



Victorian Council for Civil Liberties Inc
Reg No: A0026497L
GPO Box 3161
Melbourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au

PRESIDENT
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IMMEDIATE PAST PRESIDENT
Julia Kretzenbacher

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The Hon. Michael Kirby AC CMG

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Committee Secretary
Senate Legal and Constitutional Affairs Committee

By email: legcon.sen@aph.gov.au

Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023

1. Liberty Victoria is grateful for the opportunity to make this submission on the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (Cth) (**the Bill**). The Bill was introduced by the Liberal-National Opposition on 23 March 2023.
2. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, tracing our history to Australia's first council for civil liberties, founded in Melbourne in 1936. We seek to promote Australia's compliance with the human rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. Further information may be found at www.libertyvictoria.org.au.

The Prohibition of Nazi Symbols

3. In 2022, the Victorian Government made it a criminal offence to display the Hakenkreuz (more commonly known as the Nazi Swastika).¹ After the confronting scenes outside the Victorian Parliament on 18 March 2023, the Victorian Government has now indicated that it will seek to prohibit the ‘Nazi salute’²
4. Liberty Victoria has been very concerned by the re-emergence of far-right extremism over recent years, and we have made submissions on that issue to:
 - (1) The Commonwealth Parliamentary Joint Committee on Intelligence and Security’s (PJCIS) Inquiry into Extremist Movements and Radicalism in Australia in February 2021;³ and
 - (2) The Victorian Legal and Social Issues Committee’s Inquiry into Extremism in May 2022.⁴
5. Liberty Victoria also gave evidence to the Victorian Parliament’s Inquiry into Extremism,⁵ where we called for a preventative rather than reactionary response to far-right extremism that addresses the drivers as to why some people are drawn to extremism in the first place; one that focuses on improving social cohesion and trust in institutions, including trust in government and the media, rather than focussing on expanding censorship and surveillance.⁶
6. Whilst concerned about extremism in all forms, Liberty Victoria does not support the criminal prohibition on Nazi icons, primarily because: (1) such measures are unlikely to have any substantive impact in preventing the rise of extremism, especially given the

¹ The Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022 (Vic).

² “Victoria to ban Nazi salutes after far-right rally”, The Age, <https://www.theage.com.au/politics/victoria/victoria-to-ban-nazi-salutes-after-far-right-rally-20230320-p5ctip.html>

³ Submission to the PJCIS Inquiry into Extremist Movements and Radicalism in Australia, <https://libertyvictoria.org.au/sites/default/files/210201%20Extremism%20Movements.pdf>. This was a joint submission with Muslim Collective.

⁴ Submission to the Victorian Parliament’s Legal and Social Issues Committee’s Inquiry into Extremism, <https://libertyvictoria.org.au/sites/default/files/220513%20LV%20Submission%20to%20the%20Extremism%20Inquiry.pdf>.

⁵ Transcript of evidence given to the Victorian Parliament’s Legal and Social Issues Committee by Michael Stanton, President of Liberty Victoria, <https://www.parliament.vic.gov.au/lsc-lc/inquiries/article/4892>.

⁶ Response to question from the Victorian Parliament’s Legal and Social Issues Committee, https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Extremism_In_Victoria/Transcripts/2022.06.14/QONs/Liberty_Victoria_response_to_question.pdf.

adaptability of icons and the difficulty of enforcement; and (2) such measures are likely to be used by extremists to gain attention in the public arena and be leveraged to attempt to recruit new members. Prohibition gives extremists the attention they crave.

7. We agree with Lydia Khalil, author of ‘Rise of the Extreme Right’, in her recent article entitled ‘Banning the Nazi salute opens a Pandora’s box’.⁷ In particular, the terrible scenes outside the Victorian Parliament demonstrate that a never-ending ‘whack-a-mole’ approach to prohibition will not be effective – extremist actors will simply move to using icons and/or gestures that are not yet unlawful, or that are at the borderline of legality, and use the inevitable controversy that follows to garner attention and boost their profile.
8. For convenience we repeat our observations on the Victorian legislation in the following paragraphs.⁸
9. Liberty Victoria is deeply worried by the emergence of far-right extremism, but opposes the ban of the ‘hakenkreuz’ for the reasons set out in our joint submission to the PJCIS.⁹
10. We understand that the display of Nazi symbols is highly confronting and offensive, particularly to the Jewish community and other minority groups that have been targeted by fascist ideology. We also recognise that the introduction of this new criminal offence is intended to convey the community’s strong condemnation of racism, and to express solidarity and support for communities that have been targeted by racial vilification. These are laudable aims.
11. Our concern, however, is that the expansion of the criminal law is not an appropriate or effective way to achieve these objectives. There is a risk that the law will have unintended consequences which undermine its objectives.

