



Attorney-General

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

I refer to correspondence of 10 November 2023 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) concerning *Scrutiny Digest 13 of 2023* which contains comments on the Identity Verification Services Bill 2023 (IVS Bill) and the Identity Verification Services (Consequential Amendments) Bill 2023 (Consequential Amendments Bill).

I appreciate the time the Committee has taken to consider both Bills and the Government's response to the *Scrutiny Digest 12 of 2023*, which was provided to the Committee on 6 November 2023.

I note the Committee's request at paragraph 2.67 of *Scrutiny Digest 13 of 2023* for an addendum to the explanatory memorandum to be tabled in Parliament as soon as practicable. The Government intends to provide the information requested by the Committee in a replacement explanatory memorandum which will be tabled when the IVS Bill and the Consequential Amendments Bill is debated in the Senate (currently listed for Tuesday 14 November).

I trust this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP

14/11/2023

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



**SENATOR THE HON MURRAY WATT
MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY
MINISTER FOR EMERGENCY MANAGEMENT**

Senator Dean Smith
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Dear Senator *Dean*

Primary Industries Levies and Charges Collection Bill 2023 (Collection Bill)
Primary Industries Levies and Charges Disbursement Bill 2023 (Disbursement Bill)

Thank you for your correspondence of 9 November 2023 on behalf of the Senate Scrutiny of Bills Committee (the Committee) in relation to the above Bills. I am writing to respond to the issues identified by the Committee in the Committee's *Scrutiny Digest 13 of 2023*.

I have considered the Committee's request and my detailed response is attached.

I thank the Committee for bringing these matters to my attention. I trust that the information provided above will support the Committee in its consideration of these important Bills.

Yours sincerely

MURRAY WATT *20 / 11 / 2023*

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

Attachment: Response to the Senate Standing Committee for Scrutiny of Bills – Collection and Disbursement Bills

Primary Industries Levies and Charges Collection Bill 2023 (Collection Bill)

Coercive powers / infringement notices / broad delegation of administrative powers

The Committee has requested advice as to why it is necessary and appropriate for any APS employee of the department to be conferred monitoring and investigative powers as a compliance officer, or person assisting a compliance officer, and as an infringement officer. The Committee has also requested advice as to whether the Collection Bill can be amended to require that only employees in possession of the appropriate training, qualifications, skills or experience be designated compliance officers or persons assisting compliance officers.

Clause 52 of the Collection Bill would empower the Secretary to appoint an APS employee in the Department, or each APS employee in the Department included in a specified class of APS employees in the Department, to be a compliance officer for the purposes of the Collection Bill.

Consistent with existing practice, it is intended that the Secretary would appoint APS employees who have relevant experience and training or are required to undertake appropriate training prior to exercising powers under the legislation. Compliance officers that are currently appointed by the Secretary are specialised staff who carry out compliance activities in relation to the levy system. There are currently around 20 officers responsible for carrying out compliance and monitoring activities. There are no existing training or qualification requirements in levies legislation. However, consistent with best practice, the longstanding practice of the department is that these officers are provided with appropriate training in relation to investigation and monitoring powers. This practice will be continued in order to ensure that powers are exercised in accordance with legislative requirements.

Officers assisting compliance officers will be supervised and directed by experienced compliance officers to ensure the correct and appropriate use of their powers. As indicated by the examples in the Explanatory Memorandum, the circumstances in which a person would assist a compliance officer would be limited. In addition, the provisions of the Bill expressly limit any actions taken in executing a monitoring or investigation warrant against things by such persons to what is necessary and reasonable in the circumstances. The *Regulatory Powers (Standard Provisions) Act 2014* also requires that such persons must act in accordance with a direction given to them by the authorised person.

It is not feasible for the appointment of compliance officers to be restricted to members of the Senior Executive Service. Compliance officers specialise in undertaking operational compliance activities, including inspections, following up missing levy returns, debt recovery actions, issuing of notices, and education of collection agents. The department estimates that for the 2022–23 financial year, the Levies Compliance Team undertook almost 10,000 compliance-related actions. The ability to appoint a team of compliance officers is essential to the effective and efficient operation of the compliance regime for the collection of agricultural levies and charges.

