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Submission to the Joint Parliamentary Committee on Law Enforcement

Inquiry into the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth)

ABOUT THE AUTHORS

Our qualifications, biographies and interests in this Inquiry are noted below.

We would be prepared to give oral evidence if that would be of assistance. We have an in press book chapter, not yet published, that comments on this Act. One of the editors of the collection has given us permission to utilise the content of that chapter]in this submission, and in any further written submissions, or, in any invited oral submissions.

Prof Mark Nolan (BSc(Hons)/LLB, MAsPacSt, PhD (ANU), SFHEA)

Professor Mark Nolan is an interdisciplinary legal scholar with qualifications in law, honours and doctoral training in social psychology, and a Masters of Asia Pacific Studies majoring in Thai language. Prior to becoming Director of the Centre for Law and Justice at CSU in April 2020, Mark worked at the ANU College of Law, The Australian National University, Canberra, since 2002. At ANU, Mark taught undergraduate and postgraduate students and researched in the area of criminal law and procedure, including codified Australian federal criminal law (such as counter-terrorism law, human trafficking, cybercrime, social security, and drug law), law and psychology, military discipline law (taught to Legal Officers in the ADF), Foundations of Australian Law, advocacy, and human rights law. Other research interests include citizenship law, social cohesion, human rights law, intergroup relations, stereotyping, prejudice, social justice theory, and sentencing law. Mark has made individual and joint submissions to parliamentary inquiries in the area of counter-terrorism law and federal criminal law since 9/11. Mark has also taught international students visiting ANU from University of Alabama (comparative counter-terrorism law and Survey of Australia Law courses).

Mark is currently the Editor-in Chief (April 2020-April 2023) of the ANZAPPL journal *Psychiatry, Psychology and Law*, and the Deputy Research Director for a new research group at Charles Sturt University, commencing in 2022, called the Contemporary Threats to Australian Security Research Group that will initially research ideologically-motivated extremism such as right-wing extremism and trade-based money laundering.

Dr Dominique Dalla-Pozza

Dominique Dalla-Pozza is a senior lecturer at the ANU College of Law working in the field of Australian Public Law. Her primary research deals with the Australian Parliament and the legislative process. She is particularly interested in the work done by parliamentary committees.

Dom's other field of interest is in National Security Law – her PhD focused on the process by which the Australian Parliament enacted counter-terrorism between 2001 and 2006.

Dom has presented her research overseas in London (2015) and in the US (2020) During 2020, Dom spent time researching issues relating to National Security law as an invited Visiting Researcher at the Center on National Security and Law at Georgetown University in Washington DC. She regularly presents on the Australian national security law framework as part of the professional development courses offered by the National Security College at The Australian National University.

A distinctive feature of the approach Dom takes to legislative process is her use of ideas drawn from deliberative democratic theory as a core theme in her work. One of her main aims as a researcher is to continue to bring together ideas from the disciplines of political science and law to provide a richer understanding of the law- making process. Dom is a member of the legal and broader research team investigating social cohesion.

TERMS OF REFERENCE ADDRESSED

We offer views relevant to the following Terms of Reference (**those in bold**):

Pursuant to subsection 7(1) of the *Parliamentary Joint Committee on Law Enforcement Act 2010*, the Committee will inquire into and report on the operation and effectiveness of Subdivision H of Division 474 of the Schedule to the *Criminal Code Act 1995* (Cth), with particular reference to:

> a) the effectiveness of the AVM Act in ensuring that persons who are internet service providers, or who provide content or hosting services, take timely action to remove or cease hosting abhorrent violent material when it can be accessed using their services; and/or,
>
> b) the effectiveness of the AVM Act in reducing the incidence of misuse of online platforms by perpetrators of violence;
>
> **c) the appropriateness of the roles and responsibilities of the eSafety Commissioner and Australian Federal Police under the AVM Act;**

d) **the appropriateness of the obligations placed on persons who are internet service providers, or who provide content or hosting services, under the AVM Act**;

e) the definition of abhorrent violent material under the AVM Act; and,

f) any related matter.

Under (f) any related matter, we would like to comment on:

- the appropriateness of the elements of criminal offences, especially the absence of subjective fault and use of presumptions of subjective fault, as created by the AWM Act;

- points made in the publication authored by Douek (2020): Douek, E. (2020). Australia's 'Abhorrent Violent Material' law: Shouting 'Nerd Harder' and Drowning Out Speech. *Australian Law Journal* 94, 41–60; and

- the possibility of activating the ability of the Parliamentary Joint Committee on Law Enforcement to report on AFP's use of the provisions in the AVM Act

Even though we are not as able to comment on some of the effectiveness Terms of Reference and role experiences that others can, including material not in the public domain about the rate of investigations, nature of prosecutorial decisions, and the like, we would like this Committee, in the absence of Committee review during the hasty parliamentary debates for the Bill (as noted by Nolan and Dalla-Pozza (in press), ''Clumsy and flawed in many respects':[1] Problems of process and substance with the *Criminal Code Amendment (Abhorrent Violent Material) Act 2019* (Cth)' [2] to appear in Leitch, S. & Pickering, P. (Eds.). (in press), *After Christchurch*. ANU Press.), to consider the choices made about elements of criminal offences, in particular.

