The Hon Michelle Rowland MP

Minister for Communications
Federal Member for Greenway

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600

via: scrutiny.sen@aph.gov.au

Dear Chair Dean

I refer to the Senate Scrutiny of Bills Committee's (the Committee) request in *Scrutiny Digest 12 of 2023* in relation to the Interactive Gambling Amendment (Credit and Other Measures) Bill 2023 (the Bill).

The Committee requested further advice as to why the Bill proposes to use offence-specific defences (which reverses the evidential burden of proof) in relation to the offence under proposed subsection 15C(1A), and requests further guidance as to the operation of the defence (paragraph 1.135 of the Digest).

Proposed amendment to existing subsection 15C(5) of the Act (Item 17, Part 1 of Schedule 1 to the Bill)

As the Committee observed, Item 17 of Schedule 1 to the Bill is a consequential change, extending the application of the defence to the proposed new offence under proposed subsection 15C(1A). It would provide that a person commits an offence if they intentionally provide a regulated interactive gambling service that is a wagering service and accepts or offers to accept payment in connection with the service using a method mentioned in new subsection 15C(4A) of the Act from a customer, or a prospective customer, of the service who is physically present in Australia.

I consider it is appropriate for existing subsection 15C(5) to be extended to reverse the evidential burden of proof to the offence under proposed subsection 15C(1A) and provide the following justification, which is consistent with the relevant principles set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide).

Placing the evidential burden on the defendant in such a case is appropriate as the evidentiary matter required to be established—whether the defendant did not know, or could not (with reasonable diligence) have ascertained that the customer, or prospective customer, was physically present in Australian—is a matter likely to be within the knowledge of the defendant. In other words, the defendant is in the best position to provide evidence as to what they actually knew or could have ascertained, in their circumstances (with reasonable diligence).

Further, it would be time consuming and burdensome for the prosecution to have to disprove this 'knowledge' matter than it would for the defendant to establish either of the matters specified in paragraphs (a) and (b) of subsection 15C(5). Existing subsection 15C(6) provides further guidance to the Court on how it would be determined (for the purposes of subsection 15C(5)) whether the person could, with reasonable diligence, have ascertained that the customer or prospective customer was physically present in Australia.

Proposed new subsection 15C(5A) of the Act (Item 18, Part 1 of Schedule 1 to the Bill)

The proposed subsection 15C(5A) (Item 18 of Schedule 1 to the Bill) would create a new due diligence defence to the criminal offence described above, which requires the defendant to prove that they did not know, and could not, with reasonable diligence, have ascertained that the customer, or prospective customer, was making a payment with one of the payment methods listed in proposed subsection 15C(4A), to which the prohibition applies.

The note to proposed subsection 15C(5A) of the Bill states that a wagering provider that seeks to rely on the due diligence defence bears the evidential burden in relation to the matter in the subsection (see subsection 13.3(3) of the Criminal Code). This means that the wagering provider would need to provide evidence of the reasonable diligence steps taken to ensure that customers are not using credit cards, credit-related products and digital currency as payment methods for interactive wagering.

As extracted below, the commentary at page 17 of the Explanatory Memorandum about the types of evidence the defendant may need to raise to support its defence that their conduct fell within the exception is largely information that is peculiarly within their knowledge, including:

> *the wagering provider's procedures and systems, including any technical solutions, steps or other arrangements that they put in place directly or through their merchant/ecommerce provider, to prevent the acceptance of a prohibited form of payment as listed at proposed new subsection 15C(4).*[1]

Such knowledge would not be readily known to an outsider, and as such consistent with the relevant principles in the Guide, the wagering service provider (i.e. the defendant) would be in the best position to provide evidence as to what they did not know, and could not (with reasonable diligence), have ascertained that they were accepting, or offering to accept, payment using a prohibited payment method. Further, I remain of the view that it would be time consuming and burdensome for the prosecution to have to disprove this 'knowledge' matter than it would for the wagering service provider to establish either of the matters specified in paragraph (a) and (b) of proposed subsection 15C(5A).

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[1] EM, p.17.

Additionally, it is anticipated that requiring the defendant to bear the onus of proof would be less time consuming for the courts and go some way to reducing legal costs. Once the defendant has adduced evidence on this matter, the onus will shift back to the prosecution to prove beyond a reasonable doubt.

I thank the Committee for raising these issues for my attention and trust this information is of assistance.

Yours sincerely

Michelle Rowland MP

31 / 10 / 2023

THE HON TANYA PLIBERSEK MP
MINISTER FOR THE ENVIRONMENT AND WATER

MS23-003004

Senator Dean Smith
Chair
Senate Scrutiny of Bill Committee
Suite 1.111
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Dear Chair

I refer to correspondence of 19 October 2023 from Fattimah Imtoual, Acting Committee Secretary, regarding the Senate Standing Committee for Scrutiny of Bills (the Committee) request seeking further information regarding the Water Amendment (Restoring Our Rivers) Bill 2023 (the Bill) as set out in Scrutiny Digest 12 of 2023.

I have carefully considered the Committee's request for further information on particular issues arising from the Bill.

I am satisfied that the approach taken in the Bill:

- ensures that the matters to be provided for in delegated legislation are appropriate;
- provides an appropriate delegation of powers and functions;
- sufficiently manages privacy concerns;
- provides sufficient procedural fairness protections; and
- specifies penalties for certain contraventions that are necessary and proportionate.

My detailed response is in the Attachment.

I thank the Committee for the opportunity to respond.

Yours sincerely

TANYA PLIBERSEK

Enc Attachment – Response to the Senate Standing Committee for Scrutiny of Bills

2.11.23

ATTACHMENT: RESPONSE TO SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS SCRUTINY DIGEST 12 of 2023

WATER AMENDMENT (RESTORING OUR RIVERS) BILL 2023

Significant matters in delegated legislation

Committee comments:

The Committee requests the Minister's advice as to why it is considered appropriate to leave the content of the Water Market Intermediaries Code (the Code) to regulation.

Response:

Proposed section 100G would provide for the regulations to prescribe the Code and outlines the matters that the Code may make provision for.

