

Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 Submission

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INTRODUCTION

The Australia Institute welcomes the opportunity to make a submission on the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023.¹ The proposed intention of the legislation is to “prohibit a person from knowingly, and without reasonable excuse, displaying a Nazi symbol.”² The legislation imposes a penalty of up to twelve months prison, or up to \$27,500 in fines, for those found guilty of the offence.

The rationale for the Bill appears to be based on several, varied factors, ranging from aligning with “our values and heritage as Australians”, to risks to national security and public order.³ In an attempt to protect the use of such symbols within the scope of civil discourse, the Bill also lists several exemptions intended, “to ensure that the legislation does not unintentionally criminalise actions that are unrelated to the promotion of Nazi ideology”.⁴

¹ Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (Cth), https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s1373_first-senate/toc_pdf/23S01020.pdf;fileType=application%2Fpdf

² Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (Cth), *Explanatory Memorandum*, https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1373_ems_91232319-cf16-4b2f-abc6-14280601b1bb/upload_pdf/EM_23S010.pdf;fileType=application%2Fpdf

³ Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (Cth), *Explanatory Memorandum*

⁴ Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (Cth), *Explanatory Memorandum*

The most salient reasoning behind the Bill is stated in the explanatory memorandum:

Australia is a tolerant and multicultural country. The International Covenant on Civil and Political Rights (ICCPR) and the Racial Discrimination Act 1975 both confirm that every Australian has the right to live free from discrimination based on their race and religion, among other factors.

Recent public displays of Nazi symbols, including on the steps of a State Parliament, reinforces the importance of introducing Commonwealth legislation to prohibit such behaviour and make clear it has no part in our public life.⁵

This passage highlights the Australia Institute's core concern: no one in Australia – or indeed, anywhere – should have to live in fear because of who they are.

There are two key elements when considering a Bill of this nature, the first is how the Bill is justified, the second is whether it achieves its aims without overreach. Thus, the fundamentally dehumanising and persecutory elements of Nazi ideology are of key importance in deciding whether this Bill can be considered just. However, any action to limit speech must be carefully considered/constructed to ensure no overreach in censorship is possible. Overall, having a greater understanding of the justification behind the legislation will give the parliament greater confidence in supporting or rejecting the proposed Bill. To this effect, this submission provides the parliament with a stronger grasp of how toleration is central to the conflicting issues of free expression and hate speech.

JUSTIFYING THE NAZI SYMBOLS BAN

In a society that values freedom and democracy, any proposed ban on any free expression can be controversial. Because of this, it is critically important to properly justify any potential censorship. Weak arguments in favour of the Nazi symbols ban may be exploited to discredit the ban overall, even if there are strong arguments in its favour. Weak arguments also risk setting a precedent that may be misused in future to argue for other bans that are not in the public interest.

The contention of this submission is that the limits of acceptable discourse can be found in the theory of toleration. A thorough conceptual understanding of toleration should allow the parliament to navigate any questions raised and achieve an outcome that is both just and inclusive for all Australians.

⁵ Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (Cth), *Explanatory Memorandum*

The renowned international scholar of toleration, Rainer Forst, argues that toleration is not a promise of resolution, but rather a promise “that coexistence in disagreement is possible”.⁶ Forst’s conception of toleration is based upon a “morally grounded form of mutual respect” where “[t]he tolerating parties respect one another as autonomous persons or as equally entitled members of a political community constituted under the rule of law”.⁷ It is through this understanding that we can start to make initial judgements about where toleration is required. Primarily, those who deny the status of other human beings as equal members of their political community are not entitled to toleration. This is an important point when considering the free expression of Nazi symbols – how could one expect protection for their freedom when it is utilised to directly deny those same freedoms to others?

