



Submission to the Inquiry into the Combatting Antisemitism,
Hate and Extremism Bill 2026
15 January 2026

Introduction

The Affiliation of Australian Women's Advocacy Alliances (AAWAA) makes this submission in response to the exposure draft of the Combatting Antisemitism, Hate and Extremism Bill 2026.¹ We acknowledge the government's intention to respond to serious threats to community safety, particularly following the Bondi Beach terrorist attack. However, we submit that Schedule 1, Part 4 of the bill—which establishes a prohibited hate groups listing framework—raises constitutional, procedural, and governance concerns that require careful attention before this legislation proceeds.

Our submission focuses on constitutional vulnerabilities relevant to organisations engaged in political advocacy on contested policy issues, particularly where advocacy for one protected attribute may be characterised as harmful to another. We do not address provisions relating to racial vilification, migration, firearms, or visas, as these fall outside our remit.

Throughout this submission, we distinguish between political advocacy (lawful communication on policy matters by civil society organisations) and 'advocacy' as defined in section 114A.2(2) of the bill (counselling, promoting, or encouraging conduct constituting hate crimes).

Summary of concerns

We identify four principal areas of concern.

First, the prohibited hate groups framework may fail the proportionality test required by the implied freedom of political communication, particularly regarding necessity (no evidence that less restrictive alternatives were considered) and balance (severe restrictions disproportionate to the conduct captured).

Second, the explicit exclusion of procedural fairness requirements in section 114A.4(5) creates a constitutional vulnerability, particularly given the severity of criminal consequences that flow from ministerial listing decisions.

¹ [Combatting Antisemitism, Hate and Extremism Bill 2026 \(exposure draft\)](#).

Third, the absence of meaningful consultation with women's organisations during the bill's development may constitute a breach of Australia's obligations under article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Fourth, the public record contains no demonstrated evidence that organisational criminalisation is necessary, no analysis of less restrictive civil and criminal alternatives, and no impact assessment on democratic participation.

Constitutional framework: implied freedom of political communication

The constitutional doctrine

The High Court has established that the Australian Constitution contains an implied freedom of political communication, derived from sections 7 and 24. This freedom operates as a restriction on legislative power: laws that burden political communication must be reasonably appropriate and adapted to serve a legitimate end compatible with the maintenance of representative government.

The proportionality test established in *McCloy v New South Wales* (2015) requires that laws burdening political communication be suitable (rationally connected to a legitimate purpose), necessary (no obvious and compelling less restrictive alternative), and adequate in balance (the purpose justifies the extent of restriction).²

Schedule 1, Part 4: the prohibited hate groups framework

Listing mechanism and criminal consequences

Schedule 1, Part 4 of the bill inserts a new Part 5.3B into the Criminal Code, establishing a prohibited hate groups framework. The Home Affairs Minister may list organisations as prohibited hate groups where the Minister is satisfied on reasonable grounds that the organisation has either engaged in or assisted in hate crimes, or has advocated engaging in conduct constituting a hate crime (subject to specified exceptions), and that listing is reasonably necessary to prevent social, economic, psychological or physical harm.³

Under section 114A.2(2), an organisation "advocates" engaging in conduct constituting a hate crime if the organisation "counsels, promotes, encourages or urges the engagement in conduct constituting a hate crime" or "praises the engagement in" such conduct where there is "an unacceptable risk that such praise might have the effect of leading a person...to engage in conduct constituting a hate crime".⁴

Once listed, severe criminal penalties attach: directing the activities of a prohibited hate group attracts 15 years imprisonment (where knowledge is established) or 10 years (where

² *McCloy v New South Wales* [2015] HCA 34; See also Library of Congress, "[Australia: Implied Constitutional Freedom of Political Communication](#)" (2021); Columbia Global Freedom of Expression, "[McCloy v. New South Wales](#)" (2023); Australian Public Law, "[Proportionality and McCloy](#)" (2016).

