of political expression occupies a central position in a democratic society. While preventing discrimination, hostility and violence is an important objective, the breadth of the

proposed offence — particularly the standard of causing a person to feel “menaced, harassed or offended” — raises questions as to whether the limitation is narrowly tailored to serious harm.

The availability of existing incitement, vilification, and public order offences may be relevant to assessing whether criminalising prescribed expressions is necessary.

Further, the imposition of a maximum penalty of two years’ imprisonment for expressive conduct is a significant limitation that requires clear justification.

(c) Evidential Burden and Fairness Considerations

The requirement that an accused person bear an evidential burden in establishing a defence (including public interest or educational purposes) also engages the presumption of innocence protected under section 32 of the Human Rights Act.

While evidential burdens are not uncommon, their use in relation to expressive conduct warrants careful scrutiny in light of the Act’s protective purpose.

5. Rule of Law and Legal Certainty

Criminal offences should be defined with clarity and precision in primary legislation. The definition of “prohibited expression” depends upon prescription by regulation and extends to expressions that “closely resemble” a prescribed expression.

This approach raises questions of legal certainty. Individuals should be able to ascertain in advance, with reasonable clarity, whether their conduct may attract criminal liability. Where the scope of an imprisonable offence is determined through delegated legislation, and further extended through resemblance-based language, the boundaries of liability may become difficult to predict.

In addition, the standard of conduct being “reasonably expected” to cause a person to feel “menaced, harassed or offended” introduces a degree of indeterminacy. While protecting members of the community from harm is an important objective, criminal prohibitions must be framed with sufficient precision to avoid capturing lawful political expression.

In the context of political communication, legal certainty is particularly important. Broad or uncertain drafting may discourage individuals from participating in legitimate democratic debate for fear of potential criminal exposure, thereby producing a chilling effect beyond the provision’s intended scope.

6. Conclusion

The objective of preventing discrimination, hostility, and violence is legitimate and important. However, the proposed offence in sections 52C and 52DA engages core constitutional and human rights protections.

The criminalisation of prescribed expressions, the reliance on delegated legislation to define the scope of liability, the breadth of the “menaced, harassed or offended” standard, and the imposition of significant criminal penalties for expressive conduct collectively warrant careful scrutiny.

Given the central importance of political communication in Australia’s constitutional system and the protections contained in the Human Rights Act 2019 (Qld), the Committee may wish to consider whether the proposed provisions, in their current form, are compatible with established principles of proportionality, legal certainty, and democratic accountability