



**THE ONLINE HATE PREVENTION INSTITUTE**

*Empowering communities, organisations and agencies in the fight against hate.*

# ONLINE HATE PREVENTION INSTITUTE SUBMISSION

## COMMENTS ON THE DISCUSSION PAPER: PROPOSED PROHIBITION ON THE PUBLIC DISPLAY OF NAZI SYMBOLS



SUBMISSION TO  
THE DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY

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## ABOUT THE ONLINE HATE PREVENTION INSTITUTE

The Online Hate Prevention Institute (OHPI) is Australia's only harm prevention charity dedicated to tackling online hate and extremism. We have been doing so since January 2012.

Our focus on online hate and extremism covers hate against individuals and hate against specific groups within society. Antisemitism is a large part of that focus, as is Holocaust denial and distortion as well as extremism where far-right group often use Nazi symbols.

We support the work of the Australia Delegation to the International Holocaust Remembrance Alliance (IHRA) with our CEO serving as an expert member of Australia's delegation and on IHRA's Committee on Antisemitism and Holocaust Denial.

The Victorian Parliament's Anti-Vilification Protections Inquiry named us an organisation the Victorian Government should work with "to develop a strategy to reduce and prevent vilification online". A recommendation we were pleased to see adopted by the Victorian Government.

## ABOUT THE AUTHOR

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Dr Andre Oboler is the CEO & Managing Director of the Online Hate Prevention Institute. He is an Honorary Associate at La Trobe Law School, a global Vice President of the IEEE Computer Society, serves on IEEE's Global Public Policy Committee, and is an expert member of the Australian Government's Delegation to the International Holocaust Remembrance Alliance.

Dr Oboler was formerly a Senior Lecturer in Cyber Security at the La Trobe Law School, intercultural liaison for the Victorian Education Department's independent inquiry into antisemitism, co-chair of the Online Antisemitism working group of the Israeli Government's Global Forum to Combat Antisemitism, an expert member of the Inter-Parliamentary Coalition to Combatting Antisemitism, a member of the Swedish Government's expert advisory group for the Malmo Forum, and served for two terms with the board of the UK's higher education regulator the QAA.

He holds a PhD in Computer Science from Lancaster University, and a B. Comp. Sci. (Hons) & LLM(Juris Doctor) from Monash University. He is a Senior Member of the IEEE, a member of the IEEE Computer Society's Golden Core, a Graduate Member of the Australian Institute of Company Directors, and a Member of the Victorian Society of Computers & Law.

DOES THE TERM 'PUBLIC PLACE OR PUBLIC VIEW' APPROPRIATELY CAPTURE THE RANGE OF CONDUCT WHICH CAN LEAD TO PUBLIC DISPLAY?

This appears reasonable, but we wish to highlight that the issues around online content (discussed in 4.2.1) are less complex and less uncertain today than they have been in the past as a large number of the philosophical and practical questions have already been addressed.

We recommend the following guide Victoria's thinking in terms of public online content:

1. It is now well established that governments have the right to regulate what is seen online in their territory.
2. While small individual websites may effectively be judgement proof, the vast majority of internet traffic is on major commercial operators, such as social media companies and gaming platforms.
3. Major platforms usually target advertising to users based on their location (including at city and state level) and have the technology to regulate the display of user content at this level as well. There is no technical barrier to them doing this, and no legal barrier to states requiring it.
4. Other countries, notably Germany, already require this and have significant fines for non-compliance. Many platforms are already therefore set up to do this, the only question is whether they apply the rule to Victoria or not.
5. The Malmo Forum in October 2021 highlighted how platforms are undertaking stronger commitments in this regard, and many states are taking stronger regulatory action.
6. When it comes to the definition of what is public or publicly visible online, it makes more sense to invert the question and take a very limited view of what is excluded.
  - a. An online space that requires a user to register and login in, may still be public or at least publicly visible if any member of the public can readily register and enter.
  - b. An example in real space we can see in recent times is the requirement around QR codes to "check in" to public spaces. The need to track people doesn't change the nature of the space or the invitation it holds out to the public at large.
  - c. Even where membership must be approved, if the practice is to approve all comers, the space has adopted the characteristic of being open to or at least visible to the public.

