



ISLAMIC COUNCIL OF VICTORIA

**Submission to the Senate Legal and  
Constitutional Affairs Legislation  
Committee Inquiry into the *Criminal  
Code Amendment (Hate Crimes) Bill 2024***

**7<sup>th</sup> November 2024**

66-68 Jeffcott Street  
West Melbourne VIC  
3003

(03) 9328 2067  
admin@icv.org.au  
[www.icv.org.au](http://www.icv.org.au)

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The Islamic Council of Victoria (ICV) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee’s Inquiry into the *Criminal Code Amendment (Hate Crimes) Bill 2024* (‘the Hate Crimes Bill’). The ICV is the peak representative body for Muslims in Victoria, and our mission is to protect and advance the rights of Muslims in Victoria and across Australia and ensure that the voice of the Muslim community is heard and respected in policymaking. Over the past few years, the ICV has made a number of submissions concerning amendments to both Victorian and Commonwealth law on hate crimes and prohibited hate speech, including on the 2023 Inquiry into the *Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill*.<sup>1</sup> We are pleased that many of the concerns raised in our previous submissions have been addressed by new legislative developments at both the state and federal levels. However, we maintain concerns about the prevalence of Islamophobia in Australia, and the need for legislation to effectively address various forms of racial, religious, gender-based and other discrimination, while still allowing for legitimate religious and political expression. It is from this perspective that we write this submission.

All inquiries about this submission should be directed to:

Adel Salman

President

Email: [admin@icv.org.au](mailto:admin@icv.org.au)

Tel: +61 3 9328 2067

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<sup>1</sup> Islamic Council of Victoria, *Submission to the Parliamentary Joint Committee on Intelligence and Security: Review of the Counter Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023* (2023) <https://icv.org.au/wp-content/uploads/2023/12/ICV-Submission-Counter-Terrorism-Legislation-Amendment-Prohibited-Hate-Symbols-And-Other-Measures-Bill-2023.pdf>; Islamic Council of Victoria, Submission to the Department of Justice and Community Safety: Victorian Government’s Proposed Reforms Relating to Anti-Vilification Protections (2023), [https://icv.org.au/wpcontent/uploads/2023/12/ICV-Submission -Anti-Vilification-Protections-Consultation.pdf](https://icv.org.au/wpcontent/uploads/2023/12/ICV-Submission-Anti-Vilification-Protections-Consultation.pdf); Islamic Council of Victoria, *Submission to the Department of Justice and Community Safety on the ‘Overview of proposed anti-vilification protections for all Victorians’ consultation paper* (2024) <https://icv.org.au/wp-content/uploads/2024/10/ICV-2024-Anti-Vilification-Submission.pdf>.

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## Background

In many of the ICV’s previous submissions to both the Victorian and Federal governments surrounding hate crimes and prohibited hate speech, we have highlighted the prevalence of Islamophobia in Australia, which unfortunately remains a consistent challenge for the Muslim community. Incidents of Islamophobia are regularly reported and have tended to spike at alarming and unprecedented rates following significant global events and inflammatory media coverage. The Islamophobia Register Australia reported that in the month following Israel’s invasion of Gaza in 2023, the organisation saw a thirteen-fold increase in reports of Islamophobic incidents.<sup>2</sup>

The Islamophobia Register noted “a direct correlation” between overseas conflicts and “divisive political rhetoric surrounding them” and incidents of Islamophobia locally.<sup>3</sup> The Executive Director of the Register stated “the staggering rate at which reports of offline Islamophobia have increased in the last week is unprecedented in the Register’s 9-year history of operation and is deeply troubling. What makes it even more concerning is that we know that the majority of incidents of Islamophobia are never reported.”<sup>4</sup> Furthermore, the Islamophobia Register noted that in the weeks following the Bondi Junction attack, a mass murder committed by an individual with no affiliation to Islam but suggested in early media reports to be an ‘Islamist terrorist,’ reports of Islamophobia had risen by 720% compared to the average week in 2024.<sup>5</sup> Between 2023 and 2024, the Register recorded a 39-fold increase in Islamophobic incidents on university campuses.<sup>6</sup>