It is necessary and appropriate to enable the Code to be made in delegated legislation as it is intended to largely mirror the existing industry codes framework, administered by the Australian Competition and Consumer Commission (ACCC) under Part IVB of the *Competition and Consumer Act 2010* (CC Act). Prescribing the Code in delegated legislation would ensure that water markets intermediaries are subject to the standard safeguards that apply in similar industries. This approach would allow for greater flexibility to update the Code in accordance with best industry practices and industry behaviours as they evolve over time. This approach would allow the Code to respond quickly to changes in the regulatory landscape and ensure that the Code remains an effective and useful tool in the overall regulatory framework.

Broad delegation of administrative powers or functions

Committee comments:

The Committee requests the Minister's detailed advice as to:

- why it is considered necessary and appropriate to confer various functions and powers in the Code to any person or body; and
- whether persons upon whom functions or powers are conferred will be required to possess appropriate training, qualifications, skills or training, and what safeguards are in place to ensure functions and powers are only exercised by appropriate persons.

Response:

Proposed subsections 100G(3), 100G(4) and paragraph 100G(7)(b) have been included in the Bill to allow flexibility for the Code to confer functions and powers on other bodies. As the Code would be made in regulations, this would allow for conferrals to be added or updated efficiently as the regulatory scheme establishes.

Proposed section 100G is modelled on section 51AE of the CC Act. As an example, in the context of section 51AE of the CC Act and industry codes made under Part IVB of the CC Act, the power to confer functions or powers on a person or body under a code has been relied upon in the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (the Franchising Code) to confer dispute resolution assistance functions on the Australian Small Business and Family Enterprise Ombudsman.

The ACCC would be the appropriate enforcement agency for the Code under the proposed amendments to section 137 of the *Water Act 2007* (the Water Act) in the Bill. It is intended that proposed section 100G may be used to confer functions and powers that would complement, not duplicate, the ACCC's proposed role as the appropriate enforcement agency. For example, similar to the Franchising Code, a dispute resolution assistance function could be conferred on another body.

Any proposal to confer functions or powers conferred on a body other than the ACCC under proposed section 100G would be expected to be subject to consultation with the ACCC, the Australian Water Brokers Association and more generally, water market intermediaries and their clients.

Privacy

Committee comments:

The Committee requests the Minister's advice as to:

- whether the *Privacy Act 1988* applies to any information collected, stored and disclosed under the Code; and
- whether other safeguards exist to protect an individual's personal information.

Response:

The Bill would allow for the proposed Code (as contained in the regulations) to provide for obligations relating to the keeping and retention of information and records, and powers to compel information or documents to be given. Such information and records may include personal information about intermediaries and their clients.

Record-keeping requirements and powers to compel information or documents, including personal information, are important compliance mechanisms to ensure that those who are regulated by the proposed Code comply with their obligations and are accountable for their actions or omissions.

It is intended that information, which may include personal information such as a person's name, address, water account and financial information, would be collected and stored by intermediaries and may be disclosed by intermediaries under the Code to the ACCC, as the regulator.

It is anticipated that most intermediaries would be body corporates, ABN holders, partnerships, or trusts, which are not covered under the *Privacy Act 1998*. However, where applicable, the *Privacy Act 1988* would apply to personal information disclosed to the ACCC by intermediaries.

The Bill would also provide safeguards for where information has been obtained by the ACCC under the Water Act (for example, under section 100ZD of the Bill) including any personal information. Such information would be defined as *protected information* for the purposes of section 155AAA of the CC Act (see item 5 of Schedule 6 to the Bill) making that information subject to those protections as outlined in the CC Act.

Procedural fairness

Committee comments:

The Committee requests the Minister's advice as to whether procedural fairness exists in relation to the issuing of a public warning notice.

Response:

Proposed subsection 100ZA(1) provides that the ACCC may issue a public warning notice about the conduct of a person if:

- the ACCC has reasonable grounds to suspect the conduct may constitute a contravention of the Code;
- the ACCC is satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and
- the ACCC is satisfied that it is in the public interest to issue the notice.

This provision is based on section 223 of the Australian Consumer Law (Schedule 2 to the CC Act).

A public warning notice would include information about the conduct that the ACCC has reasonable grounds to suspect may constitute a contravention of proposed Part 5 of the Water Act (as inserted by the Bill) or the Code.

This provision in of itself would not seek to limit the fundamental common law right of procedural fairness. The ACCC's general principles in relation to enforcement and public warning notices include:

- In exercising its enforcement discretion, the ACCC takes into account procedural fairness and considers what is required to afford appropriate procedural fairness in the particular circumstances of each case.

- A public warning notice could only be issued where the ACCC has formed the view that it has reasonable grounds to suspect that certain conduct may constitute a contravention of the Code and where the ACCC was affirmatively satisfied of certain matters prescribed in proposed section 100ZA, including that it was in the public interest to issue the notice. In the context of a similar power in section 223 of the Australian Consumer Law (Schedule 2 to the CC Act), the ACCC has publicly stated that:[1]
    - a key consideration for the ACCC in evaluating whether it is appropriate to issue a public warning notice will be whether it considers there is an imminent need to inform consumers so they can avoid suffering detriment; and
    - the likely impact on the businesses involved will also be a key consideration.

While proposed section 100ZA would be interpreted in its own statutory context and the particular circumstances of each case, the above considerations are likely to also be relevant to the exercise of the power to issue a notice under proposed section 100ZA.

The ACCC has a range of enforcement tools and remedies that it may seek to use, depending on the particular facts of each case, with a view to obtaining an appropriate and proportionate enforcement outcome.

Significant penalties

Committee comments:

The Committee requests the Minister's detailed advice as to the appropriateness of the penalty in proposed subsection 239AJ(5) and whether it is broadly equivalent to the penalties for similar offences. The Committee's consideration of the appropriateness of the provision would be assisted if the response explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.

[1] https://www.accc.gov.au/public-registers/public-warning-notice-register

Response:

The proposed maximum penalty in subsection 239AJ(5) would be appropriate because section 239AJ of the Water Act would likely be the ACCC's primary tool for investigating contraventions of the water market integrity provisions in the Water Act, such as market manipulation and insider trading, which attract significant penalties. For example, the penalty for a contravention of the insider trading provision in proposed section 101H for an individual is 2,000 penalty units and up to 20,000 penalty units for a corporation (see proposed section 101K). The penalty for non-compliance with a notice under proposed section 239AJ must also be significant to avoid a potentially perverse outcome where a person could avoid detection of significant misconduct (with a significant penalty) by not producing documents, any be subject to a much smaller penalty.

