



Australian Government

Attorney-General's Department

Attorney-General's Department Submission

Senate Legal and Constitutional Affairs Committee
Inquiry into right wing extremist movements in Australia

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Introduction

1. The Attorney-General's Department (the department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee's (the Committee) inquiry into right wing extremist movements in Australia.
2. This submission focusses on item (b) in the inquiry's terms of reference: 'the terms and operation of the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill [now Act] 2023' (the Act).
3. The Act, which passed the Parliament on 6 December 2023, and received Royal assent on 11 December 2023, amended the Criminal Code Act 1995 (Criminal Code) to:
 - Establish new criminal offences for the public display of prohibited Nazi and terrorist organisation symbols; the public performance of the Nazi salute; and trading in goods depicting or containing prohibited symbols (Schedule 1).
 - Establish new criminal offences for using a carriage service for violent extremist material; and possessing or controlling violent extremist material obtained or accessed using a carriage service (Schedule 2).
 - Expand the offence of advocating terrorism in section 80.2C to include instructing on the doing of a terrorist act or commission of a terrorism offence, or praising the doing of a terrorist act or commission of a terrorism offence in specified circumstances; and increasing the maximum penalty for advocating terrorism from 5 to 7 years' imprisonment (Schedule 3).
 - Remove the sunseting requirement for instruments which list terrorist organisations and bolster safeguards (Schedule 4).
4. In preparing this submission, the department consulted with the Department of Home Affairs (Home Affairs), the Australian Security Intelligence Organisation (ASIO), and the Australian Federal Police (AFP).

Part 1: Context and development of the Act

Context

5. Australia's legal frameworks must be fit-for-purpose to ensure the community is resilient to contemporary and emerging threats. The Act was informed by law enforcement, intelligence and prosecutorial advice that reforms were needed to strengthen legal settings to protect the community from threats posed by radicalisation, violence and activities that incite hatred.

6. The threat of terrorism and violent extremism remains an enduring challenge for Australia, and the threat is becoming increasingly diverse and complex. Violent extremists are finding new ways to promote hatred, instil fear and vilify people within the community. Symbology is an effective tool that extremists are using to signal their ideology to a wide-reaching audience, and to recruit and radicalise others. It is critical that law enforcement is equipped to intervene at an early stage to protect the community by preventing radicalisation, violence and activities that incite hatred. There have been several recent examples of extremist groups employing violent ideologies to expose Australians to harm – including the National Socialist Network demonstration at the Victorian Parliament in March 2023 and ongoing racist stickering efforts and vandalism reported by members of the community. ASIO’s submission to this inquiry provides further information about the threat environment.
7. Since the terrorist attacks in Israel on 7 October 2023, there has been a significant rise in anti-Semitism and Islamophobia. Neo-Nazis are becoming increasingly vocal and public in their actions. Public discourse is being weaponised with hateful rhetoric that dehumanises groups and members of groups in the Australian community. Such conduct undermines social cohesion, erodes shared values and can lay the foundation for violence and extremism, which threatens Australia’s multicultural and democratic society. The harm caused by this conduct can be profound – it is an attack on human dignity which affects the physical and psychological wellbeing not only of those targeted, but of the whole community. For this reason, the Government has also committed to enhancing protections in anti-discrimination law to ensure that no Australian experiences discrimination or vilification because of their religious beliefs.

Counter-terrorism legislative frameworks

8. Australia’s counter-terrorism legislative frameworks do not differentiate in their application between different ideologies, or between ideologically motivated and religiously motivated terrorism. For example, the definition of a ‘terrorist act’ is defined in the Criminal Code at section 100.1 as (emphasis added) an action or threat of action where:
 - (a) the action falls within subsection (2) and does not fall within subsection (3); and
 - (b) the action is done or the threat is made with the **intention of advancing a political, religious or ideological cause**; and
 - (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

As a result, the laws remain flexible and adaptive to address new and emerging motivations for terrorism activity.

Development of the Act and consultation

9. The department commenced work on the measures in the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill (the Bill) in October 2022. In developing these measures, the department conducted extensive consultation across the Australian Government and engaged with states, territories and community stakeholders.