³ [Combatting Antisemitism, Hate and Extremism Bill 2026 \(exposure draft\)](#), Schedule 1, Part 4, s 114A.4(1).

⁴ *Ibid* s 114A.2(2).

recklessness is established); membership attracts 7 years imprisonment; and recruiting, training, funding, or supporting such organisations attracts penalties of 10 to 15 years.⁵

Current limitation to race and national origin

We note that as currently drafted, the definition of "hate crime" in section 114A.3 is limited to conduct targeting groups distinguished by race or national or ethnic origin.⁶ The bill does not at present extend the prohibited hate groups framework to conduct based on other protected attributes including sex, sexual orientation, gender identity, intersex status, religion, or disability. This limitation is constitutionally significant for our analysis.

However, we submit that the constitutional and procedural concerns we identify in this submission apply regardless of which protected attributes are covered by the framework. Should the framework be expanded in future—whether through amendment during passage or subsequent legislation—to include additional protected attributes, the structural vulnerabilities we identify would remain.

Constitutional analysis: proportionality test

We submit that the prohibited hate groups framework, as currently structured, presents constitutional vulnerabilities under the implied freedom of political communication proportionality test.

Suitability

The framework captures organisations based on 'advocacy' rather than engagement in criminal conduct. The rational connection between criminalising organisational membership for advocacy positions and preventing violence is attenuated. Political advocacy organisations do not engage in violence; they engage in communication on governmental and political matters. The framework conflates political disagreement with incitement to violence.

Necessity and failure to consider less restrictive alternatives

Australia maintains comprehensive existing mechanisms for addressing discrimination and harmful conduct. No explanation has been provided in public materials (such as the exposure draft or the explanatory memorandum) as to why these mechanisms are inadequate, necessitating organisational criminalisation.

Civil anti-discrimination frameworks: The Australian Human Rights Commission provides a complaints process for allegations of discrimination, with remedies including policy changes, apologies, and compensation.⁷ State and territory anti-discrimination tribunals provide similar mechanisms. These processes include procedural fairness, published decisions, and opportunities for parties to respond to allegations.

⁵ Ibid ss 114B.1, 114B.2, 114B.3.

⁶ Ibid s 114A.3.

⁷ [Complaints under the Sex Discrimination Act: Gender Identity | Australian Human Rights Commission](#).

Criminal law: Division 80 of the Criminal Code already criminalises urging or threatening violence against groups distinguished by protected attributes.⁸ State and territory criminal laws provide additional offences for vilification and violence. These laws enable prosecution of individuals who engage in or incite criminal conduct.

Administrative processes: The *Sex Discrimination Act 1984* provides exemption processes for organisations seeking to maintain single-sex services or spaces. The Australian Human Rights Commission administers these processes with transparency, published decisions, and opportunities for affected parties to make submissions. These processes enable organisations to lawfully maintain services or spaces based on protected attributes where justified.

Parliamentary and democratic processes: Contested policy issues are resolved through parliamentary debate, government consultation processes, and democratic participation. Organisations and individuals make submissions to parliamentary inquiries, engage with policy consultations, and participate in public debate on matters where policy positions differ.

The government has not demonstrated that these existing civil, criminal, administrative, and democratic mechanisms are inadequate to address the harms the bill seeks to prevent. Nor has it explained why individual prosecution under existing hate crime offences is insufficient, necessitating organisational criminalisation. The distinction between prosecuting individuals for criminal conduct and criminalising organisations for advocacy positions is constitutionally and democratically significant.

The inadequate consultation period—72 hours from release of the exposure draft to submission deadline (discussed below under CEDAW obligations)—prevented any systematic analysis of less restrictive alternatives. This procedural deficiency is itself evidence of the necessity failure: if less restrictive alternatives were adequately considered, such analysis would appear in the public record or explanatory materials.

