



Australian Government
Attorney-General's Department

Attorney-General's Department

Parliamentary Joint Committee on Law Enforcement

*Review of the Criminal Code Amendment (Sharing of Abhorrent
Violent Material) Act 2019*

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Introduction

The Attorney-General's Department (AGD) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Law Enforcement (Committee) inquiry into the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (the AVM Act).

Section 474.45 of the schedule to the *Criminal Code Act 1995* (Cth) (Criminal Code) requires a review of the AVM Act to be conducted two years after its commencement, and for a report of that review to be given to the Attorney-General by 6 April 2022.

The Terms of Reference for the Committee's inquiry are to inquire into and report on the operation and effectiveness of the AVM Act, 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.

At the time the AVM Act was introduced, the Prime Minister also requested the following matters be addressed as part of the statutory review:

- enforcement of the provisions, particularly in respect of foreign companies who are located overseas and do not have subsidiary companies in Australia, and
- the scope of the provisions, and whether there is a mechanism to capture but not criminalise material filmed by bystanders.

AGD has administrative responsibility for the AVM Act as part of its broader administrative responsibility for the Criminal Code, and was the instructing department on the AVM Bill. It is also responsible for the publication of guidance material relating to the AVM Act (see **Attachment A**). This submission focuses on the context in which the AVM Act was developed and introduced, and the rationale behind key provisions at that time.

The Department of Home Affairs (Home Affairs) has policy responsibility for the AVM Act, as well as national security and law enforcement policy. The Department of Infrastructure, Transport, Regional Development and Communications (DITRDC) has policy responsibility for online safety, including the regulation of harmful online material. These departments have portfolio responsibility for the Australian Federal Police (AFP) and the Office of the eSafety Commissioner respectively.

Background

The AVM Act was introduced following the Christchurch terrorist attack on 15 March 2019. This attack demonstrated the ability for live streaming and other video sharing platforms to be used by extremist perpetrators to amplify their messages during, and in the immediate aftermath of, such incidents. In this case, the attack was live streamed by the perpetrator and subsequently re-shared across a number of social media platforms with millions of copies proliferating in the period immediately after the atrocity.

The AVM Bill was introduced on 3 April 2019, and received Royal Assent on 5 April 2019. The objective of the AVM Bill was to ensure that persons who are internet service providers and content or hosting services take timely action to remove or cease hosting abhorrent violent material when it can be accessed using their services.

The AVM Act introduced a range of new offences in the Criminal Code to ensure that internet, hosting or content services proactively refer abhorrent violent material to law enforcement, and that hosting and content services expeditiously remove abhorrent violent material that is capable of being accessed within Australia. The Act also provides the eSafety Commissioner with the power to issue a notice to a content service provider or hosting service stating that, at the time of the notice, the abhorrent violent material could be accessed using, or was hosted on, that service.

The offences in the AVM Act were designed to complement already existing offences in the Criminal Code. For example, the Criminal Code includes serious offences for those who urge violence against groups, and members of groups, distinguished by race, religion and other factors. There are also separate offences for those who use a carriage service to menace, harass or cause offence.

Similarly, the AVM Act does not displace or modify any existing reporting or content removal requirements and, in some circumstances, material may be subject to multiple laws. For example, some abhorrent violent material may also be potential prohibited content under Schedule 7 to the *Broadcasting Services Act 1992* (Cth), and subject to the removal scheme found in that schedule.¹

General comments

In AGD's view, the AVM Act is currently operating as intended. It strikes an appropriate balance between industry concerns regarding the potential burden and unintended consequences of the reporting and referral offences, and public expectations regarding the Government's ability to curtail the dissemination of vile and horrific violent material.

The AVM Act is one of a suite of tools available to the eSafety Commissioner to facilitate timely removal of this harmful content. For example, the *Online Safety Act 2021* (Cth), which will commence in January 2022, consolidates the legislative arrangements for the eSafety

¹ From 23 January 2022, the Schedule 7 powers will be replaced with the new Online Content Scheme under the Online Safety Act 2021.

