



**Australian Government**  
**Attorney-General's Department**

April 2023

# **Submission to the Senate Standing Committee on Legal and Constitutional Affairs: Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023**

## Introduction

The Attorney-General's Department (AGD) and the Department of Home Affairs (Home Affairs) welcome the opportunity to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs, as part of its review of the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (the Bill).

This submission sets out key considerations for framing Commonwealth legislation, to which AGD and Home Affairs recommend the Committee turns its mind in reviewing the Bill. These considerations include constitutional validity, compatibility with Australia's human rights obligations, and the advice set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, available on AGD's [website](#).

## Constitutional validity

The Constitution lists certain subject-matters with respect to which the Parliament may make laws. The majority of legislation enacted by the Parliament is required to be supported by a head of power under section 51 or 52 of the Constitution. The High Court has also recognised some implied restrictions on legislative power derived from the fundamental system of government established by the Constitution.

As AGD does not give legal advice to parliamentary committees, we do not comment further on these issues.

## Compatibility with Human Rights

All people are entitled to respect, equality, dignity and the opportunity to participate in the social, cultural and economic life of our nation free of hatred or harassment. To ensure legislation is compatible with human rights, all Bills and disallowable legislative instruments within the meaning of section 42 of the *Legislation Act 2003* require a Statement of Compatibility to assess whether they are compatible with the seven core international human rights treaties to which Australia is a party. These treaties are:

- the [International Covenant on Civil and Political Rights](#) (ICCPR)
- the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR)
- the [International Convention on the Elimination of All Forms of Racial Discrimination](#) (CERD)
- the [Convention on the Elimination of All Forms of Discrimination against Women](#) (CEDAW)
- the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (CAT)
- the [Convention on the Rights of the Child](#) (CRC)
- the [Convention on the Rights of Persons with Disabilities](#) (CRPD).

Statements of Compatibility are provided to the Parliamentary Joint Committee on Human Rights (PJCHR) for review. The PJCHR was established under the *Human Rights (Parliamentary Scrutiny) Act 2011* to examine all Commonwealth bills and legislative instruments for compatibility with human rights.

AGD and Home Affairs recommend the Committee also have regard to the Statement of Compatibility.

## Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers

AGD and Home Affairs recommend the Committee reviews the Bill in light of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers ([hyperlinked above](#)).

The Guide provides advice on matters that should be considered when developing criminal offences that are intended to become part of Commonwealth law. This includes how to determine whether behaviour should be criminalised, and how to choose an appropriate sanction, noting there is a range of options for imposing liability under legislation.

The Guide outlines matters that should be taken into consideration in determining the physical and fault elements of an offence, including to ensure that the provisions are clear and specific such that they are capable of being understood and complied with by members of the Australian community. The Guide provides advice on framing defences, including defences that automatically apply to Commonwealth offences, and, if an offence-specific defence is appropriate, the matters to be considered in developing this.

The Guide also sets out considerations for setting an appropriate penalty for a new offence, including the importance of consistency across legislation.

The Guide also provides advice relevant to matters of future implementation that should be considered when developing new Commonwealth law, including whether an offence is practicably enforceable.