This evidentiary gap is particularly significant for the necessity prong of the proportionality test. If the government cannot demonstrate that less restrictive alternatives are insufficient, the framework fails the constitutional test. The absence of this analysis suggests that the necessity prong of the proportionality test cannot be satisfied: if less restrictive alternatives exist and have not been demonstrated to be inadequate, organisational criminalisation is not necessary.

Adequate in balance

The severity of the criminal penalties is grossly disproportionate where the threshold for listing is ‘advocacy’ rather than engagement in criminal conduct. Organisations engaged in lawful political advocacy on contested policy issues, communicating through democratic processes including parliamentary submissions, public campaigns, and policy debates, would face potential criminalisation based on characterisations of their advocacy as creating “serious risk to the health or safety of a section of the public”.⁹

⁸ *Criminal Code Act 1995* (Cth) Div 80.

⁹ Schedule 1, Part 4, s 114A.3(3)(a)(v).

The chilling effect on political participation is evident. Women's organisations have documented that advocacy on contested issues relating to sex-based protections already results in professional consequences, de-platforming, and public vilification.¹⁰ Criminal penalties for membership or support of advocacy organisations would suppress organised political participation on matters where policy positions are contested between groups holding different protected attributes.

Procedural fairness and administrative law concerns

Beyond constitutional concerns regarding political communication, the framework's procedural structure raises additional vulnerabilities.

Exclusion of procedural fairness requirements

Section 114A.4(5) of the bill provides: "The AFP Minister is not required to observe any requirements of procedural fairness in deciding whether or not the AFP Minister is satisfied for the purposes of this section."¹¹ Section 114A.5(5) contains an identical provision regarding the Director-General of Security's advice.¹²

These provisions explicitly exclude any requirement for the Minister to:

- Notify the organisation before listing
- Provide the organisation with an opportunity to respond to allegations
- Conduct a hearing
- Disclose the evidence or intelligence upon which the listing decision is based

The organisation becomes aware of its listing only after the regulation is made. Criminal liability for membership, directing, recruiting, funding, or supporting the organisation then attaches immediately, subject only to knowledge or recklessness regarding the organisation's status as a prohibited hate group.

Constitutional vulnerability

While the bill purports to exclude procedural fairness, Australian administrative law recognises that jurisdictional error remains reviewable. The relevant questions for judicial review would be whether the Minister had reasonable grounds for the satisfaction required by section 114A.4(1), whether the decision was so unreasonable that no reasonable decision-maker could have reached it (Wednesbury unreasonableness¹³), or whether the decision involved bad faith or improper purpose.

¹⁰ See AAWAA, "[Sex self-ID and the erosion of women's rights: an Australian coalition's letter to CEDAW](#)" (13 March 2024) and AAWAA, "[Australia's slide backwards on women's rights: what we told the CSW at the UN](#)" (27 July 2025).

¹¹ [Combatting Antisemitism, Hate and Extremism Bill 2026 \(exposure draft\)](#), Schedule 1, Part 4, s 114A.4(5).

¹² *Ibid* s 114A.5(5).

¹³ See the 1948 UK case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1 KB 223.

However, these grounds for review are narrow and apply only after listing has occurred and criminal consequences have attached. The framework thus creates a situation where:

- An organisation is listed without notice or opportunity to defend itself
- Members, directors, and supporters face immediate criminal liability upon knowledge of the listing
- The organisation must then seek judicial review to establish that the Minister's decision was made without reasonable grounds, was unreasonable, or involved improper purpose
- Throughout this process, the organisation's operations cease, its members face prosecution, and its advocacy is suppressed

Retrospective criminalisation

A further critical issue raised by the framework is the potential for retrospective criminalisation. The bill applies criminal liability to individuals based on membership in or support of an organisation that was lawful at the time of their involvement but is subsequently listed as prohibited. Individuals who engaged in lawful political advocacy or organisational membership before listing occurs would face criminal prosecution for conduct that was not criminal when undertaken.

This operates as a form of retrospective criminal liability, which is antithetical to the rule of law and the principle that criminal law must be prospective. The fundamental constitutional principle that criminal liability must be certain and knowable at the time conduct occurs is undermined where organisations can be listed without warning or procedural safeguards, creating retroactive criminal consequences for lawful participation.