Commissioner and creates new and strengthened schemes to keep Australians safe online, including a new scheme to address serious online abuse of adults.

While AGD understands the AVM Act offences have not been prosecuted since their introduction, we note successful prosecutions are not the only metric for measuring the effectiveness of criminal offences. Criminalising conduct can also act to encourage or deter certain behaviour. In this case, the existence of these offences has encouraged industry to develop systems to identify and remove abhorrent violent material from their platforms. The offences and related notice powers also provide the public with confidence that the eSafety Commissioner and AFP have the powers they need to act quickly when this type of abhorrent violent material is streamed online.

The notice powers available to the eSafety Commissioner have been exercised on a number of occasions,² and provide that agency with an important tool to assist industry in removing this content as expeditiously as possible. Similarly, the referral power increases the likelihood that the AFP will become aware of, and is able to investigate, this type of conduct at the earliest opportunity.

Key concepts

Abhorrent violent material

The term 'abhorrent violent material' is defined at section 474.31 of the AVM Act to mean material that is audio, visual, or audio-visual material that records or streams abhorrent violent conduct (see below) engaged in by one or more persons where a reasonable person would regard the material as being, in all the circumstances, offensive.

In determining whether material is 'offensive', the matters set out at section 473.4 of the Criminal Code should be taken into account. These include the:

- standards of morality, decency and propriety generally accepted by reasonable adults
- literary, artistic or education merit (if any) of the material, and
- general character of the material (including whether it is of a medical, legal or scientific character).

The Explanatory Memorandum to the AVM Bill clarifies that the definition of 'abhorrent violent material' is not intended to capture footage of violent sporting events (for example, boxing), medical procedures, or consensual sexual acts that involve elements of violence.

The term includes a recording that has been altered, to ensure that abhorrent violent material that has been edited into a new form but still includes its original content would continue to be abhorrent violent material. For example, video footage that is abhorrent violent material could be edited in respect of its length, edited to appear in colour or monochrome, or have unrelated images or text superimposed onto the footage (for example, a watermark). This content would

² As at 11 October 2021, 24 notices have been issued in relation to 15 pieces of content.

remain abhorrent violent material to the extent it continued to fulfil the definition of abhorrent violent material. The definition does not include material recording animated, re-enacted or fictionalised conduct.

Abhorrent violent conduct

The definition of ‘abhorrent violent material’ is limited to material that records or streams abhorrent violent conduct. Subsection 474.32(1) provides that a person engages in abhorrent violent conduct if the person does any of the following:

- engages in a terrorist act (involving serious physical harm or death, and otherwise within the meaning of section 100.1 of the Criminal Code)
- murders another person
- attempts to murder another person
- tortures another person
- rapes another person, or
- kidnaps another person.

This definition (and, by extension, the definition of ‘abhorrent violent material’) is deliberately limited to the most egregious violent material. The common theme in these categories is that the recording or streaming of these violent acts could be used to publicise violent propaganda, promote terror, incite further violence, or cause harm or distress to the community.

Produced by person(s) engaged in conduct

The AVM Act offences require that the abhorrent violent material must be produced by a person who is, or by two or more persons, each of whom:

- engaged in the abhorrent violent conduct
- conspired to engage in the abhorrent violent conduct
- aided, abetted, counselled or procured, or was in any way knowingly concerned in, the abhorrent violent conduct, or
- attempted to engage in the abhorrent violent conduct.

This requirement is intended to ensure that only material recorded or streamed by perpetrators and their accomplices will be captured by the definition of abhorrent violent material. Material recorded or streamed by other persons, such as victims of the conduct, bystanders who are not complicit in the conduct, or media organisations, is not caught by this definition even though such material may record or stream abhorrent violent conduct. The Explanatory Memorandum to the AVM Bill makes it clear that it was not intended that the offences include material produced by bystanders or individuals not engaged in the abhorrent violent conduct.