DRAWING THE LIMITS ON NAZI SYMBOLS

It is important to ensure that censorship remains just and does not overreach. Another of Forst’s theoretical frameworks – reciprocity – is useful here. Forst states:

nobody can make certain claims (to the validity of norms, to rights or resources) which he denies to others (reciprocity of contents), and that one may not simply assume that others share one’s perspective, one’s values, convictions, interests or needs (reciprocity of reasons) by claiming to speak in their ‘real’ interests ... In addition, no party may appeal to the authority of ‘higher truths’ that cannot expect to meet with general approval.⁸

Following the reasoning above, a ban on the public display of Nazi symbols is morally justified. Anyone seeking to utilise their freedom of expression to deny or otherwise violate the fundamental freedoms of others cannot, in good faith, expect the community to tolerate their speech acts. Those who seek to publicly display symbols of white supremacy – an ideology fundamentally grounded in the subordination of certain groups of human beings – cannot expect their freedom of speech to be protected when they use it to preach and advocate for the dehumanisation of, and denial of freedoms to, other human beings.

However, in keeping with the logic of toleration, it is essential that the Bill does not overstep its bounds. The Bill must be clear enough in its wording and structure to ensure that restriction does not occur without good reason. At present, the specific of the wording of the Bill is not distinct enough and leaves several key elements open to

⁶ Forst (2016) *Toleration in conflict: Past and present*, Cambridge University Press, p. 1

⁷ Forst (2016) *Toleration in conflict*, p. 29

⁸ Forst (2016) *Toleration in conflict*, p. 454

interpretation. The following comparison with other legislation (passed and proposed) highlights the strengths and weaknesses of the Prohibition of Nazi Symbols Bill.

IS THIS BILL WELL-SUITED TO ITS OBJECTIVE?

In recent years, state and territory governments have considered and sometimes passed legislation that makes the display of Nazi symbols, or hate symbols more generally, illegal. A review of these Bills and Acts identifies areas that may be lacking in the Prohibition of Nazi Symbols Bill. This submission focuses on the recent legislation passed in New South Wales and Victoria, as well as proposed legislation in Queensland.

Definition of “Nazi symbols”

As with the recently passed New South Wales legislation,⁹ the proposed Bill does not clearly define what constitutes a Nazi symbol beyond the Nazi salute, although examples are provided in the explanatory memorandum.¹⁰

This differs from the Victorian legislation¹¹ wherein a Nazi symbol is expressly defined as (and limited to) a swastika/“hooked cross”, and the proposed Queensland legislation,¹² which allows government regulation to determine which hate symbols are prohibited without regard for a specific connection to Nazism.

The overall goal in providing definitions should be to ensure the intended symbols are captured by the legislation. The Bill should include a clear list of prohibited symbols.

It is also worth considering the Queensland model, which also includes a regulated, publicly-available list of prohibited symbols.¹³ This has the advantage of allowing governments to quickly respond to the changing iconography of extremist groups. However, it grants the government a power that is probably more appropriately wielded by the parliament.

⁹ *Crimes Amendment (Prohibition on Display of Nazi Symbols) Act 2022 No 37* (NSW), <https://legislation.nsw.gov.au/view/pdf/asmade/act-2022-37>

¹⁰ Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (Cth), *Explanatory Memorandum*

¹¹ *Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022* (Vic),

<https://content.legislation.vic.gov.au/sites/default/files/2022-06/22-029aa%20authorised.pdf>

¹² Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (Qld), <https://www.legislation.qld.gov.au/view/whole/html/bill.first/bill-2022-017>

¹³ Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (Qld)

What constitutes an offence?

The Prohibition of Nazi Symbols Bill would make it an offence to publicly display a Nazi symbol (including the Nazi salute), knowing that it is a Nazi symbol.

The Queensland Bill goes further, banning the public distribution or publishing of a prohibited symbol. However, this ban is limited to the distribution, publishing or display of such a symbol “in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended”.¹⁴

This is a key distinction, which would help protect those who might display Nazi symbols for motives other than hatred or white supremacism, as will be discussed in the following section.

Exceptions to the offence

The Prohibition of Nazi Symbols Bill establishes that the offence does not apply if the person has a reasonable excuse to do so. Reasonable excuses include: if the display is for a genuine scientific, educational or artistic purpose; if the display is part of a person’s work as a journalist; or if the display is for a purpose that is in the public interest.

