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Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023

Committee Secretary

Parliamentary Joint Committee on Intelligence and Security

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Dear Committee Secretary

Thank you for the opportunity to make a submission to the PJCIS' Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Measures) Bill 2023.

I am an expert in the field of freedom of speech and the regulation of harmful speech focussing on hate speech and terrorist speech, with 30 years of experience. I have published widely on this topic in media outlets, commentaries, and academic publications. I have made submissions to relevant parliamentary inquiries on these matters previously, including to the COAG Review of Counter-Terrorism Laws (2012), the SLCAC's Inquiry into the National Security Legislation Amendment Bill 2010 (April 2010), and the Attorney General's Department's National Security Discussion Paper (2009). The comment I make here are in my professional capacity, and not on behalf of the University of Queensland.

I wish to state at the outset that I support the federal government's introduction of a new criminal provision prohibiting the display of, and trade in, symbols associated with the Nazi regime including the Nazi hakenkreuz. Such symbols are not merely expressions of opinion; they convey and enact virulent hatred that is by definition at a level which constitutes a threat of violence towards Jews and other victims of the Holocaust including LGBTQIA+ people. This justifies their regulation in the criminal law.

However, it is imperative that any new criminal provision is narrowly and carefully drawn in order to ensure clarity and effectiveness, and so as not to be overbroad in its application in a democratic society.

I will focus in my submission on the proposal to:

Create offences for the public display of prohibited Nazi or Islamic State symbols and trading in these symbols.

I make numerous recommendations and one commendation, which are to be read consequentially because they build upon one another. For the purposes of clarity, I have included a new draft of the relevant provisions at the end of my submission, annotated with strike-out text for the passages I recommend deleting, and red text for passages I recommend adding in.

**The relevant proposed provisions**

The Bill (Schedule 1 – Prohibited Symbols) seeks to rename Division 80 of the *Criminal Code Act 1995* and add a new Subdivision CA to Division 80. The new Subdivision seeks to treat the Nazi hakenkreuz and double-sig rune identically to the ‘Islamic State flag’ as prohibited symbols.

The definition of publicly displaying prohibited symbols in proposed s80.2H includes causing a thing to be displayed in a public place, and where it is a prohibited symbol, and

S80.2H(3): where a reasonable person would consider that doing so either:

- a) Involves dissemination of ideas based on racial superiority or racial hatred, or
- b) Could incite another person or a group of persons to offend, insult, humiliate or intimidate:
  - i) A person (the targeted person) because of the race of the targeted person; or
  - ii) The members of a group of persons (the targeted group) because of the race of some or all of the members of the targeted group.

S80.2H(4): Or if a reasonable person would consider that the conduct mentioned ... involves advocacy that:

- a) is advocacy of hatred of:
  - i) a group of persons distinguished by race, religion or nationality (a targeted group), or
  - ii) a member of a targeted group; and
- b) constitutes incitement of another person or group of persons to offend, insult, humiliate, intimidate or use force or violence against:
  - i) the targeted group; or
  - ii) a member of the targeted group

s80.2H(7): Or if the conduct is likely to offend, insult, humiliate or intimidate a person who is:

- a) a reasonable person; and
- b) a member of a group of persons distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin;

because of the reasonable person’s membership of that group.

S80.2H(9): But not where a reasonable person would consider that:

- a) the conduct ... is engaged in for a purpose that is:
  - a. a religious, academic, educational, artistic, literary or scientific purpose; and
  - b. not contrary to the public interest, or
- b) the conduct is engaged in for the purposes of making a news report, or a current affairs report, that:
  - a. is in the public interest; and

- b. is made by a person working in a professional capacity as a journalist.

There follows a list of specific defences (s80.2H(10)) including enforcing the law in genuinely opposing global jihadist ideology (in the case of the Islamic State flag) or genuinely opposing Nazi ideology, fascism or a related ideology (in the case of the Nazi hakenkreuz or double-sig rune).

### Discussion

These provisions are confusing for several reasons. I urge the PJCIS to recommend their amendment in order to clarify their purpose and structure, and to achieve the goals that the government intends to achieve. There are many different definitions of hatred included in the proposed s80.2H, some of which already exist in related law and some of which do not. The inclusion of all of these different possibilities is confusing, and lacks the clarity required when introducing new criminal prohibitions.

