

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Broadcasting Services Act 1992

Broadcasting Services (Anti-terrorism Requirements for Television Narrowcasting Services) Standard 2021

Authority

The Australian Communications and Media Authority (ACMA) has determined the *Broadcasting Services (Anti-terrorism Requirements for Television Narrowcasting Services) Standard 2021 (the 2021 Standard)* under subsection 125(2) of the *Broadcasting Services Act 1992 (the BSA)*.

The 2021 Standard replaces the *Broadcasting Services (Anti-terrorism Requirements for Subscription Television Narrowcasting Services) Standard 2011* and the *Broadcasting Services (Anti-terrorism Requirements for Open Narrowcasting Television Services) Standard 2011 (the 2011 Standards)*. The main variation to the 2011 Standards is their consolidation into a single standard.

Intended impact and effect of the Standard

The ACMA intends the 2021 Standard to maintain community safeguards by imposing restrictions on the broadcast of certain terrorist-related material by providers of subscription television narrowcasting services and open narrowcasting television services.

Under the 2021 Standard, licensees cannot broadcast a program that:

- advocates the doing of a terrorist act;
- would be reasonably understood as directly recruiting a person to join, or participate in the activities of, a listed terrorist;
- would be reasonably understood as soliciting funds for a listed terrorist, or assisting in the collection or provision of funds for a listed terrorist.

The 2021 Standard (like the 2011 Standards which it replaces) holds a licensee responsible for what they broadcast, even if they claim they were unaware of the content of the program. This is to encourage licensees to set up effective systems for checking programs before they are broadcast. Licensees are fundamentally accountable for what they broadcast and may not evade the prohibitions in the Standard by failing to make themselves aware of the material that they broadcast.

Subsection 139(6) of the BSA, provides that a person commits an offence if in providing a subscription narrowcasting service or an open narrowcasting service, the person engages in conduct that breaches a condition set out in subclause 11(1) of Schedule 2 to the BSA. The conditions in subclause 11(1) include complying with program standards applicable to the licence under Part 9 (see paragraph 11(1)(b) of Schedule 2).

Subsection 140A(6) also provides that a person who provides a subscription narrowcasting service or an open narrowcasting service must not breach a condition

set out in subclause 11(1) of Schedule 2. Subsection 141A(6) is a civil penalty provision.

Parliament has prescribed that the maximum penalty for an offence, and the maximum civil penalty, is in each case 50 penalty units.

The 2021 Standard does not remove the need for licensees to comply with other anti-terrorism laws, such as those contained in the *Criminal Code Act 1995*.

A provision-by-provision description of the 2021 Standard is set out in the notes at **Attachment A**.

The 2021 Standard is a disallowable legislative instrument for the purposes of the *Legislation Act 2003 (the LA)*.

Documents incorporated by reference

The 2021 Standard incorporates by reference the following Acts:

- the BSA;
- the *Criminal Code Act 1995*;
- the *Charter of the United Nations Act 1945*.

The 2021 Standard incorporates those Acts as in force from time to time.

The Acts listed above can be accessed, free of charge, from the Federal Register of Legislation: <http://www.legislation.gov.au>.

The 2021 Standard incorporates by reference the *Gazette* which can be accessed, free of charge, from the Federal Register of Legislation: <http://www.legislation.gov.au>.

Consultation

Before the 2021 Standard was made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA and section 126 of the BSA.

On 9 June 2021, the ACMA published (on its website) the details of a proposal to consolidate the 2011 Standards in a single standard and make minor drafting changes. The proposal was necessary because the 2011 Standards were due to “sunset” under the relevant provisions of the LA on 1 October 2021. Public comment was invited on the proposal, with a closing date of 21 July 2021.

The ACMA received one submission from the Australian Subscription Television and Radio Association. The ACMA also consulted with relevant Commonwealth government agencies on the proposal. No changes to the draft standard were necessary as a result of that consultation process.

Regulatory impact assessment

A preliminary assessment of the proposal to make the Standard was conducted by the Office of Best Practice Regulation (**OBPR**), based on information provided by the

ACMA, for the purposes of determining whether a Regulation Impact Statement (**RIS**) would be required. OBPR advised that the preliminary assessment shows the regulation is operating effectively and efficiently and since the 2021 Standard will be made without significant amendments, it may be certified without a RIS (OBPR reference number: 44109).