10. The department consulted with the AFP; the ASIO; the Commonwealth Director of Public Prosecutions; and the Departments of Defence; Foreign Affairs and Trade; Home Affairs; Infrastructure, Transport, Regional Development, Communications and the Arts; and Prime Minister and Cabinet on the Bill. The department also consulted states and territories on the proposed measures through the Legal Issues Working Group of the Australia-New Zealand Counter-Terrorism Committee.
11. As required under the 2004 Intergovernmental Agreement on Counter-Terrorism Laws¹, the Prime Minister wrote to state and territory First Ministers to secure approval of the proposed amendments to Division 102 of the Criminal Code relating to terrorist organisation listings. As required by the Intergovernmental Agreement, a majority of jurisdictions approved these amendments prior to introduction.
12. The Attorney-General and the department also consulted a number of religious peak bodies in relation to the proposed offences for the public display and trade of prohibited Nazi and terrorist organisation symbols. The department acknowledges the important feedback provided by the Executive Council of Australian Jewry, the Australian Catholic Bishops Conference, the Australian Muslim Advocacy Network (AMAN), the Hindu Council of Australia, and Buddhist Council of New South Wales. These consultations informed the development of the Bill.
13. The Bill was introduced into the Parliament on 14 June 2023 and subsequently referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for review and report on 21 June 2023. The PJCIS received 151 submissions, held a public hearing on 1 September 2023, and reported on 15 November 2023.
14. In response to the Committee's report, the Government introduced amendments to the Bill on 28 November 2023 to implement all its recommendations, except recommendation 2. The amendments:
 - removed the Islamic State flag from the definition of prohibited symbol in section 80.2E of the Bill
 - created new offences for the public display and trade of symbols that a terrorist organisation, or members of a terrorist organisation, use to identify the organisation
 - extended the journalistic purpose exemption in subsection 80.2J(5) to ensure that news reports containing prohibited symbols made by not only professional journalists, but also other professionals involved in the news and current affairs process, can be lawfully traded
 - expanded the journalistic purpose exemptions in paragraph 80.2H(9)(b), paragraph 80.2M(3)(b) and paragraph 474.45D(1)(e) to include editors, producers and others involved in the news and current affairs reporting process
 - clarified that any report made by the PJCIS in respect of terrorist organisation listings under the Criminal Code must be solely presented to the Parliament, and
 - expanded the public display offences to criminalise the public performance of the Nazi salute.
15. Following passage of the Bill on 6 December 2023 and Royal Assent on 11 December 2023:

¹ Council of Australian Governments, *Intergovernmental Agreement on Counter-Terrorism Laws* (25 June 2004).

- Schedules 1 (Prohibited symbols and Nazi salute) and 2 (Use of carriage service for violent extremist material) commenced on 8 January 2024.
- Schedule 3 item 1 (advocating terrorism penalty) commenced on 12 December 2023.
- Schedule 3 item 2 (definition of advocates) commenced on 8 January 2024
- Schedule 4 (Terrorist organisation regulations) commenced by proclamation on 5 February 2024.

Part 2: Details of measures in the Act

Prohibited symbols and Nazi salute offences

16. The Act created new criminal offences in the Criminal Code for publicly displaying a prohibited Nazi or terrorist organisation symbol (sections 80.2H and 80.2HA), publicly performing the Nazi salute (section 80.2H) and trading in goods depicting or containing a prohibited Nazi or terrorist organisation symbol (sections 80.2J and 80.2JA). Each of these offences carry a maximum penalty of 12 months' imprisonment.

Definitions

Prohibited Nazi symbols and Nazi salute

17. The Act defines a prohibited Nazi symbol as the Nazi hakenkreuz (or hooked cross), the Nazi double-sig rune (the Schutzstaffel insignia or SS bolts) or something that so nearly resembles the Nazi hakenkreuz or the Nazi double-sig rune that it is likely to be confused with, or mistaken for, one of those symbols (section 80.2E). The Nazi hakenkreuz and Nazi double-sig rune instil fear in the community including those with family who endured the Holocaust, and have recently been used to target other groups such as the LGBTIQ+ community.

18. The term 'Nazi salute' is not defined in the Act. The term is intended to refer to gestures which were used by the National Socialist German Workers' Party from 1920 to its dissolution in 1945. The Nazi salute generally involves raising a straight, right arm at an angle from the body. There were slight variations in how members of the Nationalist German Workers' Party performed the salute. The gesture is abhorrent and has no place in Australian society. It is intended that the court would have discretion to determine whether a gesture made was the Nazi salute, taking into account all of the circumstances of the case, including both the appearance of the gesture and the context in which it has been made. The Act does not provide a proscriptive definition of the Nazi salute in recognition that there may be variations in the way it may be performed.

19. These symbols and gesture are widely recognised as associated with Nazi Germany, and representative of the regime which persecuted and systematically murdered millions of Jews, people living with disability, people of colour, LGBTIQ+ people and other groups.

20. Given that the purpose of the new prohibited Nazi symbols offences is to criminalise the public display and trade of Nazi symbols, and the public performance of gestures, that incite hatred and vilify members of the Australian community, it is important that the prohibited Nazi symbols and gesture can be readily identified by ordinary members of the Australian public as being associated with Nazi ideology. The Nazi hakenkreuz, the Nazi double sig rune and the Nazi salute were selected as they are the most widely recognised Nazi hate symbols. As the selected Nazi symbols and gesture are widely recognised, they are also the most impactful in their ability to disseminate hateful views and vilify members of the community.

Prohibited terrorist organisation symbols

21. Violent extremists and terrorist organisations use symbols to signal their ideology to a wide-reaching audience, to recruit and inspire behaviours from like-minded individuals and to establish group belonging. These symbols are also used to propagate violent extremist views and hateful ideologies and vilify and incite violence against targeted groups, threatening social cohesion and the safety of the Australian community. The new offences in section 80.2HA and 80.2JA extend the condemnation of terrorist organisations, by demonstrating that there is no tolerance for terrorist organisation symbols in the community.

