

Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023

Submissions on behalf of the
Australian Muslim Advocacy Network





About AMAN

1. The Australian Muslim Advocacy Network Ltd (AMAN) works to secure the psychological and physical safety of Australian Muslims in the face of anti-Muslim hate campaigns and Islamophobia using research and policy dialogue.
2. AMAN has played a leading role in the development and introduction of new hate crime laws in Queensland, including a ban of prohibited hate symbols.

Outline of Submissions

3. AMAN agrees with the concerns outlined by Senator Cash in her Second Reading Speech about Nazi symbols and the ideology. This submission contains queries about the effectiveness and evenness of this approach in
 - a. preventing people from being socialised in Nazi ideology (and other dehumanising ideology¹);
 - b. protecting all communities; and
 - c. ensuring consistent prosecutions for like-for-like behaviour.
4. AMAN outlines what would be a more effective and even approach for the Commonwealth considering both criminal and civil laws.

Analysis

5. AMAN understands that the *Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023* ('the Bill') intends to limit and criminalise the use of such symbols except

¹ Dehumanisation of outgroups is a common thread to far right groups (Department of Security Studies and Criminology (2020, October 9) Mapping networks and narratives of online right-wing extremists in New South Wales (Version 1.0.1). Sydney: Macquarie University) and ISIS narratives (Marczak N (2018) A century apart: the genocidal enslavement of Armenian and Yazidi women. In: Connellan MM, Fröhlich C (eds) A gendered lens for genocide prevention. Palgrave Macmillan, London, pp 133–162).



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in certain limited contexts such as where “the display is for a genuine scientific, educational or artistic purpose”².

6. AMAN notes that the offence which the Bill seeks to create, and the relevant provisions which arise from it, is already an offence within New South Wales in accordance with section 93ZA of the *Crimes Act 1900*. An offence which was introduced in August 2022.

Limited application

7. The recent spike in the use and appearance of Nazi symbols in the public discourse are very concerning because of their clearly repugnant historical context. The spike in the use and appearance of symbols glorifying the genocide of Muslims in Bosnia, for example the symbols and terms used on Brenton Tarrant’s weapons, since replicated in graffiti in Australia, are not covered by this Bill. Those symbols are repeated as a way to glorify and praise his attacks.
8. Some movements have claimed not to be Nazi but are still concerned with the violent denial of diversity³.
9. Muslims are targeted by public acts of hatred by those identifying as Nazi, ethno-nationalist (pro-White Australia), ‘counter jihad’⁴ or anti-Islam.
10. AMAN agrees that while the right to freedom of expression ought to be protected in accordance with state and national laws, as well as Australia’s responsibility as a signatory of international legal instruments, in particular the *International*

² *Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023*, ss 81.1(3)(b).

³ Using the definition of Bjorn Ihler from the Khalifa Ihler Institute.

⁴ Lee B (2015) A day in the ‘swamp’: understanding discourse in the online counter-jihad Nebula. *Democr Secur* 11(3):248



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Covenant on Civil and Political Rights ('ICCPR'), that freedom can and ought to be limited where necessary to protect the public order. In that regard, AMAN agrees that the Bill does not unlawfully contravene freedom of speech, however, it does not uphold Australia's obligations, as it does not protect all communities equally.

Expansion of federal intervention into hate crime law

11. AMAN recognises that this Bill extends federal intervention beyond the crime of 'urging violence'⁵ (which has been woefully under-used⁶), 'using a carriage service to cause offence, harass or menace'⁷ (which only applies where an individual is being directly targeted⁸). We agree that these existing criminal provisions are not effective. A principled approach is encouraged to formulating a better response.

Ambiguity and limitations of 'Nazi symbols'

12. A key concern which arises from the proposed Bill is the ambiguity associated with the classification of 'Nazi symbols'. The Explanatory Memoranda helpfully outlines an extensive list of examples of symbols which would be caught within the scope of the Bill and thus outlawed. The list is extracted from "publications like the annual reports on Antisemitism in Australia published by the Executive Council of Australian Jewry". This list, however, is not contained within the Bill even on a non-exhaustive basis or as an explanatory note.