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out in **Attachment B** has been prepared to meet that requirement.

Notes to the *Broadcasting Services (Anti-terrorism Requirements for Television Narrowcasting Services) Standard 2021*

Part 1 Preliminary

Section 1 Name of instrument

Section 1 provides that the name of the instrument is the *Broadcasting Services (Anti-terrorism Requirements for Television Narrowcasting Services) Standard 2021*.

Section 2 Commencement

Section 2 provides that the Standard will commence on the day after the day it is registered.

Section 3 Authority

This section identifies the provision that authorises the making of the Standard, namely subsection 125(2) of the *Broadcasting Services Act 1992*.

Section 4 Repeals

Section 4 provides that the *Broadcasting Services (Anti-terrorism Requirements for Subscription Television Narrowcasting Services) Standard 2011* and the *Broadcasting Services (Anti-terrorism Requirements for Open Narrowcasting Television Services) Standard 2011* are repealed.

Section 5 Definitions and interpretation

Section 5 defines some key terms used throughout the Standard.

Section 6 References to other instruments

This section provides that in the Standard, unless the contrary intention appears:

- a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- a reference to any other kind of instrument is a reference to that other instrument as in force at the commencement of the Standard.

Part 2 Introduction

Section 7 Object of standard

Section 7 sets out the object of the Standard, namely to prevent the broadcasting of programs that advocate the doing of a terrorist act, or encourage people to join or finance listed terrorists.

The Standard maintains community safeguards by prohibiting the broadcast of material that attempts to incite the doing of a terrorist act.

Section 8 Application

Section 8 specifies that the Standard will apply to persons who provide a subscription television narrowcasting service under a class licence determined under paragraph 117(c) of the BSA or an open narrowcasting television service under a class licence determined under paragraph 117(e) of the BSA.

Part 3 Anti-terrorism Requirements

Section 9 Recruiting for a listed terrorist

Section 9 of the Standard prohibits a licensee from broadcasting a program which would be reasonably understood as directly recruiting a person to join, or participate in the activities of, a listed terrorist.

For the purposes of the Standard, the term ‘recruit’ is defined in section 5. This definition includes to induce, incite and encourage.

The emphasis in section 9 is on programs that *directly* recruit a person to join or participate. In assessing programs prior to their broadcast in Australia, a licensee should have regard to such matters as whether the program:

- provides contact details of a listed terrorist;
- informs viewers of meeting times and places;
- refers viewers to training material and other information that could be used to prepare for participation in the activities of a listed terrorist.

A licensee will be in breach of this section regardless of whether it knew the program could be reasonably understood as recruiting for membership or participation in a listed terrorist.

Section 10 Financing terrorism

Section 10 of the Standard prohibits a licensee from broadcasting a program that would be reasonably understood as soliciting funds for a listed terrorist, or assisting in the collection or provision of funds for a listed terrorist.

The Standard defines ‘listed terrorist’ in section 5 as:

- (a) a listed terrorist organisation within the meaning of the *Criminal Code*; or
- (b) a proscribed person or entity listed in the *Gazette* by the Minister for Foreign Affairs pursuant to section 15 of the *Charter of the United Nations Act 1945*.

The list of terrorist organisations under the *Criminal Code* is available online at www.nationalsecurity.gov.au. Information about proscribed persons and entities designated as such by the Minister for Foreign Affairs is available from the DFAT website (www.dfat.gov.au).

A licensee will be in breach of this section regardless of whether it knew the program would be reasonably understood as soliciting funds for a listed terrorist, or assisting in the collection or provision of funds for a listed terrorist.

Section 11 Advocating the doing of a terrorist act

Section 11 of the Standard prohibits a licensee from broadcasting a program that advocates the doing of a terrorist act.

Under this section, a program advocates the doing of a terrorist act if it directly or indirectly counsels, promotes, encourages or urges the doing of a terrorist act or provides instruction on the doing of a terrorist act. The provision also prohibits directly praising the doing of a terrorist act in circumstances where there is a substantial risk that the praise might lead a person (regardless of their age or of any mental impairment) to engage in a terrorist act. Paragraph 11(3)(a) has been expanded to prohibit programs that ‘promote’ or ‘encourage’ the doing of a terrorist act, in alignment with paragraph 102.1(1A)(a) of the *Criminal Code*.

