

Tech Against Terrorism Written Evidence to the Inquiry into the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019.

Submitted: 14 October 2021

1. BACKGROUND

The Australian Parliament passed the Criminal Code Amendment (Sharing Abhorrent Violent Material) Act 2019 on 4 April 2019. On 9 September 2021, the Parliamentary Joint Committee on Law Enforcement (the committee) agreed to inquire into and report on the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (AVM Act), with particular reference to:

- 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
- the effectiveness of the AVM Act in reducing the incidence of misuse of online platforms by perpetrators of violence;
- the appropriateness of the roles and responsibilities of the eSafety Commissioner and Australian Federal Police under the AVM Act;
- 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 definition of abhorrent violent material under the AVM Act; and,
- any related matter.

2. TECH AGAINST TERRORISM'S CORE ARGUMENTS AND RECOMMENDATIONS

The arguments in our response to the consultation on the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (AVM Act) may be summarised as follows:

- 1. The Act's high penalties and short timeframe for content removal creates dangerous incentives for tech companies to err on the side of over-removal of content in order to avoid the threat of liability and harsh penalties.** Among our concerns regarding risks to freedom of speech are tight removal deadlines in combination with high fines for platforms who are unable to moderate their platforms, which might make companies err on the side of over-removal. This significantly undermines human rights, particularly freedom of speech.
- 2. The Act lacks consideration for smaller platforms in terms of its penalties.** Not only does the AVM Act apply to companies of all sizes, but in theory a penalty could also be imposed for every individual piece of content posted (including duplicates). Imposing stringent legal requirements with no regard for platform size will harm the diversity and innovation that drives the tech sector. Stringent legal requirements will disproportionately impact smaller tech companies with fewer resources to support compliance, whereas larger tech platforms will more likely be able to allocate the resources necessary to comply with the Act.
- 3. The Act creates a level of uncertainty through lacking operable definitions or clarity where it is crucial.** The Act lacks operable definitions of what is considered "expeditious". This creates serious consequences for compliance with the legislations as well as freedom of expression when the uncertainty is coupled with harsh fines and

penalties.

4. **The Act empowers the e-Safety Commissioner to issue a notice triggering the presumption that a service provider has been “reckless” about its service hosting abhorrent violent material, which is difficult for the service provider to prove otherwise.** This provides the incentive for companies to err on the side of over-removal of content in order to hinder liability.
5. **The Act maintains an extraterritorial approach for removal of abhorrent violent material, which could effectively see national laws being implemented globally, raising questions about territoriality.** Any social media company that can be used to access footage of abhorrent violent material occurring anywhere in the world can be liable for this offence provided that it is “reasonably capable of being accessed within Australia”.⁶ This means that there is an extraordinary potential reach of this offence.
6. **The Act was passed through both houses of parliament in a remarkably short time.** This limited the possibility of any consultation from the industry or civil society, or for policymakers to amend draft legislations in time to incorporate recommendations submitted during a consultation process.

3. CONSULTATION RESPONSE

On 9 September 2021, the Parliamentary Joint Committee on Law Enforcement (the committee) agreed to inquire into and report on the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (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,**
 - **We are concerned over the lack of a definition provided in the Act for what constitutes “expeditious” removal.** The Explanatory Memorandum notes that “the type and volume of the abhorrent violent material, or the capabilities of and resourcing available to the provider may be relevant factors” but does not clarify or indicate whether these factors make the timeframe longer or shorter.¹
 - **We are also concerned that the short timeframe associated with the term “expeditious” and potential high penalties, presents risks for freedom of expression.** Among our concerns regarding risks to freedom of speech are tight removal deadlines in combination with high fines for platforms who are unable to moderate their platforms, which might make companies err on the side of over-removal. This significantly undermines human rights, particularly freedom of speech. Furthermore, there is a risk of platforms reporting users to the police when they assess users’ content and behaviour to be an offence at first glance, without properly considering the context (for example journalistic or educational) of the content. This would also risk the right to privacy. We therefore argue that rather than leaving the responsibility of adjudication to tech companies, governments should support tech

¹ Douek, Evelyn, Australia’s ‘Abhorrent Violent Material’ Law: Shouting ‘Nerd Harder’ and Drowning Out Speech (August 26, 2019). 94 Australian Law Journal 41 (2020), Available at SSRN: <https://ssrn.com/abstract=3443220>

companies in building expertise and tools to correctly identify “abhorrent violent material” rather than set unreasonable expectations in legislative frameworks.

- **We are also concerned that the short timeframe will impact smaller platforms who have limited capacity and resources and are therefore more vulnerable to the harsh penalties.** Smaller tech companies face restricted capacity and often have fewer resources. They are therefore less likely to be able to adhere to these removal deadlines and reporting requirements. This risks the existence of smaller tech companies, as large tech companies with more resources would monopolise the online space, as well as undermine the internet’s diversity.
- b. **the effectiveness of the AVM Act in reducing the incidence of misuse of online platforms by perpetrators of violence;**

N/A

- c. **the appropriateness of the roles and responsibilities of the eSafety Commissioner and Australian Federal Police under the AVM Act;**

