



FROM THE PERMANENT REPRESENTATIVE

AUSTRALIAN PERMANENT MISSION
GENEVA

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Mr David Kaye and Ms Fionnuala D. Ní Aoláin
Special Rapporteurs
Office of the High Commissioner for Human Rights
Palais Wilson
52 rue des Pâquis
CH-1201 Geneva, Switzerland

Dear Special Rapporteurs,

Re: joint communication from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism regarding the Australian Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (the Act) (your reference: OL AUS 5/2019)

I refer to the above joint communication and my subsequent interim reply (to Ms Beatriz Balbin, Chief, Special Procedures Branch, OHCHR) of 24 April 2019, regarding Australian “caretaker” conventions, after Australia’s Parliament was prorogued on 11 April 2019 ahead of a general election on 18 May 2019.

Australia is grateful for the opportunity to provide further information on the issues raised in the communication, and to explain how the Act is compatible with the obligations specified in article 19 of the International Covenant on Civil and Political Rights (ICCPR). I apologise for the delay in responding.

Overview

The Act commenced on 6 April 2019. It inserted new offences related to the sharing of abhorrent violent material into the *Criminal Code 1995*. These offences were:

- an offence applying to internet service providers, hosting and content providers that fail to notify the Australian Federal Police within a reasonable time about material present on, or accessible through, their service, where that material relates to abhorrent violent conduct that occurred (or is occurring) in Australia; and
- offences applying to content service and hosting services that fail to remove abhorrent violent material expeditiously where that material is reasonably capable of being accessed within Australia.

The Act also provides the eSafety Commissioner the power to notify a content service provider or a hosting service provider that abhorrent violent material is accessible through, or hosted on, their service. Such a notice does not require the removal, but rather creates the legal presumption that the service provider is reckless as to the accessibility or presence of the specified material on their service.

The Act uses a specific, narrow definition of abhorrent violent material. The definition is limited to very specific categories of the most egregious, violent audio, visual or audio-visual material produced by a perpetrator or their accomplice, must stream or record conduct where a person actually engages in a terrorist

act (involving serious physical harm or death of another person), murders or attempts to murder another person, tortures another person, rapes another person or kidnaps another person (where the kidnapping involves violence or the threat of violence).

It is worth observing that content and host service providers have been responsive to notices issued by the eSafety Commissioner and that no prosecutions have occurred under the Act. Notices have been issued in relation to terrorist material, such as the live-streamed footage of the Christchurch attacks by the alleged perpetrator, and depictions of murders.

Regulating the public's access, sharing and dissemination of abhorrent violent material through the Act is a measure which is a necessary and proportionate restriction for the legitimate objective of protecting the safety of Australians. The ability to readily share material of this exceptionally extreme nature, particularly material intended to incite copy-cat attacks and promote extreme ideologies, is not an appropriate exercise of the right to freedom of expression. It can threaten national security, perpetuate further criminal activity, prejudice the dignity of victims and has the potential to cause harm and distress to various sections of the community.

However, the Act recognises there may be circumstances where it is appropriate for material of this nature to be accessible and contains a range of defences in relation to the offence for failure to remove abhorrent violent material. These include where the material relates to a news or current affairs report that is in the public interest and is made by a person working in a professional capacity as a journalist, where the accessibility of the material is for lawful advocacy purposes, and where the accessibility of the material relates to research or artistic works created in good faith. The Australian Government considers these defences adequately capture circumstances in which persons should be exempt from the Act.

As a further check on the use of the Act, the Attorney-General's written consent is required before commencing any prosecutions for the offence of failing to remove abhorrent violent material. The Attorney-General's consent is also required for the failure to notify offences, if the relevant conduct occurred wholly outside Australia and the offender is neither an Australian citizen nor a body corporate incorporated under Australian law.

Insufficient consultation time

The Christchurch attack of March 2019 and the circulation of the video associated with that attack demonstrated the potential for significant harm to be caused by the dissemination of abhorrent violent material, and necessitated the rapid development and enactment of this legislative measure. The passage of the Act sent a clear and timely message that the Australian Government will not accept online platforms being used as tools for spreading hate and extremism.

The footage was shared and circulated widely, exposing numerous members of the community to its content. Allowing the footage to remain in circulation would prejudice the dignity of the victims and increase the potential for harm to the families or communities of victims, along with the wider community, who may have experienced significant distress in reaction to the scenes depicted. Further, had the footage remained widely accessible, the risk that such footage would be copied by other extremists or used as propaganda or recruitment material for further criminal activity would have been significant. Restricting access to the audio and visual content produced by perpetrators of events such as the Christchurch attack diminishes the potential for a perpetrator to advocate for further attacks and protects the targeted groups from discrimination, hostility and violence. For these reasons, it was critical that the legislation was passed as soon as possible.