Section 239AJ may be used in relation to individuals and corporations. It is appropriate that the penalty for non-compliance be sufficient as a deterrent to require a corporation to comply with a notice, and not be seen as a cost of doing business.

In addition, the penalty in subsection 239AJ(5) is broadly equivalent not only to those in section 155 of the CC Act but also to certain penalties in the *Australian Securities and Investments Commission Act 2001* (ASIC Act), which is a relevant comparison having regard to the water market integrity functions that ACCC would perform under the Water Act. For example:

- a person who fails to comply with a requirement to appear to answer questions under section 19 or produce books on financial products under section 31 of the ASIC Act is liable to a penalty of 2 years imprisonment (subsection 63(1) of the ASIC Act).
- a person who fails to comply with a requirement to provide certain information in relation to an acquisition or disposal of financial products under section 41 of the ASIC Act is liable to a penalty of 120 penalty unit (subsection 63(2) of the ASIC Act)

In summary, the amount of penalty outlined under subsection 239AJ(5) is appropriate because when considered in its legislative and regulatory context, it provides an effective deterrent to the commission of the offence, reflects the seriousness of the offence and is consistent with penalties for comparable offences in Commonwealth legislation. Therefore, the amount of penalty in subsection 239AJ(5) would be consistent with the principles outlined in the Guide to Framing Commonwealth Offences.

The Hon Michelle Rowland MP

Minister for Communications
Acting Attorney-General and Cabinet Secretary
Federal Member for Greenway

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

By email: scrutiny.sen@aph.gov.au

Dear Chair Dean

I refer to correspondence of 19 October 2023 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) concerning Scrutiny Digest 12 of 2023 which contains comments on the Identity Verification Services Bill 2023 and the Identity Verification Services (Consequential Amendments) Bill 2023.

I appreciate the time the Committee has taken to consider the Bills. I enclose the Government's response to the Committee's requests for more detailed information about both the Bills.

I trust this information is of assistance.

Yours sincerely

Michelle Rowland MP
6 / 11 / 2023

Encl. Attachment A – Response to *Scrutiny Digest 12 of 2023*: Identity Verification Services Bill 2023
Attachment B – Response to *Scrutiny Digest 12 of 2023*: Identity Verification Services (Consequential Amendments) Bill 2023

CC. *Senator the Hon Penny Wong, Minister for Foreign Affairs*

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Attachment A

Identity Verification Services Bill 2023

Response to the Senate Standing Committee for the Scrutiny of Bills
Scrutiny Digest 12 of 2023

Reversal of evidential burden of proof

The Committee:

- *requests advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) under subclause 30(3)*
- *suggests it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence, and*
- *notes that its consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.*

Subclauses 30(1) and (2) of the Identity Verification Services Bill 2023 (the Bill) protect personal information by creating criminal offences applying to entrusted persons, such as current and former Departmental employees, who record, disclose or access protected information (including personal information). The maximum penalty for the offences would be 2 years' imprisonment. This penalty reflects the serious consequences that may arise from the relevant conduct, given that a breach of the obligations of entrusted persons may place a person's life or safety at risk, in particular shielded persons.

The Bill provides for offence-specific exceptions to these offences, for which the defendant will bear the evidential burden. These exceptions ensure that an entrusted person will not be inappropriately subject to criminal liability for their conduct where the recording, disclosure or access was:

- where the conduct is authorised by a law of the Commonwealth or of a state or territory (provided for in subclause 30(3)(a))
- where the conduct is in compliance with a requirement under a law of the Commonwealth or of a state or territory (provided for in subclause 30(3)(b))
- for the purposes of the Act (as authorised by clause 31 of the Bill)
- in exercising powers, or performing functions or duties, relating to an approved identity verification facility (as authorised by clause 31 of the Bill)
- for lessening or preventing a serious and imminent threat to human life or health (as authorised by clause 32 of the Bill)
- related to the work of an IGIS official or Ombudsman official (as authorised by clause 33 and 34 of the Bill respectively), or
- with the consent of the person to whom the information recorded, disclosed or accessed relates (as authorised by subclause 35(1)) of the Bill.

The *Guide to Framing Commonwealth Offences* (the Guide) provides that offence-specific defences reverse the fundamental principle of criminal law that the prosecution must prove every element of the offence. In accordance with the principle at paragraph 4.3.1 of the

Guide, a matter should only be included in an offence-specific defence, as opposed to being specified as an element of the offence, where:

- it is peculiarly within the knowledge of the defendant, and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

The exceptions set out in the Bill reflect that the criminal offences at subclauses 30(1) and (2) are only intended to apply where an entrusted person's conduct is not a proper or legitimate part of their work. There are a range of legitimate circumstances in which entrusted persons will need to access, make a record of, or disclose protected information in performing their duties. These exceptions will ensure that the Department is not prevented from performing its role in developing, maintaining or operating the identity verification services. The exceptions are also intended to support the oversight functions of the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman, and permit the disclosure of protected information where necessary to protect lives or with consent.

It will be peculiarly within the defendant's knowledge as to the basis on which they believed they were authorised to do so, for the following reasons.

- There are a vast range of legitimate circumstances in which entrusted persons will need to access, make a record of, or disclose protected information in performing their duties. Every time they do so, they will need to be sure that they have appropriate authorisation under the Bill.
- Relevantly, the offences in clause 30 will only apply to entrusted persons, which is defined in subclause 30(4) to be limited to persons employed by, or contractors engaged to provide services to, the department. It will not apply to the general public or persons outside the department. Entrusted officers will have received training and on-the-job supervision and oversight, and it is reasonable to expect that they will understand their obligations under the Bill when dealing with protected information. Internal guidance policies and procedures will also be in place in order to ensure that entrusted persons understand the need to, and are supported to make, case by case decisions about whether they are authorised to access, make a record of, or disclose protected information before they take such action.

In addition, it will be significantly more difficult and costly for the prosecution to prove, beyond a reasonable doubt, that the entrusted person was not authorised to access, make a record of, or disclose protected information, To do this, it would be necessary to negative a significant number of facts – including that the protected information was not disclosed for the purposes of the Act or in the course of performing the persons functions or duties (as provided for in the exception in clause 31) as well as the fact that there was authority for the person's actions in any Commonwealth, state or territory law (as provided for in subclause 30(3)(a)). This would be in addition to negativing the application of all of the other exceptions. In practice, given the range of laws that might authorise such actions, and the number of actions that might be performed for the purposes of the Act, it may be impossible for the prosecution to disprove all of these matters. At best, it would be extremely costly and burdensome.

