

**CRIMINAL CODE AMENDMENT (PROHIBITION ON DISPLAY OF NAZI
SYMBOLS OR GESTURE) BILL 2024**
EXPLANATORY MEMORANDUM

The Criminal Code Amendment (Prohibition on display of Nazi Symbols or Gestures) Bill 2024 (the Bill) amends *The Criminal Code* (Criminal Code) to proscribe the display of Nazi symbols and gestures and makes a consequential amendment to the *Criminal Law (Unlawful Consorting and Prohibited Insignia) Act 2021*.

Part 1 - Preliminary

Clause 1 Short title

The Act will be known as the *Criminal Code Amendment (Prohibition on Display of Nazi Symbols or Gesture) Act 2024* when it is enacted.

Clause 2 Commencement

Clause 2 provides for commencement of the Act.

Paragraph (a) provides that Part 1 comes in operation on the day the Act receives Royal Assent (assent day).

Paragraph (b) provides that Part 2 comes into operation on a day fixed by proclamation. It is intended that Part 2 come into operation as soon as administrative arrangements and appropriate Regulations are put in place to facilitate the enforcement of the new offences and the new Nazi symbol removal notice scheme introduced in that part.

Paragraph (c) provides that the rest of the Act, being Part 3, commences the day after assent day. Part 3 provides for a consequential amendment to clarify the existing operation of the *Criminal Law (Unlawful Consorting and Prohibited Insignia) Act 2021*. Since no additional administrative processes are required to support this clarification, it is appropriate for this part to come into operation the day after assent day.

Part 2 – The Criminal Code amended

Clause 3 Act amended

This clause provides that the provisions in Part 2 amend *The Criminal Code* (Criminal Code).

Clause 4 Part II Chapter 11A inserted

This clause inserts new Chapter 11A into the Criminal Code. This new Chapter contains proposed new sections 80K – 80ZF, which set out the proposed new legal framework for proscribing the use of Nazi symbols and the Nazi salute in certain circumstances.

This Chapter introduces two key new types of offences – the ‘Display offences’ and the ‘Graffiti offence’. The Chapter also provides for a mechanism to enable the timely removal of Nazi symbols from public display.

Section 80K

Proposed section 80K defines the key terms that are used in the new Chapter. Most of the definitions refer to the proposed new sections in which the terms appear. Of particular note is subsection (2), which provides that a reference to ‘a thing marked with a Nazi symbol’ does not include a reference to a tattoo or other body marking that is a Nazi symbol.

Section 80L

Proposed section 80L sets out what a Nazi hakenkreuz is. Importantly, the Nazi hakenkreuz must be a symbol that is “used in connection with the Nazi Party, the Third Reich, Neo-Nazism or Nazi ideology”. This means that a swastika used in connection with Buddhism, Hinduism or Jainism for instance, is not a Nazi hakenkreuz.

Section 80M

Proposed section 80M(2)(a) provides that Nazi symbols are the Nazi hakenkreuz (as defined in new section 80L), Nazi flag, double-sig rune, Nazi eagle, and the image of a person performing the Nazi salute. Paragraph (b) includes as a Nazi symbol something that so nearly resembles a thing or image referred to in paragraph (a) that it is likely to be mistaken for that thing; and (c) includes or a thing or image prescribed by the regulations.

New subsection (1) clarifies that an image includes a depiction or representation.

New subsections (3) – (5) also allow for new symbols to be prescribed as Nazi symbols where the Minister is satisfied that the symbol is widely known by the public as being solely or substantially representative of the Nazi Party, the Third Reich, Neo-Nazism or Nazi ideology. This will enable the timely addition of new symbols, when appropriate.

Section 80N

Proposed section 80N sets out what a reference to a person displaying Nazi symbols includes for the purposes of the offences in the Chapter.

Subparagraph (1)(b) specifically provides for the display of a tattoo or other body marking that comprises a Nazi symbol. While merely having such tattoos and body markings is not unlawful, leaving such markings uncovered in manner that would be visible to another person would constitute displaying a Nazi symbol, which may be unlawful under the offences.

Subsection (2) provides that a Nazi symbol is considered to be displayed in a public place if it is physically in the public place, or is visible to another person in a public place.