⁷ Lydia Khalil, “Banning the Nazi salute opens a Pandora’s box”, 29 March 2023, <https://www.lowyinstitute.org/publications/banning-nazi-salute-opens-pandora-s-box>.

⁸ Liberty Victoria comment on the proposed ban of the Swastika in Victoria, <https://libertyvictoria.org.au/content/proposed-ban-swastika-victoria>.

⁹ Submission to the PJCIS Inquiry into Extremist Movements and Radicalism in Australia, <https://libertyvictoria.org.au/sites/default/files/210201%20Extremism%20Movements.pdf>. This was a joint submission with Muslim Collective.

12. Critically, several features of the offence as drafted [in the Victorian legislation] erode fundamental protections for people accused of criminal offences, and risk exposing legitimate religious, educational or artistic uses of the swastika to scrutiny by police. If enacted the bill: (1) will allow a person to be convicted and exposed to a risk of imprisonment on the standard of what they 'ought' to have known (rather than what they did know), and (2) will place a reverse onus (likely to be on the balance of probabilities¹⁰) on an accused person to make out a defence (such as religious belief, academic work or artistic expression) [again, we note the Commonwealth Bill does not share these issues, requiring the Nazi symbol to be displayed knowingly, and by imposing a lesser evidentiary onus on an accused person to raise a relevant defence].
13. This unravels the 'golden thread' of the criminal law of the presumption of innocence and means that an accused person could raise a reasonable doubt about whether they had intended to use the symbol for a legitimate reason but still be convicted and exposed to the risk of imprisonment because they did not establish the defence on the balance of probabilities. Concerningly, it appears that these aspects of the proposed offence have been chosen to make prosecution easier, notwithstanding that in other contexts reverse onus provisions have been found to be unjustifiable and contrary to the *Charter of Human Rights and Responsibilities Act 2006* (Vic).¹¹
14. Given the very serious consequences of being convicted of such an offence (including potential imprisonment and the shame of being found to support Nazi ideology), if it is to be enacted the offence should require that: (1) the intentional display of the Hakenkreuz as a symbol of hate must proven beyond reasonable doubt rather than on a standard of what a person 'ought' to have known'; and (2) only require potential defences to be raised on an evidentiary basis (and once raised it should be for the prosecution to disprove the defence beyond reasonable doubt).

¹⁰ *Evidence Act 2008* (Vic) s 141(2).

¹¹ *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436, 477 [152]-[153] (Maxwell P, Ashley and Neave JJA), although the proposed declaration of inconsistent interpretation was set aside by the High Court in *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1, where Crennan and Kiefel JJ also observed "[i]t may be that, in the context of a criminal trial proceeding, a declaration of inconsistency will rarely be appropriate": at 229 [605].

15. It must be noted that, even in cases in which an accused has strong prospects of establishing a defence in court, the risk of police action and charges remain.¹² Contrary to the objectives of the law this will most likely fall – even in error given the available defences – on members of the Hindu and other religious communities and on artists and satirists.
16. Such a risk should not be taken in circumstances where the proposed law is highly unlikely to reduce racial vilification in Victoria. The experience of far-right organisations shows the use of far-right icons (such as the swastika) can easily be adapted and modified to be highly suggestive of the prohibited icon but not violate prohibition (consider, for example the use of other Fascist and Norse icons by far-right groups).¹³ This offence [in the Victorian legislation] also has an exception for tattoos, and does not appear to apply to online content (such as social media posts). These fairly straightforward avenues for evading the offence create perverse incentives to ‘game the system’.
17. Further, as demonstrated by far-right ‘meme’ culture online, such icons constantly evolve and often involve initially benign icons (such a ‘Pepe the Frog’ or even the ‘okay’ symbol) or religious iconography (such as of crusaders and saints). Simply put, prohibition is a blunt instrument that will not prevent signals and ‘dog-whistling’ being given to extremist groups.
18. The long-standing prohibition of the swastika in Germany has done nothing to prevent the re-emergence of far-right extremism over recent times. These laws are likely to be tested by potential extremists who may seek to portray themselves as ‘martyrs’ committed to free expression, and prohibition and censorship might well have the perverse outcome of generating more attention towards such persons (and indeed the icons themselves) through lengthy litigation.