In contrast, if an entrusted person had a particular reason for thinking that their conduct was authorised in line with the Bill then it would not be difficult for them to describe where they thought that authority arose. This is particularly the case given entrusted persons will be employees of, or contractors with, the department, and will have received appropriate training

and supervision in how to appropriately handle protected information. In line with subsection 13.3(6) of the *Criminal Code Act 1995*, the entrusted person would only need to adduce or point to evidence suggesting a reasonable possibility that their access to, or recording or disclosure of, protected information was authorised by one of the exceptions in the Bill in order to discharge the evidential burden.

For these reasons, the offence-specific exceptions in the Bill are consistent with the two-limb test set out in paragraph 4.3.1 of the Guide. They are matters that are peculiarly within the knowledge of the defendant, and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

Attachment B

Identity Verification Services (Consequential Amendments) Bill 2023

Response to the Senate Standing Committee for the Scrutiny of Bills
Scrutiny Digest 12 of 2023

The Committee requests the Attorney-General's more detailed advice as to why it is both necessary and appropriate to expand, via ministerial determination, the purposes for which personal information may be disclosed under section 46 of the Australian Passports Act 2005.

To continue operating effectively, identity verification services depend on the ability to verify or match the biometric or biographic information on a person's identity credential against Commonwealth, state and territory government records. An Australian passport is one such identity credential. As the National Drivers Licence Facial Recognition Solution (NDLFRS, as defined in clause 5 of the Identity Verification Services Bill 2023 (the IVS Bill)) is currently not operational, an Australian passport is the only government issued identity credential that enables biometric verification. Biometric verification is a highly secure way of verifying identity and is currently required to create a 'strong' myGovID.

The Identity Verification Services (Consequential Amendments) Bill 2023 (the Consequential Amendments Bill) would amend the *Australian Passports Act 2005* (Cth) (the Passports Act) to allow for automated disclosures of personal information to a specified person via the Document Verification Service (DVS) and Face Verification Service (FVS). This will comprehensively authorise the operation of the DVS and FVS in relation to Australian travel documents regulated by the Passports Act.

The Committee has expressed concern that the scope of personal information that may be disclosed, the person to whom the information is disclosed, and the purpose for which it will be disclosed, will be set out in delegated legislation rather than on the face of the Bill. It is correct that these three matters would need to be set out in any determination made by the Minister in accordance with item 3 of the Consequential Amendments Bill. However, the approach taken for the Consequential Amendments Bill is appropriate and consistent with the policy intent and operation of section 46 which ensures detail and administrative matters associated with the disclosure of personal information is provided in the Minister's determination. In enacting the Passports Act, the Parliament considered section 46 and its intended use as appropriate and reasonable.

The Committee has expressed the view that significant matters should be set out in primary legislation. This is the approach taken in the IVS Bill and the Consequential Amendments Bill. The authorisation for the disclosure of personal information for the purpose of participating in the DVS, or the FVS, or any other service specified, or of a kind specified, in the Minister's determination to share or match information relating to the identity of a person will be provided for in section 46 of the Passports Act, as amended by item 3 of the Consequential Amendments Bill. The kind of personal information can be disclosed, who it can be disclosed to and for what purpose are appropriate to set out in a determination given these are detailed in nature and support the effective administration of the Passports Act. This approach is consistent with the existing authorisation regime provided for under section 46, which deals with similar matters to those covered in the IVS Bill. For example, item 2 of the table in clause 23 of the current Australian Passports Determination 2015 covers the disclosure of information for the purpose of confirming or verifying information relating to

an applicant for an Australian travel document or a person to whom an Australian travel document has been issued.

The strong privacy safeguards provided in the IVS Bill would provide further limitations on the disclosure of personal information by the Minister in accordance with any such determination. This is because, in accordance with the IVS Bill, all entities accessing the identity verification services will be required comply with the privacy safeguards set out in clauses 8, 9, 10, 11, and 12 of the IVS Bill, which will be given effect to through a participation agreement. Therefore, any person that the Minister discloses personal information to in accordance with section 46 of the Passports Act, as amended by item 3 of the Consequential Amendments Bill, would also be subject to these safeguards.

A ministerial determination made in accordance with section 46 of the Passports Act is a legislative instrument (as per section 57 of the Act) and, accordingly, is subject to disallowance for a period of 15 sitting days in either House in accordance with the *Legislation Act 2003*. This provides the Parliament with the ability to scrutinise the determination.

The Committee requests the Attorney-General's more detailed advice as to whether high-level guidance about what can be included in a ministerial determination under proposed paragraph 46(da)(iii) and any considerations the minister must make before making such a determination can be provided on the face of the bill.

It is foreseeable that as technology advances, new services may be required to support the secure and efficient matching or verification of identity. As set out in the Explanatory Memorandum to the Consequential Amendments Bill, proposed new paragraph 46(1)(da)(iii) is intended to provide flexibility for the Minister to specify new services or kinds of services that may be used to share or match information relating to the identity of a person in a determination. This ensures that a new type of identity verification service that may be used to share or match information relating to the identity of a person could be included in the future should there be a need to do so.

The proposed amendments in the Consequential Amendments Bill are intended to support the operation of the identity verification services as provided for in the IVS Bill, and do not commence unless and until the commencement of the IVS Bill. The IVS Bill provides the legislative framework to authorise the identity verification services with strong privacy safeguards and oversight arrangements. It is intended that should the need arise for a new type of identity verification service to share or match information relating to the identity of a person, any such service would be operated in accordance with the legislative framework set out in the IVS Bill. Any such specification by the Minister in a determination specifying a service or a kind or service would be made following consultation with the responsible department and responsible Minister for the services, and would also be subject to parliamentary scrutiny through the disallowance process.

For these reasons, I do not consider it is necessary to include in the Consequential Amendments Bill high-level guidance about what can be included in such a ministerial determination under proposed paragraph 46(1)(da)(iii) of the Passports Act, or any considerations the Minister must make before making such a determination.

