



Ms Sophie Dunstone
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Via email: legcon.sen@aph.gov.au

18 April 2023

Dear Ms Dunstone,

The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs in regard to The Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (the Bill).

This inquiry is of great interest to us, however, given the short timeframe and number of competing inquiry timelines (including for this committee) our response is not as comprehensive as we would have liked. We continue to express concern at the truncated timeframes for consultation on important legislation, like this, which has a significant effect on human rights and civil liberties.

We **attach** our previous submission to the NSW Department of Communities and Justice regarding the Crimes Amendment (Prohibition on Display of Nazi symbols) Bill 2022 (NSW Bill) which provides an indication of our views as to the legislation that is the subject of this inquiry is compatible with human rights.

Freedom of expression does not give licence to individuals to engage in expression which engenders hate and incites violence. To that end, we support the principles underpinning the bill.

The submission also indicates the ways in which we consider bills, such as the one before this inquiry, could be strengthened. All of the recommendations that we made to the NSW inquiry, similarly apply to the present one.

We especially wish to highlight one recommendation for improvement of the bill. As it stands, the bill would allow for the decision to prosecute lie with police and not the independent Commonwealth Director of Public Prosecutions (CDPP). We consider this to be a problem and one which could open the state up to unnecessary critique from far-right extremists for acting oppressively in a non-transparent way. By ensuring that all prosecutions brought under the bill were authorised by the CDPP, who acts in accordance with public guidelines, it would add transparency to the decision to prosecute and ensure that it is above political critique. As the CDPP is used to exercising discretion in the public interest, it also adds another layer of protection for civil liberty in the event that scenarios arise where people engage in *prima facie* unlawful conduct which should otherwise be exempted from sanction on public interest grounds.

Far-right extremism is not a new phenomenon in Australia. We have observed that it has been on the rise in during the pandemic where white supremacist and neo-Nazi groups coalesced online around extremist beliefs with common themes. Less than a month after WorldPride, a celebration of the queer community, Australia saw a week of violence and hate perpetrated by far right Christian and neo-Nazi extremists against the trans, and wider queer, community. NSWCCL condemns these actions unequivocally and stands with the queer community in their push for stronger human rights protections in the face of rising hate. Violence has no place in our politics and must be universally condemned.

We reiterate our comments in the submission on the NSW bill that the present bill subject to inquiry offers a symbolic solution, at best, to the risk posed by neo-Nazi groups in Australia. We urge the committee to recommend the government that concrete steps must be taken to ensure there is an appropriately resourced whole of government response to deradicalisation of extremists. We are firmly of the belief that the state cannot criminalise and prosecute harmful ideologies out of existence.

NSWCCL will continue to defend freedom of religion and expression and the right to protest we support this bill in its ambition to reduce the impact of hate speech, violence and threats against diversity in Australia.

We trust that this brief contribution is of assistance and regret that our contribution could not be more extensive. We'd be pleased to assist the committee further on this matter, if called upon to do so.

Yours sincerely,

Josh Pallas
President



NSWCCL SUBMISSION

**NSW DEPARTMENT OF
COMMUNITIES AND JUSTICE**

**SUBMISSION ON
CRIMES AMENDMENT
(PROHIBITION ON DISPLAY
OF NAZI SYMBOLS) BILL 2022**

2 May 2022

NSWCCL

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

<http://www.nswccl.org.au>
office@nswccl.org.au

Correspondence to: PO Box A1386, Sydney South, NSW 1235

The New South Wales Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to make a submission to the NSW Department of Communities and Justice in regard to the *Crimes Amendment (Prohibition on Display of NAZI symbols) Bill 2022 (Bill)*.

NSWCCL has concerns about the Bill as presently drafted and supports the passage of the Bill only with amendments as outlined below, and on the basis of the comments set out below.

Introduction

1. It is regrettable that the invitation to provide feedback on this bill requires a submission on less than 2 weeks' notice. In view of the issues involved in considering the Bill and the importance of seeking widespread community support for the Bill, this short consultation period is unsatisfactory.
2. In supporting this Bill (subject to amendments), it is necessary to be clear about why the Bill is justified. There is a legitimate concern that the criminalisation of the display of Nazi symbols as proposed in the Bill could be counter-productive.¹ Every effort should be made to ensure that the Bill is beyond criticism and there is overwhelming support for the Bill to minimise the risk of people using prosecutions under the proposed law to seek public sympathy on the grounds of perceived oppressive State action.