22. The Act does not specify particular terrorist organisation symbols, or particular terrorist organisations, for the purpose of the new offences. This is to ensure that the measures can respond to Australia's complex, challenging and changing threat environment by targeting terrorist organisation symbols, and the organisations they represent, as they arise and change over time. Safeguarding against terrorist organisations adopting new symbols in an attempt to avoid criminality is a key objective, as is ensuring that the symbols used by any new terrorist organisation that emerges in the future will be covered by these measures.

23. The Act provides that for the purpose of the definition of prohibited terrorist organisation symbol, 'terrorist organisation' has the meaning given to that term in Division 102 of the Criminal Code. This includes listed terrorist organisations and organisations which are directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act. This ensures that only symbols of organisations that are engaged in serious criminal conduct are captured by the offences.

24. The offences are intended to capture symbols that are inextricably linked with a terrorist organisation and are harmful because of their association with a terrorist organisation and the violent, hateful and discriminatory ideologies and activities that the organisation represents, espouses and engages in. The term 'symbol' is intended to be interpreted as a visual representation; for example, an image, emblem or icon. The offences capture symbols which are used to identify a terrorist organisation by the organisation itself or by its members, in a range of media, contexts and formats including, but not limited to, promotional or recruitment material, telecommunication exchanges between members, public statements or propaganda.

25. The Act also recognises that there may be some variations in the ways in which prohibited terrorist organisation symbols are depicted. The legislation is not intended to be so prescriptive in defining these symbols as to exclude variations from being captured by the provisions, where they would be recognised by the public as being prohibited terrorist organisation symbols, and engender public harm accordingly. This could include any figure, drawing, symbol, pattern or design substantially similar to a prohibited terrorist organisation symbol and capable of being reasonably recognised as a modified version of that symbol. This ensures that the offences capture circumstances in which an individual could seek to avoid criminal liability by slightly altering a prohibited terrorist organisation symbol before engaging in otherwise prohibited conduct.

26. Unlike the prohibited Nazi symbols offences, the prohibited terrorist organisation symbols offences require the prosecution to prove the person knew the symbol was a prohibited terrorist organisation symbol. As terrorist organisations have co-opted symbols that are also utilised for legitimate purposes in other contexts, it is conceivable that an individual may cause such a symbol to be displayed in a public place, wholly unaware that the symbol is used by a terrorist organisation to identify itself or that the organisation that uses the symbol is a terrorist organisation. The requirement to prove that the person knew the symbol was a terrorist organisation symbol provides an important safeguard.

Public display of prohibited symbols offences

27. The public display offences are designed to prevent the harassment and vilification of innocent Australians whose communities are targeted by neo-Nazi and terrorist organisation supporters in person and online. These offences only capture public display and public performance. Public display or performance is intended to capture display or performance capable of being seen by a member of the public, including online. The intention of the offences is to criminalise the display of prohibited symbols, and the performance of the Nazi salute, in circumstances where their display or performance 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, and the Nazi salute is given, in public places. The offences do not apply to the display of prohibited symbols in private or the giving of the Nazi salute in private.

28. The Act requires the prosecution to establish that one of subsections 80.2H(3), (4) or (7) (in relation to prohibited Nazi symbols and the Nazi salute) or 80.2HA(3), (4) or (7) (in relation to prohibited terrorist organisation symbols) apply, for the public display offences to be made out.

- Subsections 80.2H(3) or 80.2HA(3) apply if a reasonable person considers that the public display of a prohibited symbol, or public performance of the Nazi salute, involves the dissemination of ideas based on racial superiority or hatred; or could incite another person or group of persons to offend, insult, humiliate or intimidate a person or members of a group because of race.
- Subsections 80.2H(4) or 80.2HA(4) apply if a reasonable person considers that the public display of a prohibited symbol, or public performance of the Nazi salute, involves advocacy that is advocacy of hatred of a group of persons distinguished by race, religion or nationality or a member of the targeted group, and constitutes incitement of another person or group of persons to offend, insult, humiliate, intimidate or use force or violence against the group or a member of the targeted group.
- Subsections 80.2H(7) or 80.2HA(7) apply if the public display of a prohibited symbol, or public performance of the Nazi salute, is likely to offend, insult, humiliate or intimidate a reasonable person who is a member of a group of persons distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin.

29. These requirements give direct effect to Australia's obligations under Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, and Articles 20 and Article 26 of the International Covenant on Civil and Political Rights.

30. The effect of the reasonable person test in subsections 80.2H(3), (4) and (7) and 80.2HA(3), (4) and (7) is that it is not necessary for the prosecution to prove that the public display of the prohibited symbol, or public performance of the Nazi salute, actually involved the dissemination of ideas or incitement or advocacy of hatred, or that the conduct actually offended, insulted, humiliated or intimidated a person because of their membership of a distinguished group. It is sufficient for the prosecution to establish that a reasonable person would consider the conduct would have that effect. This recognises that one of the purposes of the offences is to prevent harms of this kind. It also signals that these harms are likely outcomes of the public display of prohibited symbols, or the public performance of the Nazi salute, due to the ideologies these symbols and gesture are widely recognised as representing.
31. Importantly, the offences do not apply to legitimate uses of prohibited symbols that are not contrary to the public interest. Information about the protections and defences available under the Act is set out below.
32. These measures are intended to complement the efforts of state and territory governments who have legislated, or have committed to legislating, the prohibition of symbols and/or gestures associated with violent extremism.

