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21 July 2023

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
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**Review of the Counter-Terrorism Legislation Amendment
(Prohibited Hate Symbols and Other Measures) Bill 2023**

1. Liberty Victoria is grateful for the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) review of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (Cth) (**the Bill**).
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 the better protection of civil liberties and human rights in the community. Further information may be found at www.libertyvictoria.org.au.

The Prohibition of the ISIS Flag

3. We have particular concerns about the Bill's proposed prohibition of the public display of the ISIS flag that will be addressed below at [15]-[17], however this submission will begin by considering the proposed prohibition of Nazi symbols.

The Prohibition of Nazi Symbols

4. As the Committee is aware, 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 committed to prohibiting the 'Nazi salute'²
5. 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 PJCIS Inquiry into Extremist Movements and Radicalism in Australia in February 2021,³

(2) The Victorian Parliament's Legal and Social Issues Committee's Inquiry into Extremism in May 2022;⁴ and

(3) The Commonwealth Parliament's Senate Legal and Constitutional Affairs Committee's Inquiry into the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (Cth) dated 9 May 2023.⁵

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 Submission to the the Commonwealth Senate Legal and Constitutional Affairs Committee Inquiry into the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023: <https://libertyvictoria.org.au/content/criminal-code-amendment-prohibition-nazi-symbols-bill-2023>.

6. We have given evidence to the Victorian Parliament's Inquiry into Extremism,⁶ and to the Commonwealth Parliament's Inquiry into the Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023.⁷
7. We have repeatedly 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.⁸
8. We understand that the display of Nazi symbols and the making of Nazi gestures 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 new criminal offences 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.
9. 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 purpose.
10. As we have noted in our previous submissions, Liberty Victoria does not support the criminal prohibition on Nazi symbols (whether the Hakenkreuz, the double-sig rune, or any other Nazi symbol) and gestures, primarily because:
 - (a) such measures are unlikely to have any substantive impact in preventing the rise of extremism, especially given the adaptability of icons and gestures and the difficulty of enforcement; and

⁶ 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/lpic-lc/inquiries/article/4892>.

⁷ Transcript of evidence given to the Commonwealth Parliament's Senate Legal and Constitutional Affairs Committee by Michael Stanton, President of Liberty Victoria (evidence given together with Mr Stephen Blanks from the New South Wales Council for Civil Liberties): https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/commsen/26775/&sid=0004.

⁸ 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.

- (b) 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.
11. We agree with Lydia Khalil, author of 'Rise of the Extreme Right', in her March 2023 article entitled 'Banning the Nazi salute opens a Pandora's box'.⁹ 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 symbols 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.
 12. Recent events involving far-right organisations demonstrate that the use of far-right symbols (such as the Hakenkreuz and the double-sig rune) 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).¹⁰ There are fairly straightforward avenues for far-right actors to evade offences and this creates perverse incentives to 'game the system', especially when the inevitable controversy that follows can be used to raise awareness of far-right ideology and causes.
 13. 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 images of crusaders and saints). Simply put, prohibition is a blunt instrument that will not prevent signals and 'dog-whistling' from extremist groups.
 14. This does not detract from Liberty Victoria's long-standing support of other anti-vilification reforms, and in particular the need for trans and gender-diverse people to have robust protections under the *Racial and Religious Tolerance Act 2001* (Vic). For example, the anti-trans banner displayed at the rally on 18 March 2023 by far-right

⁹ 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>.

¹⁰ 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>.

activists should properly be regarded as hate speech. However, for the above reasons the attempted prohibition of symbols and gestures has specific difficulties.