*Issue #1: Symbols of the Nazi era (such as the hakenkreuz and the double-sig rune) ought not to be treated as an identical focus of criminal prohibition to the 'Islamic State flag'*

When the government pledged publicly to legislate against the use of Nazi symbols, it did not propose also to ban the Islamic State flag. However, s80.2E proposes to treat the two identically.

Proposals to criminalise Nazi symbols have significant public and community support. Nazi symbols such as the hakenkreuz and the double-sig rune are indelibly associated with the virulent hatred they convey. It is, of course, possible to use such symbols in ways that clearly denounce and critique the ideology they convey, such as in films or educational settings. That does not remove the fact that these symbols are undeniably associated with virulent acts of violence against targeted groups subject to marginalisation.

However, the wording of the Bill in relation to the Islamic State flag, including the inclusion of symbols 'similar' to it, is arguably different. The words on the Islamic State flag constitute a phrase that is central to the Islamic faith. In criminalising this phrase, the Bill risks members of the public misunderstanding the misuse of this phrase by the Islamic State, and risks criminalising a core tenet of the Muslim faith. The use of the phrase 'jihad' is potentially misleading and offensive to Muslims, as the word itself can mean an internal struggle to live according to one's faith. In other words, the attempt to criminalise the Islamic State flag may capture terms and depictions that are core tenets of the Islamic faith, and which may contribute to poor understandings of Islam in the Australian community.

**Recommendation 1:** I **recommend** that members of the Muslim community be consulted and listened to, to discover how to criminalise propaganda and symbols that are specific to the Islamic State in a way that will not be overbroad.

**Recommendation 2:** I **recommend** that the new provision not be limited to the Nazi hakenkreuz and the double-sig rune, but that it be extended to include recognised symbols and insignia of the Nazi regime.

*Issue #2: The use of multiple ways to describe 'hatred' at the relevant threshold*

S80.2H(3) introduces two ways in which a reasonable person might respond to the public display of a prohibited symbol.

The first is if it disseminates ideas based on racial superiority or racial hatred. I note that this language is derived from Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), a multilateral international human rights treaty to which Australia is a signatory. This Article requires States to declare an offence punishable by law:

all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

The language derived from Article 4 of the ICERD and that appears in s80.2H(3) does not currently appear in any Australian statute concerned with racial hatred/vilification. The Commonwealth has the constitutional power to implement the terms of that Article by prohibiting this conduct, and doing so would constitute appropriate recognition and implementation of Australia's obligations under a relevant international human rights treaty as long as the conduct concerned is of a sufficiently harmful threshold to warrant prohibition under the criminal law. Yet there is no further definition of this conduct in the Bill. Furthermore, the provisions of the ICERD apply only to race and not to other recognised grounds on which vilification occurs of a sufficient gravity to be captured by this legislation. For example, recent events in Victoria have shown that the Nazi hakenkreuz and Nazi salute can be used to show support for and solidarity with anti-trans advocates.

**Recommendation 3:** I **recommend** that the Bill amend the concept of 'ideas based on racial superiority or racial hatred' to target conduct that is sufficiently grave to warrant criminal prohibition, and to incorporate a wider range of recognised grounds. The first component can be done by amending the clause to read: 'is conduct that constitutes incitement to hatred, violence or discrimination against'. (I return to the question of recognised grounds below).

S80.2H(3) also incorporates language from the civil provision in s18C of the *Racial Discrimination Act 1975* (Cth) (*RDA*) into a new criminal provision by incorporating the phrase 'offend, insult, humiliate or intimidate'. There has been a great deal of controversy and public debate over the presence of this phrase in the civil provision of s18C of the *RDA*, on the basis of whether or not the description of unlawful conduct it encapsulates is sufficiently grave to warrant civil legal sanction. The federal court has interpreted this phrase in its entirety, and clarified that the impugned conduct must constitute a significant public harm in order to be actionable under that provision. This limits its application in practice to appropriately harmful conduct. The federal court's authority would uphold s18C as a valid implementation of the relevant provision of the ICERD, however there is no definitive High Court authority on this question to date.