In some circumstances, it may be difficult to determine whether material recorded or streamed by a third party has been produced by an accomplice or by an innocent bystander. As such, the offences will only be made out if the prosecution can prove that the person had reasonable grounds to believe that the material had been produced by a perpetrator(s) or their

accomplice(s) (in relation to offences under sections 474.33), or that the person was reckless as to whether the material had been produced by a perpetrator(s) or their accomplice(s) (in relation to offences under section 474.34).

In other words, if a person believed on reasonable grounds that the material had not been produced by an accomplice, or the person was not aware that there was a substantial risk that material has been produced by an accomplice, the prosecution would be unlikely to prove this element of the offences.

Risk of criminalising legitimate content

The definition of ‘abhorrent violent material’ is clearly limited to the most egregious types of conduct. As set out above, it is limited to recording or streaming of terrorism, murder, attempted murder, torture, rape or kidnapping involving violence that is produced by a perpetrator or accomplice.

The AVM Act also includes a number of defences to the offences, in recognition of that fact that there are legitimate purposes for which this material may be hosted. These include:

- for the purpose of reporting news in the public interest
- in conducting scientific, medical academic or historical research, and
- for purposes related to artistic work, in good faith.

In addition to these defences, the AVM Act includes an express provision which clarifies it is not intended to limit the implied freedom of political communication.

Some of the defences contained in the Act are qualified by requirements to act ‘in good faith’ or only apply to conduct that is ‘reasonable’. These qualifiers are necessary to ensure the defences only apply to genuine claims of an exempted purpose, such as historical or medical research, and to ensure unsubstantiated claims remain within the scope of the offences.

Substantive provisions

The AVM Act inserted the following new offences in the Criminal Code:

- **Failure to report**—an offence for internet service providers, hosting and content providers that fail to notify the AFP within a reasonable time about material relating to abhorrent violent conduct occurring in Australia.
- **Failure to remove**—offences for content service and hosting services that fail to remove access to abhorrent violent material expeditiously where that material is reasonably capable of being accessed within Australia.

The AVM Act also gives the eSafety Commissioner a new **power to issue a notice** stating that, at the time the notice is issued, a content or hosting service is providing access to or hosting abhorrent violent material.

Where abhorrent violent conduct occurs in Australia, providers may have to both notify the AFP and remove the material from their services.

Section 474.33: Notification obligations of internet service providers, content service providers and hosting service provider

The AVM Act inserted section 474.33 into the Criminal Code. This section creates a new offence where:

- a person is an internet service provider, or provides a content service or a hosting service
- the person is aware that the service provided by the person can be used to access particular material that the person has reasonable grounds to believe is abhorrent violent material that records or streams abhorrent violent conduct that has occurred, or is occurring, in Australia, and
- the person does not refer details of the material to the AFP within a reasonable time after becoming aware of the existence of the material.

This offence is intended to ensure that where an internet service provider, content service provider or a hosting service provider becomes aware (whether due to a complaint, self-auditing or otherwise) that their service can be used to access abhorrent violent material that records or streams abhorrent violent conduct that has occurred or is occurring in Australia, the provider will refer the details of that material (for example, the material itself or a website address that can be used to access the material) to the AFP.

The offence does not capture ignorance or negligence, and will not apply where a provider is genuinely unaware of particular material being accessible on their platform. However, it does require action when there is a level of awareness of abhorrent violent material being available (for example, if providers receive user-complaints about the online material).

The purpose of this offence is to ensure that the AFP is notified by providers of both the existence of the underlying abhorrent violence conduct (for example, a terrorist act that is being live-streamed) as well as the existence and accessibility of the abhorrent violent material itself online.

While 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, any complaints received about 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.

Defences

In practice, it is likely that providers will become aware of a vast array of abhorrent violent material that is already in the public domain. It would serve no practical purpose to require such material be referred to the AFP. It would also create a significant administrative burden on all parties.