- d. In contrast, an online community for members of a company, a charity, a school, an alumni network, or other membership-based group where identity and qualification to participate is verified, is a private space.

In-line with recommendation 35 of the Victorian Parliament's anti-vilification protections inquiry, as adopted by the Victorian Government, the Online Hate Prevention Institute would be happy to work with the Government to further develop the online response. We note, however, the need for a partnership between the Victorian Government and the Online Hate Prevention Institute in order to fund our efforts to provide such support.

**IS 'INTENTION' AN APPROPRIATE FAULT ELEMENT FOR THE PUBLIC DISPLAY OF THE PROHIBITED SYMBOL? IF NOT, WHAT WOULD BE MORE APPROPRIATE AND WHY?**

In addition to the intentional display of the symbol, we do have a concern about a failure to remove.

- This could apply in the case a graffiti that is publicly visible and not removed within a reasonable time, especially if the owner will neither remove it nor allow others to remove it (for example denying access to the local council) once they have actual notice of the problem.
- This could apply online if a technology platform, on being notified of publicly visible content, fails to take action to remove it / block it from being visible in Victoria.

Thank than altering the model legislation, we recommend adding a note to the legislation to the effect that "A failure by an owner, whether physical or digital, to remove a Nazi symbol in reasonable time after being notified of it, taking into account all the circumstances, may be deemed an act of intentionally displaying it".

We believe the statement that, "young people who do not know the origin or context for the symbol" is too emphatic a statement and we would urge avoiding it in any speeches related to the legislation. The reason for this is that there are cases we are aware of in Victoria of student as young as year 7 at school, who were studying the Holocaust, and making use of Swastikas to terrorise Jewish students. While such a situation at school may be handled internally without recourse to police and the courts, the option of criminal charges should exist and might in some circumstances be exercised (for example where the behaviour continues after all other efforts to prevent it, including education, have failed). There are also

claims of people as young as 14 joining neo-Nazi youth groups. The suggestion young people should be excused due to ignorance is problematic.

WHICH SYMBOLS OF NAZI IDEOLOGY, OTHER THAN THE HAKENKREUZ, SHOULD BE BANNED FROM PUBLIC DISPLAY BY THE OFFENCE? WHY SHOULD THOSE SYMBOLS BE BANNED?

The paper on page 3 correctly states that “the swastika has deep historical significance and positive connotations for some faith communities” and this is a point that must be made. It also states, ‘the swastika was appropriated and altered by Nazism that the symbol took on hateful connotations and became known as the Hakenkreuz or ‘hooked cross.’” The underlined section is in our view misleading and harmful.

While Hitler originally used the word Hakenkreuz in his German description of the symbol, it has been consistently translated as Swastika in English. This is not just a matter of the English version of Hitler’s Mein Kampf, but of almost all historical documents, scholarly research, educational material etc. that follows. To refer to the symbol as Hakenkreuz obfuscates what is being discussed and allows doubts to be raised. There is a significant risk that this language will contribute to Holocaust distortion. At the same time there is a need to differentiate the abuse of the symbol by the Nazis from the positive uses of the symbol by Hindus and many others, we therefore recommend:

1. Referring to it as the “Nazi Swastika” when used in the context of Nazism, rather than as the Hakenkreuz
2. Providing a preamble to the legislation noting the:
  - a. Positive use of the symbol going back at least 5,000 years and continuing to this day
  - b. Nazis appropriated the symbol twisting it into the emblem of their regime and its antisemitic, racist, white supremacist, and genocidal ideology
  - c. Glorification of Nazism and its symbols by neo-Nazi and white supremacist groups

It is wrong to define the Swastika (in general) as a symbol of hate and opposition from various groups to this is valid and should be respected. It is equally wrong to suggest the Nazis did not in fact use a Swastika, as some sources claim in their efforts to protect the symbol. Avoiding both problems is possible and has been done by others in the past.