13. While AMAN concedes that there are certain obvious and outward examples of Nazi symbols which would and could be captured within the scope of the Bill, such as the Hakenkreuz or Double Sig rune, there is potential for confusion in relation

⁵ Criminal Code Act 1995 (cth)s80.2A

⁶ Jabri Markwell, R. "The conflation of Islam and terrorism and the rise of far right extremism" in Iner, D (2022) Islamophobia in Australia Report III. (ISRA and Charles Sturt University: Sydney).

⁷ Criminal Code Act 1995 (cth) s474.17

⁸ Jabri Markwell (above n 6).



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to what could be deemed a Nazi symbol. Questions may arise as to whether what is deemed a Nazi symbol is agreed upon and confined to symbols known and acknowledged historically or whether new symbols/logos may later be categorised as such as a result of publications by the Executive Council of Australian Jewry or similar bodies. If so, such a system would, in effect, create a ‘moving goalpost’ with respect to what would be outlawed and captured by the Bill. For example, should new right-wing organisations continue to sprout, they may opt to retire from the use of historic Nazi symbols and begin using new symbols or logos to reflect their views and identify themselves, would those new symbols be deemed Nazi symbols? If so, how would that determination be made on an ongoing basis? Queensland’s proposed Bill includes a listing mechanism for a prohibited symbols by regulation.⁹

14. Prohibition of hate symbols, as defined in the proposed Queensland legislation, meets a clear definitional threshold: ‘symbol or image – is widely known by the public or the relevant group as being solely or substantially representative of an ideology of extreme prejudice against a relevant group.’¹⁰

Concerns with carceral approaches

15. The Bill outlines a maximum penalty for persons convicted of an offence under the new Division of 12 months’ imprisonment or 100 penalty units. These penalties reflect similar penalties imposed for like offences in State counterpart legislation (such as s93ZA of the *Crimes Act 1900* (NSW)), however is more than the Queensland proposed penalties (70 penalty units or 6 months imprisonment).

⁹ Ibid, s52C.

¹⁰ Ibid, s52C(3)



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16. Generally, AMAN prefers approaches that avoid incarceration, particularly for minors, who are socialised online in these problematic materials. De-amplification and fines through the Online Safety Act is our preferred lever. The Online Safety Act also has the potential to penalise the platforms that fail to moderate.

Publicly displays

17. The Bill refers to the act of 'publicly displays' however does not define this term. 'Public act' is defined in the corresponding NSW legislation and 'publicly displays' is defined in proposed legislation before the Queensland Parliament.¹¹

18. Senator Cash's First Reading Speech states, 'This Bill sends the sort of strong signal that is needed especially when so many young people can be quickly and effectively influenced online by those wishing to spread their evil messages.' However, it is not clear whether publicly display includes online.

Discriminatory effects caused by unprincipled approach to problem

19. If hate crime laws are being expanded at the federal level to address racist nationalism, we have to query whether this will result in more individuals who should be charged under terrorism laws being charged under this provision. The penalty under this provision is a maximum of 12 months imprisonment versus a maximum penalty of life imprisonment for preparing or planning to commit terrorism.¹² Prosecutors continue to avoid prosecuting 'ideologically motivated' racist or ethno-nationalists using terrorism laws compared to the number of prosecutions of Australian Muslim individuals.¹³ The reasons for this range from a

¹¹ Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023, s52D(4)

¹² Criminal Code Act 1995 Act (Cth) s101.6

¹³ Jabri Markwell (above n 6).



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lack of clarity about the evidentiary threshold to establish ideological cause, to outgroup and ingroup bias within police. The proscription of ISIS as a terrorist organisation makes prosecution of Australian Muslim offenders under terrorism laws more appealing to police and other prosecutorial bodies due to the enhanced prospects of success such a proscription creates.

20. The fact that this new offence does not extend to ISIS material (like the proposed Queensland legislation) means that an accused person who is Muslim is more likely to be charged with possessing things connected with terrorist acts.¹⁴ If the person knows of the connection, they will face 15 years imprisonment. If the person is reckless as to existence of the connection, they will face 10 years imprisonment. A person can commit a terrorist offence under this provision even if

- a. A terrorist act does not occur; or
- b. The thing is not connected with the preparation for, the engagement of a person in, or the assistance in a specific terrorist act; or
- c. The thing is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.¹⁵

21. This overtime creates a discriminatory tiered system, where the terrorist label and long-term punishment are exclusively maintained for accused persons who are Muslim. This actively fuels grievance within the community and fuels ISIS propaganda about the targeting of Muslim communities.

