

Parliamentary Joint Committee on Law Enforcement
Inquiry into the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019
Written question on notice to the Office of the eSafety Commissioner

Question on notice (provided 1 December 2021)

At the hearing, officials from eSafety advised that, in relation to the issuance of notices under the AVM Act, the determination of whether material is AVM is ultimately a matter for the hosting/content service that receives the notice:

“[T]he notice we provide to a hosting service or a content service is only to bring the material to their attention. Whether it is AVM becomes a matter for them. If it is the case that a service is prosecuted through the relevant offence provision for failing to take expeditious action against content, it's open to the court to consider whether or not there were, in fact, grounds to consider the material AVM, and the service may very well have identified defences for reasons for the material not to be regarded as AVM, justifying their decision not to take expeditious action to remove the material.”

However, the AVM Act itself and the AGD Factsheet indicate that the eSafety Commissioner may issue a notice stating that material *is* AVM, suggesting that the eSafety Commissioner is responsible for determining that the material is AVM before issuing the notice.

Could the Office of the eSafety Commissioner please clarify its role under the AVM Act. Does eSafety consider that it is only responsible for bringing *potential* AVM to the attention of providers via a notice? Or is eSafety required to first determine that the material *is* AVM before bringing it to a provider's attention?

Answer (provided 6 December 2021)

Notices issued under the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (AVM Act) by the eSafety Commissioner are not takedown notices. They are intended to make the service aware of abhorrent violent material (AVM) on or hosted by the service.

Before issuing a notice under the AVM Act, the eSafety Commissioner must be satisfied on reasonable grounds that specified material was AVM. However, the service may take a different view as to the material's character, concluding that the material is not AVM. The service may also conclude that one or more defences apply under the Act. This position may be relevant to any decision taken by the service *not* to remove the material expeditiously.

In cases where a service does not remove the material, the AVM notice creates a rebuttable presumption that the service was reckless as to the presence of AVM on its service. This presumption can be relied on in any criminal trial that may arise. Whether the presumption can be rebutted may turn on a number of factors. The presumption can be rebutted if there is other evidence adduced to suggest that the service was not reckless as to the fact that the material was AVM. In addition, at any trial there would need to be proof to the criminal standard that the material was, in fact, AVM.