The ICV supports the proposition expressed in the Explanatory Memorandum of the Hate Crimes Bill that urging or threatening force or violence against protected groups is profoundly harmful in itself, and can lay the foundation for violence or extremism, including Islamophobic incidents and offences motivated by

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<sup>2</sup> Menchie Khairuddin, ‘Islamophobic reports up thirteen-fold since October,’ *The Third Sector*, 30 November 2023, <https://www.thirdsector.com.au/islamophobic-reports-up-thirteen-fold-since-october-7th/>.

<sup>3</sup> Islamophobia Register Australia, *Reports of Islamophobia continuing to increase at staggering rate - now ten-fold post Israel/Palestine escalations* (Press Release), 23 October 2023, [https://islamophobia.com.au/wp-content/uploads/2023/10/Islamophobia-Register\\_23-OCT-Press-Release.docx-1.pdf](https://islamophobia.com.au/wp-content/uploads/2023/10/Islamophobia-Register_23-OCT-Press-Release.docx-1.pdf).

<sup>4</sup> Ibid.

<sup>5</sup> Islamophobia Register Australia, *720% Increase in Incidents Reported* (Social Media Post, 24 April 2024) [https://www.instagram.com/p/C6IrND0yb\\_e/](https://www.instagram.com/p/C6IrND0yb_e/).

<sup>6</sup> Islamophobia Register Australia, *Increase in Islamophobic incidents on Australian University Campuses* (Press Release) 24 May 2024, [https://islamophobia.com.au/wp-content/uploads/2024/05/Islamophobia-RegisterAustralia\\_24-MAY-Press-Release.pdf](https://islamophobia.com.au/wp-content/uploads/2024/05/Islamophobia-RegisterAustralia_24-MAY-Press-Release.pdf).

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racial, religious, gender-based or other prejudice.<sup>7</sup> For this reason, the ICV supports the strengthening of hate crime offences in federal legislation, to prevent and punish the weaponisation of public discourse and the promotion of violence. However, we maintain reservations about some of the specific amendments contained in the Hate Crimes Bill, which are outlined below.

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## **Recommendation 1: Fault Threshold**

**The ICV supports lowering the threshold of the fault requirement for offences under sections 80.2A and 80.2B of the *Criminal Code Act*, but recommends that the required fault element be a test of objective reasonableness, rather than recklessness.**

The ICV believes that the fault element of intentionally urging violence against a group or member of a group because of a protected attribute is a prohibitively high threshold. It may often be difficult for victims of prejudice-motivated offences to prove the subjective intentions of an offender, being that they intended for violence to occur on the basis of a protected attribute. However, a lack of intention for violence to occur does not make the offence of urging or threatening force or violence any less dangerous, and these offences are still highly traumatic and harmful to the victim regardless of the offender's intention. Additionally, based on anecdotal reports from our community through the ICV's Islamophobia Support Service, as well as reports from the Islamophobia Register, victims of prejudice-motivated offences are often discouraged from pursuing charges due to a supposed lack of evidence, because of the difficulty of proving an offender's subjective intention and motivations, even where there is objective evidence of a prejudicial motive.<sup>8</sup>

For this reason, the ICV supports amending the fault element of the offences in sections 80.2A and 80.2B to establish a lower threshold for offenders to be charged and prosecuted. However, we recommend that the fault element required be an objective test of whether a reasonable person in the offender's circumstances would have perceived their conduct to create a risk of force or violence.

As defined in section 5.4 of the *Criminal Code Act*, a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist, and, having regard to the

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<sup>7</sup> Explanatory Memorandum, *Criminal Code Amendment (Hate Crimes) Bill 2024* [2].

<sup>8</sup> Dr. Ron Mason, Derya Iner, Chloe Smith, *Islamophobia in Australia IV (2014-2021)* (Report, 2023), 48.