Guiding Principles

¹⁴ Criminal Code Act 1995 Act (Cth) s101.4

¹⁵ Ibid, subclause (3).



22. We need a more resilient legal architecture to discourage groups which violently deny Australia's cultural diversity based on behaviour, not their outward identities.

- a. To strengthen inclusiveness and provide psychological safety to affected communities.
- b. To act more preventatively (acting more deeply and more upstream to prevent people being drawn to such movements).
- c. To avoid counterproductive effects, such as promoting stature¹⁶ or escalating a war of symbols¹⁷
- d. To ensure more even and equal protection for a range of targeted communities. Uneven protection for affected communities undermines inclusiveness.
- e. To legislate in a principled and holistic manner to not entrench discriminatory discrepancies in prosecution practice between Nazi and ISIS inspired persons who prepare or plan terrorism.
- f. To support the rights of the child for prosecution and incarceration to be an option of last resort.

23. Prohibiting hate symbols has an important role in strengthening inclusiveness and psychological safety in the community, however, some reason suggests that hate crimes laws do not deter the spread of hatred.

24. Laws and labels must productively contribute to status and behaviour.

¹⁶ Media coverage of ISIS promoted the stature of ISIS in ways they wanted to be promoted, to assist with recruitment. See Lauren Williams (2016) <https://www.lowyinstitute.org/publications/islamic-state-propaganda-mainstream-media>.

¹⁷ See also Lydia Khalil, 'Banning the Nazi salute opens a Pandora's box' (29 March 2023, Sydney Morning Herald).



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- a. Recent history teaches us the dangers of building the stature of violent movements in the mainstream that seek to appeal to young men, including teenagers.¹⁸ The Lindt Siege was carried out by someone with a psychological profile drawn towards achieving cult celebrity status rather than advancing a genuine ideological or religious cause.¹⁹ The media coverage of the Lindt siège as a 'religious cause' then propelled the anti-Islam movement.
 - b. The proliferation of anti-Muslim movements (dressed as anti-Islam groups) supercharged the organisation of white supremacists in Australia. Researchers have found it to be the predominant force.
25. Carceral approaches tend to disproportionately impact marginalised communities and can have very counterproductive effects. This disproportionality in effect is caused and/or exacerbated by factors such as limited access to competent legal representation, an unfamiliarity with legal systems and the rights and responsibilities that arise therein (further extenuated by language/education barriers) as well as a general mistrust of judicial bodies which thrives within minority communities.
26. The expansion of federal law into hate crime needs to be principle based and not reactive to specific instances. As part of this principled approach, proscription listing process and terrorism laws need to be considered to reduce disparities that may eventuate in prosecutions.

¹⁸ Williams (above n 16).

¹⁹ Victorian Expert Panel Report on Terrorism < <https://www.vic.gov.au/expert-panel-terrorism-report-2> > p 62



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27. Preventative action is needed. Preventative action disrupts or introduces friction into the socialisation of Australians (many of whom are teenagers) towards accepting violence as proper and necessary towards identified 'outgroups.'
- a. The reality is that most socialisation towards accepting violence against a target group occurs without explicitly inciting violence or using explicit hate symbols.
 - b. The intervention point must be working to disrupt dehumanising discourse²⁰.
 - c. Dehumanising discourse promotes acceptance of violence towards a target outgroup, defined by a protected characteristic. This ideology is often promulgated by bad faith actors through disinformation and misinformation.
 - d. Online dehumanisation is a public harm that cannot be left to community complaints under vilification laws or the Online Safety Act. The burden of policing this public harm should not sit on affected communities through complaint mechanisms. Regulators must play their role.

Policy Challenges concerning the Online Sphere

28. Most socialisation towards violence occurs without explicitly inciting violence or using explicit hate symbols.
29. Platforms are geared to assess one piece of material at a time rather than patterns of behaviour over time by a bad faith actor.
30. Hateful or dehumanising disinformation is not captured by platforms' hate speech policies.

²⁰ AMAN, Policy Brief – Working Definitions of Dehumanising Speech and Discourse, <https://www.aman.net.au/?page_id=1425> Last updated 15 April 2023.