¹² Consider, eg, police seizing the works of the artist Bill Henson and the (ultimately unsuccessful) prosecution of the artist Paul Yore: Rowena Orr SC and Georgie Coleman “Collage as child pornography and the limits to the right to freedom of expression – Case note” Arts + Law (Web Page, 23 February 2015) <https://www.artslaw.com.au/article/collage-as-child-pornography-and-the-limits-to-the-right-to-freedom-of-expr/>.

¹³ See, eg, Washington Post, “Identifying far-right symbols that appeared at the U.S. Capitol riot” (Web Page, 15 January 2021) <https://www.washingtonpost.com/nation/interactive/2021/far-right-symbols-capitol-riot>.

19. If persons are willing to display extremist icons in public (be it the swastika or an ISIS flag), this may also be a relevant matter for police and intelligence services investigating more serious crimes that can arise from extremist ideology. Pushing such icons underground does not assist when seeking to recognise the public face of extremist ideologies. If such icons are displayed as part of advocating for the doing of a terrorist act, that is already a criminal offence contrary to s 80.2C of the *Criminal Code Act 1995* (Cth).
20. If the criminal law is to have any role in this area, this can be achieved through vilification offences similar to those which exist under the *Racial and Religious Tolerance Act 2001* (Vic), considered by Chief Judge Kidd in *Blair Cottrell v Erin Ross* [2019] VCC 2142.
21. As we have recently submitted to the Victorian Government's Inquiry into Extremism, the focus of addressing the emergence of far-right extremism should not be on expansion of executive power and censorship; it should be on education and addressing the root causes of why some people are attracted to such ideologies in the first place, including social isolation, growing economic insecurity and mistrust in government and the media. The proposed prohibition of the hakenkreuz is a band-aid solution to a much deeper societal problem resulting the re-emergence of right-wing extremism.
22. For completeness, as observed above, we note that the Commonwealth Bill to ban Nazi icons does not share some of the same flaws as the Victorian legislation (the reverse onus provision is not to the standard of the balance of probabilities, and the requisite fault element is knowledge rather than what an accused person 'ought' to have known).
23. However, the Bill suffers from a different fundamental problem – the lack of any definition of what is a 'Nazi symbol' (except for an indication that it includes the Nazi salute). The problem with this is that Nazi icons are incredibly broad – they include many different symbols, including Norse runes, the black sun, and even the Celtic cross. These symbols can be endlessly modified and adapted. This is recognised in the Explanatory Memorandum to the Bill, which states:

Examples of symbols included in the scope of term in the Bill include:

- the Hakenkreuz – the Nazi swastika or hooked cross;
- the Double Sig rune (SS lightning bolt) that were used by the SchutzStaffel (SS), who primarily perpetrated the mass killings of Jews;
- the Totenkopf (Death’s head) used by the Nazi SS from 1934 to 1945;
- the Sonnenrad (Black sun/wheel);
- the Broken Sun Cross, or Sun Cross Swastika;
- the unstylised Celtic Cross;
- the Algiz rune;
- the Tyr rune; and
- the Othala/Odal rune.

24. Whilst Liberty Victoria opposes the criminal prohibition of Nazi symbols, if there is to be such criminalisation there must be specificity and precision in the Act itself as to what symbols are included, and this is even more important having regard to the maximum penalty of 12 months’ imprisonment. That is too serious a potential sanction for the prohibited icons to remain undefined in the legislation, and to leave to the discretion of the police and prosecutors as to whether a particular symbol reaches the threshold.
25. The potential for the ‘unstylised Celtic Cross’ and Norse runes to be captured by the definition demonstrates the difficulty of attempting to prohibit symbols. Further, it is very easy for those targeted by the prohibition to use icons highly suggestive of the prohibited icon (or highly suggestive of the prohibited gesture), and then challenge any prosecution at considerable public expense and in so doing generate considerable public attention to their cause, which would be a perverse outcome.
26. There is also an issue as to why the Commonwealth should legislate in this field given there is already legislation in some States (Victoria and New South Wales), and whether enacting the Bill: (1) is based on a valid head of federal power; and (2) if so, would result in invalidity of State legislation by being seen to “cover the field”. That issue should be carefully considered but is not the focus of this submission.
27. Thank you for the opportunity to make this submission. Please do not hesitate to contact Michael Stanton, President of Liberty Victoria, through the Liberty Victoria office at info@libertyvictoria.org.au.

Liberty Victoria

17 April 2023