Subsection (3) also explicitly clarifies that a person who wears, carries or otherwise controls a Nazi symbol in a manner that it would be visible to another person would be considered to be displaying the symbol, regardless of whether the symbol is in fact seen by another person.

Subsection (4) provides that a Nazi symbol is considered to be displayed in private property if the person displays the Nazi symbol while physically on the private property, or the Nazi symbol is visible to another person on the private property regardless of whether the Nazi symbol is seen by the other person.

Display Offences

Section 80O

This provision contains one of the two key 'Display Offences' in the Bill.

Subsection (1) makes it a crime to display a Nazi symbol in a public place. Importantly, because of the meaning of display set out in new section 80N(2), this offence would also capture the situation where a person flies a Nazi flag on a flagpole in their front yard in full view of the public street for instance.

Subsection (2) also makes it a crime to display a Nazi symbol on private property without the consent of the person who has management or control of the property, such as the occupier or lessee of the property for instance.

Subsection (3) provides that the offences do not apply to a person who has not reached the age of 18.

Section 80P

This provision contains the second key 'Display offence'. Proposed new section 80P makes it a crime to perform a Nazi salute (or gesture that so nearly resembles a Nazi salute that it is likely to be mistaken for a Nazi salute) in a public place, and which is intended to be a Nazi salute.

The requirement in subparagraph (1)(c) for the gesture to be intended as a Nazi salute acts as a safeguard so as not to inadvertently capture similar gestures used in other contexts, for example hailing a taxi.

Subsection (3) also criminalises the performance of the Nazi salute on private property where this is done without the consent of the person who has the management or control of the private property.

In line with the offence in new section 80O, subsection (4) provides that the offences do not apply to a person who has not reached the age of 18.

The penalties for the offences at sections 80O and 80P are: imprisonment for 5 years; or a summary conviction penalty of imprisonment for 2 years and a fine of \$24 000.

Graffiti Offence

Section 80Q

This provision contains the Nazi graffiti offence. Proposed new section 80Q provides that a person commits a crime if the person applies a Nazi symbol to public property or the property of another person without that person's consent. Subsection (2) provides a deliberately broad definition of what applying the Nazi symbol to property means to reflect the myriad of methods that may be used to graffiti property, including more sophisticated methods which may not be readily captured by the traditional concept of writing on property.

As with the Display Offences, subsection (3) provides that this crime does not apply to a person who has not reached 18 years of age.

The penalties for the offence at section 80Q are:

imprisonment for 5 years; or a summary conviction penalty of imprisonment for 2 years and a fine of \$24 000.

Defences & Exceptions

Proposed sections 80R and 80S provide for defences that apply in relation to the offences in new Chapter 11A.

Section 80R

Proposed section 80R provides defences to the Display Offences where the relevant conduct was engaged in reasonably and in good faith in the performance, exhibition or distribution of an artistic work; or in the course of any publication or debate for any genuine academic, artistic religious or scientific purposes, a purpose in the public interest or the purposes of accurate reporting of any event or matter of public interest. Subsection (2) makes it clear that the person's conduct will be not regarded as having been engaged in reasonably and in good faith if the conduct promotes or supports the Nazi Party, the Third Reich, Neo-Nazism or Nazi ideology.

These defences will ensure that Nazi symbols may be used for appropriate purposes. This approach is consistent with the defences set out in section 80G of the Criminal Code in relation to crimes related to racist harassment and incitement to racial hatred.

Section 80S

Proposed new section 80S provides for defences which apply to Chapter 11A. Subsection (1) may apply where the person is able to establish on the balance of probabilities that the person did not know, and could not reasonably be expected to have known, that the Nazi symbol was displayed.

Subsection (2) applies where the person proves on the balance of probabilities that the person did not know, and could not reasonably be expected to have known, that the symbol was a Nazi symbol.

Subsection (3) also provides a defence where the person acted reasonably and in good faith in opposition to the Nazi Party, the Third Reich, Neo-Nazism or Nazi ideology.