Directions power

33. The Act provides police officers with the power to issue a direction (in accordance with section 80.2L), requiring a person to remove a prohibited symbol from public display (section 80.2K). This power is intended to limit the time for which a prohibited symbol is displayed in a public place, and therefore minimise the harm caused by the display.
34. A police officer may only give a direction if they suspect on reasonable grounds that the public display involves the dissemination of ideas, incitement or advocacy of hatred as set out in section 80.2K. The requirement for a police officer to have a reasonable suspicion is designed to ensure that the powers are not erroneously exercised, and that a police officer undertakes an appropriate assessment before giving a direction. The Act is intentionally not prescriptive as to what a reasonable suspicion is, as this would depend on the circumstances in which the public display takes place.
35. Section 80.2L sets out a number of requirements for how a direction is to be given. The police officer may give a direction, either orally or in writing, if the person either caused the symbol to be displayed in a public place, is the owner or occupier of land at which the symbol is displayed, or is the owner of an aircraft, vehicle or vessel from which the symbol is displayed (paragraph 80.2L(2)(a)). There must also be steps that a person can take to cause a symbol to cease being displayed (paragraph 80.2L(2)(b)). A direction must specify the time by which the prohibited symbol must cease to be displayed, and this time must be reasonable (subsection 80.2K(8)).
36. The Act established an offence for failing to comply with such a direction in the specified time (subsection 80.2M(1)). The purpose of the offence is to incentivise compliance with directions given by police officers in recognition of the harm that public display of prohibited symbols causes to the community. A person who commits an offence is liable for a maximum penalty of 20 penalty units (subsection 80.2M(1)).
37. The Act contains defences to the offence in subsection 80.2M(1), which recognise that if the conduct that caused a prohibited symbol to be displayed in a public place does not constitute an offence in subsection 80.2H(1), or if the conduct meets the criteria for one of the defences to the offence, the symbol should not need to be removed from display.

Offences for trading of symbols bearing a prohibited Nazi or terrorist organisation symbol

38. The offences in sections 80.2J and 80.2JA target profiting, including selling, renting or leasing, of goods depicting or containing prohibited Nazi and terrorist organisation symbols. The intention of the offences is to prevent the further dissemination of the hateful and violent ideologies that these symbols represent, and to stop the continuation of an economy which allows for profiting from extremist and hateful ideologies. The offences do not apply to the private ownership of goods that bear such symbols.

39. The Act requires the prosecution to prove that:

- The person intentionally trades in goods (paragraphs 80.2J(1)(a), 80.2JA(1)(a)).
- The person is reckless as to the fact that the goods depict or contain a prohibited symbol (paragraphs 80.2J(1)(b), 80.2JA(1)(b)).
- The person knows, or is reckless as to whether, the prohibited symbol is associated with Nazi ideology; or knows that the symbol is a prohibited terrorist organisation symbol (paragraphs 80.2J(1)(c), 80.2JA(1)(c)). The requirement that a person knows the prohibited symbol is a prohibited terrorist organisation symbol provides a safeguard against prosecution where an offence has been committed unintentionally. This recognises that terrorist organisations have co-opted symbols that are also used for legitimate purposes in other contexts, therefore an individual could cause such a symbol to be displayed in a public place, unaware that the symbol is used by a terrorist organisation.
- The trading of the symbol meets one or more of the jurisdictional requirements set out in subsection 80.2J(3) (paragraphs 80.2J(1)(d), 80.2JA(1)(d)). These reflect that the Commonwealth's power to legislate in relation to the trading in goods is restricted by the Constitution.
- Subsections 80.2J(4) and (5) do not apply (paragraphs 80.2J(1)(e), 80.2JA(1)(e)). See 'Protections for the legitimate use of prohibited symbols' below for further detail.

40. Importantly, the offences do not apply to legitimate uses of prohibited symbols that are not contrary to the public interest. Information about the protections and defences available under the Act is set out below.

Discussion of key points

Protection of the rights of faith communities

41. The Act protects the rights of faith communities to practice their religions free from fear and vilification by:

- Criminalising the public display and trading of the Nazi hakenkreuz and Nazi double-sig rune, and the public performance of Nazi salute, which have been used to incite and glorify atrocities against Jewish people and members of other faith communities since World War II.
- Criminalising the public display and trading of symbols by terrorist organisations and their members to further hateful and violent ideologies, where those symbols have been misappropriated by these organisations, and otherwise hold specific significance in faith communities.