Implications for the Kable principle

The Kable principle, derived from Chapter III of the Constitution, holds that State and federal courts exercising federal jurisdiction must maintain institutional integrity.¹⁴ Courts cannot be required to exercise powers that impair their institutional integrity or are incompatible with their constitutional role as repositories of federal jurisdiction.¹⁵

When prosecutions proceed for membership or support offences under Division 114B, courts must adjudicate based on the validity of the underlying ministerial listing. However, where the listing lacks adequate procedural safeguards, courts face a tension between enforcing criminal penalties based on executive determinations and maintaining institutional integrity through meaningful review.

The framework provides limited mechanisms for judicial review of listing decisions before severe criminal penalties are imposed. This may compromise courts' institutional integrity under the Kable principle, as courts become vehicles for enforcing executive determinations that were made without procedural fairness and with limited judicial oversight.

¹⁴ *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51; see, also, Rule of Law Institute of Australia, "[Kable's Case and the Rule of Law](#)" (31 January 2016).

¹⁵ Cambridge University Press, "[Institutional integrity of courts](#)" in *Australian Constitutional Law* (2024).

CEDAW obligations and consultation failures

The procedural deficits are compounded by failures in the legislative development process itself and that jeopardise Australia's obligations under CEDAW, the Convention on the Elimination of All Forms of Discrimination Against Women¹⁶.

Article 7: women's participation in policy formulation

CEDAW Article 7 requires states to eliminate discrimination against women in political and public life and specifically to ensure women's right "to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government".

The CEDAW Committee's General Recommendation No. 23 emphasises that a token presence of women is unacceptable. Women must be "equally involved in decision-making at all levels" for states to meet their obligations.¹⁷ The Committee has stated that "when women are not broadly represented in the senior levels of government or are inadequately or not consulted at all, government policy will not be comprehensive and effective".

The 72-hour consultation period and absence of consultation with women's organisations

The exposure draft of this bill was released on 12 January 2026, with submissions due by 4 pm on 15 January 2026. This provided a consultation period of 72 hours for stakeholders to review a complex omnibus bill containing amendments across multiple portfolios including criminal law, migration, customs, and firearms.

The public record contains no evidence of consultation with women's organisations during the development of this bill. This is particularly significant where the framework—if expanded beyond its current limitation to race and national origin—could affect organisations advocating for women's protections based on our sex, a protected attribute under Australian anti-discrimination law.

The absence of consultation with women's organisations on legislation that establishes a framework potentially applicable to advocacy organisations engaged in political communication on contested policy issues affecting women's rights constitutes a failure of Australia's obligations under article 7 of CEDAW. Women's meaningful participation in policy formulation requires consultation at the development stage, not merely an opportunity to make submissions during a 72-hour exposure draft period.

This suppression would further affect women's participation in political life, which is protected not only by the implied freedom of political communication but also by article 7 of CEDAW.

¹⁶ [Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, OHCHR.](#)

¹⁷ General recommendations adopted by the Committee on the Elimination of Discrimination Against Women, Sixteenth session (1997), [General recommendation No. 23: Political and public life.](#)

Article 2: duty to refrain from discrimination by public authorities

Article 2 of CEDAW requires states to "refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation". Where legislation disproportionately affects women's organisations or impairs women's participation in political life, this may constitute discrimination by public authorities within the meaning of article 2.

The structural features of the prohibited hate groups framework—capturing advocacy organisations, imposing severe criminal penalties, excluding procedural fairness, and providing no guidance on resolving conflicts between protected attributes—create conditions in which women's political participation could be impaired.

Missing from the public record: evidence and justification failures

The bill was developed in response to the Bondi Beach terrorist attack; however, significant evidentiary and analytical gaps remain in the public record.

