

Dr Raihan Ismail

Australian National University
CANBERRA ACT 2601
[REDACTED]

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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

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

1. I write to make a submission about Schedule 1 of this Bill. Schedule 1 deals with 'prohibited symbols' that include Nazi symbols and the Islamic State flag. My focus, in light of my academic expertise, is on the Islamic State flag.

Recommended changes to Schedule 1 to the Bill

Recommendation 1: That clause (d) of the definition of *prohibited symbol* be removed. Alternatively, that the clause be replaced with a narrower provision that criminalises the conduct of intentionally seeking to represent or replicate the Islamic State flag (or a Nazi symbol).

Recommendation 2: That clauses 80.K, 80.2L and 80.2M (police powers) be removed.

Summary

2. The recommendations above are designed to correct what I consider to be unwarranted breadth in the scope of the proposed criminal offences. Specifically:
 - a. The definition of *prohibited symbol* could inadvertently extend to symbols that everyday Muslims use, merely because those innocuous symbols could be confused with, or mistaken for, the Islamic State flag.
 - b. The Bill empowers police officers to act upon their own view of what is, or could be confused for, an Islamic State flag, and could empower police officers to direct the removal from public display of everyday Muslim symbols.
3. Both of these problems give rise to real danger for the free exercise by Australian Muslims of their religious beliefs. Neither of the two problems is

present in the Opposition's Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023. In these two respects, I submit that the Committee should prefer the approach taken in the Opposition's Bill.

My background and expertise

4. I am a Senior Lecturer, specialising in religion and politics, at the Australian National University's Coral Bell School of Asia Pacific Affairs. For the past year I have been on leave from the ANU, holding an appointment as the Goldman Faculty Leave Fellow at Brandeis University's Crown Center for Middle East Studies in Waltham, Massachusetts. I will shortly cease both roles to take up permanent appointment from 7 August 2023 to the University of Oxford's HH Sheikh Hamad Bin Khalifa Al Thani Professorship in Contemporary Islamic Studies.
5. I have published two books in the field of contemporary Islamic Studies: *Saudi Clerics and Shi'a Islam* (Oxford University Press, 2016) and *Rethinking Salafism: The Transnational Networks of Salafi 'Ulama in Egypt, Kuwait, and Saudi Arabia* (Oxford University Press, 2021).
6. I have studied the so-called 'Islamic State' terrorist group and its false claims to be an authentic Islamic movement. Among my publications in this respect are "Reclaiming Saudi Salafism: The Saudi Religious Circles and the Threat of ISIS", *Journal of Arabian Studies*, vol. 9, no. 2 (2019), pp. 164-181.
7. On 16 June 2023, I published via the Australian Broadcasting Corporation an article that discusses Schedule 1 to the Bill. That article is attached for reference. This submission expands upon the concerns I raised in that article and makes recommendations to amend the Bill to address those concerns.

The definition of *prohibited symbol*

8. The Bill sets out the four kinds of *prohibited symbol*:

Each of the following is a ***prohibited symbol***:

- (a) the Islamic State flag;
- (b) the Nazi hakenkreuz;
- (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.

9. The problem with the relationship between (a) and (d) is that there are many commonly used Islamic flags and symbols that bear resemblances to the Islamic State flag and could be confused with, or mistaken for, the flag.

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10. The reason why this is so is that the Islamic State terrorist group *deliberately* designed its flag to co-opt long-standing Islamic symbology. Co-opting symbology is part of an attempt to claim religious authenticity. Three examples are:
- a. The Islamic State flag is black. Black is the colour of the flag that the Abbasid caliphate used. For many Muslims, especially Sunnis, the Abbasid caliphate was the high point of the Islamic world, including its achievements in science, philosophy and literature. The Islamic State uses black to emulate the Abbasid caliphate.
 - b. The text on the Islamic State flag is the *shahadah* – the core tenet of Islam. Translated into English, the text reads: ‘There is no god but God, and Muhammad is the Messenger of God’. Muslims recite this in their daily religious practice. Muslims frequently write it on scripts, flags and other symbols. Among the flags on which the script appears is the national flag of Saudi Arabia.
 - c. The text is written in a calligraphic style that seeks to bear similarities to writings said to be used in early Qur’anic manuscripts and a letter written by the Prophet Muhammad.
11. In light of these matters it should hardly be surprising that many Muslims create and display symbols that look much like the flag of the Islamic State without intending that there be any such resemblance. The following are two examples:
- a. For Shia Muslims, the colour black symbolises the rejection of oppression, and the commemoration of the martyrdom of Shia Imams. The names of Shia Imams, especially Imam Husayn, are displayed on black flags in Arabic text, often in numerous calligraphic styles. These flags are displayed during Shia processions in various parts of Shia communities around the world.
 - b. For both Sunni and Shia Muslims, the colour black is also used as the background for Islamic wall art containing Arabic script, often in different calligraphic styles. The colour black as a background is popular for artistic purposes. Black backgrounds helps accentuate Arabic calligraphy. Wall art of this kind is displayed in homes, mosques and other public places.
12. One of the many difficulties with clause (d) of the definition is that it does not identify *who* would be confused by the relevant symbol or *who* would mistake it for the Islamic flag. If ‘confusion’ or ‘mistake’ is to be assessed by reference to the ordinary person, as it surely is, the clause is dangerously broad. The ordinary Australian would mistake many innocent Islamic symbols, including those mentioned above, for the Islamic State flag. The ordinary Australian does not read or understand Arabic script, does not understand the meaning to Muslims of the *shahadah*, and does not understand that black flags in Islam are not exclusively the flags of the Islamic State. And in light of this confusion,

