

Your Ref:
Our Ref: 932

14 February 2023

Ms Ginna Webster
Secretary
Department of Justice
GPO Box 825
Hobart 7001

By email: haveyoursay@justice.tas.gov.au

Dear Secretary,

Police Offences Amendment (Nazi Symbol Prohibition) Bill 2023 – Community Consultation

I am grateful for the opportunity to advocate on behalf of all Tasmanian children and young people by commenting on the draft Police Offences Amendment (Nazi Symbol Prohibition) Bill 2023 ('the Bill'). Thank you also for the short extension of time in which to provide my comments.

The Bill proposes to amend the *Police Offences Act 1935* (Tas) by inserting an offence prohibiting the display of Nazi symbols by a public act, and without legitimate public purpose, if the person knows, or reasonably ought to know, that the symbol is a Nazi symbol. The Bill defines a Nazi symbol as meaning '*a symbol associated with the Nazis or Nazi ideology*'. In acknowledgment of the continued importance of the swastika to the Buddhist, Hindu and Jain communities, the Bill clearly states that the display of a swastika in connection with Buddhism, Hinduism or Jainism does not constitute the display of a Nazi symbol.

I support the Government's strong condemnation of the deliberate use of hate symbols to promote hate and cause fear in our community. Public displays of Nazi symbols without legitimate public purpose should be prohibited as far as reasonably possible because of the harm they cause to the Tasmanian community, including children and young people. I particularly acknowledge the harm caused to, and inter-generational trauma experienced by, members of the Jewish community and other communities that have suffered enormously because of Nazi ideology. I therefore welcome the Government's intent to make the public display of Nazi symbols an offence.



Below, I make several comments regarding the application of the Bill to children and young people and propose amendments that, in my view, would assist to achieve the intent of the reform. I make comment in the knowledge that in Tasmania, the minimum age of criminal responsibility remains appallingly low, at just 10 years of age, and so any criminalising approaches to law reform must reasonably be assessed from the perspective of a 10-year-old child.

Mental element

As currently drafted, the offence would apply where a person publicly displays a Nazi symbol *“if the person knows, or reasonably ought to know, that the symbol is a Nazi symbol”* (clause 6C(1)). The inclusion of the phrase *“or reasonably ought to know”* in clause 6C(1) would introduce an objective mental element.

While I understand the pragmatic argument for the inclusion of an objective mental element, it is important to remember that the offence would also apply to children and young people. Holding children to an objective standard of knowledge in this area may not be appropriate, given its relative complexity and children’s varied stages of social, emotional and cognitive development. See further comment below under *Safeguards*.

I note that section 93ZA(1) of the *Crimes Act 1900* (NSW) has adopted a subjective mental element. In the context of responding to behaviours of children and young people, I believe this approach would better achieve the objectives of the Bill.

Safeguards

As a general principle, I believe that an educative approach to dealings with children and young people who publicly display Nazi symbols would be preferable; this is consistent with the well understood principles of youth justice.

The proposed offence assumes that an individual who publicly displays a Nazi symbol knows about its capacity to incite hatred and fear among others. We should not assume this is the case for all children and young people.

I note that the need to consider children differently from adults is recognised in the Victorian legislation by a provision that precludes prosecution of a “child” (i.e. a person under the age of 18 years) in the absence of written consent from the Director of Public Prosecutions (see s 41K(6) of the *Summary Offences Act 1996* (Vic)).

In my respectful opinion, a similar safeguard should be included in the Bill.

Exceptions

I can readily contemplate children and young people attending peaceful rallies and displaying the symbols *in protest* to Nazism, and these activities should be protected from the remit of prosecution. However, there appears to be no defence or exception in the Bill related to the reasonable and in good faith display of symbols *“in opposition to fascism, Nazism, neo-Nazism or other related ideologies”* (see s 41K(2)(d) of the *Summary Offences*



Act 1996 (Vic)). The below exceptions to the offence provided in the Victorian legislation should be considered for inclusion in the Tasmanian legislation:

- A person who displays a flag of Nazi Germany with a marking through it to signal the person's opposition to Nazism;
- A person participating in a protest who displays a Nazi symbol on a placard which also contains words stating opposition to fascism.

Non-criminalising response

I respectfully propose inclusion of a new sub-clause to enable a police officer to direct an individual to remove a Nazi symbol from display where the police officer reasonably believes an offence has been committed. See for example s41L of the *Summary Offences Act 1996 (Vic)*:

41L Direction to remove Nazi symbol from public display

(1) A police officer may give a direction to a person to remove from display a Nazi symbol if the police officer reasonably believes the person is committing an offence against section 41K by displaying the Nazi symbol.

As discussed above, there may be a range of situations where it would be preferable that police officers have authority to give such directions. Many children and young people may not realise the significance and seriousness of publicly displaying a Nazi symbol, or the harm it can cause to members of the Tasmanian community. In my view, the option of giving a simple direction to remove a symbol from display would be a preferable and non-criminalising alternative to initiating criminal proceedings against a child or young person.

I support the general intent of the legislation and hope that the amendments I have proposed, as outlined above, are received favourably.

Yours sincerely

Leanne McLean

Commissioner for Children and Young People

cc: *The Hon. Elise Archer, Attorney-General*
The Hon. Roger Jaensch, Minister for Education, Children and Youth
Tim Bullard, Secretary, Department for Education, Children and Young People