For the above reasons, I do not consider it to be necessary to amend the Bill to expressly require that officers have particular skills, experience or training.

Privacy

The Committee has requested advice about whether personal information may be captured within the authorised uses and disclosures set out in relation to relevant levy/charge information and, if so, the anticipated scope or type of personal information that would be collected, used and disclosed under the Collection Bill.

Relevant levy/charge information is primarily collected and used to administer the levy system and monitor compliance. There are over 110 levies across more than 75 commodities, with approximately 7,400 collection agents responsible for paying equivalent amounts and for submitting levy returns. Relevant levy/charge information may include some personal information, such as individuals' names, residential addresses (where a business address is the same as a residential address) and could in limited circumstances include some sensitive information within the definition of the *Privacy Act 1988* (Privacy Act).

In addition to being used for administering the levy system and monitoring compliance, relevant levy/charge information could also be used and disclosed for a range of other purposes that support the levy system and the levied industries, such as enabling research and development corporations (RDCs) to effectively communicate with their members and to support the development of agricultural policy and research, and statistics.

The personal information proposed to be collected, used and disclosed under the Collection Bill is limited to that necessary for the proper administration of the levy system. The authorised use or disclosure of personal information is governed by provisions in Part 5 of the Collection Bill that provide appropriate safeguards against unauthorised use or disclosure.

Personal information may be shared with entities outside the department, however only when there is legal authority to do so. The authorisation provisions in Division 3 of Part 5 of the Collection Bill are intended to clearly express the purposes for which information collected can be used and disclosed and provide protection for personal and sensitive information. The protections in the Privacy Act would also apply to the collection, use and disclosure of all personal information and sensitive information.

Reversal of evidential burden of proof

The Committee has sought further information about why it is proposed to use an offence-specific defence for the criminal offence in subclauses 45(4) and (5) and the appropriateness of the reversal of the burden of proof.

Subclause 45(4) provides that the offence or civil penalty does not apply if the use or disclosure of the information is required or authorised by the Collection Bill or another law of the Commonwealth or a prescribed law of a State or Territory. Subclause 45(5) provides that the offence or civil penalty does not apply if the person uses or discloses the information in good faith in the purported administering of the Collection Bill or rules, or purported monitoring of compliance with the Collection Bill or rules, or assisting another person in the purported administering of the Collection Bill or the rules, or purported monitoring of compliance with the Collection Bill or rules. In essence, this provision provides a defence

where the person who uses the information provides certain justification for that use of the information.

I consider that the reversal of the evidential burden in the exception in subclause 45(4) is appropriate and justified on the basis that it would be both significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter, and the relevant matter is peculiarly within the knowledge of the defendant. If subclause 45(4) were amended to provide that the use or disclosure was not required or authorised by law as an element of the offence, the Commonwealth would have to prove that no other Commonwealth law (or less relevantly, prescribed State or Territory law) applies to require or authorise the use or disclosure.

If the evidential burden is reversed as proposed, the defendant needs only to prove that one law applied to require or authorise the use or disclosure. In circumstances where a defendant used or disclosed information in purported reliance on a law, information about which law they were purporting to rely on is peculiarly within the knowledge of the defendant.

For similar reasons, I consider that the reversal of the evidential burden in the exception in subclause 45(5) is appropriate and justified on the same grounds. Information about whether the defendant acted in good faith in the circumstances as set out in that subclause, is information which is peculiarly within the knowledge of the defendant who would be expected to understand their reasons for use or disclosure as part of their employment duties in any event.

Whether a defendant has acted in good faith would require consideration of the defendant's subjective belief about why they considered they were required or authorised to use or disclose the information in the purported administering/monitoring compliance with the Collection Bill (or assisting another to do so). It would be significantly more difficult and costly for the prosecution to prove that the defendant did not act in good faith.

This provision is consistent with the provision in clause 81 of the Primary Industries Levies and Charges Disbursement Bill 2023, as well as provisions in other portfolio legislation; namely, section 580 of the *Biosecurity Act 2015* and section 397G of the *Export Control Act 2020* as inserted by item 12 of Schedule 1 to the *Export Control Amendment (Streamlining Administrative Processes) Act 2023* when that Schedule commences.