The Committee requests the Attorney-General's more detailed advice as to what safeguards are in place to protect the disclosure of personal information under proposed paragraph 46(da)(iii), including whether the safeguards and limitations which apply to the disclosure of personal information under proposed paragraphs 46(da)(i) and (ii) will also apply.

A person to whom the Minister discloses personal information in accordance with proposed new paragraphs 46(1)(da)(i) and (ii) and any ministerial determination would be subject to the privacy safeguards provided for in the IVS Bill.

The IVS Bill contains strong privacy protections which will apply to all entities wishing to request identity verification through the identity verification services. In practice, these safeguards will be implemented through participation agreements between requesting entities and the department.

Clauses 8, 9, 10, 11, and 12 of the IVS Bill set privacy obligations and other limits and compliance requirements that will apply to all entities making requests through the identity verifications services. For example, the IVS Bill requires requesting entities to obtain a person's consent to the collection, use and disclosure of the person's identification information for the purposes of requesting identity verification services in relation to that person (subclause 9(2)(b) of the IVS Bill). When obtaining consent, entities must notify individuals of certain matters, including:

- how the entity seeking consent uses identity verification services and how any facial images collected by that entity for the purpose of making a request for services will be used and disposed of (subclause 9(3)(a) and (b) of the IVS Bill)
- whether facial images will be retained for any other purposes (subclause 9(3)(c) of the IVS Bill)
- what legal obligations the entity seeking to collect identification information has in relation to that collection, what rights an individual has and what the consequences of declining to give consent are (subclause 9(3)(d), (e) and (f) of the IVS Bill), and
- where the individual can get information about making complaints (subclause 9(3)(d)), and where the individual can get information about the operation and management of the approved identification verification facilities (subclause 9(3)(h) of the IVS Bill).

The Committee requests the Attorney-General's more detailed advice as to whether it is appropriate for the bill to provide for the disclosure of personal information that was collected before the commencement of the bill, noting that information may be disclosed for purposes for which it was not initially collected for.

Items 5 and 7 of the Consequential Amendments Bill are necessary to ensure that individuals can continue to use an Australian passport that was issued prior to the commencement of the Bill when seeking to have their identity verified. Limiting the disclosure of personal information to that obtained after commencement of the Consequential Amendments Bill will have serious and negative impacts on Australians. It will mean that individuals currently with an Australian passport, which accounts for approximately 50 per cent of the population, will not be able to use their passport to verify their identity. This may cause operational issues and undermine the ability for current Australian passport holders to create a 'myGovID' and access essential services. As noted above, an Australian passport is the only government issued identity credential that enables biometric verification and is needed to create a 'strong' myGovID.

Furthermore, the privacy safeguards and limitations in the IVS Bill will ensure any such disclosures are appropriate. In particular, clause 9(2)(b) of the IVS Bill requires informed consent to be obtained from the relevant individual for the collection, use and disclosure of identification information when requesting an identity verification service. In practice, this means that the disclosure of personal information on an Australian passport for identity verification purposes will occur in response to requests made with the relevant individual's consent.

For these reasons, I do not agree with the Committee's concerns that items 5 and 7 of the Consequential Amendments Bill mean that the personal information of Australian citizens will be disclosed for purposes for which the relevant person did not initially consent.

Attorney-General

Reference: MC23-028070

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
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By email: scrutiny.sen@aph.gov.au

Dear Chair

Thank you for your correspondence of 10 August 2023 regarding the Senate Scrutiny of Bills Committee's (the Committee) request for further information on the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (the Bill).

I appreciate the time the Committee has taken to review the Bill, and have enclosed my response to the Committee's questions for its consideration.

I trust the response is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
30 / 10 /2023

Encl. *Response to the Committee's questions on the Bill*

Response to Senate Standing Committee on the Scrutiny of Bills
Scrutiny Digest 9 of 2023

The Senate Standing Committee on the Scrutiny of Bills (the Committee) has requested the Attorney-General's further advice in relation to a number of matters in the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (the Bill). These matters are set out in the Scrutiny of Digest 9 of 2023.

The following information is provided in response to the Committee's request for further advice on the Bill. Noting the Bill is concurrently being considered by the Parliamentary Joint Committee on Intelligence and Security (PJCIS), the Government will consider any recommendations for proposed amendments to the Bill from this Committee in light of recommendations of the PJCIS.

Schedule 1 – Prohibited Hate Symbols

Broad scope of offence provisions—Freedom of expression

1.14 The Committee requests the Attorney-General's advice as to:

a) whether the bill can be amended to include a written description of the symbols that are sought to be prohibited (such as that contained in the explanatory memorandum) and a graphic depiction of the symbols;
b) whether the meaning of 'displayed in a public place' can be clarified further;
c) whether the bill can be amended to include a safeguard on the exercise of a police officer's discretion to determine a reasonable period of time to comply with a direction, such as allowing an affected person opportunity to give an explanation as to why compliance is not possible in a proposed period of time; and
d) **whether the explanatory memorandum can be amended to include guidance as to what would constitute 'reasonable steps' in the context of a person causing the prohibited symbol to cease to be displayed.**

a) Written descriptions and graphic depictions of prohibited symbols

The Bill defines a prohibited symbol as the Islamic State flag, the Nazi hakenkreuz, the Nazi double sig rune, and something that so nearly resembles these things that it is likely to be confused with, or mistaken for, that thing (new section 80.2E). Written descriptions of each prohibited symbol are contained in the Explanatory Memorandum.[1] Graphic depictions of the prohibited symbols were not included in the legislation because it would be contrary to the intent of the public display offence for the legislation itself to contain (and thereby display) the symbols.

b) Meaning of 'displayed in a public place'

The Bill would introduce a definition of a 'displayed in a public place' in new section 80.2F.

[1] Explanatory Memorandum, paragraphs 20-32.

