

EXPLANATORY STATEMENT

Issued by the authority of the Assistant Minister for Customs, Community Safety and Multicultural Affairs, Parliamentary Secretary to the Minister for Home Affairs

Customs Act 1901

Customs Legislation Amendment (Objectionable Goods) Regulations 2020

The *Customs Legislation Amendment (Objectionable Goods) Regulations 2020* (the Regulations) introduces a permit exemption for Australian police officers importing and exporting prohibited goods for law enforcement purposes. The Regulations also make consequential amendments to align the definitions associated with specific prohibited goods with other legislative amendments.

The *Customs Act 1901* (the Customs Act) is the legislative authority that sets out the customs requirements for the importation, and exportation, of goods to and from Australia.

Subsection 270(1) of the Customs Act provides, in part, that the Governor-General may make regulations not inconsistent with the Act prescribing all matters, which by the Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to the Act.

Section 112 of the Customs Act provides, in part, that the Governor-General may, by regulation, prohibit the exportation of goods from Australia and that the power may be exercised by prohibiting the exportation of goods absolutely or by prohibiting the exportation of goods unless specified conditions or restrictions are complied with.

Regulation 4A of the *Customs (Prohibited Imports) Regulations 1956* (the PI Regulations) and regulation 3 of the *Customs (Prohibited Exports) Regulations 1958* (the PE Regulations) prohibit the import and export of certain goods, for example offensive material or goods that advocate the doing of a terrorist act, unless permission has been granted. The Department of Infrastructure, Transport, Regional Development and Communications (Communications) manages the permit process for such goods. The Australian Border Force has the power to seize goods at the border where permission has not been granted.

The purpose of the Regulations is to amend the PI Regulations, the PE Regulations, and the *Customs Regulation 2015* (Customs Regulation) to:

- streamline the process through which Australian police officers can import and export objectionable goods in association with law enforcement activities;
- amend the definition of advocating the doing of a terrorist act in the regulatory regime relating to objectionable goods in the PI and PE Regulations; and
- update references to the definition of child abuse material in the Customs Regulation.

The majority of permit applications are made by police forces as part of active investigations or prosecutions relating to serious crimes, mostly child exploitation offences. The goods for

which permission is often sought are physical devices, such as a hard drive, CD or mobile phone that contain objectionable material. The permit process places an unnecessary administrative burden on Australian police forces and Communications. The Regulations create an exemption for Australian police force members who are required to import or export otherwise prohibited goods in their official capacity for the purposes of criminal investigation or law enforcement activity, including prosecutions. The importation of goods for these limited purposes do not require permission to be obtained from Communications.

Paragraphs 4A(1B)(c) of the PI Regulations and 3(2A)(c) of the PE Regulations establish that goods ‘advocate the doing of a terrorist act’ if they praise the doing of a terrorist act and there is a risk that such praise might lead a person to engage in a terrorist act. The Regulations amend this test such that there must be a ‘substantial risk’. Paragraphs 4A(1B)(a) of the PI Regulations and 3(2A)(a) of the PE Regulations also establish that goods advocate the doing of a terrorist act if they counsel or urge such acts. The Regulations amend these provisions to include goods that ‘promotes’ and ‘encourages’ such acts. These amendments align with section 9A of the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act), which deals with refused classification for publications, films or computer games that advocate the doing of a terrorist act.

Commonwealth Acts, including the Customs Act, previously distinguished between ‘child abuse material’ and ‘child pornography material’. The *Combating Child Exploitation Legislation Amendment Act 2019* (the Amendment Act) removed the definition of ‘child pornography’ in subsection 233BAB(3) of the Customs Act and instead included its terms in the definition of ‘child abuse material’. The Regulations amend the Customs Regulation to make similar amendments to the references to child pornography.

The Department consulted with Communications on the introduction of a permit exemption and to align the definition of goods that ‘advocate the doing of a terrorist act’ in the PI and PE Regulations with the Classification Act. The Australian Federal Police and state and territory police forces were consulted and support the permit exemption. No consultation was undertaken for the remaining amendment, which is consequential to the Amendment Act.

Details of the Regulations are set out in the **Attachment A**.