We draw attention to the second Hindu-Jewish leadership summit in 2008 which stated:

“Svastika is an ancient and greatly auspicious symbol of the Hindu tradition. It is inscribed on Hindu temples, ritual altars, entrances, and even account books. A distorted version of this sacred symbol was misappropriated by the Third Reich in Germany, and abused as an emblem under which heinous crimes were perpetrated against humanity, particularly the Jewish people. The participants recognize that this symbol is, and has been sacred to Hindus for millennia, long before its misappropriation.”<sup>1</sup>

We also draw attention to the entry on the Swastika in the Holocaust Encyclopedia at the United States Holocaust Memorial Museum which states:<sup>2</sup>

- “The swastika is an ancient symbol that was in use in many different cultures for at least 5,000 years before Adolf Hitler made it the centrepiece of the Nazi flag. Its present-day use by certain extremist groups promotes hate”
- “To this day, it is a sacred symbol in Hinduism, Buddhism, Jainism, and Odinism. It is a common sight on temples or houses in India or Indonesia. Swastikas also have an ancient history in Europe, appearing on artifacts from pre-Christian European cultures.”
- “The swastika became the most recognizable symbol of Nazi propaganda, appearing on the flag referred to by Hitler in Mein Kampf, as well as on election posters, arm bands, medallions, and badges for military and other organizations. A potent symbol intended to elicit pride among Aryans, the swastika also struck terror into Jews and others deemed enemies of Nazi Germany.”
- “Included among the so-called Nuremberg Race Laws was the Reich Flag Law (September 15, 1935) that declared that henceforth the swastika flag would constitute the official national flag of the German Reich.”

We recommend, drawing on the above, that the Preamble state:

“This legislation recognises the serious harm that is caused with the public display of Nazi symbols outside of appropriate and genuine educational, academic, artistic, cultural or scientific

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<sup>1</sup> [http://www.millenniumpeacesummit.org/2nd\\_Hindu-Jewish\\_Leadership\\_Summit\\_Declaration.pdf](http://www.millenniumpeacesummit.org/2nd_Hindu-Jewish_Leadership_Summit_Declaration.pdf)

<sup>2</sup> <https://encyclopedia.ushmm.org/content/en/article/history-of-the-swastika>

purposes. The public glorification of Nazi symbols promotes antisemitism, racism and white supremacy. Such hate is at odds with the values of Victoria and is not welcome in this state.

We recognise that the Swastika is an ancient symbol use to promote peace in different cultures for at least 5,000, and that it continues to be a sacred symbol in Hinduism, Buddhism, Jainism, and Odinism today. Nothing in this legislation shall interference with this peaceful usage of this sacred symbol.

We recognise also that the Nazis twisted the meaning of the ancient Swastika when they adopted it as the primary symbol of Nazism. As a Nazi symbol it was fundamentally linked to the antisemitic Nuremberg Race Laws and became a symbol of fear for the victims of Nazism. The Nazi-Swastika continues to be used today by certain extremist groups that promote hate. The purpose of this legislation is to prohibit the use of Nazi symbols, including the use of the Swastika when intended to represent Nazism, in inappropriate public displays.”

We recommend the legislation refer to “Nazi and neo-Nazi symbols” to prevent a technical challenge that certain modern symbols were not actually used by the Nazis. We note the Swastika is uni-code symbol U+5350 i.e. ☸ this symbol may be used either as an ancient auspicious symbol, or to represent Nazism. Critically it is the identical character, only the context will differentiate it.

As noted in the Victorian Parliament’s Inquiry into Anti-Vilification Protections,<sup>3</sup> the German Parliament has a detailed list of proscribed symbols.<sup>4</sup> Problematic symbols include the Black sun (“Schwarze Sonne” or more generally “Sonnenrad”), the twin lightning bolts of the Sig rune, the number 88 (H being the either letter of the alphabet, so 88 standing for HH or Heil Hitler), the number 14 is a neo-Nazi symbol for the “14 words”, often the two preceding symbols appear together as “14/88”, the Nazi salute, the Nazi eagle, the Celtic cross, the SS Deaths head, images of Hitler, Pepe the Frog and a particular cartoon

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<sup>3</sup> [https://www.parliament.vic.gov.au/images/stories/committees/lsc-LA/Inquiry\\_into\\_Anti-Vilification\\_Protections\\_Report/Inquiry\\_into\\_Anti-vilification\\_Protections\\_002.pdf](https://www.parliament.vic.gov.au/images/stories/committees/lsc-LA/Inquiry_into_Anti-Vilification_Protections_Report/Inquiry_into_Anti-vilification_Protections_002.pdf) pg 179

<sup>4</sup> [https://www.verfassungsschutz.de/SharedDocs/publikationen/EN/right-wing-extremism/2018-10-right-wing-extremism-symbols-and-organisations.pdf?\\_\\_blob=publicationFile&v=10](https://www.verfassungsschutz.de/SharedDocs/publikationen/EN/right-wing-extremism/2018-10-right-wing-extremism-symbols-and-organisations.pdf?__blob=publicationFile&v=10)

meme of a Nazi soldier are more recent symbols. There are also symbols of specific Nazi / neo-Nazi groups including local groups.