42. The Act also protects the rights of faith communities to practice their faith and to use sacred symbols in connection with religious observance by:

- Requiring the prosecution to prove that a reasonable person would consider that the conduct was not engaged in for a genuine religious purpose and is contrary to the public interest. A religious purpose would include, for example, the public display or trade of the sacred swastika, recognising its immense significance to Buddhist, Hindu, Jain and other faith communities.
- Referring to the Nazi hakenkreuz as a 'hakenkreuz' rather than 'swastika', recognising that the sacred swastika is an ancient symbol of peace and good fortune that was misappropriated by the Third Reich.
- Requiring the prosecution to prove the person knows the symbol is a terrorist organisation symbol. This recognises that terrorist organisations have co-opted symbols that are also utilised for legitimate religious practice, and ensures that the latter is not captured by the offences.

43. In the course of developing the legislation, the Attorney-General and the department met with a number of peak bodies representing faith communities to discuss the proposed measures. The feedback received during these consultations informed the way these provisions have been framed.

44. The religious purpose exemptions are intended to send a strong message to religious groups, courts and the public that the genuine use of an otherwise prohibited symbol (or a symbol that closely resembles one), by a religious group for religious reasons is not intended to be captured by the offences. The public display of a prohibited symbol would additionally need to satisfy the requirements in one of subsections 80.2H(3), (4) and (7) or 80.2HA(3), (4) and (7) (inciting offence, insult, humiliation, intimidation; advocacy of hatred) in order to constitute an offence, which is unlikely to be the case when used as part of religious observance.

Protections for legitimate uses of prohibited symbols

45. The Acts contains a range of protections and defences that apply to the public display and trading offences (subsections 80.2H(9)-(10), 80.2HA(9)-(10), 80.2J(4)-(8) and 80.2JA(4)-(8)). These appropriately limit the scope of the offences by ensuring that circumstances in which the public display and trade of prohibited symbols, and public performance of the Nazi salute, is legitimate and not contrary to the public interest, are not captured.

46. To establish the offence, the prosecution must demonstrate that a reasonable person would consider that the conduct was not engaged in:

- For a religious, academic, educational, artistic, literary or scientific purpose that is not contrary to the public interest (paragraphs 80.2H(9)(a) and 80.2HA(9)(a) and subsections 80.2J(4) and 80.2JA(4)). An artistic purpose could include, for example, the trade of commercial movies and TV shows depicting prohibited symbols. The educational and academic exemptions have been included to ensure the continuation of education about World War II and terrorist organisations. The public interest requirement safeguards against individuals using a legitimate purpose as a front for a harmful one – for example, publicly displaying a terrorist organisation symbol for the purposes of 'educating' young people about the merits of committing a terrorist attack.

- For the purposes of making a news report, or current affairs report that is in the public interest, and made by a journalist, editor, producer or other person involved in the process of making news or current affairs reports (paragraphs 80.2H(9)(b) 80.2HA(9)(b); and for disseminating a news or current affairs report made in a journalistic capacity which depict or contain a prohibited symbol (subsections 80.2J(5) and 80.2JA(5)). These provisions recognise the critical role dissemination of information and news plays in our democratic society and the importance of protecting the work of a range of professionals involved in the news and current affairs process.

47. The reasonable person test ensures that a defendant could not avoid criminal liability by simply asserting that the public display or trade was done for a specified purpose.

48. Defences are available where a person engaged in public display or trading for the purposes of enforcing a law; or carrying out or supporting the fulfilment of a public official's duties or functions (paragraphs 80.2H(10)(d), 80.2HA(10)(d) and subsections 80.2J(8) and 80.2JA(8)). Defences are also available where a public display was done to support proceedings in a court or tribunal; and where the trade was done to assist with the administration of justice (subsections 80.2H(10), 80.2HA(10), 80.2J(6) and 80.2J(6)). These defences are designed to ensure the offences do not compromise law enforcement or court proceedings.

49. There is an additional defence to the trading offences that applies in circumstances where the goods being traded in contain commentary on public affairs. This defence requires that each prohibited symbol that the goods depict or contain appears in the commentary, and that making the commentary is in the public interest (subsections 80.2J(6) and 80.2JA(6)). This defence is an important safeguard to ensure robust political communication can continue in Australia, however appropriate limitations are included to prevent this provision being inappropriately used to excuse illegitimate trade.

50. There is also an additional defence for public display where the conduct was genuinely done for the purpose of opposing Nazi or terrorist ideology (paragraphs 80.2H(10)(f) and 80.2HA(10)(f)). This defence is intended to ensure that prohibited symbols and gestures can continue to be used and displayed for the purpose of opposing the harmful ideologies that they represent.

Trade of historical memorabilia by collectors and militaria dealers

51. The offences for trading prohibited Nazi or terrorist organisation symbols target profiting from items depicting or containing a prohibited symbol, including by selling, renting or leasing those items. The definition of 'trades' in section 80.2G also includes preparatory and ancillary conduct (for example preparing, transporting or possessing goods with intention of selling them) to provide comprehensive coverage of conduct that could lead to commercial profiting from goods depicting or containing a prohibited symbol. The Government did not accept the PJCS's recommendation to delay the commencement of these offences by 6 to 12 months as it would have been inconsistent with the policy intention of the legislation to prevent profiting from the trade of goods bearing symbols of hate. Noting the hateful and violent ideologies that the prohibited symbols represent, trading in goods which bear those symbols results in the further dissemination of these ideologies as well as the continuation of an economy which allows for profiting from extremism and hate. The ideologies that these symbols represent are fundamentally incompatible with Australia's democratic and multicultural society.