SUBMISSIONS AND RECOMMENDATIONS

Definition of abhorrent violent material under the AVM Act; and,

The definition of AVM in s 474.31 of the *Criminal Code* (Cth) builds on the definition of abhorrent violent conduct in s 474.32 of the Code. One point to note is that the definition of "abhorrent violent conduct" (AVC), found in s. 474.32 of the *Criminal Code* (Cth), is broader than terrorist acts (as for example, in s. 100.1 of the *Criminal Code* (Cth)).

[1] This description of the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019 (Cth) can be found in Commonwealth *Parliamentary Debates*, House of Representatives, 4 April 2019, 1852 (Mark Dreyfus, Shadow Attorney-General).

[2] This chapter (which is in press) was initially developed and presented for the symposium *After Christchurch: Violent Extremism Online* hosted by the ANU Australian Studies Institute and held at ANU College of Law, Canberra, on 29 August 2019. A form of this paper was also presented at the Joint Conference of the Australian and New Zealand Association of Psychiatry, Psychology and Law and the Forensic Faculty of the Royal Australian and New Zealand College of Psychiatry, *Collaboration and Challenges Across the Global South* held in Singapore on 5–8 November 2019.

As a reminder, the AVC definition states:

474.32 Abhorrent violent conduct

(1) For the purposes of this Subdivision, a person engages in abhorrent violent conduct if the person:

(a) engages in a terrorist act; or

(b) murders another person; or

(c) attempts to murder another person; or

(d) tortures another person; or

(e) rapes another person; or

(f) kidnaps another person.

In that sense, this definition involved some potential intended or unintended expansion of the ambit of Commonwealth law. The definition can be engaged outside of the context of terrorist act perpetration and/or planning for them or promoting them after commission. In that way the AVM/AVC responded to much more than the risks seen in the Christchurch attack livestreaming alone (even though the events in Christchurch were an acknowledged trigger for the Act (see Nolan and Dalla-Pozza, in press). We encourage the Committee, at this stage, to examine the appropriateness of this net-widening beyond terrorism-related content and analyse if that breadth has caused problems.

The appropriateness of the roles and responsibilities of the eSafety Commissioner and Australian Federal Police under the AVM Act;

Those bearing the roles of determining if a person engages in abhorrent violent conduct according to the s 474.32 AVC definition have a challenge; to understand, if seems to be needed, the legal definitions of all offences/conduct listed in s 474.32 (1)(a)-(f). Unless what is meant here is to invoke lay definitions and not legal definitions of this conduct, relevant staff in the Office of the eSafety Commissioner must have to consult widely on the relevant legal definitions.

The appropriateness of the obligations placed on persons who are internet service providers, or who provide content or hosting services, under the AVM Act

The point made above relates to any burden also being placed on internet service providers or content and hosting service providers attempting risk and monitoring behaviour in response to potential legal liability created by the Act.

The appropriateness of the elements of criminal offences, especially the absence of subjective fault and presumptions about subjective fault, as created by the AWM Act;

There are a number of issues relating to the definition of criminal offences and defences that are worth re-examining at this time if they were to provide a bar to prosecution or thought to be inappropriate otherwise from the perspective of defendants. These include:

i. As indicated in Nolan and Dalla-Pozza (in press), there is no definition of reasonable time in the failure to notify offence (defined under s 474.33 of the *Criminal Code* (Cth)), even though the Explanatory Memorandum for the Bill suggested as follows:

> A 'reasonable time' is not defined. A number of factors and circumstances could indicate whether a person had referred details of

> abhorrent violent material within a reasonable time after becoming aware of the existence of the material. For example, the *type and volume of the material*, and the *capabilities of and resourcing available to the provider may be relevant factors*. In a prosecution for an offence against section 474.33, the determination of whether material was referred within a reasonable time will be a matter for the trier of fact (p. 19, paragraph [39], emphasis added).[3]

The Committee may wish to consider if the important information hidden in this Explanatory Memorandum discussion deserves to be in the Act or a related regulation.

ii. Even though the Attorney-General needs to give written consent for proceedings to commence relating to offences such as the failure to remove offence under s 474.34, there is no bar on making arrests prior to that consent being given (see s 474.42(3))).

