



Australian
Human Rights
Commission

Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023

Australian Human Rights Commission

Submission to the Senate Standing Committee on Legal and Constitutional
Reform

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1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to make this submission to the Inquiry of the Senate Standing Committee on Legal and Constitutional Affairs on the *Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023* (Cth).
2. The Commission is Australia’s National Human Rights Institution. It provides independent and impartial services to promote and protect human rights and fundamental freedoms.
3. The Commission undertakes a range of policy development and research tasks that aim to promote compliance with Australia’s human rights obligations, while also investigating and conciliating complaints of unlawful discrimination and breaches of human rights.
4. The Commission plays an important national role in the promotion of core human rights principles, including those relevant to this Inquiry, namely the elimination of all forms of racial discrimination.

2 Antisemitism in Australia

5. In its *National Anti-Racism Framework Scoping Report* (Framework Report) released in December 2022, the Commission noted the ongoing prevalence and harm caused by racism in Australia.¹
6. Antisemitism, as a form of racism that is recognised under the *Racial Discrimination Act 1975* (Cth), remains a matter of grave concern to the Commission.
7. The Framework Report flags recent spikes in antisemitism and racist extremism as one of the drivers in the Commission’s call for the development of a national anti-racism framework.²
8. Since 2007, an annual report on antisemitism in Australia has been prepared by the Executive Council of Australian Jewry (ECAJ), based on incidents self-reported by members of the Jewish community in each state, and on ECAJ’s analysis of media, social media, political discourse and other sources.
9. ECAJ’s *Report on Antisemitism in Australia 2022* recorded 478 incidents of antisemitism. Incidents included physical assault; abuse, harassment, and intimidation; vandalism; graffiti; and hate communications via email, postal mail, telephone, leaflets, posters and stickers.³
10. While there was only a small increase in the overall number of incidents recorded between 2021 and 2022 (almost 7%), this number represents a 35% increase in recorded incidents since 2020.⁴
11. In the 2021–2022 reporting year, there were substantial increases in the number of reported incidents in two categories: posters/stickers (up 70% from 72 to 123) and graffiti (up 18% from 106 to 125).⁵

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12. ECAJ reported that the 70% increase in incidents in the poster category, which includes banners, clothing, flags, leaflets, posters, placards and stickers, had two contributing factors – one of which was the increase in neo-Nazi activity. This activity included putting up antisemitic propaganda material in the form of posters, stickers and the like, particularly in the eastern states and South Australia.⁶
13. The Commission’s Framework Report also notes that ‘severe and disturbing threats’ are a common form of online hate being directed at Australian Jewish communities. These threats often include Nazi symbols which through their use are intended to inflict harm on Jewish people.⁷
14. The display of Nazi symbols has a particular impact on individuals and communities, including the Jewish community, and may do significant damage to personal security, social belonging, inclusion, participation, and cohesion. The Commission recognises there is public interest in stopping this behaviour.

3 Improving legal protections against racism

15. Participants in the Commission’s national anti-racism framework scoping project consistently called for legal protections against racism that are enforceable and reflective of Australia’s existing international commitments.
16. Adequate legal protections against racial discrimination, vilification, harassment, and race hate were identified as key.
17. Many shared their views that without enforceable legal frameworks, affected individuals and communities are forced to bear the double burden of combatting racism while processing the trauma from experiences of racism, and that there would be no reliable means to ensure accountability and protection from the harms of racism.⁸
18. In the *Free and Equal Position Paper* released in March 2023, the Commission calls for a National Human Rights Act.⁹
19. The Commission considers such legislation will more comprehensively protect and promote the rights of Australians. Such legislation would include the right to live free from racial discrimination, vilification and hate and provide individuals whose human rights have been breached with an avenue to pursue a legal remedy.¹⁰
20. The Commission considers a National Human Rights Act an important basis to address antisemitism.

4 The criminal prohibition of Nazi symbols

21. Additional to civil protections against racism, there may be cases in which egregious racist conduct should also be the subject of criminal offences.
22. The Commission is, in principle, supportive of the proposal to introduce a criminal prohibition and sanction against the display of Nazi symbols and is reassured that the Statement of Compatibility with Human Rights completed in accordance with Part 3

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of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) raises no matters of concern regarding the Bill's operation as it relates to the right of freedom of expression contained in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR).