Automated decision-making

The Committee has sought further information about why it is considered necessary and appropriate to permit the Secretary to arrange for the use of computer programs to make decisions in relation to any decision specified in the rules made under the Collection Bill. The Committee has also asked whether consideration has been given to prohibiting certain decisions from being prescribed by the rules, and to how automated decision-making processes will comply with administrative law requirements.

The Collection Bill forms part of a package to modernise the agricultural levies legislative framework. One of the key objectives of the modernisation is to provide contemporary, flexible and efficient legislation that would better support levied industries' needs in the future.

I consider it necessary and appropriate for the Collection Bill to establish a framework which could, in future, allow for the use of computer programs to make decisions to support the efficient and effective administration of the Collection Bill.

Appropriate safeguards are provided for in the Bill, given that any decision would be specified in a legislative instrument that is subject to parliamentary scrutiny and consultation requirements under section 17 of the *Legislation Act 2003*. These decisions could be closely examined by the Senate Standing Committee for the Scrutiny of Delegated Legislation. Appropriate consultation would certainly include consultation with any affected levied industries, levy payers and collection agents as to how the automation of such decisions might affect them.

I note that subclause 54(1) prohibits the delegation by the Secretary of the powers provided for by subclauses 53(1) and 53(2), in addition to the Secretary's rule-making power provided for by clause 59. As these powers could only be exercised by the Secretary, they would always be exercised with the accountability that comes with that role. Consideration at the highest departmental level would therefore be required prior to the automation of any decision being specified in the rules. How such automation would comply with administrative law requirements, such as procedural fairness, the requirement to consider relevant matters, and the rule against fettering of discretionary power, would be relevant considerations.

I further note that subclause 53(4) would allow the Secretary to make a substitution for an automated decision, if the Secretary considers the automated decision is not the correct or preferable decision. This would provide a safeguard should the outcome of an automated decision be considered incorrect or undesirable.

As the Collection Bill does not oblige the Secretary to automate decisions, they would retain the discretion not to automate decisions they considered more appropriate to be made by a decision-maker. Because of this I do not propose to prohibit particular decisions under the Collection Bill from being prescribed in the rules.

Vicarious liability

The committee has sought further information about clauses 56, 57 and 58, which seek to provide that the Collection Bill and rules apply to a partnership, trust and unincorporated body or association as if it were a person, with the changes as set out in those clauses. Clauses 56, 57 and 58 are based on standard provisions that are used in several other Commonwealth Acts, which outline when liability might apply to these types of entities. Equivalent provisions are included in the Primary Industries (Excise) Levies Bill 2023, the Primary Industries (Customs) Charges Bill 2023, and the Primary Industries (Services) Levies Bill 2023. Were it not for these standard provisions, partnerships, trusts and unincorporated bodies or associations would not be legal entities for the purposes of those Bills or the Collection Bill.

Subclauses 56(1), 57(1) and 58(1) deem a partnership, a trust and an unincorporated body or association, respectively, to be a legal person for the purposes of the Collection Bill and the rules. Subclauses 56(2), 57(2)–(3) and 58(2), in turn, provide that an obligation imposed on a partnership, trust or an unincorporated body or association under the Collection Bill is imposed on each individual partner, trustee or member of the body or association's

committee of management, but that an obligation may be discharged by any of the partners, trustees or members, respectively.

Subclauses 56(4), 57(2)–(3) and 58(4) provide that an offence committed by a partnership, a trust or an unincorporated body or association is taken to have been committed by each partner, trustee or member of the body or association’s committee of management. These proposed provisions recognise that, in appropriate circumstances, particular individuals within partnerships, trusts and unincorporated associations should be responsible for offences committed by those entities.

A safeguard is included in each case, which provides that an offence will only be committed if the partner, trustee or member did the relevant act or made the relevant omission or aided, abetted, counselled or procured the relevant act or omissions or was in any way knowingly concerned in, or party to, the relevant act of omission. This is consistent with the principle set out in the *Guide to Framing Commonwealth Offences* that an individual should be responsible only for his or her own acts and omissions. As the *Guide* also notes, taxation law is one of two instances where responsibility has traditionally been imposed on the partners of a partnership and the members of unincorporated associations, respectively.

