Law Council
OF AUSTRALIA

Office of the President

25 September 2023

Mr Peter Khalil MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Dear Chair

Counter Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023

The Law Council of Australia appreciated the opportunity to appear before the Parliamentary Joint Committee on Intelligence and Security (the **Committee**) on Friday, 1 September 2023 in relation to its inquiry into the Counter Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (the **Bill**).

During the hearing, we were asked[1] by the Deputy Chair, Mr Andrew Wallace MP, to consider the merits of alternative approaches to defining prohibited symbols. Our answer is below. We also include additional observations regarding the evidence base on early intervention in countering violent extremism.

Alternative approaches to defining prohibited symbols

The rule of law requires that the intended scope and operation of offence provisions should be unambiguous and key terms should be defined;[2] and that people must be able to know in advance whether their conduct might attract criminal sanction.[3] Additionally, the general deterrence effect of criminal offences is contingent on offences being readily accessible, enforceable and known in the community.

The inevitable difficulty of drafting clear, certain and prospective criminal offences prohibiting public display of Nazi symbols, as well as the risk of unintended consequences of criminalisation,[4] reinforces the importance of the Law Council's recommendation that, instead of criminal prohibition, consideration should be given to strengthening civil racial and religious vilification laws to more fully respond to the harms caused by hateful conduct.[5] Notably, even

[1] Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023, Proof Committee Hansard, Friday, 1 September 2023, 45.
[2] Law Council of Australia, Policy Statement–Rule of Law Principles (March 2011), 2 Principle 1(b). ('***Law Council's Rule of Law Statement***')
[3] Ibid, 2 Principle 1.
[4] Law Council of Australia, Submission no. 150 to the Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (14 August 2023), 11 [20]. ('***Law Council Submission***')
[5] Ibid, 19 [60].

Telephone +61 2 6246 3788 • *Email* mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale Street, Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

in jurisdictions that have established criminal offences, there is a recognition that 'a ban on Nazi symbolism on its own cannot be effective in reducing the display of hateful materials or messaging in the community',[6] and that there is a need to consider a broader range of reforms to anti-vilification laws.

From a rule of law perspective, there are shortcomings to each of the three approaches taken in Australian jurisdictions that have already prohibited, or are considering prohibiting, the display of Nazi symbols.

The broadly-targeted approach

The **first approach**, taken in New South Wales,[7] is to leave Nazi symbols undefined[8] and to then allow the trier of fact to determine whether the use of any particular symbols falls within the ordinary meaning of the words '*Nazi symbols*'.[9]

The intent of this approach is to enable the offence to capture 'not only the more well-known symbols such as the Hakenkreuz or the Nazi flag but also a range of other, lesser-known Nazi symbols'.[10] However, it is important to bear in mind that the potentially wide reach of this approach to defining '*Nazi Symbols*' is narrowed by the requirement that the display must be intentional to attract criminal liability.[11] The New South Wales Attorney-General accepted that this knowledge requirement would make proof of the offence more difficult, however, was necessary to ensure that benign conduct was not captured.[12] The proposed offence in section 80.2H(1) of the Bill does not require that the display be intentional.

The broadly-targeted approach has the advantage that the offence provision can be expressed concisely, without the need to expressly 'cover the field' and exhaustively list Nazi symbols in primary legislation. The disadvantage of this approach is that, in the absence of case law, it is difficult to know in advance whether any particular display of symbols falls within the definition.

The specifically-targeted approach

A **second approach**, taken in Victoria,[13] is to define a '*Nazi symbol*' as a Hakenkreuz[14] and a symbol that so nearly resembles the Hakenkreuz that it is likely to be confused with or

---

[6] Parliament of Victoria, Legislative Assembly, Legal and Social Issues Committee, Inquiry into anti-vilification protections (Report, March 2021), 180. ('***Inquiry into anti-vilification protections (Vic)***')

[7] *Crimes Act 1900* (NSW), s. 93ZA.

[8] Except clarifying that the display of a swastika in connection with Buddhism, Hinduism or Jainism does not constitute the display of a Nazi symbol, Ibid, s. 93ZA(2).

[9] See further, for discussion of that ordinary meaning: New South Wales, *Parliamentary Debates*, Legislative Assembly, Tuesday, 21 June 2022, 9075 (Ms Gabrielle Upton):

> *The term "Nazi" encompasses the membership of the National Socialist German Workers' Party, which held government in Germany under Adolf Hitler between 1933 and 1945; and the ideologies of fascism, racism and antisemitism, and the belief in the supremacy of Hitler as Führer, which characterised that regime; as well as those individuals who support or sympathise with the ideology of that regime, including modern neo-Nazis, who shamefully embrace those ideologies. Similarly, the word "symbol" takes its ordinary meaning, which includes anything used or regarded as standing for or representing something else, or an emblem, token or sign.*

[10] Ibid.