The AVM Act provides that it is a defence to this offence if the person reasonably believes that details of the material are already known to the AFP (for example, if there has already been widespread media reporting about particular material, or if the provider has already referred the material to the National Centre for Missing or Exploited Children or to Interpol).

Penalties

The maximum penalty that can be imposed if a natural person fails to comply with section 474.33 is 800 penalty units (currently \$177,600). The maximum penalty that can be imposed if a body corporate fails to comply with this section is 4000 penalty units (currently \$888,000) pursuant to the corporate multiplier rule under section 4B of the *Crimes Act 1914*.

Criminal penalties need to provide sufficient scope to punish and deter the most egregious instances of each offence. Where a person is aware that such material has been made available through their service, it is critical that the AFP is notified so that it can act with respect to the underlying conduct, if they are not already aware of it. Further, allowing the material itself to be shared and disseminated quickly helps to spread and publicise the propaganda of the perpetrator.

Further, many of the platforms that these offences target are well-resourced, and the maximum penalties need to be high enough to provide a court with sufficient scope to deter and punish these organisations. For example, the 10% of annual turnover mechanism was designed to ensure that even the largest corporations would be vigilant in the face of these offences.

At the same time, the penalties stated are maximum penalties – a court will take account of the circumstances in each case in determining the appropriate penalty.

Section 474.34: Removing, or ceasing to host, abhorrent violent material

Hosting service providers and content service providers must expeditiously cease hosting or remove abhorrent violent material that is reasonably capable of being accessed within Australia. This applies to all providers, whether they are based in Australia or overseas, and applies regardless of where the depicted abhorrent violent conduct occurred.

The requirement to remove or cease hosting material requires the provider to ensure that the material is no longer accessible to end users in Australia.

This obligation does not apply to internet service providers.

Content service provider

Section 474.34(1) of the AVM Act creates a new offence where:

- a person provides a content service
- the content service can be used to access material
- the material is abhorrent violent material, and

- the person does not ensure the expeditious removal of the material from the content service.

This offence is intended to limit the accessibility, sharing and dissemination of abhorrent violent material by limiting the amount of time that material can be accessed using a content service.

‘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.

Subsection 474.34(4) provides that the fault element for paragraphs 474.34(1)(b) and (c) is recklessness. As paragraphs 474.34(1)(b) and (c) both refer to a circumstance rather than conduct, recklessness is the appropriate fault element. This is consistent with the default fault elements that would otherwise apply per section 5.6 of the Criminal Code. It would not be appropriate to restrict the fault element to knowledge, as this could provide an incentive for content service providers to be wilfully blind to the content provided on their service, rather than proactively engage with the removal of abhorrent violent material.

Appropriateness of ‘recklessness’ fault element

During development and debate of the legislation and following its commencement, a number of concerns were expressed about the use of recklessness as the relevant fault element in relation to the presence of abhorrent violent material on, or the accessibility of material via, a provider’s service. This means the prosecutor needs to prove that a provider was aware of a substantial risk that their platform was being used to access abhorrent violent material and, having regard to the circumstances known to them, it was unjustifiable for the provider to take that risk (for example, in not acting to remove the content).

Careful consideration was given to the appropriate fault elements for these offences. The recklessness threshold was deliberately chosen to ensure providers could be held to account in circumstances where they ought to have known that their services were being used to spread abhorrent violent material. A requirement of actual knowledge, rather than recklessness, was not considered appropriate as it could encourage situations of wilful blindness. However, although a lower threshold than knowledge, recklessness is still a very high threshold. A failure to proactively monitor content is unlikely to, of itself, satisfy this threshold. Something more would typically be needed.

The AVM Act does not require providers to take steps to make themselves aware of abhorrent violent material accessible on their platforms and does not require that providers monitor all content on their platforms.