Parliamentary oversight

The Committee has asked whether the Collection Bill can be amended to provide the power for the Minister or Secretary to make notifiable and other written instruments that are not of a legislative character on the face of the Collection Bill.

The ability for rules to provide for the making of non-legislative instruments enables the Government to ensure that the levies system remains transparent, accountable and responsive to industry needs. Limiting the power to provide for instruments that are not legislative in character by amending the Bill would inhibit the ability for the scheme to respond to evolving industry needs. Any new powers specified in the rules to make non-legislative instruments would be subject to appropriate parliamentary scrutiny, including disallowance and close examination by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Subclause 59(4) of the Collection Bill does not extend the scope of matters that may be addressed in rules under the Collection Bill beyond those mentioned in subclauses 59(1), (2) and (3). Any provision for a matter to be dealt with by making an instrument under the rules would need to be clearly set out in the rules.

In particular, any provision of the rules under the Collection Bill enabling the making of an instrument that has a legislative character would need to provide for the instrument to be a legislative instrument and not a notifiable instrument, and this would be subject to Parliamentary scrutiny. Only those instruments that were not of legislative character, could appropriately be made as notifiable instruments.

Primary Industries Levies and Charges Disbursement Bill 2023 (Disbursement Bill)

Instruments not subject to an appropriate level of parliamentary oversight

The Committee has asked whether the Disbursement Bill can be amended to include a requirement for consultation to occur prior to the declaration of a body as a declared recipient under subclause 39(1) of the Disbursement Bill. For the reasons below, it would be duplicative and unnecessary to add a further consultation requirement to this declaration.

The declaration of a body as a declared recipient body forms part of a process to enable the spending of amounts raised through levies and charges on research and development, marketing and other activities for the benefit of a primary industry sector. This process includes the imposition of one or more relevant levies and charges through regulations under the Primary Industries (Excise) Levies Bill 2023, the Primary Industries (Customs) Charges Bill 2023 or the Primary Industries (Services) Levies Bill 2023 (the Imposition Bills), the Minister and the body entering into a funding agreement, the declaration of the body as a recipient body, and the designation, in rules under the Disbursement Bill, of a designated primary industry sector in relation to the body.

As both the imposition of a levy or charge and the designation of a designated industry sector require the making of a legislative instrument, section 17 of the *Legislation Act 2003* requires that any consultation that is appropriate and reasonably practicable must be undertaken before these steps are taken. Appropriate consultation would include consultation with the affected industry as to whether the body to which funds are to be disbursed is the most appropriate body to carry out research and development, marketing or other activities for the benefit of the industry. The Imposition Bills also provide specific consultation requirements that must be satisfied before regulations are made setting or amending the rate of a levy.

Further, under subclause 39(3) of the Disbursement Bill, the Minister must have entered into a funding agreement with the body under clause 38 before making a declaration under clause 39. This requires that the Minister identifies the appropriate body to be declared as a recipient body prior to entering into an agreement and that the body consents to abide by its obligations under both the legislation and the agreement.

Significant penalties

The Committee has sought further information about the proposed secondary use or disclosure offence provided in subclause 72(9) and the offence of use or disclosure of protected information in subclause 81(1). Both proposed offences relate to the unauthorised use or disclosure of protected information and, as the committee notes, the proposed penalty for each offence is a maximum penalty of 12 months' imprisonment.

In line with the considerations in the Guide to Framing Commonwealth Offences, I consider that each of the proposed penalties are appropriate to effectively deter the commission of the relevant offence, and reflect the serious and potentially damaging consequences of each offence, which both involve the unauthorised use or disclosure of protected information. Protected information covers information (including commercially sensitive information) the disclosure of which could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence or information the disclosure of which could reasonably be expected to prejudice constitutional trade or commerce.

I note that the proposed penalty in subclause 72(9) is consistent with the penalty for the equivalent offence in subsection 11(4) of the *National Residue Survey Administration Act 1992*, which is being replaced by the Disbursement Bill. The proposed penalty in subclause 81(1) is less significant than the penalty for the equivalent offence in subsection 11(1) of the *National Residue Survey Administration Act 1992* (see subsection 122.4(1) of the *Criminal Code Act 1995*, which provides a maximum penalty of 2 years' imprisonment). The proposed penalties are also consistent with the penalty for the equivalent offence in subclause 45(1) of the Collection Bill.

