

Submission: Prohibited Hate Symbols and Other Measures Bill 2023

*A submission made by the Australia Institute to the
Parliamentary Joint Committee on Intelligence and
Security on the Counter-Terrorism Legislation
Amendment (Prohibited Hate Symbols and Other
Measures) Bill 2023.*

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Summary

The Australia Institute welcomes the opportunity to make a submission on the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023. This submission incorporates and expands upon an earlier submission from the Australia Institute on the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023. This submission laid out the authors' position on state censorship of the public display of prohibited symbols:

- That no one in Australia – or indeed, anywhere – should have to live in fear because of who they are.
- That those who deny the status of other human beings as equal members of their political community are not entitled to having their speech or actions (regarding this matter) tolerated by the community.
- That any legislation directly impacting free speech must be clear enough in its wording and structure to ensure that restriction does not occur without good reason (preventing overreach).
- That educational and rehabilitative components should be considered as a replacement or complement to prison sentences in order to reduce the risk of further radicalisation and recruitment into extremist groups that can occur in prisons.

This submission relates that position to the current Bill under inquiry and makes five recommendations:

1. That the examples for legitimate excepting circumstances be detailed within the legislation itself, using the Victorian legislation as a guide. Some explanation is provided in the explanatory memorandum, but a comprehensive set of examples provided within the legislation itself would provide stronger instruction for the courts and prevent accidental overreach.
2. Broadening the protected circumstances for those who are not professional journalists reporting on prohibited symbols in the public interest. Defining things narrowly in this instance creates legal boundaries that are too limited and increases the chance for government overreach.
3. That the legislation be amended to reflect that any usage of prohibited hate symbols in protest action should be legitimate outside of its specific usage to promote ideologies of hate.
4. That the legislation be amended so that prohibited symbols include variations, derivatives and modifications to the prohibited symbols, but not other symbols that happen to resemble a prohibited symbol.

5. That educational and rehabilitative components be considered alongside or as a replacement for jailtime. 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.

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Introduction

The Australia Institute welcomes the opportunity to make a submission on the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023.¹

The proposed legislation seeks to “further strengthen Australia’s counter-terrorism legislative framework to respond to new and evolving national security threats, including the complex motivations, strategies and tactics of violent extremists”.²

The Bill seeks to accomplish this by making a number of changes to the existing legal framework, including prohibiting the public display of hate symbols, establishing new offences for disseminating or possessing violent extremist material via carriage service, expanding the offence of advocating terrorism, and removing the sunset requirement for the listing of terrorist organisations.³

There are two key elements of concern when considering a Bill of this nature: how the Bill is justified and whether it achieves its aims without overreach. Thus, the fundamentally dehumanising and persecutory elements of Nazi, Islamic State, and terrorist ideologies 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 restrictions is possible.

In addressing these concerns, this submission incorporates and expands upon an earlier submission from the Australia Institute on the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023.⁴ This submission laid out the authors’ position on state censorship of the public display of prohibited symbols:

- That no one in Australia – or indeed, anywhere – should have to live in fear because of who they are.
- That those who deny the status of other human beings as equal members of their political community are not entitled to having their speech or actions (regarding this matter) tolerated by the community.

¹ Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (Cth), https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r7048_first-reps/toc_pdf/23077b01.pdf

² Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (Cth) Explanatory Memorandum, https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7048_ems_e001b60e-63f3-402e-b7a6-3d2519c39247/upload_pdf/23077b01%20EM.pdf

³ Prohibited Hate Symbols and Other Measures Bill 2023 Explanatory Memorandum

⁴ Walters & Browne (2023) *Submission: Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023*, <https://australiainstitute.org.au/report/submission-criminal-code-amendment-prohibition-of-nazi-symbols-bill-2023/>

- That any legislation directly impacting free speech must be clear enough in its wording and structure to ensure that restriction does not occur without good reason (preventing overreach).
- That educational and rehabilitative components should be considered as a replacement or complement to prison sentences in order to reduce the risk of further radicalisation and recruitment into extremist groups that can occur in prisons.

This submission relates that position to the current Bill under inquiry and ends with our recommendations.

Justifying the legislation

We contend that the limits of acceptable discourse can be found in the theory of toleration. 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”.⁵

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”.⁶

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 prohibited symbols: how could one expect protection for their freedom when it is used to deny others their freedom?