One reason why bystander material was excluded from the operation of the AVM Act is that its inclusion would constitute a significant expansion in the responsibilities on internet, hosting and content services under the AVM Act, as well as the eSafety Commissioner and the AFP. This could lead to situation where a significant, and potentially unmanageable, amount of content is

regulated under the AVM Act. We note there may be other, more appropriate mechanisms available should the Government be minded to regulate this content online, particularly given the serious criminal penalties that flow from a failure to meet the AVM Act requirements.

There are a number of ways a provider could become 'aware' of a risk that their platform can be used to access particular abhorrent violent material. For example, platforms may become aware of material through a notice from the eSafety Commissioner (see below), media reporting on particular content or through user complaints.

There may be multiple companies who are host and/or content service providers in relation to a given piece of content. While all relevant providers may be subject to the offences if they do not expeditiously remove abhorrent violent material from their services, in circumstances where a notice has not been issued by the eSafety Commissioner, the threshold of recklessness will be easier to establish for providers with a closer link to the content (for example, a provider which administers a website) than providers whose services are more remotely related to the content (for example, providers of business-to-business infrastructure and cloud services).

Hosting service provider

Subsection 474.34(5) creates a similar offence to subsection 474.34(1) that applies to hosting service providers. The offence applies when:

- a person is providing a hosting service
- the hosting service can be used to access material
- the material is abhorrent violent material, and
- the person does not expeditiously cease hosting the material.

As with the content service provider offence, the term 'expeditious' is not defined, and the default fault element of recklessness applies to paragraphs 474.34(5)(b) and (c).

Subsection 474.34(15) provides that material is taken to be removed from a content service if the material is not accessible to any of the end-users of that service. Given the purpose of the offence is to limit the distribution of the content, it is sufficient that the content is no longer being distributed to the end users of the service.

Application of offences to hosting service providers

Following introduction of the AVM Act, some concerns were raised regarding the application of the offences to certain hosting providers such as business-to-business infrastructure and cloud service providers, on the basis that these providers would not ordinarily exercise control over, or be aware of, content hosted by their clients.

The application of the offences to hosting providers was carefully considered by Government. As the offences require some level of awareness in relation to the presence of abhorrent violent material, the expectation was that services such as these are unlikely to be directly captured by the offences, unless they receive a notice from the eSafety Commissioner or were otherwise given specific, credible information about particular content.

AGD does not consider it appropriate to exempt these services from the operation of the offences. Ultimately, whether to issue a notice to a content service, a hosting service or both is a decision for the eSafety Commissioner to determine on a case-by-case basis, and will depend on the unique circumstances of each AVM investigation. It may be necessary to issue a notice to a hosting service where it has not been possible to identify a contact point for the relevant content provider, or where the content provider has been non-responsive or unwilling to take action. The AVM Fact Sheet on AGD's website provides further guidance on this issue.

Defences

Section 474.37 sets out defences available in relation to the offences at section 474.34. These include where accessibility or hosting of the material:

- is necessary for enforcing a law of the Commonwealth, a State, a Territory, a foreign country or part of a foreign country
- is necessary for compliance with, or investigating a contravention of, a law of the Commonwealth, a State, a Territory, a foreign country or part of a foreign country
- is for the purposes of proceedings in a court or tribunal
- is necessary for, or of assistance in, conducting scientific, medical, academic or historical research and that accessibility is reasonable in the circumstances for conducting that research
- relates to a news report, or a current affairs report, that is in the public interest and is made a person working in a professional capacity as a journalist
- is in connection with an individual assisting a public official in the performance of his or her duties or functions and the accessibility is reasonable in the circumstances for that purpose, or
- relates to the development, performance, exhibition or distribution, in good faith, of an artistic work.

The general defences in Part 2.3 of the Criminal Code also apply to these offences, including the defence of lawful authority at section 10.5, which will excuse or justify conduct which is authorised by law.