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circumstance, it is unjustifiable to take that risk.<sup>9</sup> Although recklessness is a much lower threshold than intention, we are concerned that it is still a subjective test that requires the party alleging an offence to demonstrate that the accused was aware of a substantial risk of harm to a particular group, and took an unjustifiable risk anyway, which may still be prohibitively difficult for investigators and prosecutors.

Instead, the ICV proposes that the Committee consider recommending an objective test, such as whether a reasonable person in the accused's position would have considered the conduct or speech to have an unjustifiable risk in urging force or violence.

A similar standard has been considered in at least Queensland and Victorian state law in relation to certain forms of harassment.<sup>10</sup> We submit that it ought to be considered for the Commonwealth Criminal Code. In our view, this would more appropriately facilitate charges and prosecutions for offences under sections 80.2A and 80.2B, criminalising behaviour that is objectively harmful and unacceptable, and ensuring that all prejudice-motivated offences are properly charged and prosecuted.

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## **Recommendation 2: Threat Offence**

**The ICV supports the addition of sections 80.2BA and 80.2B to create an offence for threatening force or violence against a target group, or an individual because of their membership of a target group.**

We support the criminalisation of active threats of violence, as distinct from urging from violence intentionally or recklessly, against protected groups. We agree that the threat offence should incur a higher maximum penalty than the offence of urging force or violence.

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<sup>9</sup> *Criminal Code Act 1995* (Cth), s 5.4.

<sup>10</sup> *Equal Opportunity Act 2010* (Vic), s92(1); *Anti-Discrimination Act 1991* (Qld), s 119(f).

### Recommendation 3: Disapplication of ‘Good Faith’ Defence

**The ICV supports the removal of the ‘good faith’ defence from sections 80.2A and 80.2B of the Criminal Code Act.**

We concur with the proposition in the Bill’s Explanatory Memorandum that urging force or violence against a particular group because of a protected attribute such as race, religion, sex, nationality or language cannot truly be done in good faith,<sup>11</sup> and thus support the disapplication of this defence.

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### Recommendation 4: Recognising Intersectionality of Attributes

**The ICV supports the addition of subsection 80.2A(3A), clarifying that an offender may have in mind a combination of the protected attributes.**

As we have highlighted in our previous submissions on both Victoria’s anti-vilification laws and Commonwealth laws on hate crimes, discrimination and prejudice-motivated offences often occur at the intersection of attributes such as race, religion, nationality, language, gender and more.<sup>12</sup> Particularly in relation to Islamophobia, offences against Muslims in Australia most often occur on the basis of multiple factors, with Islamophobia being described by experts as a form of ‘anti-Muslim racism,’ rather than exclusively religious discrimination.<sup>13</sup> As stated by a report from Charles Sturt University and ISRA, Islamophobic offences are typically “associated with other characteristics that make people vulnerable, such as gender, age and race.”<sup>14</sup> Muslim women in particular are subject to alarming rates of hostility and abuse based on the intersection of race, religion and gender. Multiple reports from Charles Sturt University and the Islamophobia Register Australia found that women who were alone were most likely to be the targets of in-person Islamophobic attacks, especially because of the practice among Muslim

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<sup>11</sup> Explanatory Memorandum, *Criminal Code Amendment (Hate Crimes) Bill 2024*, [10].

<sup>12</sup> Islamic Council of Victoria, *Submission to the Parliamentary Joint Committee on Intelligence and Security: Review of the Counterterrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023* (2023) <https://icv.org.au/wp-content/uploads/2023/12/ICV-Submission-Counter-Terrorism-Legislation-Amendment-Prohibited-Hate-Symbols-And-Other-Measures-Bill-2023.pdf>, 3; Islamic Council of Victoria, *Submission to the Department of Justice and Community Safety on the ‘Overview of proposed anti-vilification protections for all Victorians’ consultation paper* (2024) <https://icv.org.au/wp-content/uploads/2024/10/ICV-2024-Anti-Vilification-Submission.pdf>, 6-7.