DRAWING THE LIMITS OF TOLERATION

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.⁷

Following the reasoning above, a ban on the public display of prohibited 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 or religious extremism – ideologies fundamentally grounded in the subordination of certain groups of human beings – cannot expect their freedom of speech to be protected when

⁵ Forst (2016) *Toleration in conflict: Past and present*, Cambridge University Press, p. 1

⁶ Forst (2016) *Toleration in conflict*, p. 29

⁷ Forst (2016) *Toleration in conflict*, p. 454

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

Is this Bill well-suited to its objective?

When it comes to outlawing prohibited symbols, a number of state and territory governments have recently 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 Prohibited Hate Symbols and Other Measures Bill. This submission focuses on the recent legislation passed in New South Wales and Victoria, as well as proposed legislation in Queensland.

DEFINITION OF PROHIBITED SYMBOLS

The Bill is superior to the recently proposed federal Criminal Code Amendment (Prohibition of Nazi Symbols) Bill⁸ regarding the definition of prohibited symbols. Clearly indicating which symbols are to be outlawed in section 80.2E⁹ is preferable to a more generic “Nazi symbol” labelling utilised by both the Prohibition of Nazi Symbols Bill¹⁰ and the recently passed New South Wales legislation.¹¹

The overall goal in providing definitions should be to ensure only the intended symbols are captured by the legislation. As such, it is appreciated that the Bill includes a clear list of prohibited symbols.

However, extending the prohibition to something “that so nearly resembles” one of the prohibited symbols “that it is likely to be confused with, or mistaken for, that thing”¹² seems too broad. Navajo emblems are reportedly “often” mistaken for swastikas.¹³ Many members of the public, particularly those who do not speak Arabic, could be expected to confuse the Islamic State flag for other black flags with Islamic calligraphy on them. Even Muslims have reportedly missed the significance of the Islamic State flag.¹⁴

⁸ 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

⁹ Prohibited Hate Symbols and Other Measures Bill 2023 (Cth)

¹⁰ Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (Cth)

¹¹ *Crimes Amendment (Prohibition on Display of Nazi Symbols) Act 2022 No 37* (NSW), <https://legislation.nsw.gov.au/view/pdf/asmade/act-2022-37>

¹² Prohibited Hate Symbols and Other Measures Bill 2023 (Cth), 80.2E(d)

¹³ Sanchez (2018) *Sacred Navajo symbols on art often confused for swastikas*, <https://apnews.com/general-news-6ed35e0b1d734190be066ef4ffe3c7a9>

¹⁴ McCants (2015) *How ISIS got its flag*, <https://www.theatlantic.com/international/archive/2015/09/isis-flag-apocalypse/406498/>

The explanatory memorandum identifies the purpose of this paragraph as preventing variations, derivatives or modifications of the prohibited symbols from being displayed.¹⁵ Specifying this in the legislation would cover these cases while protecting symbols that are easily mistaken for, but unrelated to, the prohibited symbols.

LEGITIMATE CIRCUMSTANCES DEFINITION IS TOO VAGUE

The Prohibited Hate Symbols and Other Measures Bill establishes that an offence does not apply for either the public display or trading of prohibited symbols under certain, legitimate circumstances. Both sections 80.2H(9) and 80.2J(4) detail an exception for “religious, academic, educational, artistic, literary or scientific purpose” that is “not contrary to the public interest”.¹⁶ We are concerned that this definition of legitimate circumstances is too vague and that the legislation therefore has the potential to reach beyond the scope of what it sets out to capture.

For example, we would assume that a copy of Adolf Hitler’s *Mein Kampf* displaying the Hakenkreuz symbol on the cover¹⁷ would be protected for both public display and trade under the legislation due to its academic, educational and (arguably) literary significance. However, *Mein Kampf* has only gained this status due to its historical significance and connection to the horrors of World War II. The book was never intended to be academic, educational, or literary – it was intended as propaganda for an antisemitic, genocidal political ideology. This brings into question where and how the limits are drawn for the legitimate circumstances and are complexities that should be considered.

Including examples within the legislation itself would help clear up some of this confusion. The Victorian legislation provides a clear understanding of contexts wherein someone may reasonably display a Nazi symbol through its inclusion of distinct examples. This includes its usage in religious contexts, through to its usage in anti-fascist activism.¹⁸ We do take note that some explanation is provided in the explanatory memorandum, yet we would contend that more a comprehensive set of examples provided within the legislation itself would provide stronger instruction for the courts and prevent accidental overreach.