A Statement of Compatibility with Human Rights has been prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is at **Attachment B**.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 27 August 2020.

OPC64656 - B

Details of the Customs Legislation Amendment (Objectionable Goods) Regulations 2020

Section 1 – Name of Regulation

This section provides that the title of the Regulations is the *Customs Legislation Amendment (Objectionable Goods) Regulations 2020* (the Regulations).

Section 2 – Commencement

This section provides for the Regulations to commence on 27 August 2020.

Section 3 – Authority

This section provides that the Regulations are made under the *Customs Act 1901* (Customs Act).

Section 4 – Schedules

This section is a machinery clause that enables the Schedule to amend the *Customs (Prohibited Exports) Regulations 1958* (the PE Regulations), *Customs (Prohibited Imports) Regulations 1956* (the PI Regulations), and the *Customs Regulation 2015* (Customs Regulation).

Schedule 1 – Amendments

Customs (Prohibited Exports) Regulations 1958

Item 1 – Paragraph 3(2A)(a)

This item amends paragraph 3(2A)(a) by inserting the words ‘promote, encourage’ after the word ‘counsel’. This aligns the definition of advocating the doing of a terrorist act with paragraph 9A(2)(a) of the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act), which deals with refused classification for publications, films or computer games that advocate the doing of a terrorist act. This also makes the PE Regulations consistent with the existing definition under paragraph 102.1(1A)(a) of the Criminal Code to the *Criminal Code Act 1995* (the Criminal Code).

Item 2 – Paragraph 3(2A)(c)

This item inserts the word ‘substantial’ before the word ‘risk’ in paragraph 3(2A)(c). The inclusion of the word ‘substantial’ clarifies that the risk must be real and apparent on the evidence presented. This aligns with the existing definition of advocating the doing of a terrorist act under paragraph 9A(2)(c) of the Classification Act.

Item 3 – Subregulation 3(4)

This item repeals subregulation 3(4) and inserts a new subregulation that maintains the existing permit process and creates an exemption for Australian police officers exporting goods to which regulation 3 applies in their official capacity for the purposes of law enforcement or criminal investigation from having to obtain permission to export such goods.

Item 4 – In the appropriate position in Part 5

This item adds a transitional provision allowing for existing permits given to Australian police officers before the Regulations commence under current subregulation 3(4) to continue to have effect.

Customs (Prohibited Imports) Regulations 1956

Item 5 – Paragraph 4A(1B)(a)

This item amends paragraph 4A(1B)(a) by inserting the words ‘promote, encourage’ after the word ‘counsel’. This aligns the definition of advocating the doing of a terrorist act with paragraph 9A(2)(a) of the Classification Act, which deals with refused classification for publications, films or computer games that advocate the doing of a terrorist act. This also makes the PI Regulations consistent with the existing definition under paragraph 102.1(1A)(a) of the Criminal Code.

Item 6 – Paragraph 4A(1B)(c)

This item inserts the word ‘substantial’ before the word ‘risk’ in paragraph 4A(1B)(c). The inclusion of the word ‘substantial’ clarifies that the risk must be real and apparent on the evidence presented. This aligns with the existing definition of advocating the doing of a terrorist act under paragraph 9A(2)(c) of the Classification Act.

Item 7 – Subregulation 4A(2)

This item repeals subregulation 4A(2) and inserts a new subsection that maintains the existing permit process and creates an exemption for Australian police officers importing goods to which regulation 4A applies in their official capacity for the purposes of law enforcement or criminal investigation from having to obtain permission to import such goods.

Item 8 – After regulation 11

This item adds a transitional provision allowing for existing permits given to Australian police officers before the Regulations commence under current subregulation 4A(2) to continue to have effect.

Customs Regulations 2015

Item 9 – Section 4 (definition of *child pornography*)

This item repeals the definition of child pornography. This amendment is consequential to the amendments to the Customs Act. Section 4 of the Customs Regulation defines child abuse material and child pornography by referencing subsections s233BAB(4) and 233BAB(3) of the Customs Act, respectively. The *Combatting Child Exploitation Legislation Amendment Act 2019* amended section 233BAB of the Customs Act by removing references to ‘child pornography’. Subsection 233BAB(4) of the Customs Act contains the new definition of child abuse material that includes material previously covered by the definition of child pornography. The definition of child pornography in section 4 of the Customs Regulation is now redundant.