[11] *Crimes Act 1900* (NSW), s. 93ZA(1).

[12] For example, New South Wales, above no. 9, 9075.

> *Whilst knowledge may be difficult to prove in those cases, this is a necessary consequence of ensuring that the bill is appropriately balanced in its objectives of targeting harmful and culpable conduct while not punishing unintentional conduct.*

[13] See generally, Division 4C, *Summary Offences Act 1966* (Vic) (public display of Nazi symbols).

[14] Ibid, s. 41J (definition of 'Nazi symbol').

mistaken for that symbol.[15] The approach taken in the Australian Capital Territory[16] is substantially similar.

The rationale for the specifically-targeted approach is that the Hakenkreuz is 'the most widely recognised symbol historically associated with Nazi and neo-Nazi ideology and its display in any form can cause harm and offence'.[17] Additionally, then Minister for Crime Prevention, the Hon. Natalie Hutchins contended that limiting the prohibited symbols to only the Hakenkreuz 'appropriately balances the breadth of the offence' and the absence in Victoria 'of a requirement to incite hatred or cause harm through the display of the Nazi symbol'.[18]

The advantage of this approach is that offence provisions clearly demarcate the scope of the offence in advance. The disadvantage of this approach is that it cannot, without legislative amendment, respond to the 'whack-a-mole' problem identified in the Law Council's primary submission:[19] that is, the incentive for extremist groups to adapt the usage of symbols to test the borderlines of a prohibition. This might occur, for example, by using otherwise anodyne symbols that have a double meaning, for example, the 'ok' hand gesture, 1488 or the Tyr Rune.

To mitigate this risk, the Victorian Government has accepted[20] the recommendation of the Legal and Social Issues Committee Report, that the Victorian Government should continue to 'monitor the public display of other hateful symbols to determine whether they should also be prohibited'.[21]

Definition by regulation

A **third approach**, currently under consideration in Queensland[22] is to enable the definition of prohibited symbols to be prescribed by regulation.[23] Again, the disadvantage with this approach is that the scope of the offence will be overly dependent on revision by the Executive, and may not be immediately apparent to members of the public.

The rule of law requires that the Executive should be subject to the law and that any action undertaken by the executive should be authorised by law.[24] This means that the Executive should not be able to issue an instrument that creates new offences or confers new powers on Executive agencies. Additionally, the content of an offence set out in an Act or regulation should be clear from the offence provision itself and 'the content of an offence should only be delegated to another instrument where there is a demonstrated need to do so',[25] so that the scope and effect of the offence is clear to the Parliament and those subject to the offence.

Conferring a power to define prohibited symbols by regulation, while not an Executive power to establish a new offence, allows the Executive to expand the conduct element of the offence in ways that may significantly change the scope and effect of the offence. The proscription of particular symbols may also significantly change the overall proportionality of the offence. For

[15] Ibid, s. 41J (definition of 'Nazi symbol' (b)).
[16] *Criminal Code 2002* (ACT), s. 751 (meaning of Nazi symbol in Part 7A.2).
[17] Victoria, *Parliamentary Debates*, Legislative Assembly, Thursday, 12 May 2022, 1723.
[18] Ibid.
[19] Law Council Submission, 11 [20].
[20] Victoria, above no. 17, 1723.
[21] Ibid. See also, Inquiry into anti-vilification protections (Vic), 181 Recommendation 25.
[22] Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (Qld). ('***The Queensland Bill***')
[23] See for example, the Queensland Bill, s. 52C(1)(a). Notably, the Minister must consider certain matters prior to making such a regulation, for instance, the symbol must be widely known by the public, or by a relevant group, as being solely or substantially representative of an ideology of extreme prejudice against a relevant group: the Queensland Bill, s. 52C(3).
[24] Law Council's Rule of Law Statement (March 2011), Principle 6(a).
[25] Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011), 26 2.3.4.

example, the Law Council's submission[26] sets out the difficulties arising from including the Islamic State flag in the definition of prohibited symbols because it is not a unique symbol and carries the risk of criminalising sincere professions of faith by Muslims in Australia.

In Queensland, it is envisaged that these risks will be partly mitigated by the requirement that regulation by prescription of a prohibited symbol must comply with minimum consultation[27] requirements including consultation with the Queensland Human Rights Commissioner.[28]

In Tasmania, a Bill,[29] which has been passed by both the House of Assembly and Legislative Council but has not yet received Royal Assent, employs a mixture of the approaches outlined above. In relation to the offence for display of Nazi symbols, there is a broad definition of Nazi symbols to include, among other things, symbols associated with the Nazis or with Nazi ideology[30] and a depiction, or recording, of a Nazi gesture.[31] In relation to the offence for performing a Nazi gesture, [32] the definition of Nazi gesture includes both the gesture known as the Nazi salute[33] and gestures prescribed by regulation.[34]

Notably, a mixed approach, combining the Victorian definition with the capacity to prescribe symbols by regulation, is under consideration in South Australia.[35] However, the Law Council does not advocate this approach (or the other options above).