52. As a result, there are few instances in which the trade of goods depicting prohibited symbols would not be contrary to the public interest. Noting this, the Act provides targeted exemptions that cover circumstances in which the trade has been done for a legitimate purpose. This includes, but is not be limited to, a religious, academic, educational, artistic, literary or scientific purpose or public interest journalism. It will be a matter for the prosecution to prove beyond reasonable doubt that these exemptions do not apply. For example, a museum trading in Nazi artefacts which bear prohibited symbols in order to educate people about the atrocities of the Nazi party in World War II is not criminalised. Similarly, trading in history textbooks which serve an educational or literary purpose is not criminalised as these are important activities for our society.
53. The offences also do not apply if none of the jurisdictional elements in subsections 80.2J(3) or 80.2JA(3) apply or if the defendant can establish that one of the defences in subsections 80.2J(6)-(8) or 80.2JA(6)-(8) apply.

Use of carriage service for violent extremist material

Overview of measure

54. The Act established new offences for using a carriage service for violent extremist material (section 474.45B); and possessing or controlling violent extremist material that is obtained or accessed using a carriage service (section 474.45C).
55. These measures are intended to address the issue of extremists using the internet to recruit, spread propaganda and incite violence, including by increasingly targeting young people. Law enforcement was previously limited in its ability to prosecute people for dealing with violent extremist material. Prior to the enactment of the offences in sections 474.45B and 474.45C, while it was a crime to possess material that is connected with a terrorist act (for example, sections 101.4 to 101.6 of the Criminal Code) it was not a crime to deal with violent extremist material where, for example, planning or preparation for a terrorist act had not yet begun.
56. The new offences fill that gap by focussing on the nature of the material rather than the intentions of the person dealing with it. The new offences are designed to facilitate law enforcement intervention at an earlier stage in an individual's progress to violent radicalisation, and provide greater opportunities for rehabilitation and disruption of violent extremist networks.
57. Commonwealth counter-terrorism investigations often identify individuals viewing and sharing violent extremist material, which the AFP consider can be a precursor or catalyst for an escalation to violence, criminal offending or acts of terrorism. Such material can contribute to a person engaging in conduct consistent with violent ideologies, planning attacks and mobilisation of groups. For example, the broad dissemination of violent extremist material online allows groups to magnify their impact.
58. Violent extremist material includes material that describes, depicts, provides instruction on, supports or facilitates serious violence for the purpose of advancing an ideology and coercing or intimidating the Government or the public. Examples of material that may constitute violent extremist material include, but are not limited to, images and videos depicting terrorist incidents such as violent extremist manifestos and propaganda, including terrorist organisations' recruitment materials (for example violent images and videos such as beheadings, shootings, bombings and violent assaults linked to a terrorist organisation and/or its ideology); and instructional material covering topics such as how to build a bomb, conduct an attack, or manufacture harmful chemicals.

59. The offences carry a maximum penalty of 5 years' imprisonment. This reflects the principle in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide) that an offence should have a 'maximum penalty that is adequate to deter and punish a worst-case offence' (subheading 3.1.1). It is also appropriate noting the offence's deterrent and early intervention objectives, and it reflects the potential range of offending that may occur. The 5-year maximum penalty is proportionately lower than other offences that require a connection to a terrorist act and therefore attract higher penalties such as possessing things connected with terrorist acts (section 101.4 of the Criminal Code), and collecting or making documents likely to facilitate terrorist acts (section 101.5 of the Criminal Code).
60. A range of defences are available to ensure that legitimate uses of violent extremist material that are not contrary to the public interest are not captured (section 474.45D).

Discussion of key points

What constitutes violent extremist material?

61. The Act defines violent extremist material as material that satisfies the following requirements:

- The material describes or depicts serious violence; or provides instruction on engaging in serious violence; or supports or facilitates serious violence (paragraph 474.45A(1)(a)). 'Serious violence' is defined by reference to the physical element component of the definition of a terrorist act in the Criminal Code (subsection 100.1(2)).

This requirement ensures that violent extremist material only includes material that deals with conduct so serious as to engender public harm purely through its possession or distribution. This narrowly defined category of material also takes into account an individual's rights to communicate and consume material freely to ensure that these rights are not unreasonably restricted. Further, it ensures that the offences are fit for their primary purpose which is to prevent violent extremist networks from using this material to radicalise others to, or assist others to engage in, 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 (paragraph 474.45A(1)(b)). Violent extremist material is not intended to include material that advances causes that are not political, religious or ideological in nature. For example, causes that are purely scientific or philanthropic in nature would not be captured.
- A reasonable person would consider that, in all the circumstances, the material is intended to assist, encourage or induce a person to engage in, plan or prepare for an intimidatory act; do anything that relates to those activities; or join or associate with an organisation that is directly or indirectly engaged in those activities (paragraph 474.45A(1)(c)).