Item 10 – Section 131

This item repeals section 131 and replaces it with a provision that only identifies child abuse material as being a restricted good for the purposes of the definition in subsection 233BABAE(3) of the Customs Act. Section 131 currently refers to both items of child pornography and child abuse materials. As the definition of ‘child abuse material’ under the Customs Act now includes material previously covered by the definition of child pornography, the reference to child pornography under paragraph 131(a) of the Customs Regulation is now redundant.

Item 11 – Clause 3 of Schedule 7 (table items 3 and 7, column headed “Goods”, paragraph (b))

This item omits the words ‘child pornography or’ from items 3 and 7 in the table identifying Tier 2 goods in Clause 3 of Schedule 7 to the Regulation.

Sections 233BAB of the Customs Act contains criminal offences for unlawful importation or exportation of goods, which are prohibited imports or exports under the PI and PE Regulations. In order for the penalties to apply, the goods must also be prescribed by regulation as ‘tier 2’ goods. The Customs Regulation prescribes goods as ‘tier 2’ for the purposes of section 233BAB by listing in Schedule 7 to this Regulation. Items 3 and 7 of the table in clause 3 of Schedule 7 prescribe items of child pornography and child abuse material as tier 2 goods. As the definition of ‘child abuse material’ under the Customs Act now includes material previously covered by the definition of child pornography, the reference to child pornography as a tier 2 good in these items is now redundant.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Customs Legislation Amendment (Objectionable Goods) Regulations 2020

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Customs Legislation Amendment (Objectionable Goods) Regulations 2020* (the Regulations) amends the *Customs (Prohibited Imports) Regulations 1956* (the PI Regulations), the *Customs (Prohibited Exports) Regulations 1958* (the PE Regulations), and the *Customs Regulation 2015* (Customs Regulation) to:

- streamline the process through which Australian police officers can import and export objectionable goods in association with law enforcement activities;
- amend the definition of advocating the doing of a terrorist act in the regulatory regime relating to objectionable goods in the PI and PE Regulations; and
- update references to the definition of child abuse material in the Customs Regulation.

Regulation 4A of the PI Regulations and regulation 3 of the PE Regulations prohibit the import and export of certain goods, for example offensive material or goods that advocate the doing of a terrorist act, unless permission has been granted. The Department of Infrastructure, Transport, Regional Development and Communications (Communications) manages the permit process for such goods. The Australian Border Force has the power to seize goods at the border where permission to import or export has not been granted.

The vast majority of permit applications are made by Australian police forces as part of active investigations or prosecutions relating to serious crimes, mostly child exploitation offences. The goods for which permission is often sought are physical devices, such as a hard drive, CD or mobile phone that contain objectionable material. The permit process places an unnecessary administrative burden on Australian police forces and Communications. The Regulations create an exemption for Australian police force members who are required to import or export otherwise prohibited goods in their official capacity for the purposes of criminal investigation or law enforcement activity, including prosecutions. The importation of goods for these limited purposes would not require permission from Communications.

Paragraphs 4A(1B)(c) of the PI Regulations and 3(2A)(c) of the PE Regulations prescribe that goods ‘advocate the doing of a terrorist act’ if they praise the doing of a terrorist act and there is a risk that such praise might lead a person to engage in a terrorist act. The Regulations amend this test such that there must be a ‘substantial risk’. This aligns with

section 9A of the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act), which prescribes refused classification for publications, films or computer games that advocate the doing of a terrorist act.

Paragraphs 4A(1B)(a) of the PI Regulations and 3(2A)(a) of the PE Regulations prescribes that goods also advocate the doing of a terrorist act if they counsel or urge such acts. The Regulations amend these provisions to include material that ‘promotes’ and ‘encourages’ the doing of a terrorist act. This amendment aligns the PI and PE Regulations with section 9A of the Classification Act. This is consistent with the concept of ‘advocates the doing of a terrorist act’ in the Criminal Code to the *Criminal Code Act 1995* (the Criminal Code Act).