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31. Disinformation is hard to define without linking to a harm. Over the past several years, AMAN has been leading work to define the dehumanising speech and discourse as a harm in itself, for use in civil penalties and industry standards linked to the Online Safety Act and Broadcasting Services Act.²¹
32. Governments and companies rely on terrorist designation lists to identify 'violent extremist' content, which is not fit for purpose in the online sphere. It does not capture most racist nationalist or ethno-nationalist material.

Recommendations

Based on comprehensive research and analysis, it is recommended that

1. Effective hate crime laws must be introduced in all states and territories in Australia that ensure police can charge and label a crime as a hate crime where the crime is partly or wholly motivated by hatred or serious contempt towards a person or class of persons based on protected characteristics.
2. Federal legislation to prohibit hate symbols needs to carefully weigh evidence of the benefits (strengthening inclusiveness and psychological safety) with the potential counterproductive side effects. There may be a role for federal criminal legislation in providing leadership to the states and acting as a stop gap measure in the absence of state legislation, but it must be formulated using a holistic and principled approach to reviewing hate crime and terrorism law.
3. At the federal level, preventative action desperately needs to be taken in the online sphere. The Australian Government should consider

²¹ AMAN (above n 20).



- a. Strengthening its civil laws in the Online Safety Act, Broadcasting Services Act and Discrimination laws.
- b. Introducing civil penalties where
 - i. an actor or platform carries out dehumanising speech or discourse,
 - ii. an actor or platform repeatedly incite hatred, severe ridicule or serious contempt of a protected group in an audience
- c. Anti-dehumanisation standards as part of an Industry Standard drafted by regulators with community and expert input. This would help drive more contextualised and competent assessments by platforms and improve their performance and safety by design.
- d. Our working definitions for dehumanising language and discourse continue to be developed, drawing from genocide prevention and social psychology research, international case law, and our own studies of dehumanising discourse online (**See Annexure A**).²²
- e. Anti-dehumanisation standards
 - i. Are proportionate and well-defined (more so than hate speech, racism and various forms of prejudice that will change over time).
 - ii. defines the bad behaviour rather than focusing on their group identity or image. It will capture Nazi recruiters that regularly share dehumanising imagery and discourse about protected groups. It will also capture ISIS recruiters and Brenton Tarrant supporters who want to repeat the Christchurch massacre.

²² AMAN (above n 20)



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- f. Enabling these standards to be enforced by the e-Safety Commissioner (in relation to social media) and the Australian Communications and Media Authority (in relation to traditional media).
 - g. Adopting range of support measures, as outlined in our submission to the Senate Economic References Committee, Inquiry into the Influence of International Digital Platforms²³ such as
 - i. Clarifying that Australia's discrimination and vilification laws apply to social media companies based overseas. Community complaint mechanisms are not sufficient and place a burden on the community. Still, access to justice can be strengthened.
 - ii. Considering government transparency measures about its role in influencing and interfering content online.²⁴
4. The Bill correctly excludes the religious swastika. AMAN is acutely aware of concerns within Hindu communities in particular about the demonisation of the term swastika. If public discourse continues to refer to the Hakenkreuz (Nazi flag symbol) as a swastika, it will distort and hijack public knowledge about the religious symbol, creating a hostile environment for Hindu, Buddhist and Jain communities.

Similarly, the Australian Government should introduce a simple amendment to the Criminal Code Act 1995 (Cth) s100.1 to remove the word 'religious' from the terrorist act definition, which has lent authority to racist nationalist, ethno-nationalist and ISIS movements, by conflating Islam and terrorism. Official speech is extremely influential on media and social media and must not be used for counterproductive effect. Its lawfulness has also been questioned from an

²³ It can be downloaded here: <http://www.aman.net.au/wp-content/uploads/2023/04/AMAN-Submission-to-SERC-for-Inquiry-into-the-Influence-of-International-Digital-Platforms.pdf>

²⁴ AMAN Policy Brief on Government Transparency <https://www.aman.net.au/?page_id=2132>



international law²⁵ and human rights perspective.²⁶ This conflation will continue to stymie efforts to reduce Islamophobia.²⁷

²⁵ Vaughan, Katy (2022) Interoperability of terrorism definitions between the law and tech platforms. Report to the Global Internet forum to Counter Terrorism.

²⁶ Jabri Markwell, R. (2023) "Religion as a Motive – Does Australian Terrorism Law Serve Justice?", International Journal for Crime, Justice and Social Democracy. doi: 10.5204/ijcjsd.2686.