Review of Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023

Mr Wallace also asked the Law Council to consider the approach taken to defining Nazi symbols in the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (Cth)[36] introduced by the Shadow Attorney-General, Senator Michaelia Cash. That bill takes the broadly-targeted approach to defining Nazi symbols outlined above. Accordingly, it is subject to similar advantages and disadvantages.

In the time available, the Law Council regrets that it has not been able to review that Bill exhaustively. The Law Council has limited resources and competing priorities, and notes that this Bill is not before the Committee. With that context in mind, the Law Council has suggested that the Bill under review by this Committee can be improved by inquiring into the experience of law enforcement, prosecution and justice agencies in New South Wales and Victoria with respect to the effectiveness of these jurisdictions' differing approach to defining prohibited symbols.[37]

[26] Law Council Submission, 19-22.
[27] The Queensland Bill, s. 52C(4).
[28] The Queensland Bill, s. 52C(4)(b).
[29] Police Offences Amendment (Nazi Symbol and Gesture Prohibition) Bill 2023 (2 of 2023) (Tas).
[30] Ibid, s. 6C(10)(a).
[31] Ibid, s. 6C(10)(c).
[32] Ibid, s. 6D(1).
[33] Ibid, s. 6D(4)(a).
[34] Ibid, s. 6D(4)(b).
[35] See further, Summary Offences (Nazi Symbol Prohibition) Amendment Bill 2022 (Private Member's Bill proposed by the Hon. Sarah Game). On 7 September 2022, with the support of the Government, the Legislative Council passed a motion to establish a Select Committee on the Prohibition of Neo-Nazi Symbols to consider this issue further.
[36] This Bill was considered by the Senate Legal and Constitutional Affairs Committee, Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (May 2023).
[37] Law Council Submission, 22.

Evidence on pathways for early intervention

We note that the evidence of the Department of Home Affairs[38] and law enforcement agencies[39] in favour of this Bill refer repeatedly[40] to the importance of early intervention and the need to disrupt radicalisation and recruitment by violent extremist groups. We reiterate our view[41] that early, community-based identification, intervention and rehabilitation of 'at-risk' individuals is more likely to occur without the threat of criminal sanction. This is because hardening criminal offences may come at the cost of more effective community-based strategies for countering violent extremism.

This position is supported by evidence of positive evaluations of countering violent extremism programs with a preventative focus in Australia. For instance, the New South Wales Countering Violent Extremism Evaluation[42] (the **NSW Evaluation**) highlighted that 'deep community engagement has played a substantial role in building trust and relationships' and was 'essential to project success and mitigating risks of community mistrust'.[43] Additionally, the NSW Evaluation found that a key challenge for the future of countering violent extremism programs is 'its positioning in relation to counter terrorism' which has 'hindered community confidence necessary for the achievement of program objectives'.[44]

The rigour of the NSW Evaluation was confirmed by the United Nations Compendium of Good Practices[45] in the context of good practices on evaluation design and process for measurable outcomes in this area.[46]

If you would like to discuss this matter further, in the first instance, please contact [redacted].

Yours sincerely



Luke Murphy
President

[38] Department of Home Affairs, Submission No. 98 to the Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (21 July 2023), 5 [16].
[39] Australian Federal Police, Submission No. 102 to the Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (21 July 2023), 2 [2].
[40] See for example, in relation to Schedule 2 of the Bill: Attorney-General's Department, Submission No. 97 to the Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (July 2023) 10 [46]; Australian Federal Police, above no. 26, 8; Department of Home Affairs, above no. 25, 4 [12]. Furthermore, in relation to Schedule 3 of the Bill: Department of Home Affairs, above no. 25, 4 [10].
[41] Law Council Submission, 11-12 [20], [23].
[42] ACIL Allen Consulting, Report to Department of Communities and Justice–New South Wales Countering Violent Extremism Program Evaluation (Final Report, October 2019). For context, The NSW Evaluation considered a suite of measures initiated by the New South Wales Government taking effect from November 2015. Broadly speaking these measures were intended to improve resilience by mitigating drivers of violent extremism and strengthen protective factors; to disengage individuals who show support for extremist ideology from such behaviour; to divert individuals who may be at risk of engaging in violent extremism; and to improve government and community capacity to understand and respond to violent extremism.
[43] Ibid, i.
[44] Ibid, iii.
[45] United Nations Global Counter-Terrorism Coordination Compact and European Union Commission, Compendium of Good Practices–Measuring Results in Counter-Terrorism and Preventing and Countering Violent Extremism (Report, 2023).
[46] Ibid, 21.