The ISIS Flag

15. The proposal in the Bill to prohibit the public display of the ISIS flag is new. It is deeply flawed, in part for the reasons explained by the Canberra Islamic Centre in its submission to this Inquiry.¹¹ We endorse that submission.
16. Properly considered, the ISIS flag is not a symbol, it is the Arabic text of the Shahada on a black background, potentially with a white circle below containing additional Arabic text.¹² The text has deep significance to the Muslim community, a vast majority of whom reject the hateful ideology of ISIS. The Shahada is the first of the five pillars of Islam – it is a profession of faith and translated into English says “I testify that there is no other God but Allah, and I testify that Muhammad is Allah’s messenger”. Saying these words is the very basis upon which a person may convert to Islam, and that profession of faith is foundational to all Muslims.
17. Liberty Victoria cautions against this proposed ban for at least the following reasons:
 - (1) **There is no demonstrated need:** to our knowledge there are no recent examples of the public display of the ISIS flag that could be argued to make this measure necessary. Even if there are such examples, they have not been widely publicised. Almost a decade ago there was an example of the display of a Jihadist flag during the Lindt café siege,¹³ but it is unclear whether the display of that flag would be sought to be banned under these proposed reforms;
 - (2) **It is incredibly hard to enforce:** how are police, or other members of the community for that matter, to know whether a particular form of stylised Arabic text (noting the importance of calligraphy to the Muslim faith) is a

¹¹ Canberra Islamic Centre, Submission to the Parliamentary Joint Committee on Intelligence and Security in respect of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (18 June 2023).

¹² The Explanatory Memorandum at [21] refers to a white circle containing the black Arabic text for “God, messenger, Muhammad” as part of the ISIS flag, which also refers to the Shahada.

¹³ David Wroe and James Massolia, “Flag being held by Lindt Chocolate Cafe hostages is not an Islamic State flag”, 16 November 2014, Sydney Morning Herald, <https://www.smh.com.au/national/flag-being-held-by-lindt-chocolate-cafe-hostages-is-not-an-islamic-state-flag-20141215-1279s0.html>.

version of the same text on the ISIS flag. Most people in Australia would have no idea of: (1) what the text says (or even that it should be read right to left); and (2) its religious significance to the Muslim community. Non-Arabic speakers will not be able to meaningfully distinguish the writing on the ISIS flag from any other example of Arabic text;

(3) **It is likely to extend to other Arabic Text:** Under the Bill's proposed definition of "prohibited symbol",¹⁴ the prohibition would extend to something that "so nearly resembles" the ISIS flag that it is likely to be confused or mistaken with it. This is chilling. What is the standard for this test? A fluent Arabic speaker who could easily distinguish between different examples of Arabic text? Or a non-Arabic speaker for whom it all looks unnervingly similar? While the Explanatory Memorandum (at [21]) refers to a white circle as part of the ISIS flag, will the absence of this white circle be sufficient to result in no offence having been committed? This raises obvious problems with the standard to be applied and enforcement, particularly by non-Arabic speakers;

(4) **It is stigmatising:** as we have addressed in our previous joint submission to the PJCIS with Muslim Collective,¹⁵ there is a significant danger of the further stigmatisation and over-policing of the Muslim community. The idea that Arabic text (of a key passage of faith) could be criminalised is a massive example of State overreach. It will cast a shadow of criminality against the Muslim faith, no matter how many comments are made by those endorsing the Bill of the contrary intent;

(5) **There has been a lack of consultation:** when it was proposed to ban the Hakenkreuz in Victoria, there was significant consultation with the Hindu, Buddhist and Jain communities. This resulted in great care being taken with language (including the use of the term 'Hakenkreuz' itself) and the inclusion of robust defences. It does not appear that there has been anywhere near the

¹⁴ Proposed s 80.2E.

¹⁵ 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.

same level of consultation with the Muslim community in relation to this proposed ban; and

- (6) **There is a qualitative difference between the Nazi regime and ISIS:** whilst we oppose the ban of Nazi icons for the above reasons, to the extent that the ban of Nazi icons is justified it must be recognised that the atrocities perpetrated by the Third Reich are unique. That is not to suggest that the actions of ISIS were not horrific. However, what is the analytical basis for extending the prohibition of Nazi symbols to the ISIS flag? The same logic could result in a never-ending list of bans of symbols linked to terrible actions by terrorist organisations (or even former state actors) engaged in horrific acts. What would be a much stronger approach, in the long term, would be to reclaim the Shahada in its true form, as a protestation of faith by the Muslim community, and recognise that it was corrupted by ISIS.