The Bill would also insert a definition of 'public place' into the Dictionary of the *Criminal Code Act 1995* (Cth) (the Criminal Code). The term 'public place' would include any place to which the public, or section of the public, have access as of right or by invitation, whether express or implied, and whether or not a charge is made for admission to a place. A 'public place' includes both physical and online places that otherwise meets the definition.[2]

The statutory note under new subsection 80.2F(3) includes an example to clarify that if a thing is included in a document that is publicly available on a website, then the thing is displayed in a public place. The Explanatory Memorandum similarly provides:

> Public display is intended to capture display capable of being seen by a member of the public, including online. The intention of the offence would be to criminalise the display of prohibited symbols in circumstances where their display could cause harm to the Australian community or be used to recruit or radicalise vulnerable Australians. The risk of these harms exists where prohibited symbols are displayed in public places.[3]

The Government does not consider that further clarification of the definition of the term 'displayed in a public place' is necessary.

c) Safeguard on the exercise of a police officer's discretion to determine a reasonable period of time to comply with a direction

New paragraph 80.2L(2)(b) provides that a direction may only be given if the police officer suspects on reasonable grounds that there are steps a person can take to cause the prohibited symbol to cease to be publicly displayed. A police officer would not be able to direct a person to take steps where it would not be possible, or where it would be dangerous, for a person to take those steps. This requirement will also ensure that the most appropriate person is directed by the officer, having considered the practicalities of removing the symbol from display.[4]

The Government will consider whether the Bill be amended to address this issue in light of recommendations of the PJCIS on the Bill.

d) Amendments to the Explanatory Memorandum as to what would constitute 'reasonable steps' in the context of a person causing the prohibited symbol to cease to be displayed

New paragraph 80.2L(2)(b) provides that a direction may only be given if the police officer suspects on reasonable grounds that there are steps a person can take to cause the prohibited symbol to cease to be publicly displayed.

The Explanatory Memorandum provides:

> This would ensure that a police officer cannot direct a person to take steps where it would not be possible, or where it would be dangerous, for a person to take those steps. This requirement will also ensure that the most appropriate person is directed by the officer, having considered the practicalities of removing the symbol from display.[5]

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[2] Explanatory Memorandum, paragraph 171.
[3] Explanatory Memorandum, paragraph 34.
[4] Explanatory Memorandum, paragraph 151.
[5] Explanatory Memorandum, paragraph 151.

What constitutes reasonable steps will depend on the circumstances and context in which the direction is issued, including the manner in which the symbol is displayed and the steps required to remove the symbol from display, including potential risks associated in taking those steps. Nevertheless, the Explanatory Memorandum could be amended to include some examples of what may be regarded as reasonable and unreasonable.

Reversal of the evidential burden of proof—Absolute liability offences

1.37 As the explanatory materials do not adequately address this issue, the Committee requests the Attorney-General's detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) under proposed subsections 80.2H(10), 80.2J(6), 80.2J(7), 80.2J(8), 80.2M(3) and 80.2M(4). The Committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.

1.38 The Committee suggests that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence. However, the Committee also requests the Attorney-General's advice as to whether it is possible to disapply section 13.3. of the Criminal Code as an alternative to specifying these abovementioned defences as offence elements.

1.39 The Committee also requests the Attorney-General's detailed justification as to the application of absolute liability to proposed subsection 80.2J(5). The Committee's consideration of the appropriateness of a provision to which absolute liability is applied is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.

Offence-specific defences and reversal of the burden of proof

The Bill includes offence-specific defences in relation to the public display offence (new subsection 80.2H(10)), the trading offence (new subsections 80.2J(6)-(8)), and the directions power (new subsections 80.2M(3) and 80.2M(4)).

Chapter 4 of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) provides guidance on when offence-specific defences are appropriate. Consistent with the Guide, offence-specific defences have been included where the matter would be peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

For example, subsection 80.2H(10) provides a series of defences to the offence of public display of prohibited symbols. These defences are justified as most are focused on the purpose for which the person engaged in the conduct. The purpose for which conduct is engaged in is likely to be peculiarly within the knowledge of the defendant. Paragraph 80.2H(10)(g) requires the person to discharge the evidentiary burden by pointing to evidence that suggests a reasonable possibility that their conduct was for the purpose of opposing Nazi ideology, fascism or a related ideology. It will be relatively straightforward for the person to meet this threshold compared to the prosecution.

Elements of the offence and disapplying s 13.3

Consistent with Chapter 4 of the Guide, offence-specific defences have been included where matters would be peculiarly within the knowledge of the defendant. The defendant's purpose in performing conduct is uniquely within the defendant's knowledge, and is a matter that the defendant is best placed to establish for the reasons articulated in the Guide. Therefore, it would not be appropriate to disapply section 13.3 of the Criminal Code to these matters, and thereby impose an evidential burden to disprove them on the prosecution.

The Government will consider whether the Bill be amended to address this issue in light of recommendations of the PJCIS on the Bill.

Application of absolute liability to proposed subsection 80.2J(5)

New subsection 80.2J(5) would set out circumstances in which the offence in new subsection 80.2J(1) would not apply. Subsection 80.2J(5) is intended to exempt bona fide journalism from the offence.

Read together with new paragraph 80.2J(1)(e), new subsection 80.2J(5) would have the effect that the offence in new subsection 80.2J(1) does not apply if:

- the goods being traded contain one or more news reports or current affairs reports (new paragraph 80.2J(5)(a))
- each prohibited symbol that the goods depict or contain appears in such a report and only appears in such a report (new paragraph 80.2J(5)(b)), and
- in relation to each such report in which a prohibited symbol appears, a reasonable person would consider that the report was made by a person working in a professional capacity as a journalist (new subparagraph 80.2J(5)(c)(i)) and disseminating the report is in the public interest (new subparagraph 80.2J(5)(c)(ii)).

Chapter 2 of the Guide provides that where strict or absolute liability applies to an element of an offence, that element will be made out if the physical elements were engaged in, or existed. This means the prosecution is not required to prove intention, knowledge, recklessness, negligence or another fault element. This is appropriate as the defendant's state of mind is not relevant to a determination of whether the circumstances in new subsection 80.2J(5) exist. Rather, the subsection relates to what a reasonable person would consider.

Further, the Guide provides that absolute liability does not allow for a defence of honest and reasonable mistake of fact to be raised. Consistent with the Guide, it is appropriate that a reasonable mistake of fact defence is not available in this instance, as the circumstances in section 80.2J(5) does not involve an assessment of what the defendant turned their mind to, but rather the considerations of a reasonable person.

