

2 May 2022

Mr Matthew Karpin
Director, Criminal Law Specialist
Policy, Reform and Legislative Branch
Department of Communities and Justice
By email: matthew.karpin@justice.nsw.gov.au

Dear Mr Karpin

Draft Crimes Amendment (Prohibition on Display of Nazi Symbols) Bill 2022

Thank you for the opportunity to provide feedback on the draft Crimes Amendment (Prohibition on Display of Nazi Symbols) Bill 2022 (**Bill**).

Firstly, Legal Aid NSW acknowledges the offence and distress that can be caused to members of the community by the display of symbols associated with Nazism. We note that past and continuing actions of Nazi groups are abhorrent and harmful to not only the Jewish community, but to others who have also been targeted by their beliefs and actions, such as the disability and LGBTIQ+ communities. We also acknowledge concerns expressed by intelligence and law enforcement agencies in relation to the threat posed by far-right extremism in Australia and the reported increase in individuals adopting such ideologies in recent times.¹

However, Legal Aid NSW is unable to support the Bill in its current form. We note that the proposed offence may unintentionally curtail freedom of expression. While freedom of expression is not an absolute right, any restrictions of this freedom must be necessary to protect national security, public order, or public health and morals.²

¹ Australian Security and Intelligence Organisations, Submission No 2 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (16 February 2021) 3; Australian Federal Police, Submission No 5 Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Extremist Movements and Radicalism in Australia* (February 2021) 5-6.

² International Covenant on Civil and Political Rights (ICCPR), opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3). Australia is a State Party to the ICCPR.

Any restrictions must also be appropriate to achieve their protective function, the least intrusive measure available, and proportionate to the interest to be protected.³

We are concerned that the proposed offence, as currently drafted, is too broad and risks criminalising behaviour that is not intended to cause harm. We submit that if the Bill proceeds, a number of amendments should be made to ensure that a better balance is struck between the interests of protecting members of the community from harm, and avoiding unnecessary criminalisation.

Definition of 'Nazi symbol'

The proposed offence refers to the display of a 'Nazi symbol', but the Bill does not contain a definition of this term. Presumably, one such symbol is what is commonly referred to as the 'swastika', but is more appropriately referred to as the 'Hakenkreuz' or 'hooked cross'. However, it is unclear what other symbols, if any, may be criminalised by the Bill. We note that there are other symbols that are associated with Nazism that are less well known, such as the Black Sun (Sonnenrad), as well other symbols that have been appropriated by Nazi and neo-Nazi movements, such as the Celtic Cross.

The lack of a definition of 'Nazi symbol' therefore creates uncertainty around precisely what is being criminalised. For example, it is not clear whether physical gestures such as the Nazi salute would constitute a 'Nazi symbol', but these would clearly fall within the definition of a 'public act', which includes 'actions and gestures'.⁴ Also, what may be regarded as a 'Nazi symbol' may shift over time as new symbols are created, or old symbols are appropriated, by neo-Nazi groups.

We also note that a symbol can have different cultural or religious meanings. For example, the swastika symbol in Sanskrit means 'wellbeing', and has been used by Hindus, Buddhists and Jains for millennia as a symbol of good fortune.⁵

To ensure greater certainty around what is being criminalised, one option would be to insert a definition of 'Nazi symbol' into the Bill and for the definition to provide an exhaustive list of such symbols (for example, the Hakenkreuz and the Nazi flag). However, in our view, this will not on its own address the issues with the proposed offence, particularly given the lack of knowledge or intent required on the part of the accused.

³ Human Rights Committee, *General Comment No 34 - Article 19: Freedoms of Opinion and Expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) 8[34].

⁴ *Crimes Act 1900* (NSW) s 93Z(5).

⁵ Mukti Jain Campion, 'How the World Loved the Swastika – Until Hitler Stole It', *BBC News* (Web Page, 23 October 2014) <<https://www.bbc.com/news/magazine-29644591>>.

Mental element

While an exhaustive list would make clear precisely what symbols are being criminalised, there would remain a risk of criminalising behaviour that is not intended to cause harm, in circumstances where an individual is oblivious to the symbol being associated with Nazism. This would likely be more of a risk with symbols that are less well known, or have been appropriated by the Nazi movement, as opposed to the universally known Hakenkreuz.