The Proposed Criminal Offence of the Public Display of Prohibited Symbols

18. Having noted the above, we acknowledge that in at least two respects the proposed Commonwealth criminal offence under the Bill is an improvement on the analogous Victorian provisions:

- (1) The fault element of at least recklessness in relation to the thing being a prohibited symbol is preferable to the Victorian offence, where a person can be convicted on the basis of what the accused person “ought reasonably to know”¹⁶ (an objective test rather than requiring subjective intent or recklessness); and
- (2) Under this Bill the applicable “defences” (including legitimate religious, academic, educational and artistic use) must be disproven by the prosecution at the outset as part of the prosecution case. This is preferable to placing an evidentiary or persuasive onus on the balance of probabilities (as is the case in the Victorian legislation¹⁷) on an accused person to make out the defence. This

¹⁶ *Summary Offences Act 1966* (Vic), s 41K(1).

¹⁷ *Ibid*, s 41K(2).

undermines a ‘golden thread’ of the criminal law and may result in people being convicted in circumstances where they have raised a reasonable doubt but not discharged the evidentiary onus.

19. Notwithstanding this, we remain opposed to the prohibition of the public display of these Nazi symbols and the ISIS flag for the reasons explained at the outset of this submission. Further, we note that the above protections can easily be legislated away if there are seen to be obstacles to prosecution, as regularly occurs with amendments to the *Criminal Code Act 1995* (Cth) (**the Code**).

Other issues with the Bill

20. This submission has focussed on the proposed prohibition of the public display of prohibited symbols. However, we are concerned by other aspects of the Bill, including:
 - (1) **The ‘Public Interest’ Criterion:** there should be no “public interest” test for the defences to apply.¹⁸ This will cause inconsistent and arbitrary decision-making. For example, different investigators (and prosecutors) may well have very different opinions as to whether a reasonable person would regard a piece of artistic expression as “contrary to the public interest”. The defences should apply to all bona fide religious, academic, educational, artistic, literary and scientific purposes;
 - (2) **The Creation of a New Offences:** it is submitted that there is no need for the creation of these new offences of using a carriage service for violent extremist material and possessing or controlling violent extremist material obtained or accessed using a carriage service (proposed ss 474.45B and 474.45C of the *Code*). It is already an offence to use a carriage service to menace, harass or cause offence (s 474.17 of the *Code*), and to possess things connected with terrorist acts, and/or to collect or make documents likely to facilitate terrorist acts (ss 101.4 and 101.5 of the *Code*). These offences are sufficient to capture the intended criminalised conduct;

¹⁸ Proposed s 80.2H(9).

(3) **Advocacy:** there is also no demonstrable need to expand the definition of advocacy to include the praising of doing a terrorist act in certain circumstances. The current offence of advocating terrorism under s.80.2C of the *Code* is sufficient. This proposed unlawful conduct, if sufficiently proximate to a planned terrorist act, will already be covered by the definition as it stands; and

(4) **The Abolition of Sun-Setting:** sun-setting in relation to the prescription of terrorist organisations is important and should continue. As has often been remarked, these terrorism offences are extraordinary, criminalising preparatory conduct in its infancy. It is important that the powers, and the prescription of particular organisations, is regularly reviewed. We should not forget how extraordinary these powers and offences are. Sun-setting is an important mechanism to ensure that these provisions and powers are regularly reviewed.

21. Further, should the Bill proceed it should be made clear that satire is intended to be included under the artistic expression defence. There is an important tradition of political satire being used as a powerful response to Fascism, perhaps most famously demonstrated by Charlie Chaplin's *The Great Dictator*. In our view, this kind of artistic and satirical criticism of far-right ideology is likely to be far more effective to combat far-right extremism than attempts to prohibit symbols and gestures. In Melbourne there has been an active community of comedians and satirists that have lampooned the emergence of far-right groups, and it should be made clear this is a form of protected speech.¹⁹
22. Thank you for the opportunity to make this submission. We would be pleased to give evidence to the Inquiry. Please do not hesitate to contact Michael Stanton, President of Liberty Victoria, through the Liberty Victoria office at info@libertyvictoria.org.au.

¹⁹ See, for example, <https://beat.com.au/true-australian-patriots-live/>.

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