<sup>13</sup> Mason G. and Asquith N. *Islamophobia within the Hate Crime Framework in Inner, Derya, ed. Islamophobia in Australia Report II (2017-2018)* (Report, 2019), 20.

<sup>14</sup> *Ibid.*

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women of wearing identifying garments and headscarves.<sup>15</sup> The Register’s most recent report of Islamophobic incidents in Australia also found that “most victims were women (78%) and most perpetrators were men (70%),” and it was most common for younger women of non-white ethnic backgrounds to be targeted,<sup>16</sup> highlighting the intersectional discrimination which fuels many Islamophobic acts.

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## **Recommendation 5: Protection of Religious and Political Expression**

**The ICV appreciates the clarification in the Bill’s Explanatory Memorandum that “the offences are not intended to capture mere expressions of opinion or belief,” but only conduct that “involves threats of force of violence.” Although this principle is not codified in the amendments, it must be upheld in the investigation and prosecution of offences.**

The ICV categorically opposes vilifying behaviour towards vulnerable communities. However, given the broad scope of protected attributes, and the removal of the ‘good faith’ defence from the legislation, it is crucial to ensure that legitimate religious and political expression is protected. We do not believe that a codified defence for conduct done in the context of political or religious expression is necessary in relation to offences under sections 80.2A or 80.2B, such as that which has been proposed for civil hate-speech offences in Victoria’s *Equal Opportunity Act*.<sup>17</sup> This is because a genuine religious practice or political expression should not involve calling for violence against a group or individual because of a protected attribute such as race, religion, sex, or disability, and thus, the *actus reus* of these offences would not be satisfied in this context.

However, given the lowered fault element of the offences, and the expanded list of protected attributes, we must emphasise that legitimate religious teachings, or political opinion, must never be criminalised. The offences under sections 80.2A, 80.2B and 80.2BA must not cover the expression or teaching of religious beliefs, statements of political or other opinion, or legitimate criticism of an ideological or

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<sup>15</sup> Islamophobia Register Australia, Charles Sturt University & ISRA, *The Impact of the First Islamophobia in Australia Report* (Report, 2022, 1; Dr. Ron Mason, Derya Iner, Chloe Smith, *Islamophobia in Australia IV (2014-2021)* (Report, 2023), 2, 26.

<sup>16</sup> Dr. Ron Mason, Derya Iner, Chloe Smith, *Islamophobia in Australia IV (2014-2021)* (Report, 2023), 2, 13.

<sup>17</sup> Department of Justice and Community Safety, *Overview of proposed anti-vilification protections for all Victorians* (Consultation Paper, 2024), 17.

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political group, but only conduct or speech that involves actively urging violence or force on the basis of a protected attribute.

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## **Recommendation 6: Strict Definition of Hate Symbols**

**In the enforcement of the offences contained in sections 80.2HA, 80.2JA and 80.2K, the definition of ‘prohibited terrorist organisation symbols’ contained in section 80.2E(3) must be narrowly applied. While we support the prohibition of Nazi symbols and overt hate symbols under the *Criminal Code Act*, the ICV maintains serious concerns about the potential for these provisions to contribute to Islamophobia and the demonisation of legitimate political causes.**

The ICV supports the criminalisation of overt hate symbols when their display would likely offend, insult, humiliate or intimidate individuals based on attributes like race, religion, nationality or sex. This measure is critical in promoting social cohesion and protecting individuals from targeted hate. However, the broad criminalisation of symbols used by prohibited terrorist groups as identifying symbols, as well as anything “likely to be confused with or mistaken for that symbol, has the potential to consequentially fuel Islamophobia and stigmatise legitimate religious beliefs or political causes.