- **We are concerned over the notices issued by the eSafety Commissioner and how this impacts platforms if they are considered “reckless”.** The Act empowers the e-Safety Commissioner to issue a notice triggering the presumption that a service provider has been “reckless” about its service hosting abhorrent violent material unless the service provider can prove otherwise.² For companies to prove otherwise when considered “reckless” seems very difficult, given that it is unclear how these notices affect “expeditious removal for the purpose of the offence”. This includes a case where the Commissioner might issue a notice after a provider has started trying to remove a piece of content, in which case it would appear the provider will still be presumed to have been reckless.³ It is also unclear whether a companies’ “recklessness” is intended to mean only for the original copy of material to which the notice refers, or all further copies of it.
 - **We are also concerned over the notices issued by the eSafety Commissioner in accordance with the rule of law.** According to the Act, the Commissioner does not need to observe the requirements of procedural fairness in the issuance of such a notice to issue a notice “as quickly as possible”.⁴
- 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;**
- **We are concerned over the penalties for companies who fail to notify the Australian Federal Police (AFP).** If companies become aware of abhorrent violent material anywhere on their service, which depicts abhorrent violent conduct in Australia, and fail to notify the AFP within “reasonable time”, they become liable for a criminal offence. The maximum penalty is 800 penalty units: that is, \$168,000 for an

² <https://www.techagainstterrorism.org/2020/10/08/the-online-regulation-series-australia/>

³ Douek, Evelyn, Australia’s ‘Abhorrent Violent Material’ Law: Shouting ‘Nerd Harder’ and Drowning Out Speech (August 26, 2019), 94 Australian Law Journal 41 (2020), Available at SSRN: <https://ssrn.com/abstract=3443220>

⁴ Douek, Evelyn, Australia’s ‘Abhorrent Violent Material’ Law: Shouting ‘Nerd Harder’ and Drowning Out Speech (August 26, 2019), 94 Australian Law Journal 41 (2020), Available at SSRN: <https://ssrn.com/abstract=3443220>

individual, or up to \$840,000 for a company. Not only does the AVM Act apply to companies of all sizes, but in theory a penalty could also be imposed for every individual piece of content posted (including duplicates).⁵ Our concern is that high fines coupled with broadly and vaguely defined grounds might lead to companies erring on the side of overly-cautious content removal or blocking. This additionally holds significant consequences for smaller platforms. Imposing stringent legal requirements with no regard for platform size will harm the diversity and innovation that drives the tech sector. Stringent legal requirements will disproportionately impact smaller tech companies with fewer resources to support compliance, whereas larger tech platforms will be able to allocate the resources necessary to comply with the regulations.

- **We are concerned over the extraterritorial approach for removal of abhorrent violent material, which could effectively see national laws being implemented globally, raising questions about territoriality.** The offence applies for material depicting abhorrent violent conduct occurring anywhere in the world. Therefore, there is an extraordinary potential reach of this offence, where any social media company that can be used to access footage of abhorrent violent material occurring anywhere in the world can be liable for this offence.⁶
- e. **the definition of abhorrent violent material under the AVM Act; and,**
- **We have concerns over the imprecise definitions and that calls for companies to remove content “expeditiously” could encourage tech platforms to remove content that is shared with the purpose of documenting terrorist offences and war crimes.** Such content can serve as crucial evidence in court proceedings. Though the Act provides a number of defences for failing to remove abhorrent violent material expeditiously, which includes “for the purposes of court or tribunal proceedings”, these protections are not strong enough to ensure that tech companies, under the time pressure and facing criminal offence, will not inadvertently remove important content or speech from their platforms. Due to this, the Government should ensure that there are sufficient safeguards in place in case of wrongful blocking and that appropriate redress mechanisms are identified.
- f. **any related matter.**
- **We have concerns over the law having passed through both houses of parliament in a remarkably short time, limiting the possibility of any consultation from the industry or civil society, or for policymakers to amend draft legislations in time to incorporate recommendations submitted during a consultation process.** The UN special rapporteurs on counterterrorism and human rights and freedom of expression shared their comments on the law with the government via a letter, noting that the law raises serious concerns about freedom of expression, such as a consequence of imposing heavy fines and imprisonment on Internet intermediaries.⁷

⁵ Douek, Evelyn, Australia's 'Abhorrent Violent Material' Law: Shouting 'Nerd Harder' and Drowning Out Speech (August 26, 2019). 94 Australian Law Journal 41 (2020), Available at SSRN: <https://ssrn.com/abstract=3443220>

⁶ Douek, Evelyn, Australia's 'Abhorrent Violent Material' Law: Shouting 'Nerd Harder' and Drowning Out Speech (August 26, 2019). 94 Australian Law Journal 41 (2020), Available at SSRN: <https://ssrn.com/abstract=3443220>

⁷ <https://www.techagainstterrorism.org/wp-content/uploads/2021/07/Tech-Against-Terrorism-%E2%80%93-The-Online-Regulation-Series-%E2%80%93-The-Handbook-2021.pdf>

- **Our concerns also include a broader trend to which the Act applies, where governments, predominately in Europe, have proposed, and in some cases implemented, outsourcing to tech platforms the responsibility for determining whether content is illegal.** This means that companies—as opposed to courts or other judicial bodies—are required by law to assess whether the content is illegal following notification by the authorities or, in certain instances, by users. This outsourcing trend, raises fundamental questions about whether independent judiciaries or private tech companies are best placed to be the arbiters of illegality.⁸

⁸ <https://www.lawfareblog.com/online-regulation-terrorist-and-harmful-content>