Section 5 of the Standard defines ‘terrorist act’ to have the meaning given by section 100.1 of the *Criminal Code*. That definition covers actions or threats of action.

A licensee will be in breach of this section regardless of whether it knew the program advocates the doing of a terrorist act.

Subsection 11(4) provides that a depiction or description of a terrorist act will not contravene subsection 11(1) if it could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire.

Section 12 Programs of political opinion not affected

Section 12 provides that the Standard does not prohibit broadcasts of informative program content (for example, news, current affairs and documentary programs) that merely informs viewers about the activities, beliefs or opinions of a listed terrorist.

Section 13 Bona fide reports and comments not affected

Section 13 enables a licensee to broadcast an excerpt of a program which would otherwise be prohibited by section 9, 10 or 11 of the Standard if:

- the excerpt is part of a news report, current affairs program, documentary or other program; and
- the excerpt is included as part of a bona fide report or comment on a matter of public interest.

This section provides a limited exception for the broadcast of material that would otherwise be prohibited by sections 9, 10 or 11.

Statement of Compatibility with Human Rights

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

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This disallowable 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 Instrument

The *Broadcasting Services (Anti-terrorism Requirements for Television Narrowcasting Services) Standard 2021 (the Standard)* is made under subsection 125(2) of the *Broadcasting Services Act 1992 (the BSA)*. The Standard repeals the *Broadcasting Services (Anti-terrorism Requirements for Subscription Television Narrowcasting Services) Standard 2011* and the *Broadcasting Services (Anti-terrorism Requirements for Open Narrowcasting Television Services) Standard 2011*, which were both due to sunset on 1 October 2021, and remakes these in a single consolidated standard.

The Standard aims to prevent the broadcast of terrorist material on open and subscription narrowcast television services. These services cater to specialised or niche areas of interest and generally have relatively small audiences.

Under the Standard, licensees cannot broadcast a program that:

- advocates the doing of a terrorist act;
- would be reasonably understood as directly recruiting a person to join, or participate in the activities of, a listed terrorist;
- would be reasonably understood as soliciting funds for a listed terrorist, or assisting in the collection or provision of funds for a listed terrorist.

The Standard holds a licensee responsible for what they broadcast, even if they claim they were unaware of the content of the program. This is to encourage licensees to set up effective systems for checking programs before they are broadcast.

Under the BSA, compliance with the Standard is a licence condition for subscription and open narrowcasting television services (see Part 7 of Schedule 2 to the BSA).

The Standard does not remove the need for licensees to comply with other anti-terrorism laws, such as those contained in the *Criminal Code Act 1995*.

Human rights implications

The Standard engages the following rights:

Article 19 of the International Covenant on Civil and Political Rights provides that all persons have the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, through any media of the person's

choice. This Standard engages the right to freedom of expression to the extent that television narrowcasting services are not permitted to broadcast a program that: would be reasonably understood as directly recruiting a person to join, or participate in the activities of a listed terrorist (section 9); would be reasonably understood as soliciting funds or assisting in the collection or provision of funds for a listed terrorist (section 10); or that advocates the doing of a terrorist act (section 11).

Article 19(3) provides that the right to freedom of expression may be subject to restrictions for specified purposes provided in the right, including the protection of national security and public order, where such restrictions are provided by law (that is, set down in formal legislation or an equivalent unwritten norm of common law) and are necessary for attaining this purpose.

To the extent that the requirements in sections 9, 10 and 11 of the Standard limit the right to freedom of expression, this is a permissible limitation that is necessary for the protection of national security and public order, in that these provisions maintain community safeguards by imposing restrictions on the broadcast of terrorist-related material by providers of subscription television narrowcasting services and open narrowcasting television services. The potential harm to audiences or the broader community that could result from the broadcast of this type of material would indicate that regulatory protections on narrowcast television services are necessary for the protection of national security and public order.

Subsection 11(4), along with sections 12 and 13 of the Standard set out when the requirements in sections 9, 10 or 11 may not apply to a broadcast. Subsection 11(4) provides that a program does not advocate the doing of a terrorist act where it depicts or describes a terrorist act, but this is considered to be done merely as part of public discussion or debate or as entertainment or satire. Similarly, section 12 and 13 provide clarification that sections 9, 10 and 11 are not intended to affect programs of political opinion or prevent a licensee from broadcasting excerpts that are bona fide reports and comments.

Conclusion

The Standard is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.