This defence recognises that a symbol, such as a Nazi eagle with a line drawn across it for instance, would still be considered a Nazi symbol since it is something that closely resembles the Nazi eagle (notwithstanding the slash drawn over it). Indeed, the point of the display may be for the Nazi eagle to be recognisable as such so that the person may demonstrate their opposition to what it represents by putting a cross over it. Where such use of the Nazi symbol is engaged in reasonably and in good faith, the defence may apply.

Section 80T

Proposed new section 80T provides an exception for members of a law enforcement agency where the act (that would otherwise contravene the Chapter) occurs in the performance of the official duties of the member, and is done in good faith. This exception recognises that law enforcement officers may have legitimate reasons for displaying Nazi symbols, such as for the purposes of covert operations to gather criminal intelligence on extremist and hate organisations.

Subsection (3) also extends this exception to persons involved in the administration of the justice system, such as persons involved in the investigation of offences, where the person commits an act in good faith during the course of his or her official duties.

Nazi symbol removal

Proposed new sections 80U – 80ZC provide for a mechanism to order the removal of a Nazi symbol from public display. This practical approach alleviates the harm caused by the display of hate symbols by enabling the timely removal of the offending display, regardless of whether the person responsible for causing the display is identified or convicted.

Section 80U

Proposed section 80U provides for a Nazi symbol removal notice to be issued to a person where a senior police officer (as defined in proposed new section 80K) reasonably suspects that a Nazi symbol is being publicly displayed.

Subsection (3) provides that such a notice must identify the location of the place the Nazi symbol is, and be addressed to the owner of the relevant place and each person who is a lessee, hirer or occupier of the relevant place as defined at subsection (1).

Subsection (4) makes it clear that the Nazi symbol removal notice scheme does not apply to tattoos or other body markings. This is also aligned with the definition in new section 80K(2) which provides that a reference to ‘a thing marked with a Nazi symbol’ does not include a reference to a tattoo or other body marking.

Section 80V

Proposed section 80V sets out the information that must be contained in the Nazi symbol removal notice.

A key requirement of the notice is that it must contain a statement to the effect that the person must, within 14 days, ensure the removal of the Nazi symbol, or a thing marked

with the Nazi symbol, so that it is not longer publicly displayed. This provision should be read together with the definition of 'remove' in new section 80K, which provides that it includes modifying or covering the thing so that it no longer displays a Nazi symbol.

This means that where SS bolts have been spray painted on a fence for instance, complying with the notice may involve painting over the Nazi symbol rather than necessarily removing the fence altogether.

Section 80V(b) also provides that the notice must include an explanation of the person's right to apply to the Commissioner of Police to have the notice revoked, and the powers Police have to enforce the removal of the Nazi symbol or thing marked with the Nazi symbol as set out at section 80ZA.

Section 80W

Proposed section 80W requires that reasonable steps must taken for the Nazi symbol removal notice to be personally served by a police officer on a relevant adult who appears to be occupying the place identified in the notice.

However, in the event that personal service cannot be effected, subsection (2)(c) provides that the Nazi symbol may be served by attaching it to a part of the relevant place where it can be easily seen.

Subsection (3) provides that the Nazi symbol removal notice expires if it is not served within 7 days after it is issued.

Section 80X

Proposed section 80X provides that the Nazi symbol removal notice takes effect as soon as it is served, and remains in effect until either the Nazi symbol or thing marked with a Nazi symbol has been removed, or the notice is revoked.

Section 80Y

Proposed section 80Y sets out how a person served with a Nazi symbol removal notice may apply to have it revoked. This must be done in writing to the Commissioner of Police, who must determine the application within 72 hours after the application to revoke is made.

Subsection (4) requires the Commissioner of Police to revoke the notice if satisfied that –

- the senior police officer did not suspect on reasonable grounds that a Nazi symbol was being publicly displayed;
- the person is not an owner, lessee, hirer or occupier of the relevant place identified in the notice; or
- the Nazi symbol to which the notice relates is no longer being displayed.

Subsection (5) provides that the Commissioner of Police may revoke the notice on application by a person or on the Commissioner's own initiative.

Section 80Y should be read together with section 80ZC, which provides for functions of the Commissioner in relation to the revocation of the Nazi symbol removal notice to be delegated to a senior police officer. This ability to delegate is aimed at ensuring the timely revocation of the notice where appropriate, by allowing other officers to perform the functions in section 80Y.