Penalties

The maximum penalty for an individual who commits an offence against subsections 474.34(1) or (5) is imprisonment for 3 years, or a fine of 10,000 penalty units (currently \$2.22 million), or both. Subsection 474.34(10) provides that the penalty for a body corporate that commits an offence against subsection 474.34(1) or (5) is not more than the greater of 50,000 penalty units (currently \$11.1 million) or 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

The maximum penalty of 50,000 penalty units for a body corporate is consistent with the corporate multiplier rule under subsection 4B(3) of the *Crimes Act 1914*. The inclusion of the alternative penalty based on annual turnover reflects that the operators of content and hosting

services are often large corporations with a very high annual turnover, such that a maximum penalty of 50,000 penalty units may not act as a sufficient deterrent to comply with the obligations created by the introduction of these new offences.

Geographical application

The AVM Act offences require that there must be reasonable grounds to believe the material is abhorrent violent material that records or streams abhorrent violent conduct that has occurred or is occurring **in Australia** (in the case of subsection 474.33), or that the material is reasonably capable of being accessed **within Australia** (in the case on subsection 474.34(1) and 474.34(5)).

In other words, the offences **do not apply** if the provider has no reason to believe that the abhorrent violent conduct took place in Australia.

The notification requirements apply to all providers, whether they are based in Australia or overseas. The requirement to remove or cease hosting material applies to hosting service providers and content service providers, whether they are based in Australia or overseas, and regardless of where the depicted abhorrent violent conduct occurred. This is designed to ensure that the material is no longer accessible to end users in Australia.

The Attorney-General's written consent is required prior to the commencement of proceedings for these offences where the alleged conduct occurs wholly in a foreign country (in the case of offences in section 474.33) and irrespective of where the relevant conduct occurs (in the case of offences in section 474.34).

The requirement for consent for conduct that occurs wholly in a foreign country is consistent with the general principle set out in section 16.1 of the Criminal Code. It is appropriate for the Attorney-General's written consent to be required in all cases, in relation to section 474.34, because of the **high penalties** the offences in this provision attract. As such, there is a greater need to guard against inappropriate prosecutions in respect of these offences. The requirement would also act as an additional safeguard in other cases – for example, where a foreign company faced conflicting requirements under foreign laws, or the availability of the material was in the public interest.

Notice issued by eSafety Commissioner

Sections 474.35 and 474.36 create a process by which the eSafety Commissioner can provide a written notice to a content service provider or hosting service stating that, at the time the notice was issued, their service could be used to access, or hosted, specified abhorrent violent material.

The eSafety Commissioner must not issue a notice under subsection 474.35(1) unless satisfied on reasonable grounds that, at the time the notice was issued, the specified:

- content service could be used to access the specified material, and that the specified material was abhorrent violent material (subsection 474.35(2)), or

- material was hosted on the specified hosting service, and that the specified material was abhorrent violent material (subsection 474.36(2)).

The issuing of such a notice creates a rebuttable presumption for the purpose of any future prosecution that the person was reckless as to certain matters – namely, and depending on the circumstances, as to whether the:

- content service could be used to access the specified material (subsection 474.35(5))
- material specified in the notice was hosted on the service (subsection 474.36(5)), or
- material was abhorrent violent material (subsections 474.35(6) and 474.36(6)).

In order to overcome this presumption, the defendant must adduce or point to evidence that suggests a reasonable possibility that, at the time the notice was issued, the person was not reckless as to those matters.

The notice effectively puts the content or hosting service provider on notice that their service is being used to access abhorrent violent material. In effect, the notice also puts the provider on notice that they may commit an offence if they have or do not remove or cease hosting it expeditiously.

It is intended that the issuing of the notice would act as a warning to the content provider (that they may commit an offence if they do not expeditiously remove the material), and to the hosting service (to cease hosting the material). If, after receiving the notice, the content provider were to ensure the expeditious removal of the material, or the hosting service were to expeditiously cease hosting the material, a prosecution would be unlikely.

It is ultimately a matter for the eSafety Commissioner to determine how, when and to whom notices are issued in accordance with the Act. The Government expects all relevant services to cooperate with the eSafety Commissioner, and to advise the eSafety Commissioner early where they anticipate difficulties removing the specified material.