There are clear operational and legal advantages here for police and prosecutors, though the Committee may wish to consider if that has or may cause issues for arrested persons depending on whether the informant was well informed. The requirement for consent from the Attorney-General can be for a range of international diplomatic reasons as well as other matters relating to harmony and social cohesion within Australia. An arrest alone can be as sensitive and provocative as a conviction, especially if bail is not granted.

iii. The failure to remove offence under s 474.34 of the *Criminal Code* (Cth) uses a term "expeditious" to describe the expected removal to avoid liability for this offence. Again, as pointed out in Nolan and Dalla-Pozza (in press) for the definition of reasonable time above, the definitional work, to the extent that exists, is done by the Explanatory Memorandum discussion, requiring statutory interpretation rules to bring this element into focus in a prosecution:

> 'Expeditious' is not defined and would be *determined by the trier of fact taking account of all of the circumstances in each case*. A number of factors and circumstances could indicate whether a person had ensured the expeditious removal of the material. For example, *the type and volume of the abhorrent violent material, or the capabilities of and resourcing available to the provider may be relevant factors* (p. 19, paragraph [51], emphasis added)[4].

This review may be a chance to reconsider, in light of any relevant experience to date, the need to consider if the important information hidden in this Explanatory Memorandum discussion deserves to be in the Act or a related regulation.

iv. The range of defences included in the Act are important to retain, as also suggested by Douek (2020), pp 53; 57.

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[3] Commonwealth. (2019) Explanatory memorandum to the Criminal Code Amendment (Abhorrent Violent Material) Bill 2019 (Cth). https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1201_ems_08b22f92-a323-4512-bf31-bc55aab31a81/upload_pdf/19081em.pdf;fileType=application%2Fpdf>

[4] Ibid.

v. The most troubling aspect of the offence elements definition is the ability for the subjective fault element of recklessness to be presumed as a result of inaction following issuance of the relevant notice by the eSafety Commissioner (see s 474.34(5)) rather than proved beyond a reasonable doubt via a standard approach under s 5.4(1) of the *Criminal Code* (Cth), or under Part 2.5 of the Code for a corporation. It is notable that the legislature neither elected to make the offences strict or absolute liability offences using the requirements of Chapter 2 of the *Criminal Code* (Cth). Instead, the offences appear to protect defendant by requiring proof of full subjective fault, only for that protection to be taken about by the presumption of fault provisions.

   The Committee may like to consider any implications this has had in known cases or investigative or prosecutorial decision-making, and the undue effect and disadvantage this could have for defendants expecting these offences to be full subjective fault offences due to the fault element of recklessness being explicitly included in offence definition. The Committee should consider if this style of drafting is appropriate for such important and high profile and sensitive prosecutions, especially of foreign corporations. The Committee could also consider if this approach has been taken in other legislation, how appropriate it is, and if that controversy is best avoided in this context and for the likely defendants who could be prosecuted with these offences.

Points made in the publication authored by Douek (2020): Douek, E. (2020). Australia's 'Abhorrent Violent Material' law: Shouting 'Nerd Harder' and Drowning Out Speech. *Australian Law Journal* 94, 41–60.

We endorse the points made in this publication and commend it to the Committee.

The possibility of activating the ability of the Parliamentary Joint Committee on Law Enforcement to report on AFP's use of the provisions in the AVM Act

It has proved relatively difficult to obtain up to date information about the extent to which the AVM provisions have been used. The Annual reports of the e-safety Commissioner do contain information about the number of notifications made under the provisions.[5] However, the AFP Annual report of 2020 makes no obvious reference to the extent to which the AFP had charged persons under the offences inserted by the *AVM Act*. [6]

It could be that the reason for this is that, no charges have been laid under the offence provisions inserted by the *AVM Act*. Nevertheless, given the controversial nature of these provisions, it would be useful for there to be increased reporting requirements around the use of these provisions.

One way increased transparency of this kind could be achieved would be for the Parliamentary Joint Committee on Law Enforcement (PJCLE) to recommend that data about the number of charges laid under these provisions be specifically reported on by the AFP in its Annual Report. We appreciate

[5] See, for example, Australian Communications and Media Authority, *Annual Report 2020- 2021* (2021) p 217 https://www.esafety.gov.au/sites/default/files/2021-10/ACMA%20and%20eSafety%20annual%20report%202020-21_0.pdf ; Australian Communications and Media Authority *Annual Reports 2019-2020* (2020) p 218 https://www.esafety.gov.au/sites/default/files/2020-10/ACMA%20and%20eSafety%20annual%20report%202019-20.pdf

[6] Australian Federal Police, *Annual Report 2019- 2020* (2020) < https://www.afp.gov.au/sites/default/files/PDF/Reports/02112020-afp-annual-report-2019-20.pdf>

that it may be an onerous undertaking for the AFP to disaggregate the data about how many charges have been laid under specific sections of the *Criminal Code*. Nevertheless, such data would provide the public with more information about the extent to which the provisions contained within the *AVM Act* have been used. As this committee may be aware, the most recent Annual Report of the Parliamentary Joint Committee on Intelligence and Security contains similar data relating to the AFP's use of the terrorism act offences contained within Part 5.3 of the *Criminal Code.*[7] We suggest that the PJCLE could recommend that this information be included in the Annual Report of the AFP.

[7] Parliamentary Joint Committee on Intelligence and Security *Annual Report of Committee Activities* (2021), pp 39-42 <
https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024714/toc_pdf/AnnualReportofCommitteeActivities2020-2021.pdf;fileType=application%2Fpdf>