It is likely groups will be able to rapidly change their symbols and repurpose everyday symbols and emojis so any scheme needs to be readily adaptable and needs to have an element of context related to the glorification of Nazism / neo-Nazism.

ARE THESE SYMBOLS USED IN ANY OTHER CONTEXT (THAT IS, NOT IN CONNECTION WITH NAZISM) WHICH MAY NEED TO BE TAKEN INTO ACCOUNT WHEN CONSIDERING EXCEPTIONS TO THE OFFENCE?

Where there is a genuine purpose unrelated to the promotion of Nazism/neo-Nazism/or similar hate based ideologies, this should provide an exception. It should not be necessary to enumerate all unrelated purposes for each symbol.

IS OPTION 1 OR OPTION 2 YOUR PREFERRED OPTION TO ENSURE THE OFFENCE CAPTURES THE HAKENKREUZ BUT NOT THE RELIGIOUS AND CULTURAL SWASTIKA? WHY?

As stated, we believe it is important to refer to it as a “Nazi Swastika” rather than a “Hakenkreuz”. On this basis, non-Nazi related uses would not be covered by definition, and hence not be banned. This would fit with option 1.

The phrase “not intended to be used for religious and/or cultural reasons” is we believe unhelpful as there are neo-Nazi and white supremacist groups that promote themselves in religious terms. This is currently very prevalent in Gab where Christian Identity is prevalent.<sup>5</sup> A movement that seeks to glorify Nazism, but is expressed in religious terms, is not what this is meant to protect. Making the focus “Nazi Swastikas” removed this issue.

If option 2 were used, the phrase “is displayed for a genuine religious or cultural purpose” would need to be more tightly defined, otherwise a celebration of Nazism by people claiming to be descendants of Nazis (or just claiming to be neo-Nazis and ideological descendants) could be presented as a genuine (if highly distasteful) cultural purpose. On option is going with this approach would be to add “unrelated to

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<sup>5</sup> <https://www.splcenter.org/fighting-hate/extremist-files/ideology/christian-identity>

the use of the symbol by Nazis”. That would exempt groups that were using the symbol prior to Nazi usage or in a manner unrelated it, but would not exempt any Nazi / neo-Nazi or derivative usage.

IF NEITHER OPTION IS YOUR PREFERRED OPTION, HOW ELSE COULD THE OFFENCE BE CRAFTED SO THAT IT CAPTURES THE HAKENKREUZ BUT NOT THE RELIGIOUS AND CULTURAL SWASTIKA?

Use the phrase “Nazi Swastika” and define it to mean “the use of a Swastika as a reference to Nazism or neo-Nazism”.

IF AN EDUCATION AND AWARENESS CAMPAIGN IS PURSUED, HOW SHOULD IT BE DELIVERED AND WHAT SHOULD IT INCLUDE?

An education campaign should take care to avoid promoting neo-Nazi groups or making banned symbols into something “cool” or it may lead to a rise in interest in extremist groups and graffiti / property damage involving symbols. The online context should also be mentioned explicitly.

It may be appropriate to use a cartoon style mocking neo-Nazi and those who would use Nazi symbols and use the opportunity to include some basic Holocaust education. Something similar to the “Dumb ways to die” approach may work.

DO YOU AGREE WITH INCLUSION OF AN OBJECTIVE KNOWLEDGE ELEMENT? IF NOT, WHY?

Yes, though actual knowledge should be allowed as well.

DO YOU AGREE WITH THE PROPOSED LIST OF EXCEPTIONS TO THE OFFENCE? IF NOT, WHY?

There are two issues mixed together here.