Schedule 2 – Use of a carriage service for violent extremist material

Broad scope of offence provisions—freedom of expression

1.45 The Committee requests the Attorney-General's advice as to whether:

a) whether the bill can be amended to include clarity as to what material is intended to be captured by the term 'violent extremist material' so as to constitute the offences under proposed subsections 474.45B(1) and 474.45C(1); and

b) the Bill can be amended to clarify what is meant by 'accessing' violent extremist material.

a) Clarifying 'violent extremist material'

Subsection 474.45A(1) of the Bill defines material as 'violent extremist material' if:

- the material depicts or describes, provides instruction on engaging in, or supports or facilitates 'serious violence'
- a reasonable person would consider that, in all the circumstances, the material is intended to, directly or indirectly, advance a political, religious or ideological cause, and
- a reasonable person would consider that, in all the circumstances, the material is intended to assist, encourage or induce a person in relation to an intimidatory act.

New subsection 474.45A(2) of the Bill defines 'serious violence' as action that falls within subsection 100.1(2) of the Criminal Code. Subsection 100.1(2) sets out a series of actions for the purpose of the definition of a terrorist act, including causing a person's death. Adopting this meaning ensures that the phrase 'violent extremist material':

- includes only material that deals with conduct so serious as to engender public harm purely through its possession or distribution, and
- appropriately covers related harmful material, including instructional terrorist material and terrorist recruitment material.

The Explanatory Memorandum provides guidance on the intended application of each element of the definition of violent extremist material.[6]

The Government will consider whether any further clarification to the term is required in light of any recommendations of the PJCIS on the Bill.

b) Clarifying 'accessing' violent extremist material

Section 473.1 of the Criminal Code defines 'access' for the purpose of Part 10.6 (in which the new violent extremist material provisions will be located if the Bill passes). The definition is set out below:

> ***access*** in relation to material includes:
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> (a) the display of the material by a computer or any other output of the material from a computer; or
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> (b) the copying or moving of the material to any place in a computer or to a data storage device; or

[6] Explanatory Memorandum, paragraph 184-204.

(c) in the case of material that is a program—the execution of the program.

The Government will consider whether any further clarification to the term is required in light of any recommendations of the PJCIS on the Bill.

Reversal of legal burden of proof

150. As the explanatory materials do not sufficiently justify this matter, the Committee requests the Minister's advice as to why it is proposed to reverse the legal burden of proof in relation to proposed subsection 474.45C(5).

New subsection 474.45C(5) would establish a presumption that where a defendant possesses or controls violent extremist material in the form of data held in a computer or contained in a data storage device, that material was obtained or accessed by the defendant using a carriage service. It would have the effect that, if the prosecution proves beyond reasonable doubt that the person had possession or control of material, the material is in the form of data held in a computer or contained in a data storage device, and the material is violent extremist material, it is presumed that the person used a carriage service to obtain or access the material. This presumption would stand unless the defendant proves that they did not obtain or access the material using a carriage service.

Part 5.1 of the Guide provides guidance on presumptions that place legal burdens on defendants. In accordance with sections 13.4 and 13.5 of the Criminal Code, the defendant would be required to discharge this burden on the balance of probabilities. The defendant would be able to rebut the presumption by producing evidence demonstrating, on the balance of probabilities, that they did not use a carriage service to obtain or access the material.

The Explanatory Memorandum explains why the reversal of the legal burden is necessary and appropriate in these circumstances:

> The purpose of this presumption would be to address problems encountered by law enforcement agencies in proving beyond reasonable doubt that a carriage service was used to engage in the relevant criminal conduct. Often, evidence that a carriage service was used to engage in the relevant criminal conduct is highly technical. Such evidence can be circumstantial, including for example that the defendant's computer had chat logs saved on the hard drive, the computer was connected to the internet, and records show the computer accessed particular websites that suggest an association with the material saved on the hard drive. A presumption in this instance is appropriate, given it is not an element that goes to the substance of the offence or to the person's criminal culpability. Rather, it is a jurisdictional element; that is, an element marking a boundary between matters that fall within the legislative power of the Commonwealth, and those that do not.
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> The onus would be on the defendant to prove that they used a method other than a carriage service to obtain or access the material. The prosecution would not need to prove that the person accessed or obtained the material using a carriage service beyond a reasonable doubt unless the defendant discharged their burden to prove otherwise.[7]

[7] Explanatory Memorandum, paragraphs 231-2.

Reversal of the evidential burden of proof

1.71 As the explanatory materials do not adequately address this issue, the Committee requests the Attorney-General's detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in relation to an offence under proposed subsections 474.45B(1) and 474.45C(1). The Committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.

1.72 The Committee suggests that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence. However, the Committee also requests the Attorney-General's advice as to whether it is possible to disapply section 13.3. of the Criminal Code as an alternative to specifying these abovementioned defences as offence elements.

Offence-specific defences and reverse evidential burden of proof

The Bill includes offence-specific defences at new section 474.45D in relation to the offences at subsections 474.45B(1) and 474.45C(1).

Chapter 4 of the Guide provides guidance on when offence-specific defences are appropriate. Consistent with the Guide, offence-specific defences have been included where the matter would be peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

The offence-specific defences in new section 474.45D recognise that the defendant's purpose for dealing with violent extremist material is uniquely within the knowledge of the defendant. The defendant is best placed to adduce evidence demonstrating their purpose. For example, if the defendant is employed as a law enforcement officer and was investigating radicalised persons or terrorists who had dealt with violent extremist material, the defendant could readily adduce evidence that they used a carriage service for violent extremist material, or possessed or controlled such material in the course of their employment.

Elements of the offence and disapplying s 13.3

Consistent with Chapter 4 of the Guide, offence-specific defences have been included where matters would be peculiarly within the knowledge of the defendant. The defendant's purpose in performing conduct is uniquely within the defendant's knowledge, and is a matter that the defendant is best placed to establish for the reasons articulated in the Guide. Therefore, it would not be appropriate to disapply section 13.3 of the Criminal Code to these matters, and thereby impose an evidential burden to disprove them on the prosecution.

The Government will consider whether the Bill be amended to address this issue is required in light of recommendations of the PJCIS on the Bill.