Commonwealth Acts, including the *Customs Act 1901* (the Customs Act), previously distinguished between ‘child abuse material’ and ‘child pornography material’. The *Combating Child Exploitation Legislation Amendment Act 2019* removed the definition of ‘child pornography’ in subsection 233BAB(3) of the Customs Act and instead included its terms in the definition of ‘child abuse material’. The Regulations amend the Customs Regulation to make the similar amendments to the references to child pornography.

Human rights implications

An outcome of this amendment is to exempt police from applying for a permit when importing or exporting objectionable material, including child exploitation material, for the purposes of law enforcement. This amendment may engage: Article 19(2) of the Convention on the Rights of the Child (CRC), specifically the responsibility that a country has to investigate instances of child maltreatment; and Article 34 to protect the child against all forms of sexual exploitation. This amendment supports the investigation of child maltreatment and the protection of the child against sexual exploitation by removing an unnecessary administrative burden on police forces conducting law enforcement activities and positively engages Articles 19(2) and 34 of the CRC

An outcome of this amendment is to make the concept of doing a terrorist act in the PI and PE Regulations consistent with the Classification Act and the Criminal Code Act.

The inclusion of the word ‘substantial’ clarifies that the risk must be real and apparent on the evidence presented. The amendment also ensures that a publication, film or computer game that directly or indirectly ‘promotes’ or ‘encourages’ (as well as ‘counsels’ or ‘urges’) the doing of a terrorist act and is classified Refused Classification (RC) under the Classification Act (and therefore cannot be published under state and territory classification enforcement laws), is prohibited from import or export.

This amendment may engage Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR). Article 19(2) provides that everyone has the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds through any media. However, Article 19(3) provides that the freedom of expression may be limited where the limitations are provided for by law and are necessary for the protection of national security. This restriction on free expression is justified on the basis that advocating

the commission of a terrorist act or terrorism offence is conduct which jeopardises the security of Australia, the personal safety of its population and its national security interests.

This amendment may also engage Article 20(2) of the ICCPR which sets out a requirement for laws to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Terrorist acts represent the gravest threats to the welfare of Australians as they include causing serious physical harm or death, damaging property, creating a serious risk to the health or safety of the public and interfering with electronic systems. Advocating terrorism heightens the probability of the commission of terrorism offences on Australian soil and encourages others to join the fight overseas. It is reasonable that such conduct should not be advocated and that reasonable steps should be taken to discourage behaviour that promotes such actions. Importantly, deterring the advocacy of such acts promotes the rights of others (in accordance with Article 19(3)(a)). In this instance, this may include protecting people's right to life as covered by Article 6 of the ICCPR.

This restriction on freedom of expression is a reasonable, necessary and proportionate measure to protect the public from terrorist acts. The requirement that the level of risk be 'substantial' ensures that the prohibition is a proportionate measure to protect the public from terrorist acts. Clarifying the threshold of risk required also assists the prohibition being reasonably applied.

The prohibition on the import of a good that 'promotes' or 'encourages' (as well as 'counsels' or 'urges') the doing of a terrorist act does not disproportionately limit freedom of expression. Accordingly, the limitation on the freedom of expression is reasonable, necessary and proportionate. Article 20(2) also supports the expanded definition of advocating a terrorist act and the prohibition of such advocacy.

An outcome of this amendment is to remove the definition of child pornography. This definition was redundant, and as such, removing it does not engage human rights.

Conclusion

The Legislative Instrument is compatible with human rights because to the extent that the Legislative Instrument engages Articles 19(2) and 34 of the CRC, the amendment supports the protection of human rights.

The Legislative Instrument is compatible with human rights because to the extent that the Legislative Instrument engages Article 19(2) of the ICCPR, the limitation is reasonable necessary and proportionate and consistent with the permissible limitations set out under Article 19(3). To the extent the Legislative Instrument engages Article 20(2) and Article 6 of the ICCPR, the amendment supports human rights.

The Hon Jason Wood MP, Assistant Minister for Customs, Community Safety and Multicultural Affairs, Parliamentary Secretary to the Minister for Home Affairs.