1. The legislation should only be about Nazi Swastikas. The use of the Swastika in other contexts should be mentioned only to clarify that (a) the Swastika has other meanings than Nazism and hate, (2) those uses are not the subject of this legislation.
2. Nazi symbols (including the Nazi Swastika) can be used in a variety of legitimate ways without breaching this law.

Regarding the second category, we agree “reasonably and in good faith” is a prerequisite to prevent abuse of any of the exceptions. The exceptions should include:

- **Educational purposes** (Addition) – this includes use in schools, public education at museums and memorial events, work by civil society organisations that provide education (e.g. anti-racism education, explaining why symbols of Nazism promote hate)
- Academic purposes – including historical research and other scholarship on Nazism / extremism
- Scientific purposes – May include research monitoring the spread of such content
- Cultural purposes – May include displays and artifacts in museums
- Artistic purposes – May include television, movies, plays, computer games etc. that depict Nazis.

There is a strong danger of this being too large an exception.

We have some concern that the exceptions may be abused. There are a range of types of Holocaust misinformation, including blaming Jews for the Holocaust, visually presenting anyone that one opposes as Hitler, or using Holocaust imagery for purposes unrelated to the Holocaust, all of which may be artistic or cultural, and could be done “reasonably and in good faith”, but which would nonetheless be antisemitic or forms of Holocaust denial / distortion. Some further clarification may be needed to specify that a imagery of the Holocaust (including use of Nazi symbols) is only appropriate when actually speaking about the Holocaust itself.

SHOULD THE EXCEPTION FOR OPPOSITION TO NAZISM BE EXPANDED OR CLARIFIED FURTHER? IF NOT, WHY?

We would welcome an exception for critical use of the Swastika in messages expressing opposition to Nazism and /or Neo-Nazism. However, we are concerned that such an exception could potentially be exploited in order to permit antisemitic messages to circulate. There are many antisemitic memes which use symbols such as the Nazi Swastika to attack Jews and / the Jewish state of Israel. These come with antisemitic narratives that present Jews or Israel as today’s Nazis. In this setting opposition to Nazism (which may be explicitly urged in such material) can actually be seen as urging opposition, potentially violent opposition, to the Jews and the Jewish community. There is also a potential slippery slope in that exceptions that are not tight enough in scope could allow the Nazi Swastika to be used in-order to make comparisons which – while superficially critical of Nazism or Neo-Nazism – act to trivialise the Holocaust.

Having said this, where such abuses occur, it is important to discuss them. This may involve showing copies of the offending material. An exception for protecting the record of the Holocaust may be useful as a way of allowing work tackling Holocaust denial and trivialization.

ARE THERE ADDITIONAL EXCEPTIONS THAT SHOULD BE CONSIDERED? HOW SHOULD THOSE EXCEPTIONS BE FRAMED TO PROTECT THE USE OF THESE PROHIBITED SYMBOLS IN PARTICULAR SITUATIONS OR WITH A PARTICULAR INTENTION?

As stated above we believe an educational exception and an exception for protecting the record related to the Holocaust (combating Nazi glorification and Holocaust denial / distortion) should be added.

HOW SHOULD THE OFFENCE APPLY TO THE PUBLIC DISPLAY OF HISTORICAL ITEMS FOR SALE THAT FEATURE PROHIBITED SYMBOLS?

Such material should not be publicly traded. There should not be an exception for this.

DO YOU AGREE THERE IS A NEED FOR ADDITIONAL POLICE POWERS TO ENFORCE THE OFFENCE? IF NOT, WHY?

A smaller fine for minor vandalism using Nazi symbols (such drawing them on chalk, or scratching them in the dirt, or other intentionally temporary manifestations) or posting Nazi symbols online is a manner that is closer to being done with disregard rather than to being done with malice. The use of such a fine as an alternative would be at police discretion and would serve as a warning.

DO YOU CONSIDER THE PROPOSED NEW ENFORCEMENT POWER IS APPROPRIATE? IF NOT, WHY?

Yes, this is an effective mechanism.

WHAT OTHER POWERS (IF ANY) SHOULD POLICE HAVE TO ENFORCE THE OFFENCE?

For online content a referral to eSafety, VEOHRC, or to civil society organisations like the Online Hate Prevention Institute that are able to address the matter with social media companies to remove content would be helpful.