The proposed offence does not appear to contain a mental element requiring either:

- (i) the accused to be aware that the symbol they are displaying is a Nazi symbol (knowledge element), or
- (ii) the accused to intend to cause offence, incitement of hatred or something similar,⁶ or for the accused to be reckless as to such matters (intention element).

While it is an element of the offence that the person 'knowingly displays' the Nazi symbol, it appears that this knowledge requirement relates to the person knowing they are displaying the symbol, as opposed to knowing that the symbol they are displaying is associated with Nazism.

We note that it may be arguable that a person who displays a 'Nazi symbol' without realising its links with Nazism may have a defence of 'reasonable excuse'. However, this is not expressly stated under clause 93ZA(2) of the Bill, which provides a non-exhaustive list of what constitutes a 'reasonable excuse'. This issue could be remedied by either inserting a knowledge element into the offence (as per (i) above), inserting an intention element (as per (ii) above), or by expressly providing that it is a 'reasonable excuse' if a person did not have knowledge that the symbol they were displaying was associated with Nazism.

Legal Aid NSW prefers an approach where an intent requirement is included, to reduce the risk of capturing individuals who are unaware of the association, and ensure that there are not greater curtailments on freedom of expression than are necessary. For example, it is not uncommon to see a cross through a Hakenkreuz to signal a person or an organisation's opposition to Nazism. Graffiti that uses a Hakenkreuz on the campaign material of a far-right candidate may also be captured by the proposed offence. Both acts may be considered to be in opposition to Nazism and yet they risk being criminalised by the Bill in its current form.

⁶ We note that it is already an offence to publicly threaten or incite violence on the ground of race, religion, sexual orientation, gender identity, or intersex or HIV/AIDS status: *Crimes Act 1900* (NSW) s 93Z.

Placement of the offence

It is unclear why it is proposed that the offence be inserted into the *Crimes Act 1900* (NSW), rather than the *Summary Offences Act 1900* (NSW). Given the elements of the offence and the maximum penalty being six months' imprisonment, it would appear more appropriate that it be inserted into the *Summary Offences Act 1900* (NSW).

Existing legal provisions

We note that there are existing legal provisions that could be used to address at least some of the conduct sought to be captured by this Bill, including:

- section 93Z of the *Crimes Act 1900* (NSW) – a person who, by a public act, intentionally or recklessly threatens or incites violence towards another person or group of persons on the ground of race or religion (among others) is guilty of an offence
- section 4 of the *Summary Offences Act 1988* (NSW) – offensive conduct in a public place is a summary offence
- section 197 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) – the police may give a direction to a person in a public place on the basis that the person's behaviour, or presence, constitutes harassment or intimidation of another person, or is causing, or is likely to cause, fear in another person
- section 18C of the *Racial Discrimination Act 1975* (Cth) – it is unlawful for a person to do an act in public that is reasonably likely to offend, insult, humiliate or intimidate another person or group of people, and the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group, and
- section 20C of the *Anti-Discrimination Act 1977* (NSW) – it is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

Alternatives to criminalisation

Legal Aid NSW has concerns around the effectiveness of criminalising the conduct outlined in the Bill. The criminalisation of behaviour that falls short of incitement to violence may be inconsistent with strategies that focus on early intervention and reintegration into the community.⁷ Favouring criminalisation over education is particularly a concern in relation to already marginalised groups that Legal Aid NSW represents, such as people who experience mental health issues, people who experience an intellectual disability, and children and young people.

⁷ For example, the Australian Federal Police operates such strategies in relation to young people whose conduct does not reach the threshold of a criminal offence, but indicates a susceptibility for being radicalised. See Dr Jenny Cartwright, 'Diversion in Australia: Not your Traditional Counter-terrorism Response' (April 2016) *AFP Platypus Magazine* 30-32. Available at: <http://www.austlii.edu.au/au/journals/AUFPPlatypus/2016/10.pdf>.

Thank you again for the opportunity to provide feedback to this consultation. If you have any questions or would like to discuss this matter further, please contact Callum Hair, Senior Law Reform Officer, Strategic Law Reform Unit, on (02) 8726 2613 or at callum.hair@legalaid.nsw.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'M. Hitter', with a long horizontal stroke extending to the right.

Monique Hitter
Acting Chief Executive Officer