No demonstrated need for organisational listing beyond individual prosecution

The public record contains no analysis demonstrating why the existing framework for prosecuting individuals who commit or incite violence is inadequate, necessitating a new framework for criminalising advocacy organisations. Individuals who commit crimes or advocate violence can be prosecuted under existing criminal law, including hate crime offences under Division 80 of the Criminal Code (sections 80.2A and 80.2B), which protect groups distinguished by protected attributes.¹⁸

The bill provides no evidence that

- Advocacy organisations (as distinct from individuals who commit crimes) require criminal listing mechanisms
- Existing individual prosecution mechanisms are insufficient to address violent conduct
- Organisational criminalisation is necessary rather than individual accountability
- Civil remedies through anti-discrimination frameworks are inadequate

No impact assessment on democratic participation and freedom of association

No assessment appears in the explanatory materials regarding how the framework might affect

- Organisations engaged in lawful political advocacy on contested policy issues
- Freedom of association protections
- Democratic participation in policy debates on matters where policy positions are contested

¹⁸ *Criminal Code Act 1995* (Cth) Div 80, Subdiv C.

- The resolution of conflicts where advocacy for one protected attribute is characterised as harmful to another protected attribute

These gaps in impact assessment are inconsistent with good governance practices and with Australia's obligations under CEDAW to ensure women's participation in policy formulation. Impact assessments are necessary to demonstrate that legislation will not impair women's exercise of political and civil rights and to ensure that conflicts between protected attributes are resolved in accordance with international human rights obligations.

No guidance on distinguishing political advocacy from criminal conduct

The bill provides no clear guidance on

- The distinction between political advocacy on contested issues and 'advocacy' of hate crimes within the meaning of section 114A.2(2)
- How "serious risk to the health or safety of a section of the public" is assessed for organisations engaged in advocacy rather than violent conduct
- What safeguards exist to prevent characterisation of political disagreement or policy positions as 'advocating' conduct creating serious risk to protected groups
- How conflicts are resolved where advocacy for protections based on one attribute (such as sex) is characterised as creating risk to persons distinguished by another attribute (such as gender identity)

The absence of this guidance creates legal uncertainty for advocacy organisations and increases the risk that the framework will be applied to suppress lawful political participation rather than prevent violence.

Recommendation

We recommend that the committee requests an extension of the consultation period for the bill; ideally, this would be until after the Royal Commission on Antisemitism and Social Cohesion has released its report. Consideration of the bill must be deferred to enable meaningful consultation with affected communities, including women's organisations, civil liberties organisations, and advocacy groups engaged in political participation on contested policy issues.

In the absence of an extension of the consultation period, we ask that the committee consider the following.

1. Evidence of necessity. Request that the government provide detailed evidence demonstrating why existing civil and criminal mechanisms are inadequate to address the harms the bill seeks to prevent, and why organisational criminalisation is necessary rather than individual prosecution.
2. Procedural fairness requirements. Amend sections 114A.4(5) and 114A.5(5) to require procedural fairness, including notice to the organisation, an opportunity to respond to allegations, and disclosure of evidence (subject to appropriate protections for classified intelligence) before listing occurs.
3. Guidance on political advocacy. Include legislative guidance distinguishing political advocacy on contested issues from "advocacy" of criminal conduct within the

meaning of section 114A.2(2), and establish safeguards preventing characterisation of political disagreement as incitement to violence.

4. Impact assessment. Require a comprehensive impact assessment examining effects on democratic participation, freedom of association, and resolution of conflicts between protected attributes, with particular attention to impacts on women's organisations and compliance with CEDAW obligations.
5. Less restrictive alternatives. Systematically evaluate civil remedies, individual prosecution mechanisms, existing hate crime offences, and democratic processes as less restrictive alternatives to organisational criminalisation.

Conclusion

We recognise the government's legitimate concern to prevent violence and protect community safety following serious terrorist incidents. These concerns require careful attention and substantive response before this legislation proceeds. We thank the committee for the opportunity to make this submission and remain available to provide further information or clarification as required.