

Anti-Discrimination NSW Submission on the Crimes Amendment (Display of Nazi Symbols) Bill 2021

1. Introduction

- 1.1 The Anti-Discrimination Board is a statutory body constituted under the *Anti-Discrimination Act 1977* (NSW) (**ADA**). The Board consists of 5 members, including a President, who are appointed by the Governor to exercise functions under the ADA.
- 1.2 The President is an independent statutory role that exercises only civil and administrative functions.
- 1.3 Anti-Discrimination NSW (ADNSW) is the business unit within the Department of Communities and Justice (DCJ) that supports the work of the President and Board. Many of the President and Board's functions under the ADA are exercised under delegation by staff of ADNSW.
- 1.4 The ADA makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status, and carer's responsibilities.
- 1.5 Vilification on the grounds of race, homosexuality, transgender status, or HIV/AIDS status is also unlawful.
- 1.6 ADNSW makes this submission on the Crimes Amendment (Display of Nazi Symbols) Bill 2021 (the **Bill**) to the Standing Committee on Social Issues (the **Committee**).

2. Proposed 93ZA of the Bill

- 2.1 The Bill proposes the new criminal offence of displaying a Nazi symbol by a public act. It further proposes that the offence would not apply if the President has granted an exemption on the basis of being satisfied that the public act is to be done reasonably and in good faith for:
 - 2.1.1 academic, artistic, scientific or research purposes in the public interest, or
 - 2.1.2 other purposes in the public interest, including discussion or debate about and expositions of any act or matter.
- 2.2 ADNSW supports the criminalization of the display of Nazi symbols, noting that such symbols are oppressive, hateful and threatening, not only to the Jewish community, but to other minority groups protected under the ADA, including people with disabilities and homosexuals, who were targeted by the Nazi regime.

2.3 Despite this support for the creation of the offence itself, ADNSW has major concerns about the legal, operational and practical implications of the exemption process proposed by s. 93ZA (2).

2.4 ADNSW is strongly of the view that any defences or exemptions to the criminal provisions are more properly contained within the *Crimes Act 1900* (NSW) (**Crimes Act**) itself and for consideration by the appropriate law enforcement and judicial processes that follow.

3. Civil exemption for criminal offence

3.1 The proposed exemption provisions conflate concepts under the ADA that apply to two separate statutory functions: – first, the granting of temporary exemptions under s. 126 in circumstances where the applicant wishes to promote equality of opportunity; and second, the civil defences available to a respondent to a complaint of unlawful vilification under the ADA. These provisions are further explained in the annexure below.

3.2 ADNSW is deeply concerned that the Bill proposes to task the President, who exercises administrative functions, with a civil process that would grant exemptions from criminal prosecution for potentially criminal conduct before the conduct has even occurred.

3.3 The proposed exemption provisions inappropriately elevate the civil law above the criminal law. Such provision would be contrary to public policy that the criminal law is for the protection and safety of the community at large and that no person should be beyond the reach of the law.

3.4 , ADNSW submits that the criteria in proposed s. 93ZA (2) should be available as a *defence* under the Crimes Act to the criminal offence, and therefore a matter for the law enforcement and testing and adjudication by proper legal and judicial processes. The application for an exemption is a pre-emptive action taken by a potential offender with knowledge that the intended display of Nazi symbol could be of a criminal nature.

3.5 IA further concern is that the actual display of the material may not accord with the manner of the exemption application. The control or enforcement of a breach of an exemption order would be complex, involving both the breach of the terms of an administrative order and the commission of a criminal offence.

3.5.1 ADNSW has further concerns the proposed s. 93ZA (2), even if it could overcome the previous objections, would be impossible to administer. The volume of material that would require exemption will be huge. Every public debate, documentary, movie, website, news article, book, theatre production or museum exhibit containing Nazi symbols would require an exemption, as would every teaching handout, lecture slide or examination paper seeking to reproduce photographs including Nazi symbols.

4. Conclusion

- 4.1 There are significant legal, operational and practical issues if the legislation is passed in its current form.
- 4.2 ADNSW submits that the civil exemption process proposed by s. 93ZA (2) is entirely inappropriate in relation to a criminal offence.
- 4.3 ADNSW considers that the matters set out in s. 93ZA (2) should instead be available as a defence within the Crimes Act to a charge under s. 93ZA.
- 4.4 In spite of these concerns, ADNSW reiterates its broad support for the criminalization of the display of Nazi symbols, which threaten community harmony and represent hatred and oppression of minority groups.

ADNSW thanks the Committee for the opportunity to provide a submission to the Inquiry into the Crimes Amendment (Display of Nazi Symbols) Bill 2021.

Elizabeth Wing

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Annexure

1. Exceptions and exemptions under the ADA

- 1.1 As well as making certain types of discrimination unlawful, the ADA also sets out *exceptions* where discrimination is allowed. For example, advertising a job looking for a person of a race when it is an essential requirement of the job, such as for a movie role in which a person of a particular race is required for reasons of authenticity, is covered by an exception under the ADA. Exceptions act like defences to complaints of unlawful discrimination, and the onus of proving the exception lies on the respondent (s. 104).
- 1.2 Section 126 of the ADA also allows for *exemptions* to be granted to allow favouring certain groups of people to improve access to certain jobs, programs, services or facilities. Exemptions are generally granted when an applicant can show that the proposed action will promote equal opportunity or benefit one of the groups listed in the ADA that has experienced discrimination. Examples of exemptions include:
 - To designate positions for Aboriginal and Torres Strait Islander people.
 - To advertise and provide an employment program for women in an area or industry where women are under-represented.
- 1.3 The ADA requires the President to consider certain factors when deciding whether to grant an exemption under the ADA. The factors, which are set out in the Anti-Discrimination Regulation 2019, are:
 - whether the proposed exemption is appropriate or reasonable,
 - whether the proposed exemption is necessary,
 - whether there are any non-discriminatory ways of achieving the objects or purposes for which the proposed exemption is sought,
 - whether the proponent of the proposed exemption has taken reasonable steps, or is able to take any reasonable steps, to avoid or reduce the adverse effect of a particular act or action before seeking the exemption,
 - the public, business, social or other community impact of the granting of the proposed exemption,
 - any conditions or limitations to be contained in the proposed exemption.
- 1.4 The merits and potential impacts of each individual application are carefully considered before the President or their delegate can decide whether to grant the proposed exemption.

2. Vilification provisions in NSW

- 2.1 The ADA makes it unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race,

homosexuality, transgender status or HIV/AIDS status of the person or members of the group.

- 2.2 There are a number of defences to a complaint of vilification under the ADA, including when the conduct was a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.
- 2.3 In the ADA's existing vilification provisions, there is an exception (as opposed to an exemption) for conduct that was a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter. Because exceptions operate like defences under the ADA, the onus of proving that the exception applies lies on the respondent.
- 2.4 As well as the civil prohibitions against vilifications, until 2018 the ADA also proscribed the *criminal* offences of serious racial vilification, serious transgender vilification, serious homosexual vilification and serious HIV/AIDS vilification. Serious vilification was characterised as vilification by means which included:
- threatening physical harm towards, or towards any property of, the person or group of persons, or
 - inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.
- 2.5 In August 2018 the serious vilification provisions were removed from the ADA and the new offence of publicly threatening or inciting violence on the grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status was inserted into the *Crimes Act 1900* as section 93Z.