Section 80Z

Proposed section 80Z makes it a simple offence should a person do anything intended to prevent, obstruct or delay the authorised removal of the Nazi symbol in accordance with the notice.

The penalty for such an offence is imprisonment for 12 months and a fine of \$12,000.

Section 80ZA

Proposed new section 80ZA sets out the powers that Police have in relation to the enforcement of a Nazi symbol removal notice. The inclusion of an explanation of these enforcement powers should help convey the seriousness of the matter and encourage the person served to comply with the requirement to have the Nazi symbol removed from public display within the specified period.

As noted previously in new section 80V, the notice provides 14 days for the removal of the Nazi symbol, or the thing marked with the Nazi symbol. Subsection (2) provides the Commissioner of Police with the discretion to extend the time allowed for the removal on the Commissioner's initiative or on application by the person.

Subsection (3) also allows the Commissioner of Police to have the Nazi symbol removed by exercising the powers set out in subsection (4), which authorises police officers and agents of the Commissioner of Police to enter the relevant place identified in the notice and use any force and employ any equipment reasonably necessary to have the Nazi symbol, or thing marked with the Nazi symbol, removed.

Where such removal results in costs being incurred by the Commissioner of Police, such costs may be recovered by the Commissioner as a debt to the State under subsection (5).

As with the case in new section 80Y, the functions of the Commissioner of Police set out in new section 80ZA may be delegated to another senior police officer.

Section 80ZB

Proposed new section 80ZB provides that minor mistakes, such as clerical errors or a material mistake in the description of the person, thing or matter, in the Nazi symbol removal notice may be corrected by the senior police officer, and the corrected notice served on the relevant persons as soon as practicable.

Subsection (3) provides that a corrected notice has the same validity and effect as if the mistake had not been made.

Section 80ZC

Proposed new section 80ZC provides that the Commissioner of Police may delegate the Commissioner's functions in writing to a senior police officer (the delegated officer).

To avoid any perception of conflict of interest, subsection (4) provides that the senior police officer who issued the Nazi symbol removal notice cannot be a delegated officer in relation to the notice.

Other administrative provisions

Section 80ZD

Proposed new section 80ZD provides that a court which convicts a person of an offence under the chapter may order the forfeiture, destruction or disposal of any Nazi symbol in respect of which the offence was committed

The provision is aimed at the removal of the Nazi symbol following conviction, and complements the Nazi symbol removal notice scheme which is not dependent on the identification or conviction of the person who may be responsible for the placing of the Nazi symbol on public display.

Section 80ZE

Proposed new section 80ZE makes it clear that a person is not entitled to any compensation in relation to anything done in respect of a Nazi symbol removal notice or an order of the Court (such as a forfeiture order made under new section 80ZD).

Section 80ZF

Proposed section 80ZF makes it clear that the general defence of mistake of fact set out in section 24 of the Criminal Code is excluded.

This is in line with the approach in section 24, which provides that it may be excluded by the express provision of the law relating to the subject of mistake of fact.

Part 2 – *Criminal Law (Unlawful Consorting and Prohibited Insignia) Act 2021* amended

Clause 5 Act amended

This clause provides that Part 3 amends the *Criminal Law (Unlawful Consorting and Prohibited Insignia) Act 2021* (Prohibited Insignia Act).

Clause 6 Section 24 amended

This clause makes a consequential amendment to section 24 of the Prohibited Insignia Act to align it with new proposed section 80N (introduced in clause 4).

Section 24 of the Prohibited Insignia Act provides that a person is taken to display insignia if the person wears or carries a prohibited thing in a manner that it "would be visible to another person" in the public place.

Given that both section 24 of the Prohibited Insignia Act and proposed new section 80N of the Criminal Code adopt a similar approach in setting out the meaning of 'display' for the purposes of prohibitions on the display of certain symbols, this clause makes a consequential amendment to section 24 to provide the same clarification of what 'display' means as appears in new section 80N.

This does not change the underlying policy or intended meaning of section 24; rather, it simply puts it beyond doubt that the insignia is being displayed if it is worn or carried in a manner that the insignia would be visible to another person in the public place, regardless of whether the insignia is in fact seen by another person or whether there is another person in the public place.