### **6.1 The conflation of Islamic symbols with hate symbols**

In our 2023 submission to the Parliamentary Joint Committee on Intelligence and Security’s inquiry into the *Prohibited Hate Symbols Bill*, we stated that the proposed changes would fuel distrust and unintended antagonism towards Islam and Muslims, particularly since the original draft bill expressly banned the ISIS flag alongside Nazi symbols.<sup>18</sup> The ICV appreciates that this explicit prohibition was not carried over into the current provisions, since the banning of the ISIS flag effectively criminalised certain displays of the Shahada - a central tenet of the Islamic faith. As stated in our 2023 submission, the previous draft bill “[defined] the Islamic State flag as a rectangular, black emblem with black Arabic writing translating to ‘God, messenger, Muhammad’ and white writing of the Islamic creed declaring ‘There is no God but Allah, and Muhammad is his messenger’ - known as the shahada or testimony of

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<sup>18</sup> Islamic Council of Victoria, *Submission to the Parliamentary Joint Committee on Intelligence and Security: Review of the Counter Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023* (2023) <https://icv.org.au/wp-content/uploads/2023/12/ICV-Submission-Counter-Terrorism-Legislation-Amendment-Prohibited-Hate-Symbols-And-Other-Measures-Bill-2023.pdf>, 4-5.



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*faith. The shahada is found in books, in artwork, in mosques, in schools, and in homes. When a person wishes to embrace Islam, they are required to recite the shahada with full conviction and understanding.*"<sup>19</sup>

Despite the removal of this express prohibition, we believe the overall effect of the provisions banning “prohibited terrorist organisation symbols,” which includes things “resembling a symbol [such that] it is likely to be confused with or mistaken for that symbol,”<sup>20</sup> still risks conflating religion with terrorism and lays the groundwork for the demonisation of religious symbols. The ICV emphasised these concerns in our 2023 submission to the Intelligence and Security Committee, and they have since become increasingly evident. For example, this year various prominent media outlets inaccurately claimed that pro-Palestine protestors in Melbourne were carrying a Hamas flag, described by the Chair of the Anti-Defamation Commission and several media publications as a “declaration of war” and “insidious [and] frightening” antisemitism.<sup>21</sup> In reality, the image referred to by these commentators was of Shia Muslims in Melbourne attending a celebration on the day of Ashura, a holy day of commemoration in Islam, carrying a green flag with Arabic text which appeared to commemorate Imam Hussein, an exalted figure among Shia Muslims. Under the provisions of 80.2E(3)(b), such a flag if waived in a different setting could technically be classified as something “likely to be confused with or mistaken for” a prohibited terrorist symbol, which overtly demonstrates the need for protections to ensure that such legitimate religious conduct never be criminalised. Moreover, the false and reckless reporting of this occurrence highlights the potential for such symbols to be demonised, and misconstrued in a way that leads to discrimination, vilification and anti-Muslim rhetoric. Legislation that criminalises any symbol resembling that of a terrorist organisation, risks further inflaming this rhetoric and demonising Muslims. Islamophobia continues to be a pressing issue, which has the potential to be exacerbated by the criminalisation of symbols associated with Islamic identity.

## **6.2 The potential to conflate valid political expression with hate symbols**

In light of the current military assault on Gaza, and now Lebanon, which has continued since October 2023, more and more Australians are striving to promote an end to the unfolding genocide and express their solidarity with the Palestinian people. However, the increasing visibility of the Palestinian struggle

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<sup>19</sup> Ibid.

<sup>20</sup> *Criminal Code Act 1995* (Cth), s 80.2E 3(b).

<sup>21</sup> ABC, ‘Wrong Flag,’ *ABC Media Watch*, 5 August 2024, <https://www.abc.net.au/mediawatch/episodes/flag/104186254>.