An 'intimidatory act' is a violent action or threat of violent action done or made, with the intention of coercing, or influencing by intimidation, the government of the Commonwealth or a state, territory or foreign country, or part thereof; or intimidating the public or a section of the public (subsection 474.45A(3)). This definition reflects that such actions are not a legitimate means of advocacy.

62. These requirements ensure that violent extremist material has an extremist character. Extremist material espouses or promotes extreme ideas, beliefs and attitudes and it may be used to radicalise others to a particular ideology. It may also support or inspire a person to take violent action.

Elements of the violent extremist material offences

63. For an offence under section 474.45B (using a carriage service for violent extremist material) to be made out, the prosecution must establish that the person:

- intended to access the material, or cause the material to be transmitted to the person, transmit, make available, publish, distribute, advertise, promote or solicit the material, or intentionally engages in any of those actions in relation to a link that can be used to access the material (paragraphs 474.45B(1)(a) and (2)(a));
- the person used a carriage service to do so (paragraph 474.45B(1)(b)); and
- the person was reckless that the material is violent extremist material (paragraphs 474.45B(1)(c) and (2)(b)).

64. For an offence under section 474.45C (possessing or controlling violent extremist material obtained or accessed using a carriage service) to be made out, the prosecution must establish that the person:

- intentionally has possession or control of the material (paragraph 474.45C(1)(a));
- the material is in the form of data held in a computer, or contained in a data storage device (paragraph 474.45C(1)(b));
- the person used a carriage service to obtain or access the material (paragraph 474.45C(1)(c)); and
- is reckless that the material is violent extremist material (paragraph 474.45C(1)(d)).

65. The fault element of 'recklessness' is attached to paragraphs 474.45B(1)(c) and 474.45C(1)(d) (the material is violent extremist material). '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)).

Protections for legitimate uses of violent extremist material

66. The offences include express defences (section 474.45D), to ensure the offences do not apply in certain circumstances, including, but not limited to where:

- The conduct is necessary to enforce or investigate compliance with a law (paragraphs 474.45D(1)(a) and (b)). This is intended to ensure that the offence does not compromise legitimate law enforcement procedures or operations. For example, it may be necessary for a person to maintain access to violent extremist material in a situation where access may assist in investigating the commission of an offence or having the material removed from an online platform.
- The material relates to a news or current affairs report that is in the public interest and is made by a person working in a professional journalistic capacity (paragraph 474.45D(1)(e)). 'Journalistic capacity' is defined in the Criminal Code Dictionary as a capacity as a journalist, editor, producer or other person involved in the process of making news reports or current affairs reports. This defence recognises the critical role that the dissemination of news plays in our democratic society, and the importance of protecting the work of range of professionals involved in the news and current affairs process.

- The conduct advocates changes to laws and is reasonable in the circumstances (paragraph 474.45D(1)(h)). This could include, for example, material published by a civil society body for the purpose of denouncing the laws, policy or practice that is perceived as contributing to the conduct recorded or streamed in that material.
- The conduct relates to the development, performance, exhibition or distribution, in good faith, of an artistic work (paragraph 474.45D(1)(i)). This could include, for example a still image recording of violent extremist material that is published as part of an online photography exhibition catalogue.

67. These defences are designed to ensure that the limitations which the offences place on the right to freedom of expression are proportionate.

68. The defendant bears the evidential burden in relation to these defences. In accordance with chapter 4.3 of the Guide, this is reasonable and appropriate as the information required to prove the existence of one of the prescribed defences would be peculiarly within the knowledge of the defendant, and not necessarily available to the prosecution. 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.

Reversal of burden of proof for section 474.45C offence (possessing or controlling violent extremist material)

69. Subsection 474.45C(5) establishes 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 has 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.

70. The purpose of this presumption is 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.

71. The defendant bears a legal burden of proof to rebut the presumption. In accordance with sections 13.4 and 13.5 of the Criminal Code, the defendant is required to discharge this burden on the balance of probabilities. The defendant is 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. For example, the defendant could produce evidence proving that they obtained or accessed the material from a portable data storage device that another person physically gave them.

Additional safeguard where the offender is a minor

72. The Act contains a requirement for the Attorney-General to consent to the prosecution of a person under the age of 18 for the new violent extremist material offences (section 474.45E). This allows the Attorney-General to consider the appropriateness of the prosecution in light of all the circumstances of the case, including the context of the conduct, the particular circumstances of the child, and the need to protect the broader community from the impacts of violent extremist material.

Advocating terrorism

Overview of measure

Increased penalty

73. The Act increased the maximum penalty for the offence of advocating terrorism in section 80.2C of the Criminal Code from 5 to 7 years' imprisonment. This more appropriately accounts for the potential severity of offending under section 80.2C.

74. The increase in penalty also reflects that advocating terrorism is an offence of equivalent seriousness with other offences in Division 80 which carry maximum penalties of 7 years' imprisonment. These offences include urging violence against the Constitution, urging violence against groups, and urging violence against members of groups.