¹⁵ Prohibited Hate Symbols and Other Measures Bill 2023 Explanatory Memorandum, pp. 25–26

¹⁶ Prohibited Hate Symbols and Other Measures Bill 2023 (Cth)

¹⁷ For example, the ebook version of *Mein Kampf* sold by Amazon: <https://www.amazon.com.au/Kampf-Deluxe-Hardbound-Adolf-Hitler-ebook/dp/B0C6HYD75V/>

¹⁸ *Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022* (Vic), s 41K

PROTECTIONS ARE TOO NARROW

The legislation's protections are too limited for those who report/publicly comment on matters relating to prohibited symbols and those use prohibited symbols in protest activity.

Section 80.2H(9)(b)(ii) details that the public display of prohibited symbols within a news report or current affairs report must be "made by a person working in a professional capacity as a journalist".¹⁹ This is unnecessarily limiting. The proposed Queensland legislation for outlawing hate symbols has wording that is better suited to the protection of those who would display a prohibited symbol in good faith. The Queensland Bill specifies that a reasonable excuse for display includes the "publication of a fair and accurate report of an event or matter of public interest".²⁰ The legislation is therefore not limited to only protecting professional journalists. As such, we would recommend the adoption of this wording for the proposed federal legislation.

The proposed federal legislation is also too limited in its protection for those who would choose to utilise a public display of the prohibited symbols in protest activity. While we agree with the provisions set out on both sections Section 80.2H(10)(f) and (g), that prohibited hate symbols should be allowed to be displayed in protest of the heinous ideologies they directly (or closely) represent, we take issue with what is left out by the narrow wording of the relevant subsections.

It is not unusual for people to criticise politicians and governments that are authoritarian or perceived as authoritarian by comparing them to Nazi Germany. To give just one example, Australia's detention of asylum seekers has sometimes been likened to Nazi Germany's concentration camps.²¹

Criticism of these politicians and governments might include displaying the Hakenkreuz or other Nazi symbols in association with the target of the criticism (photoshopping an SS armband onto a photo of a far-right politician, for example). This is a usage that is anti-Nazi, but not in protest of Nazism.

Yet, under the proposed legislation, if someone were to protest federal detention policy using prohibited symbols in likening the Australian government to Nazism, they would presumably be committing an offence. It is unjust (and potentially unconstitutional) to capture political speech of this nature (that is not in service of fascist or jihadist ideology) within the legislation.

¹⁹ Prohibited Hate Symbols and Other Measures Bill 2023 (Cth)

²⁰ 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>

²¹ For example, Hasham (2016) *Psychiatrist likens immigration detention views to Nazis and gulags*, <https://www.smh.com.au/politics/federal/psychiatrist-likens-immigration-detention-to-nazis-and-gulags-20160216-gmv833.html>

We would recommend that the wording of the legislation be amended to reflect that any usage of prohibited hate symbols used in protest action should be legitimate outside of its specific usage to promote ideologies of hate.

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.²² 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 prison sentences that the Prohibited Hate Symbols and Other Measures Bill proposes. Lessons can be learned from the past 70 years of deradicalisation and disengagement programs.²³ 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.²⁴

²² Cherney (2020) *Prison radicalisation and deradicalisation in Australia*,

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

²³ 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

²⁴ Bjørge (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 & recommendations

This submission endorses banning the public display of hate symbols, provided that adequate measures are taken to ensure that private display and reasonable public display are exempted. Hate symbols (on public display) breach the limits of toleration due to their undeniable connection to white supremacist and jihadist ideologies. No one in Australia should be subject to subordination based on fundamental aspects of their humanity.

However, this submission urges that great consideration be given to the detail of the wording of the Bill. A more detailed and carefully worded version of the Bill would help ensure that no perverse outcome or overreach can result from the practical application of the legislation.

As such, the Australia Institute recommends:

1. That the examples for legitimate excepting circumstances be detailed within the legislation itself, using the Victorian legislation as a guide. Some explanation is provided in the explanatory memorandum, but a comprehensive set of examples provided within the legislation itself would provide stronger instruction for the courts and prevent accidental overreach.
2. Broadening the protected circumstances for those who are not professional journalists reporting on prohibited symbols in the public interest. Defining things narrowly in this instance creates legal boundaries that are too limited and increases the chance for government overreach.
3. That the legislation be amended to reflect that any usage of prohibited hate symbols in protest action should be legitimate outside of its specific usage to promote ideologies of hate.
4. That the legislation be amended so that prohibited symbols include variations, derivatives and modifications to the prohibited symbols, but not other symbols that happen to resemble a prohibited symbol.
5. That educational and rehabilitative components be considered alongside or as a replacement for jailtime. 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.