many such flags would also pass the 'likely to offend' test in clause 80.2H(7).

13. There is an easy alternative. The Parliament could remove clause (d). If there remains a concern about terrorist propagandists deliberately trying to replicate the Islamic flag, the Parliament could amend clause 80.2H(1) as follows:

(1) A person commits an offence if:

- (a) the person causes a thing to be displayed in a public place; and
- (b) the thing is a prohibited symbol or the person intends for the thing to resemble a prohibited symbol and to make people think that it is a prohibited symbol; and...

14. This amendment, or something like it, would focus the provisions on the real problem: deliberate terrorist propagandism. It would avoid inadvertently capturing everyday religious practices that have nothing to do with terrorism. There could be a similar change to clause 80.2J.

15. If nothing is done about clause (d), no Australian Muslim could feel free to display a black flag, or indeed any flag containing Arabic script. They will rightly fear that such a flag could be confused for the Islamic State flag and in turn be criminalised. That outcome is catastrophic. The Islamic State has deliberately sought to co-opt centuries-old Islamic symbology to claim, falsely, legitimacy as an authentic Islamic organisation. The best response to that co-optation is to leave room for Muslims to reclaim their symbols back. The worst possible response is to criminalise those symbols entirely.

16. The 'religious purpose' proviso in clause 80.2H(9) is no answer to the problem. No Australian should need to rely on a defence to overcome the criminalisation of religious practice, let alone a defence that requires them to demonstrate that their religious practice is 'not contrary to the public interest'.

Police powers

17. I explained above that the ordinary Australian is unlikely to know the difference between the Islamic State flag and any number of other flags or banners that Muslims might use and which are not intended to be terrorist symbols. The ordinary police officer is no more likely than the ordinary Australian to be able to distinguish between an Islamic State flag and a similar but innocuous flag. Yet the Bill gives the police unprecedented powers to take down flags and other symbols based on their own view about what they are or resemble and without judicial intervention.

18. Muslim Australians will rationally fear from clauses 80.2K, 80.2L and 80.M that their everyday displays of religious symbology will be policed. There will be some Australians who, either innocently or nefariously, will report displays of Islamic symbols to the police to ask that they be taken down under the new

provisions. None of that is conducive to the free exercise by Australian Muslims of their religious beliefs. If the view of the Committee is that the display of the Islamic State flag should be outlawed, clause 80.2H is sufficient to achieve that objective. There is no need to confer extraordinary powers on police who have insufficient knowledge of Islam and its symbols to exercise those powers accurately and judiciously.

19. The combination of clauses 80.2K, 80.2L and 80.M with clause (d) of the definition of *prohibited symbol* is of accentuated concern. Clause (d) expands the powers of the police to act upon things that they think will be 'confused' or 'mistaken' for the Islamic State flag. There is no possible justification for such a broad power.

Concluding observations

20. The Attorney-General has explained to the Parliament (Hansard, 14 June 2023) that:

in criminalising the public display and trade in the Islamic State symbol, the government recognises the important distinction between Islamic State, which is a terrorist organisation with a violent ideology, and the Islamic faith, which is deeply respected and valued as part of Australia's multicultural society. The government condemns Islamophobia and stands with the Australian Muslim community in opposition to terrorism in all its forms.

21. The Bill, in its current form, and perhaps inadvertently, fails to maintain the distinction between the Islamic State and the Islamic faith of which the Attorney-General speaks. The Bill places Australian Muslims in jeopardy of having their religious practices policed and even criminalised. This is because the Bill does not, in the Attorney-General's words, criminalise 'the public display and trade in the Islamic State symbol'. It goes much further. It extends to symbols that, to the untrained eye, look like the Islamic State flag. There are many such symbols. The Bill then empowers police to act extrajudicially upon symbols that *they* think look like the Islamic State flag. And, as a result, the Bill disempowers Muslims from displaying their religious symbols for fear of criminalisation and over-policing. I have suggested two changes that I think will remove these problems.

22. I express no view on whether Schedule 1 is otherwise an appropriate law.

Sincerely,



Dr Raihan Ismail
23 June 2023