23. The Commission also considers the Bill to be compatible with the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD).
24. The Commission notes that the Race Discrimination Commissioner, Mr Chin Tan, in Senate Estimates in October 2021, described the then Victorian proposal to introduce legislation to ban the public display of the swastika as an important initiative. In the hearing he also agreed a national response was worthy of consideration.¹¹

5 Operation of the proposed criminal prohibition

25. As noted in the Framework Report, participants raised concerns about the pressing need to acknowledge hate incidents' additional menacing effect and dignity harm on targeted individuals and communities.¹²
26. In the Framework Report, the Commission details how communities affected by racism have suggested it is imperative to consider harm-based, community-centric approaches when determining whether action is taken against racially hateful conduct including in cases where criminal sanctions may be imposed.¹³
27. The proposed Bill recognises that the knowledge of the alleged perpetrator is an important element in proving the offence of displaying a Nazi symbol.
28. The Commonwealth Director of Public Prosecution (CDPP) will have regard to the *Prosecution Policy of the Commonwealth* to satisfy themselves that there is sufficient evidence to justify a prosecution.¹⁴
29. A key consideration of the Policy is that, once the prosecutor is satisfied there is sufficient evidence to justify a prosecution, they then determine whether 'the public interest' requires the prosecution be pursued.¹⁵
30. A non-exhaustive list of public interest factors to be considered is contained in the Prosecutions Policy, including the effect on community harmony and public confidence in the administration of justice – cl 2.10 (g); and the actual or potential harm, occasioned to an individual – cl 2.10 (p).
31. Clause 2.10 of the Prosecution Policy indicates that the applicability of, and weight to be given to, these and other factors will depend on the particular circumstances of each case.

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- ¹ *National Anti-Racism Framework Scoping Report 2022* (Report December 2022), 20
<<https://humanrights.gov.au/our-work/race-discrimination/publications/national-anti-racism-framework-scoping-report>>
- ² *National Anti-Racism Framework Scoping Report 2022* (Report December 2022), 20
<<https://humanrights.gov.au/our-work/race-discrimination/publications/national-anti-racism-framework-scoping-report>>
- ³ Julie Nathan, *Report on Antisemitism in Australia 2022* (Executive Council of Australian Jewry, Report, 2022), 6 <<https://www.ecaj.org.au/wordpress/wp-content/uploads/ECAJ-Antisemitism-Report-2022.pdf>>
- ⁴ Julie Nathan, *Report on Antisemitism in Australia 2022* (Executive Council of Australian Jewry, Report, 2022), 6 <<https://www.ecaj.org.au/wordpress/wp-content/uploads/ECAJ-Antisemitism-Report-2022.pdf>>
- ⁵ Julie Nathan, *Report on Antisemitism in Australia 2022* (Executive Council of Australian Jewry, Report, 2022), 6 <<https://www.ecaj.org.au/wordpress/wp-content/uploads/ECAJ-Antisemitism-Report-2022.pdf>>
- ⁶ Julie Nathan, *Report on Antisemitism in Australia 2022* (Executive Council of Australian Jewry, Report, 2022), 6 <<https://www.ecaj.org.au/wordpress/wp-content/uploads/ECAJ-Antisemitism-Report-2022.pdf>>
- ⁷ See generally Andre Oboler, *Measuring the Hate: The State of Antisemitism in Social Media* (Report, 2016).
<<https://www.ohpi.org.au/measuring-antisemitism/>>
- ⁸ *National Anti-Racism Framework Scoping Report 2022* (Report December 2022), 148
<<https://humanrights.gov.au/our-work/race-discrimination/publications/national-anti-racism-framework-scoping-report>>
- ⁹ Australian Human Rights Commission *Free and Equal Position Paper – A Human Rights Act for Australia* (Report March 2023) <<https://humanrights.gov.au/human-rights-act-for-australia>>
- ¹⁰ Australian Human Rights Commission *Free and Equal Position Paper – A Human Rights Act for Australia* (Report March 2023) <<https://humanrights.gov.au/human-rights-act-for-australia>>; see also Australian Human Rights Commission, *Free & Equal: A Reform Agenda for Federal Discrimination Laws* (Report, December 2021) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>
- ¹¹ Parliament of Australia, Hansard Transcript of Legal and Constitutional Affairs Legislation Committee Senate Estimates Hearing, 26 October 2021
<<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F25205%2F0012;query=Id%3A%22committees%2Festimate%2F25205%2F0001%22>>
- ¹² *National Anti-Racism Framework Scoping Report 2022* (Report December 2022), 151
<<https://humanrights.gov.au/our-work/race-discrimination/publications/national-anti-racism-framework-scoping-report>>
- ¹³ *National Anti-Racism Framework Scoping Report 2022* (Report December 2022), 151
<<https://humanrights.gov.au/our-work/race-discrimination/publications/national-anti-racism-framework-scoping-report>>
- ¹⁴ Commonwealth Director of Public Prosecution, *Prosecution Policy of the Commonwealth -Guidelines for the Making of Decisions in the Prosecution Process* (as updated 19 July 2021) cl. 2.4
<<https://www.cdpp.gov.au/sites/default/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf>>
- ¹⁵ Commonwealth Director of Public Prosecution, *Prosecution Policy of the Commonwealth -Guidelines for the Making of Decisions in the Prosecution Process* (as updated 19 July 2021), see clause 2.8
<<https://www.cdpp.gov.au/sites/default/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf>>