The incorporation of these words from the civil provision into a new criminal provision is, in my view, unwise. These terms are potentially too broad to be considered an appropriate way to fulfil

Australia's obligations under international human rights law, and to be considered appropriate for criminal sanction, even when they are connected to the relevant prohibited symbols.

Recommendation 4: I **recommend** that the subsection s80.2H(3)(b) which includes incitement to 'insult', 'offend' and 'humiliate' be deleted from this Bill.

Recommendation 5: I **recommend** that s80.2H(3) be further amended (after s80.2H(3)(b) has been deleted) to create s80.2H(3)(a)(i) and s80.2H(3)(a)(ii) and to specify the range of grounds recognised by anti-discrimination law in Australia as being vulnerable to the type and severity of hatred being targeted by this Bill. This includes race, colour, national or social origin, sex, sexual orientation, gender identity, intersex status, and religion.

S80.2H(4)(a): If advocacy is to be included as a criminal offence, then it is also important to ensure that only conduct that is sufficiently grave to warrant criminal prohibition is captured by this provision.

Recommendation 6: I therefore **recommend** that s80.2H(4)(a) be amended to ensure that advocacy is defined as follows: 'advocacy that constitutes incitement to hatred, violence, or discrimination against'.

Recommendation 7: I **recommend** that s80.2H(4)(a)(i) be amended to define targeted groups as inclusive of: race, colour, national or social origin, sex, sexual orientation, gender identity, intersex status, and religion.

S80.2H(4)(b) repeats the problem of including wording derived from a civil provision, which is not appropriate in a criminal provision. It also repeats the proposal in s80.2H(3)(b) and is to that extent redundant.

S80.2H(4)(b) also further complicates matters by including alongside terms relating to a lesser type of unlawful conduct, the incitement of a person to use force or violence against members of target groups. This is a muddled provision, which ought not to stand in its current form. It includes both conduct that may not reach a criminal threshold and conduct that may reach a criminal threshold, namely incitement to force or violence. The amendments I have already proposed would resolve this by including the incitement of violence in the first provision in s.80.2H(3).

Recommendation 8: I therefore **recommend** that s80.2H(4)(b) be deleted entirely.

S80.2H(7) presents the same problems as already covered above. It incorporates wording from s18C of the *RDA* that arguably presents a threshold of conduct that may not be sufficiently grave to be prohibited in the criminal law. It also complicates the interpretation of Nazi symbols – which by definition do cross a threshold of conduct sufficiently grave to be prohibited in the criminal law, and which are not merely insulting or offensive. Rather, they represent a threat of violence against targeted groups. This should be explicitly recognised in the wording of the statute.

S80.2H(7) also presents a further problem; namely the inclusion of political or other opinion as a ground in what is essentially a provision resting on grounds relevant to anti-discrimination law. This is done on the basis that this component of the provision is said (in the Note) to be giving effect to Article 26 of the International Covenant on Civil and Political Rights (ICCPR). That Article requires the law to prohibit:

discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The inclusion of all these grounds in a criminal provision against prohibited symbols arguably confuses two concepts; discriminatory hatred and terrorist speech. Discriminatory hatred that may not reach a threshold for criminal prohibition is supported by this Article of the ICCR, an international human rights treaty which the federal government has the power to implement domestically. However, such prohibition need not be criminal.

Further, the inclusion of political opinion in this provision reflects wording in ss80.2A and 80.2B of the *Criminal Code 1995*, which were introduced as new ‘sedition’ laws in 2005. I have written extensive critiques of the confusing and unhelpful treatment of discriminatory hatred and terrorist speech as essentially the same kind of harmful speech, eg Katharine Gelber 2009 ‘The False Analogy Between Vilification and Sedition’, *Melbourne University Law Review* 33(1): 270-291, and in my previous submissions, referred to above. This provision repeats this problem.

Recommendation 9: I therefore **recommend** that s80.2H(7) be deleted in its entirety.

