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Committee Secretary
Legal and Constitutional Affairs Committee
Department of the Senate
By email: legcon.sen@aph.gov.au

17 April 2023

Dear Secretary,

Inquiry into the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023

Thank you for the opportunity to comment on the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 ('the Bill').

This submission may be published on the committee's website.

My expertise

I am a legal academic at the Thomas More Law School, Australian Catholic University. I have a PhD in law, which focuses on anti-vilification laws, and my research is published in leading Australian law journals. I have previously made submissions to parliamentary inquiries into anti-vilification laws Federally,¹ and in Victoria,² which were referred to in the committee's final reports. I am a nationally recognized expert in anti-vilification laws.

I make this submission in an individual capacity.

Recommendations

This submission recommends that:

1. the Bill be **rejected** and not proceed for further consideration by Parliament;
2. instead, consideration be given to promoting multicultural harmony in the Australian community, and combatting radical extremism, by-
 - a. reviewing educational programs on the benefits of cultural diversity,
 - b. promoting the services offered by equal opportunity and human rights commissions in each state and territory, and ensuring that these services are properly funded.

The Bill and its purpose

The Bill seeks to prohibit the public display of 'Nazi symbols' when this is done knowingly and without reasonable excuse.

¹ Swannie, Bill, Submission No 221 to 2016 Commonwealth Parliament, Joint Committee on Human Rights, *Inquiry into Freedom of Speech in Australia* (8 December 2016).

² Swannie, Bill, Submission No 22 to 2019 Victorian Parliament, Legislative Assembly, Legal and Social Committee, *Inquiry into Anti-Vilification Protections* (20 December 2019).

The Bill's purpose is to condemn the glorification of Nazi ideology.³

Reasons not to proceed with the Bill

First, obscene, indecent, threatening or offensive conduct, when done publicly, is already a criminal offence in Victoria.⁴

Second, intentionally displaying a prohibited symbol of Nazi ideology is already a criminal offence in Victoria.⁵

Therefore, the conduct of concern to Parliament is already prohibited under existing laws and no further regulation is needed. It is remarkable that those proposing the Bill appear to be unaware of these existing laws, and appear to assume that new laws are needed.

Third, the Bill is a type of criminal anti-vilification law, which are notoriously ineffective, mainly because police are reluctant to enforce them, and the elements of the offence are difficult to prove according to the criminal standard (beyond reasonable doubt).⁶

Fourth, criminal proceedings are likely to make martyrs of Nazi extremists, and media coverage of such proceedings is likely to publicise their views and cause further harm to marginalised communities.⁷

Fifth, the offence contained in the Bill is extremely ill-defined. The Bill does not define what is prohibited – the display of a 'Nazi symbol' – stating that it will be given its 'ordinary meaning'.⁸ However, the term is not used in other legislation and therefore it has no 'ordinary meaning'. It seems to include any reference to the Nazi party or Nazi ideology, including wearing a 'Nazi uniform'.⁹

Sixth, the exemptions are extremely broad, including any 'reasonable excuse'. This is likely to be used by defendants to raise spurious arguments to justify their conduct – see point four above.

Seventh, the Bill appears to target one group of people (Nazis) and favour another (Jewish people). This appearance is likely to be divisive, rather than promoting harmony. A better approach is to strengthen general anti-vilification laws, discussed below, which do not target any particular group, but which prohibit all forms of racial or religious vilification.

The preferred approach

In March 2021, Victorian Parliament received a report recommending it strengthen Victorian **civil** anti-vilification laws in several ways.¹⁰ Specifically, the committee recommended:

³ Explanatory Memorandum.

⁴ *Summary Offences Act* (1966) s 17(1).

⁵ *Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022* (Vic).

⁶ Dan Meagher, 'So far no good: the regulatory failure of criminal racial vilification laws in Australia' (2006) 17 (3) *Public Law Review* 209.

⁷ Joe Higgins, 'Nazi salute legislation could create 'martyrs', ACU law expert says', *The Catholic Leader*, 22 March 2023 <https://catholicleader.com.au/news/australia/nazi-salute-legislation-could-create-martyrs-acu-law-expert-says/>

⁸ Explanatory Memorandum, 3.

⁹ Second Reading Speech, 29.

¹⁰ Parliament of Victoria, Legislative Assembly, Legal and Social Issues Committee, Inquiry into anti-vilification protections (2021) <https://new.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-anti-vilification-protections/reports>

- improving the accessibility and effectiveness of anti-vilification laws, by focusing on the harms of vilification to members of target groups,¹¹
- promoting awareness of the benefits of multiculturalism, and preventing vilification, through education programs, particularly in schools,
- ensuring that legal redress for the harms of vilification is accessible to members of target groups.

Civil anti-vilification laws operate very differently to **criminal** laws, in two main ways:

- civil laws can provide legal redress to victims of vilification, such as an apology,
- civil laws enable complaints to be made and resolved confidentially, rather than publicly.

Civil anti-vilification laws therefore have significant advantages, for members of communities targeted by vilification, over criminal laws.

The Bill, on the other hand, provides no redress for victims of vilification and appears to be an exercise in political posturing and empty symbolism.

Therefore, Parliament should urge Victorian Parliament to act on the recommendations regarding anti-vilification laws in Victoria, rather than proceeding with the Bill.

Regards,

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¹¹ Ibid 120.