However, the Queensland Bill has wording that is better suited to the protection of those who would display a prohibited symbol in good faith. For example, where the Prohibition of Nazi Symbols Bill makes an exception for “a person’s work as a journalist in a professional capacity”,¹⁵ the Queensland Bill specifies that a reasonable excuse includes the “publication of a fair and accurate report of an event or matter of public interest”,¹⁶ not limited to professional journalists.

The Victorian legislation, which lists numerous examples of what constitutes legitimate usage, is even more specific. By providing greater context as to what counts as a reasonable excuse, the Victorian legislation provides a generous understanding of contexts wherein someone may reasonably display a Nazi symbol. This includes its usage in religious contexts, through to its usage in anti-fascist activism.¹⁷ It is vitally important that the proposed Bill protects those who have reason to display such symbols in good faith.

¹⁴ Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (Qld)

¹⁵ Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (Cth), s 81.1

¹⁶ Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (Cth), s 52D(2)

¹⁷ *Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022* (Vic), s 41K

The Queensland Bill has a more detailed definition of what counts as a public place (in the context of where a public display can occur) than the Prohibition of Nazi Symbols Bill or the New South Wales and Victorian Acts do.¹⁸ This ensures that the distinction between private and public places is widely understood. This is one of the most important areas where overreach can occur. What people choose to display within their private dwellings and other private spaces should not be subject to the legislation. The Prohibition of Nazi Symbols Bill explanatory memorandum refers to this in section 81.1 (7),¹⁹ but the legislation itself does not.

ALTERNATIVES OR SUPPLEMENTS TO CRIMINALISATION

If the purpose of these laws is to help foster a truly tolerant, multicultural society, their enforcement must not rely exclusively on punitive measures. Given that violent extremist groups use prisons to radicalise and recruit, in some circumstances jailing offenders could be counter-productive.²⁰ Educational and rehabilitative components are also essential.

The Australia Institute urges the parliament to consider programs of deradicalisation (change in beliefs) or disengagement (change in behaviours) that might replace or complement the fines and prison sentences that the Prohibition of Nazi Symbols Bill proposes. Lessons can be learned from the past 70 years of deradicalisation and disengagement programs.²¹ Engaging offenders and potential offenders may better reintegrate them into the wider, multicultural community and reduce recidivism rates. Exit in Sweden is one example of a deradicalisation program that has seen strong success. The Swedish Council for Crime Prevention gave the program a “highly positive” evaluation, noting that a large majority of those who presented to the program were successful in leaving the White Power movement.²²

¹⁸ Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (Qld)

¹⁹ Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (Cth), *Explanatory Memorandum*

²⁰ Cherney (2020) *Prison radicalisation and deradicalisation in Australia*,

<https://www.aspistrategist.org.au/prison-radicalisation-and-deradicalisation-in-australia/>

²¹ Hansen and Lid (eds) (2020) *Routledge handbook of deradicalisation and disengagement*, Routledge, chapter 3; European Commission (n.d.) *Prevent strategies of member states*, https://home-affairs.ec.europa.eu/policies/internal-security/counter-terrorism-and-radicalisation/prevention-radicalisation/prevent-strategies-member-states_en

²² Bjørgo (2002) *Exit Neo-Nazism: Reducing recruitment and promoting disengagement from racist groups*, p 25, <https://nupi.brage.unit.no/nupi-xmlui/handle/11250/2394077>

CONCLUSION

This submission endorses banning the public display of Nazi symbols, provided that adequate measures are taken to ensure that private display and reasonable public display are exempted. Nazi symbols (on public display) breach the limits of toleration due to their undeniable connection to white supremacist, Nazi ideology. No one in Australia should be subject to subordination based on fundamental aspects of their humanity. However, this submission urges much greater consideration be given to the detail of the wording of the Bill. A more detailed and carefully worded version of the Bill would go a long way to ensure that no perverse outcome or overreach can result from the practical application of the legislation.