75. The effect of paragraph 80.2C(1)(b) is that where a person is found guilty of advocating the commission of a terrorism offence referred to in subsection 80.2C(2), the maximum penalty is 7 years' imprisonment or the maximum term of imprisonment for the terrorism offence that the person had advocated, whichever is lesser. This recognises that there are terrorism offences captured by subsection 80.2C(2) for which the maximum penalty is lower than 7 years' imprisonment, and it would not be appropriate for a person to receive a higher penalty for advocating the commission of a terrorism offence than the penalty that they could receive if they committed the terrorism offence itself.

Expanded definition of 'advocates'

76. The AFP and ASIO have advised that the promotion and idealisation of extremist views is of increasing concern, particularly with respect to young people becoming radicalised online. Glorification of terrorists or terrorist acts, in certain circumstances, can incite others to imitate or seek to engage in similar behaviour, furthering radicalisation. Such behaviour amounts to a form of advocacy.

77. To address this issue, the Act repealed the previous definition of 'advocates' in subsection 80.2C(3) of the Criminal Code, and replaced it with a new definition that added two new activities to the list of conduct that may constitute advocating the doing of a terrorist act or the commission of a terrorism offence for the purpose of the offence at subsection 80.2C(1).

78. The previous list of conduct that constitutes advocating terrorism, that is, where a person counsels, promotes, encourages or urges the doing of a terrorist act or the commission of a terrorism offence, has also been retained (paragraph 80.2C(3)(a)).

79. The Act expanded the offence to include where a person provides instruction on the doing of the terrorist act or commission of a terrorism offence (paragraph 80.2C(3)(b)). The intention of adding an instruction limb was to capture a range of conduct by which a person could provide instruction, such as providing or distributing a guide or manual on how to carry out a terrorist act.
80. The expanded offence also includes 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 (paragraph 80.2C(3)(c)). The purpose of adding a praising limb was to recognise that conduct of this nature could lead a person to engage in a terrorist act or commission of an offence and, where there is a substantial risk it will have this effect, it is justifiable to apply criminal penalties.

Proscribing terrorist organisations

Overview of measure

Removal of sunseting requirements

81. The Act repealed subsection 102.1(3) from the Criminal Code, with the effect of removing the three yearly sunseting requirements from the regulations that list terrorist organisations. The Act also amended the Legislation (Exemptions and Other Matters) Regulation 2015 to exempt terrorist listings instruments from the default 10-year sunseting period contained in section 50 of the Legislation Act 2003.
82. As a result, terrorist organisations will remain proscribed as such unless otherwise removed from the list by the AFP Minister. This change applies to the 29 terrorist organisation listings in force.
83. The purpose of this amendment is to align the terrorist organisation listing framework with the current context of largely enduring terrorist organisations that pose ongoing threats to Australia's security. Many of the terrorist organisations currently listed have been re-listed multiple times.

Additional safeguards

84. Subsection 102.1(4) provides that the AFP Minister is required to de-list an organisation if they become aware that the legislative thresholds for listing are no longer met. Section 102.1(17) provides that any individual or organisation may apply to the Minister responsible for the AFP (the AFP Minister) to have an organisation de-listed as a terrorist organisation. This provision provides an ongoing opportunity to engage the AFP Minister's obligation to consider applications made requesting to de-list the organisation if no longer satisfied that the threshold is met. The Act strengthened this safeguard by imposing an obligation on the AFP Minister to consider the application as soon as practicable to further ensure that any listings are appropriate.
85. The AFP Minister is not obliged to consider de-listing applications in circumstances where an application concerning the particular listed organisation has been made in the previous 12 months. The intention of this provision is to guard against circumstances in which an individual or organisation repeatedly applies to the AFP Minister to de-list an organisation, despite the AFP Minister recently re-satisfying themselves of the thresholds being met. The provisions do not specify or restrict the method in which a de-listing application must be made to the AFP Minister.

86. The Act also introduced a requirement for de-listing instruments to specify the date on which the AFP Minister ceased to be satisfied that the thresholds were met, enabling the listing to cease from this date, rather than the date the de-listing instrument was made.
87. The Act expanded the ability of the Committee to review listings instruments by enabling the Committee to commence an own-motion review into listed terrorist organisations at any time. The intention of this measure is to enhance the Committee's independent review function in light of the removal of sunseting requirements. Any review by the Committee would be supported by evidence from the public service and intelligence agencies.
88. Instruments proscribing terrorist organisations would also continue to be subject to disallowance.

Part 3: Implementation

89. The department has provided guidance materials to the AFP to support the implementation of these measures. It includes particular guidance on matters such as the directions powers in relation to the removal of prohibited symbols from public display, and the protections and defences that play a critical role – both in relation to prohibited symbols and violent extremist material – in ensuring that these new offences are fit for purpose and do not unduly encroach upon individual's personal rights and freedoms. This guidance material has also been shared with states and territories. The AFP submission provides further information on implementation of the measures in the Act.