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Department of Justice
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10 February 2023

To whom it may concern,

Re: Comments on the Police Offences Amendment (Nazi Symbol Prohibition) Bill 2023 (Tas) ('the Bill')

Thank you for the opportunity to comment on this Bill. The Tasmania Law Reform Institute (TLRI) supports the objectives of the Government's Bill. Given Nazi symbols' unique historical context, and especially the fear they can inspire for Jewish people, it is appropriate to prohibit their public display and to provide police officers with adequate powers to enforce the new summary offence. Critically, the Bill is respecting privacy and individual liberty inasmuch as it does not seek to criminalise the possession of Nazi symbols, only public displays of them.

The Bill has adopted a practical definition of 'Nazi symbol', and has sensibly precluded many situations where display may be legitimate and done in good faith. Another strength of the Bill is that it encompasses public acts on the Internet. The TLRI has considered how the Bill is to: construct the elements of the offence; construe police powers; and respond to tattoos and similar forms of body art.

In this regard the following amendments are recommended.

1. Clause 6C(1)

The TLRI recommends that cl 6C be structured in the following ways:

- **Clause 6C(1) should be amended to state 'A person who knowingly displays, by a public act and without reasonable excuse, a Nazi symbol commits an offence.'**
This wording, which is identical to s 93ZA(1) of the *Crimes Act 1900* (NSW), better achieves the objectives of the Bill and serves the community fairly because:

- By deleting ‘reasonably ought to know’, the amendment will avoid introducing a novel fault element in Tasmanian criminal law, which appears to be an objective fault element. The TLRI recommends that, given the proposed new offence is imprisonable, a subjective mental element – ‘knowingly displays’ – is appropriate and fair. ‘Knowingly displays’ will, among other things, ensure just outcomes in situations currently not considered in the Bill. For example, it would avoid injustice where an individual did not know that the Nazi symbol displayed in their home was visible from a public street;
 - ‘Without reasonable excuse’ will provide protection for minors who may ‘know’ they have displayed a Nazi symbol publicly, but are unable to grasp the seriousness of doing so. (Some protection is provided by s 18 of the *Criminal Code* for young people aged 10-13 years.) The offence proposed in the Bill, and those contained in NSW and Victoria, assume that an individual who publicly displays a Nazi symbol (without an excuse or legitimate reason) knows about the capacity of those symbols to incite hatred and fear. That assumption is fair where adults are concerned, but it is less safe in relation to minors. Relevantly, s 41K(6) of the *Summary Offences Act 1996* (Vic) attempts to preclude minors from prosecution in the absence of written authorisations from the Director of Public Prosecution.
- **The wording in cl 6C(1)(a) and (b), and (2) should be retained.**
 - **Clause 6C(3) should be amended to state ‘Also, without limiting subsection (1), a reasonable excuse includes the display of a Nazi symbol where the symbol —’.** This amendment is required to match the proposed new wording above of cl 6C(1), above.
 - **The wording of cl 6C(3)(a), (b), (c) and (d) should be retained.**
 - **The final phrase of cl 6C(3) – ‘but does not include a display, of a Nazi symbol, that is not in the public interest’ – should be deleted.** This phrase is unnecessary and may cause interpretive uncertainty.

2. Police powers – directions to remove symbols

The TLRI recommends that a new sub-clause be introduced into cl 6C. The wording could be based largely upon s 41L of the *Summary Offences Act 1996* (Vic). Among other things, s 41L:

- authorises police officers to direct individuals to remove from display a Nazi symbol when police officers reasonably believe an offence has been committed; and
- fines the contravention of such directions (10 penalty units).

Including these powers will enable police to pursue the objectives of the Bill with a minor intervention (a police direction) backed by the threat of a comparatively small penalty for non-compliance.

There may be a wide variety of scenarios where it is in the community’s interest that police officers have authority to give such directions, including when they are interacting with

minors (aged 10-17 years) who, as noted, may be unable to grasp the seriousness of displaying a Nazi symbol – meaning that a charge under cl 6C(1) could be excessive.

It should be noted that ss 41K and 41L of the *Summary Offences Act 1996* (Vic) do not apply to ‘public acts’ on the Internet. Consequently, an amendment to the Bill to authorise police ‘directions’ should include capacity for police officers to direct that a Nazi symbol be removed from an online space, such as (but not limited to) social media pages.

3. Police powers - searches

Clause 6C(4) empower police officers to, among other things, search individuals, vehicles, and premises (sub-cl (a) – (c)). It is submitted that these powers are disproportionate and unnecessary when:

- as noted, the Bill does not seek to criminalise possession of Nazi symbols, only their illegitimate public display;
- police officers can gain adequate evidence for the ‘public act’ element of cl 6C(1) by, among other things, photographing individuals, vehicles, or premises – or, in the case of Internet displays, downloading relevant sites; and
- current police powers are likely to be sufficient for the operation of the law – notably section 58B(1)(b) of the *Police Offences Act 1935* (Tas) .

4. Tattoos

The TLRI recommends that tattoos and similar forms of permanent (not temporary) body art ought to be exempt from prosecution under cl 6C(1). The wording for this amendment can be adapted from the *Summary Offences Act 1966* (Vic), s 41K(3). The arguments in favour of this approach are that:

- The Bill does not seek to criminalise possession of Nazi symbols;
- The objectives of the Bill are unlikely to be undermined by excluding tattoos, as evidenced by the exemption contained in the Victorian model;
- It is doubtful that tattoos on the face, hands or neck can easily be removed from display, and to require such could be excessively restrictive for a small number of individuals; and
- Tattoos and similar forms of permanent body art may be exempt in many cases as displays for artistic purposes.

Kind regards,



Professor Jeremy Prichard

Director