### *Issue #3: Exemptions and defences*

It is vitally important that any provision such as this has clear exemptions to preserve freedom of speech in a democratic society. S80.2H(9) provides those exemptions.

I have some concern that the current drafting may present possibilities that s80.2H(9) could be utilised in a way that is contrary to the intent of the provision. A far-right organisation, for example, could make an educational or entertainment video which could use the relevant symbols in ways that promote it, and this could provide a platform from which they could argue this is in the public interest, and a matter of genuine historical debate.

Recommendation 10: I **recommend** that s80.2H(9) be amended to clarify that the exemptions may only be used to support activities that are genuinely in opposition to Nazi and related ideologies.

Commendation 1: Given the special place of journalism in democratic debate, I **commend** the Bill for its inclusion of a specific exemption for fair and accurate reporting by professional journalists.

In s80.2H(10) it is noted that a defence to the use of prohibited symbols includes genuinely engaging in conduct ‘for the purpose of opposing global jihadist ideology or a related ideology’, or genuinely engaging in conduct ‘for the purpose of opposing Nazi ideology, fascism or a

related ideology'. This defence permits the use of Nazi symbols in educational contexts such as the study of WWII, in artistic contexts in which the symbols of Nazism are used to educate and inform people of the horrors inflicted by Nazi ideology, and in other scientific or cultural contexts where the purpose is to educate and inform people about the dangers of fascism and its risks to human rights. This defence should be retained.

Recommendation 11: I **recommend** that s80.2H(10) be retained.

I would be happy to provide further detail if the Committee wishes.

Yours sincerely



Katharine Gelber

## Proposed amendments from recommendations: summary

### S80.2E Meaning of *prohibited symbol*

Each of the following is a prohibited symbol:

- (a) the Islamic State flag;
- (b) the Nazi hakenkreuz, **the Nazi double sig-rune, and other widely recognised symbols of the Nazi regime**
- ~~(c) the Nazi double sig-rune;~~
- (d) something that so nearly resembles a thing to which paragraph (a), (b) or (c) applies that it is likely to be confused with, or mistaken for, that thing.

S80.2H(3): where a reasonable person would consider that doing so ~~either~~:

- a) ~~Involves dissemination of ideas based on racial superiority or racial hatred~~ **is conduct that constitutes incitement to hatred, violence or discrimination against,** ~~or~~
- b) ~~Could incite another person or a group of persons to offend, insult, humiliate or intimidate:~~
  - i) A person (the targeted person) because of the race, **colour, national or social origin, sex, sexual orientation, gender identity, intersex status, or religion (a targeted group)** of the targeted person; or
  - ii) The members of a group of persons (the targeted group) because of the race, **colour, national or social origin, sex, sexual orientation, gender identity, intersex status, or religion (a targeted group)** of some or all of the members of the targeted group.

S80.2H(4): Or if a reasonable person would consider that the conduct mentioned ... involves advocacy that:

- c) ~~is advocacy~~ **constitutes incitement to hatred, violence or discrimination against** ~~of hatred~~ **of:**
  - iii) a group of persons distinguished by race, **colour, national or social origin, sex, sexual orientation, gender identity, intersex status, or religion (a targeted group)** (a targeted group), or
  - iv) a member of a targeted group; ~~and~~
- d) ~~constitutes incitement of another person or group of persons to offend, insult, humiliate, intimidate or use force or violence against:~~
  - iii) ~~the targeted group;~~ or
  - iv) ~~a member of the targeted group~~

~~s80.2H(7): Or if the conduct is likely to offend, insult, humiliate or intimidate a person who is:~~

- ~~e) a reasonable person; and~~
- ~~d) a member of a group of persons distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin;~~



~~because of the reasonable person's membership of that group.~~

S80.2H(9): But not where a reasonable person would consider that:

- c) the conduct ... is engaged in for a purpose that is:
  - a. a religious, academic, educational, artistic, literary or scientific purpose; and
  - b. **in opposition to fascism, Nazism, or other related ideologies; and**
  - c. not contrary to the public interest, or
- d) the conduct is engaged in for the purposes of making a news report, or a current affairs report, that:
  - a. is in the public interest; and
  - b. is made by a person working in a professional capacity as a journalist.