²⁷ Matteo Vergani, Fethi Mansouri, Liliana Orellana (2022) Terrorism concern and persistence of negative attitudes towards Islam and Muslims. Community and Applied Social Psychology. Volume 32, Issue 6



ANNEXURE A

Working Definitions – Dehumanising language and discourse

An actor that serially or systematically produces or publishes material that an ordinary person would conclude,

(a) presents the class of persons identified on the basis of a protected characteristic to have the appearance, qualities, or behaviour of

(i) an animal, insect, filth, form of disease or bacteria, inanimate;

(ii) mechanical objects, or

(iii) a supernatural alien.

This material would include words, images, and/or insignia. (“**Dehumanising language**”); or

(b) curates information to a specific audience to portray over time that the class of persons identified on the basis of a protected characteristic

(i) are polluting, despoiling, or debilitating an ingroup or society as a whole;

(ii) have a diminished capacity for human warmth and feeling or independent thought;

(iii) pose a powerful threat or menace to an in-group or society;

(iv) are to be held responsible for and deserving of collective punishment for the specific crimes, or alleged crimes of some of their “members”;

(v) are innately criminal, dangerous, violent or evil by nature;

(vi) do not love or care for their children;

(vii) prey upon children, the aged, and the vulnerable;

(viii) are responsible for global problems;

(ix) behave in ways characteristic of vermin;



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(x) was subject as a group to past tragedy or persecution that should now be trivialised, ridiculed, glorified or celebrated;

(xi) are innately primitive and intellectually incapable of achievement on a par with other humans; or

(xii) must be categorised and denigrated according to skin colour or concepts of racial purity or blood quantum.

("Dehumanising discourse")

If the above definition was used as part of a civil penalty, it could be complemented by an intention component:

in circumstances in which a reasonable person would conclude that the material was intended to cause others to see that person or class of persons as lacking the human qualities that qualify someone to be treated equally to other humans.

Adding an intention element may make enforcement more difficult and may not be necessary.



How did we develop this working definition?

AMAN developed this working definition after spearheading a study of five information operations online (Abdalla, Ally and Jabri-Markwell, 2021). The first iteration of this definition was published in a joint paper with UQ researchers (Risius et al, 2021).

Dehumanising Speech

The three categories of dehumanising speech in Clause (a) are drawn from [Maynard and Benesch](#) (80), and fleshed out with further examples from tech company policies (refer to Meta for example).

Dehumanising discourse

Subclauses (b)(i) is derived from Maynard and Benesch (80).

Subclause (b)(ii) is derived from [Haslam](#) (258).

Subclauses (iii) and (iv) are elements of dangerous speech that Maynard and Benesch refer to as ‘threat construction’ and ‘guilt attribution’ respectively (81). However, [Abdalla, Ally and Jabri-Markwell’s](#) work shows how such conceptions are also dehumanising, as they assume a group operates with a single mindset, lacking independent thought or human depth (using Haslam’s definition), and combine with ideas that Muslims are inherently violent, barbaric, savage, or plan to infiltrate, flood, reproduce and replace (like disease, vermin)(15). The same study found that the melding and flattening of Muslim identities behind a threat narrative through headlines over time was a dehumanisation method (17). Demographic invasion theory-based memes (9) or headlines that provided ‘proof’ for such theory (20) also elicited explicit dehumanising speech from audiences.

Maynard and Benesch write, ‘Like guilt attribution and threat construction, dehumanization moves out-group members into a social category in which conventional moral restraints on how people can be treated do not seem to apply’ (80).

Subclauses (v) and (vii) to (x) are drawn from the ‘Hallmarks of Hate’, which were endorsed by the Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v. Whatcott* 2013 SCC 11, [2013] 1 S.C.R. 467. These Hallmarks of Hate were developed after reviewing a series of cases involving incitement of hatred to a range of protected groups. These clauses were tested against Haslam’s definitional frame for denial of intrinsic human qualities.

Subclauses (v) (‘criminal’) and (vi) are drawn from the Uluru Statement of the Heart. Subclauses (vi) to (xii) are drawn from AMAN’s observations of online information



operations generating disgust toward First Nations Peoples. Disgust is a common effect of dehumanising discourse. These clauses were tested against Haslam’s definitional frame for denial of intrinsic human qualities