Reversal of evidential burden of proof

The Committee has sought further information about the appropriateness of the reversal of the burden of proof in subclauses 81(4) and (5).

Subclause 81(4) provides that the offence or civil penalty does not apply if the use or disclosure of the information is required or authorised by the Disbursement Bill or another law of the Commonwealth or a prescribed law of a State or Territory. Subclause 81(5) provides that the offence or civil penalty does not apply if the person uses or discloses the information in good faith in the purported carrying out of activities covered by paragraph 66(1)(a) of the Disbursement Bill and paid for with amounts debited from the NRS Special Account or in the purported administering, or assisting another person in the purported administering, of Part 5 of the Disbursement Bill. In essence, this provision provides a defence where the person who uses the information provides certain justification for that use of the information.

I consider that the reversal of the evidential burden in the exception in subclause 81(4) is appropriate and justified on the basis that it would be both significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter, and the relevant matter is peculiarly within the knowledge of the defendant. If subclause 81(4) were amended to provide that the use or disclosure was not required or authorised by law as an element of the offence, the Commonwealth would have to prove that no other Commonwealth law (or less relevantly, prescribed State or Territory law) applies to require or authorise the use or disclosure. If the evidential burden is reversed as proposed, the defendant needs only to prove that one law applied to require or authorise the use or disclosure. In circumstances where a defendant used or disclosed information in purported reliance on a law, information about which law they were purporting to rely on is peculiarly within the knowledge of the defendant.

For similar reasons, I consider that the reversal of the evidential burden in the exception in subclause 81(5) is appropriate and justified on the same grounds. Information about whether the defendant acted in good faith in the circumstances as set out in that subclause is information which is peculiarly within the knowledge of the defendant who would be expected to understand their reasons for use or disclosure as part of their employment duties in any event. Whether a defendant has acted in good faith would require consideration of the defendant's subjective belief about why they considered they were required or authorised to use or disclose the information in the purported carrying out of activities covered by paragraph 66(1)(a) or in the purported administering, or in assisting another person in the

purported administering, of Part 5 of the Disbursement Bill. It would be significantly more difficult and costly for the prosecution to prove that the defendant did not act in good faith.

This provision is consistent with the provision in clause 45 of the Collection Bill, as well as the provisions in other portfolio legislation; namely, section 580 of the *Biosecurity Act 2015* and section 397G of the *Export Control Act 2020* as inserted by item 12 of Schedule 1 to the *Export Control Amendment (Streamlining Administrative Processes) Act 2023* when that Schedule commences.

Parliamentary oversight

The Committee has asked whether the Disbursement Bill can be amended to provide the power for the Minister or Secretary to make notifiable and other written instruments that are not of a legislative character in relation to particular matters on the face of the Disbursement Bill.

The ability for rules to provide for the making of non-legislative instruments enables the Government to ensure that the levies system remains transparent, accountable and responsive to industry needs. Limiting the power to provide for instruments that are not legislative in character by amending the Bill would inhibit the ability for the scheme to respond to evolving industry needs. Any new powers specified in the rules to make non-legislative instruments would be subject to appropriate parliamentary scrutiny, including disallowance and close examination by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Subclause 90(2) of the Disbursement Bill does not extend the scope of matters that may be addressed in rules under the Disbursement Bill beyond those mentioned in subclause 90(1). Any provision for a matter to be dealt with by making an instrument under the rules would need to be clearly set out in the rules.

In particular, any provision of the rules under the Disbursement Bill enabling the making of an instrument that has a legislative character would need to provide for the instrument to be a legislative instrument and not a notifiable instrument, and this would be subject to Parliamentary scrutiny. Only those instruments that were not of legislative character could appropriately be made as notifiable instruments.



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Dear Chair

I refer to correspondence from the Senate Standing Committee for the Scrutiny of Bills (the Committee) of 9 November 2023 on the Water Amendment (Restoring Our Rivers) Bill 2023 (the Bill).