While the Act was passed swiftly, the Act also includes a requirement that the Government review the legislation two years after passage. The Government has also been actively engaging with industry stakeholders in relation to their handling of the footage from the Christchurch attack both prior to and after passage of the legislation, and to provide guidance on the operation of the Act. These stakeholders include Twitter, DIGI, Google, Telstra, Optus, ACMA, Amazon, Vodafone, Microsoft and the Communications Alliance.

Timeframe for removal

The Act is intentionally not prescriptive about what would constitute expeditious removal. Instead, expeditious is intended to be interpreted by a court in the context of, and taking account the circumstances of, each case. Factors that a court may consider relevant include: the type and volume of the material; how clear it is that the material constitutes abhorrent violent material; the quantity of complaints received about the material; and the level of oversight the provider has over content.

In determining from what point the time frame for ‘expeditious’ removal commences, the court would need to determine at what point the defendant was reckless to abhorrent violent material was accessible through or available on the service.

Under section 5.4 of the *Criminal Code*, recklessness is a high threshold. For a person to be reckless with respect to a circumstance requires that:

- the person is aware of a substantial risk that the circumstance exists or will exist; and
- having regard to the circumstances known to him or her, it is unjustifiable for that person to take the risk.

Recklessness can also be made out by proving intent or knowledge.

Once a person is reckless as to the existence of abhorrent violent material accessible through or hosted on their service, they are required to remove the content expeditiously.

A notice from the eSafety Commissioner creates a presumption that a person is reckless as to the presence or accessibility of the specified material. However, it is possible that a person may already be reckless as to the presence/accessibility of the material before they receive the notice, for example, if they receive reports from users complaining about certain material or if there is widespread media coverage. If they were, the time period for expeditious removal would have begun at this earlier time, not on receipt of the notice.

In all cases, the question of whether someone was reckless as to whether material could be accessed through or was hosted on a service, would be a matter of fact to be determined by a court.

Given the significant harm that could be caused by the failure to remove abhorrent violent material, the Australian Government believes the Act strikes an adequate balance between sending a clear message to hosting and content services of their responsibilities and giving these service providers the opportunity to make an appropriate assessment of material.

Automated moderation

The offences target providers who are aware of at least a substantial risk that abhorrent violent material can be accessed through, or is hosted on, their service and fail to act. The offences would not apply where the provider is genuinely unaware of a substantial risk of particular material being accessible on their platform.

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, media reporting on particular content or through user complaints.

Any restrictions placed on service providers have been closely balanced with the need to mitigate significant harm caused by continued access to abhorrent violent material, which is narrowly defined to include only the most egregious forms of material. The Australian Government believes that the Act adequately strikes this balance, and that any restrictions are sufficiently targeted necessary and proportionate to their aim.

Defences

The journalism defence in paragraph 474.37(1)(e) provides that the offences in subsection 474.34(1) do not apply to “material that can be accessed using a service if: ...

- (e) the material relates to a news report, or a current affairs report, that:
 - (i) is in the public interest; and

(ii) is made by a person working in a professional capacity as a journalist...”

The defence has been phrased in this way to strike the best possible balance between allowing the publication of legitimate public interest news reports while excluding false claims of journalism.

‘Professional capacity as a journalist’ is not intended to limit the application of the defence to professional journalists working for mainstream media. Bloggers and others who engage in self publication may also fall under the defence provided their actions were undertaken in a professional capacity as a journalist.

It is important to reiterate that abhorrent violent material is very narrowly defined for the purposes of these offences. The material must have been produced by the person(s) who undertook (or was otherwise involved with) the violent conduct. Materials produced by victims, bystanders, law enforcement, journalists or media organisations would not be abhorrent violent material, and would not be subject to the offences.

As such, the offences would only apply where a content or host service provider makes accessible, or hosts, material produced by those involved with the abhorrent violent conduct. Although it would be unlikely for the activities of legitimate journalism to fall foul of these offences, this defence has been included to put this beyond doubt.

Withdrawal

The Special Rapporteurs requested that the law be withdrawn. Since the correspondence, the law has been passed by the Australian Parliament and enacted.

For the reasons given above the Australian Government considers that the Act is compatible with Australia’s obligations under Article 19 of the ICCPR. Where the Act seeks to limit those rights, it does so in a fashion that is necessary and proportionate to achieving the legitimate objectives of ensuring that:

- persons who provide internet services, hosting service and content services are reporting abhorrent violent material that records or streams abhorrent violent conduct that has occurred or is occurring in Australia to the Australian Federal Police ; and
- persons who provide content services and hosting services are acting expeditiously to remove or cease hosting abhorrent violent material from their services.

I trust the above information will be of assistance to the Special Rapporteurs. I reiterate the Australian Government’s longstanding commitment to cooperating with the United Nations and the Australian Government’s strong human rights record.

Yours sincerely,



Sally Mansfield
Ambassador and Permanent Representative