NSWCCL position on free speech and hate speech, and banning symbols

3. NSWCCL has long held that the right to free speech, and more specifically the right to freedom of political communication, is appropriately limited by restrictions on vilification on the grounds of race and other attributes. Accordingly, NSWCCL has always supported s18C of the *Racial Discrimination Act 1975 (Cth)* and long advocated for the introduction of legislation along the lines of s93Z of the *Crimes Act 1900 (NSW)*. These provisions are appropriate implementations of the human right recognised in Article 20.2 of the ICCPR, and do not improperly restrict the right of free speech enshrined in Article 19 of the ICCPR.
4. The display of Nazi symbols without a reasonable excuse may constitute an infringement of Article 20.2 of the ICCPR. It is therefore not inconsistent with human rights to proscribe the display of Nazi symbols. However, it is noted that the display of Nazi symbols is prohibited only in a relatively small number of countries.²
5. The right to free speech is fundamental to the operation of a free society, and it is not appropriate to enact laws which, in their administration, could operate so as to place unreasonable burdens on defendants to prove their acts were justified. Further, it is not appropriate to enact laws that could give rise to public perceptions that the police may be acting oppressively in their enforcement.
6. The banning of symbols is particularly problematic and capable of generating controversy. Commonwealth legislation which effectively enables the banning of displays of union symbols at workplaces has recently been upheld in the Federal Court.³ The banning of symbols should be seen as an exceptional exercise of legislative power, and done only with overwhelming community support and where there is a real need.

Problems with the proposed Bill

7. NSWCCL identifies the following concerns with the Bill:
 - (a) there is a lack of clarity as to exactly what symbols are banned. The term "Nazi symbol" is not defined. This creates an evidentiary burden on the prosecution to prove that a particular symbol is a Nazi symbol, and the Courts will need to determine whether or not

¹ See report of NSW Police comments: [Proposed NSW swastika ban could backfire, deputy police commissioner says](#)

² Austria, Belgium, Brazil, Canada, Czech Republic, France, Germany, Hungary, Latvia, Lithuania, Netherlands, Poland, Romania, Russia, Slovakia, Sweden and Ukraine

³ *Lendlease Building Contractors Pty Limited v Australian Building and Construction Commissioner (No 2)* [2022] FCA 192

particular symbols are Nazi symbols within the scope of the prohibition. Some symbols were used by the Nazis but also have widespread other uses⁴. Are such symbols prohibited?

- (b) the decision to prosecute is in the hands of the police (unlike the decision to prosecute offences under s.93Z). This could give rise to assertions that the police may be acting oppressively in their enforcement, which could be counter-productive by giving prominence to extremist Nazi views.
 - (c) while the range of “reasonable excuses” is not closed, there is no process for determining in advance whether or not a particular display of a symbol will be within the scope of the exception.⁵
 - (d) given the lack of any procedural manner in which permission can be obtained for public display in advance, the evidentiary burden on accused persons to establish a reasonable excuse could be oppressive.
8. Each of these problems can be addressed through appropriate amendments, and NSWCCCL recommends that the Bill be drafted to avoid these problems.
9. There other problems inherent in the proposed Bill which are incapable of remedy through amendment. The Bill will unlikely be of practical utility in reducing the threat to national security posed by neo-Nazi, or other extremist neo-fascist, activity. Indeed, the Bill would appear to be a largely symbolic contribution to reducing that threat. It does not even purport to address symbols of other extremist groups, such as the Ku Klux Klan.
10. The Bill will be ineffective in relation to public displays of Nazi symbols in ways which are beyond the power of the NSW Parliament to regulate – for example, in the online environment.
11. The Bill will most likely be ineffective in relation to public displays of Nazi symbols in the nature of graffiti, which is the most common form of public display of Nazi symbols. References to Nazism are possible even without use of recognised Nazi symbols – for example, there are reports in the current election campaign of the drawing of a “Hitler moustache” on election candidate posters.⁶
12. A further issue is that NSW does not have specific human rights legislation, unlike Victoria, the ACT and Queensland. In those jurisdictions, the introduction of the Bill would require a careful analysis of its provisions against human rights standards, and an interpretation of the Bill compatible (as far as possible) with human rights protections.

Recommendations

13. NSWCCCL advocates for the Bill to be amended in the following ways:
- (a) the prohibited symbols be specifically identified, either in a schedule to the *Crimes Act 1900 (NSW)* or in the regulations.
 - (b) that prosecutions under the proposed s.93ZA require approval of the Director of Public Prosecutions. NSWCCCL notes that the Director of Public Prosecutions makes decisions in relation to whether or not to prosecute in accordance with published guidelines.
 - (c) that there be a process for applying for permission to display a Nazi Symbol (for example to the Anti-Discrimination Board), and that if such permission is granted then display of the symbol in accordance with the permission (and any conditions attaching to it) be a reasonable excuse;
 - (d) that the evidentiary burden for establishing the lack of a reasonable excuse be explicitly placed on the prosecution.⁷

⁴ Eg the [Totenkopf](#)

⁵ For example, is it reasonable to display Nazi symbols in connection with an auction sale? in 2013 there were media reports of Lawsons holding an auction sale of Nazi memorabilia

⁶ See, for example, [‘Obscene’: Josh Frydenberg election signs defaced with Nazi symbols](#)

⁷ In some legislation it is explicitly placed on the defendant - see for example *Work Health and Safety Act 2011 (NSW)* ss 144, 165, 171, 185, 200, 242; *Rail Safety National Law (NSW)* ss 160, 184, 228, 229

This submission was prepared by Stephen Blanks on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the NSW Department of Communities and Justice.

Yours sincerely,

Michelle Falstein
Secretary
NSW Council for Civil Liberties

Contact in relation to this submission: Stephen Blanks