As requested by the Committee, an addendum to the explanatory memorandum is being developed outlining how 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
- specifies penalties for certain contraventions that are necessary and proportionate.

The addendum reflects the information that was provided to the Committee. It will be tabled in the Senate during debate on the Bill.

Yours sincerely

TANYA PLIBERSEK

20.11.23



Attorney-General

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Dear Chair

Thank you for your correspondence of 9 November 2023 regarding the Senate Scrutiny of Bills Committee's consideration of 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 this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP

27/11/2023

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

Response to Senate Standing Committee on the Scrutiny of Bills
Scrutiny Digest 13 of 2023

The Senate Standing Committee on the Scrutiny of Bills (the Committee) has requested the Attorney-General's further advice in relation to the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (the Bill). The Committee's observations are set out in *Scrutiny Digest 13 of 2023*.

The following information is provided in response to the Committee's request. As noted in my response of 30 October 2023, the Government is considering the Committee's recommended amendments to the Bill alongside the recommendations of the Parliamentary Joint Committee on Intelligence and Security (PJCIS), which tabled its report on the Bill on 15 November 2023. The Government will respond to the PJCIS in due course.

Schedule 1 – Prohibited Hate Symbols

Broad scope of offence provisions—Freedom of expression

2.93 The Committee requests that an addendum to the explanatory memorandum containing examples of reasonable and unreasonable steps to be taken to cease public display of a prohibited symbol be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understand the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 2001*).

The Government will table an addendum to the Explanatory Memorandum, which includes examples of what may be regarded as reasonable and unreasonable steps to be taken to cease the public display of a prohibited symbol.

Reversal of the evidential burden of proof—Absolute liability offences

2.114 The Committee requests the Attorney-General's further 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)(a) and (b), 80.2J(6), 80.2J(7), 80.2J(8) and 80.2M(4).

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 offence for failing to comply with a direction to remove a prohibited symbol from public display (new subsections 80.2M(3) and 80.2M(5)).

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.

The Explanatory Memorandum sets out the justification for the offence-specific defences at paragraphs 24 in the Statement of Compatibility with Human Rights, and 98-102, 124-128 and 166 in the Notes on Clauses, including how these defences are consistent with the Guide.

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

Broad scope of offence provisions—Freedom of expression

2.127 The Committee requests that an addendum to the explanatory memorandum including the definition of ‘access’ be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act*).

2.128 The Committee also requests the Attorney-General’s further advice as to whether:

- the definition of ‘access’ provided under section 473.1 of the Criminal Code can include inadvertently accessing violent extremist material through the ordinary use of a computer or carriage service; and
- what, if any, safeguards are in place for persons who contravene proposed subsection 474.45B(1) by inadvertently accessing violent extremist material, including, for example, whether any specific defences are available for a defendant to rely on.

Paragraph 2.127 - Definition of ‘access’

The Government will table an addendum to the Explanatory Memorandum, which includes information on the applicable definition of ‘access’.

Paragraph 2.128 - Inadvertent access to violent extremist material is criminalised

The new offence for using a carriage service for violent extremist material at section 474.45B would not criminalise inadvertent access because new paragraph 474.45B(2)(b) would provide that the fault element attached to paragraph 474.45B(1)(c) - ‘the material is violent extremist material’ - is recklessness. ‘Recklessness’ is defined at section 5.4 of the Criminal Code. By operation of this fault element, a person who accidentally comes across violent extremist material on the internet without any warning from the context would not be caught by the offence, because they would not have been aware of a substantial risk that the material was violent extremist material (see requirement in paragraph 5.4 (1)(a)).

Section 474.45D sets out the defences that would be available in relation to this offence.

Reversal of legal burden of proof

2.148 The Committee requests the Attorney-General’s further detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) under proposed paragraphs 474.45D(1)(a), (b) and (g).

The Bill includes offence-specific defences at new section 474.45D in relation to the use of violent extremist material, and the possession or control of violent extremist material that was obtained or accessed using a carriage service.

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 Explanatory Memorandum sets out the justification for the offence-specific defences at paragraphs 234 to 247 in the Notes on Clauses, including how these defences are consistent with the Guide.