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in Australia has also meant that expressions of solidarity with Palestine are being increasingly misconstrued and vilified. Symbols associated with the Palestinian struggle for freedom, justice and human rights, such as the *keffiyeh*, have already faced backlash, in some cases being restricted or prohibited. For example, in 2024 the Victorian Parliament banned the wearing of keffiyehs in parliament, deeming it “political paraphernalia,” and directed an MP to remove watermelon-shaped earrings, being another symbol used to represent Palestinian identity and solidarity, particularly in contexts where Palestinian flags have been banned.<sup>22</sup> In the United States, there have been calls to ban the *keffiyeh* in public schools, due to the false perception that it is an antisemitic hate symbol.<sup>23</sup> Earlier this year, the Executive Director of the Anti-Defamation League, an international non-governmental organisation aiming to combat antisemitism, compared the *keffiyeh* to the Nazi swastika.<sup>24</sup>

We appreciate that the offences contained in sections 80.2HA, 80.2JA and 80.2K explicitly refer to symbols used by prohibited terrorist groups. However, the aforementioned examples underscore the growing tension surrounding symbols of Palestinian identity and resistance and raise important and topical questions about the boundaries between political expression and prohibited hate speech or symbols, which cannot be ignored in the context of these new amendments to the Criminal Code. Namely, it is common for Zionist proponents to define the Zionist colonisation of Palestine as an inherent aspect of their religious, cultural or ethnic identity.<sup>25</sup> Prominent definitions of antisemitism such as that of the International Holocaust Remembrance Alliance, conflate criticism of the state of Israel with antisemitic speech on the basis that it “[denies] the Jewish people their right to self-determination.”<sup>26</sup>

In this context, symbols of resistance to Zionism as a political ideology, such as the Palestinian flag or keffiyeh, are often inaccurately described as ‘hate symbols’ or deemed to be associated with prohibited

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<sup>22</sup> Benita Kolovos, ‘Victorian parliament deems keffiyeh ‘political’ as it bans MPs from wearing it,’ *The Guardian*, 15 May 2024, <https://www.theguardian.com/australia-news/article/2024/may/15/victorian-parliament-bans-mps-wearing-keffiyeh>.

<sup>23</sup> ‘Symbols of Oct. 7 slaughter’: Jewish group petitions for NYC keffiyeh ban - NYP’ *The Jerusalem Post*, 25 August 2024, <https://www.jpost.com/diaspora/antisemitism/article-816197>.

<sup>24</sup> Terry Ahwal, ‘Jonathan Greenblatt’s racist keffiyeh smear is another chapter in the ADL’s war on Palestinians,’ *Mondoweiss*, 8 April 2024, <https://mondoweiss.net/2024/04/jonathan-greenblatts-racist-keffiyeh-smear-is-another-chapter-in-the-adls-war-on-palestinians/>.

<sup>25</sup> Islamic Council of Victoria, *Position Statement on the Occupation of Palestine* (2024), <https://icv.org.au/wp-content/uploads/2024/08/Palestine-Position-Statement-Final-PDF.pdf>, 11; Peter Beinart, ‘Debunking the myth that anti-Zionism is antisemitic,’ *The Guardian*, 8 March 2019, <https://www.theguardian.com/news/2019/mar/07/debunking-myth-that-anti-zionism-is-antisemitic>.

<sup>26</sup> ‘Working definition of antisemitism’ *International Holocaust Remembrance Alliance*, <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism>.

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terrorist organisations such as Hamas. It is important to emphasise that Zionism is a political ideology, and opposition to it is not a hate crime or motivated by prejudice. Political dissent or criticism of Zionism, or of any state, government or political ideology associated with any religious or national group, must never be conflated with hate speech under laws such as the *Hate Crimes Bill*. For this reason, the definition of “proscribed terrorist symbols” within section 80.2E 3(b) of the *Criminal Code Act* must be narrowly applied, and never extend to legitimate expressions of national identity, political solidarity or religious values.

## Conclusion

The ICV appreciates the opportunity to give feedback on the *Criminal Code Amendment (Hate Crimes) Bill 2024*, and we appreciate the Parliament’s efforts to strengthen legislative protections against hate crimes and prejudice-motivated violence. We believe that the proposed amendments make several positive steps towards creating a safer and more inclusive Australian society. However, we urge the committee to consider amendments that will ensure the legislation is both effective in combating hate-based violence and balanced to protect legitimate religious and political expression. The ICV remains committed to advancing the rights and safety of all communities within Australia and hopes that the recommendations in this submission will contribute to a robust, equitable and effective legislative framework.