Schedule 3 – Advocating terrorism

Broad scope of offence provisions – Significant penalties in primary legislation

1.61 In light of the above, the Committee requests the Attorney-General's advice as to:

a) whether 'advocates' may be able to be defined with more specificity;

b) whether the explanatory memorandum can be amended to include guidance with respect to the interpretation of key terms, including 'praises' and whether there is a 'substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence'; and

c) what conduct is intended to be captured by the amended offence that is not already captured by current offences.

a) Definition of 'advocates'

The Bill would expand the existing definition of 'advocates' in subsection 80.2C(3) so it includes a third category of activity:

- The first is where a person counsels, promotes, encourages or urges the doing of a terrorist act of the commission of a terrorism offence (new paragraph 80.2C(3)(a)). This replicates the existing definition of 'advocates' in section 80.2C.
- The second is where a person provides instruction on the doing of a terrorist act or commission of a terrorism offence (new paragraph 80.2C(3)(b)).
- The third is where a person praises the doing of a terrorist act or commission of a terrorism offence in circumstances where there is a substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence (new paragraph 80.2C(3)(c)).

The Explanatory Memorandum provides guidance on the types of conduct that may meet each of the new limbs of the definition.[8]

There is a wide range of conduct that may fall within these limbs, and the Government does not consider it appropriate to limit interpretation beyond the ordinary meaning of the words contained in the legislation. Rather, it should be a matter for a court to consider on a case-by-case basis.

b) Amending the Explanatory Memorandum with respect to the interpretation of key terms, including 'praises' and whether there is a 'substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence'

The terms 'instruction' and 'praises' are not defined in the Bill and would take their ordinary meaning. There is a wide range of conduct that may fall within these terms. For example, 'instruction' could include providing or distributing a manual on how to carry out a terrorist act; filming a video stepping out how to perform a beheading; or guiding someone on how to obtain material in order to engage in a terrorist act.

[8] Explanatory Memorandum, paragraphs 262-268.

Similarly, the Bill is intentionally silent on the circumstances in which the qualifier that a substantial risk that praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence would apply. This would be considered on a case-by-case basis to give the courts maximum discretion to consider any matters it deems relevant in making an assessment about whether the elements of the offence are satisfied.

The Explanatory Memorandum provides guidance on the types of conduct that may meet each of the new limbs of the definition.[9]

The Government does not consider it appropriate to limit interpretation beyond the ordinary meaning of the words contained in the legislation. Rather, it should be a matter for a court to consider on a case-by-case basis.

c) What conduct is intended to be captured by the amended offence that is not already captured by current offences

The glorification of terrorism and violent extremism through praise has been of increasing concern to Commonwealth law enforcement and intelligence agencies in recent years. For example, following the March 2019 Christchurch mosque shooting, numerous individuals used the internet to share video footage of the atrocity, and the perpetrator's manifesto—idealising the perpetrator and his actions and ideologies. Glorification of terrorists or terrorist acts, in circumstances such as these, can incite others to imitate or seek to engage in similar behaviour, furthering radicalisation. Such behaviour amounts to a form of advocacy.

The expanded definition of 'advocacy' ensures that all relevant conduct is captured, removing any uncertainty about whether instructing or praising, in certain circumstances, would amount to advocacy.

There are currently two definitions of advocating terrorism in the Criminal Code. The first is used in the offence of advocating terrorism at section 80.2C, and the second is used for the purpose of establishing the threshold for listing a terrorist organisation in Division 102. However, these definitions are different, with the definition of advocating in Division 102 including, in addition to counselling, promoting, encouraging or urging the doing of a terrorist act:

- instructing on the doing of a terrorist act; or
- praising the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person to engage in a terrorist act.

The Bill would amend the definition of advocates in subsection 80.2C(3) of the Criminal Code to more closely align it with the definition used for the purpose of listing terrorist organisations in Division 102.

[9] Explanatory Memorandum, paragraphs 262-268.

Schedule 4 – Terrorist organisation listings

Exemption from sunsetting

1.76 The Committee requests the Attorney-General's detailed advice as to what circumstances justify the exemption from sunsetting for regulations made under subsection 102.1(1) of the Criminal Code.

Exemptions from sunsetting for regulations are only granted in exceptional policy circumstances. In my capacity as Attorney-General, I am responsible for assessing applications to exempt instruments from sunsetting with regard to established policy criteria, as outlined in the *Guide to managing the sunsetting of legislative instruments*. One of these criteria is that the instrument is part of an intergovernmental scheme,.

Regulations made under subsection 102.1(1) of the Criminal Code are a part of the broader counter-terrorism legislative framework contained in Part 5.3 of the Criminal Code. These regulations, and the broader counter-terrorism legislative framework, operate in accordance with the *Intergovernmental Agreement on Counter-terrorism Laws 2004* (IGA), an intergovernmental scheme which supports a referral of powers to the Commonwealth. It is this referral of power that provides the Commonwealth with the requisite power to legislate regarding terrorist organisations.

Regulations proscribing an organisation as a terrorist organisation under subsection 102.1(1) must be made with the support of states and territories. Pursuant to the IGA and the Criminal Code, state and territory First Ministers must be consulted on all proposed terrorist organisation listings. A majority of jurisdictions (including at least 4 states) must not oppose the listing for it to proceed. The Commonwealth cannot unilaterally make regulations to list a terrorist organisation, nor would it be appropriate for the Commonwealth to unilaterally sunset regulations that list a terrorist organisation without formal consultation with the states and territories. Therefore, I assess that regulations made under subsection 102.1(1) of the Criminal Code meet the above policy criteria to be exempt from sunsetting in accordance with subsection 50(1) of the *Legislation Act 2003*.

The exemption supports broader policy changes proposed by the Bill, including by providing that terrorist organisation listings would not expire unless delisted by the AFP Minister. This ensures we are properly addressing enduring terrorist organisations that pose ongoing threats to Australia's security.

In lieu of sunsetting, the Bill introduces additional safeguards to ensure that terrorist organisation listings can be reviewed to ensure they remain appropriate. The Bill enables expanded parliamentary oversight through empowering the PJCIS to conduct own-motion reviews into listings instruments, including whether an organisation continues to meet the legislative thresholds for listing. These reviews provide an independent review mechanism to ensure terrorist organisation listings and the regulations remain in force only as long as is needed. Instruments proscribing terrorist organisations would also continue to be subject to disallowance, in addition to the expanded scrutiny powers of the PJCIS.

In addition to parliamentary review mechanisms, subsection 102.1(17) of the Criminal Code provides that an individual or an organisation may make an application to the AFP Minister

to de-list an organisation. Receiving an application to de-list engages the positive obligation on the AFP Minister to review whether the organisation continues to meet the legislative thresholds for listing. The Bill introduces a requirement for the AFP Minister to conduct a review as soon as practicable upon receipt of an application.