

2016-2017-2018-2019

The Parliament of the
Commonwealth of Australia

THE SENATE

Presented and read a first time

**Criminal Code Amendment (Sharing of
Abhorrent Violent Material) Bill 2019**

No. , 2019

(Attorney-General)

**A Bill for an Act to amend the *Criminal Code Act
1995*, and for related purposes**

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Commencement information

| Column 1 | Column 2 | Column 3 |
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| Provisions | Commencement | Date/Details |
| 1. The whole of this Act | The day after this Act receives the Royal Assent. | |

1 Note: This table relates only to the provisions of this Act as originally
2 enacted. It will not be amended to deal with any later amendments of
3 this Act.

4 (2) Any information in column 3 of the table is not part of this Act.
5 Information may be inserted in this column, or information in it
6 may be edited, in any published version of this Act.

7 **3 Schedules**

8 Legislation that is specified in a Schedule to this Act is amended or
9 repealed as set out in the applicable items in the Schedule
10 concerned, and any other item in a Schedule to this Act has effect
11 according to its terms.

1 **Schedule 1—Sharing of abhorrent violent**
2 **material**
3

4 ***Criminal Code Act 1995***

5 **1 At the end of Division 474 of the *Criminal Code***

6 Add:

7 **Subdivision H—Offences relating to use of carriage service for**
8 **sharing of abhorrent violent material**

9 **474.30 Definitions**

10 In this Subdivision:

11 ***abhorrent violent conduct*** has the meaning given by
12 section 474.32.

13 ***abhorrent violent material*** has the meaning given by
14 section 474.31.

15 ***consent*** means free and voluntary agreement.

16 ***content service*** means:

17 (a) a social media service (within the meaning of the *Enhancing*
18 *Online Safety Act 2015*); or

19 (b) a designated internet service (within the meaning of the
20 *Enhancing Online Safety Act 2015*).

21 ***hosting service*** has the same meaning as in the *Enhancing Online*
22 *Safety Act 2015*. For this purpose, disregard
23 subparagraphs 9C(a)(ii) and (b)(ii) of that Act.

24 **474.31 Abhorrent violent material**

25 (1) For the purposes of this Subdivision, ***abhorrent violent material***
26 means material that:

27 (a) is:

28 (i) audio material; or

- 1 (ii) visual material; or
2 (iii) audio-visual material;
3 that records or streams abhorrent violent conduct engaged in
4 by one or more persons; and
5 (b) is material that reasonable persons would regard as being, in
6 all the circumstances, offensive; and
7 (c) is produced by a person who is, or by 2 or more persons each
8 of whom is:
9 (i) a person who engaged in the abhorrent violent conduct;
10 or
11 (ii) a person who conspired to engage in the abhorrent
12 violent conduct; or
13 (iii) a person who aided, abetted, counselled or procured, or
14 was in any way knowingly concerned in, the abhorrent
15 violent conduct; or
16 (iv) a person who attempted to engage in the abhorrent
17 violent conduct.
- 18 (2) For the purposes of this section, it is immaterial whether the
19 material has been altered.
- 20 (3) For the purposes of this section, it is immaterial whether the
21 abhorrent violent conduct was engaged in within or outside
22 Australia.

23 **474.32 Abhorrent violent conduct**

- 24 (1) For the purposes of this Subdivision, a person engages in
25 ***abhorrent violent conduct*** if the person:
26 (a) engages in a terrorist act; or
27 (b) murders another person; or
28 (c) attempts to murder another person; or
29 (d) tortures another person; or
30 (e) rapes another person; or
31 (f) kidnaps another person.

1 *Murder*

- 2 (2) For the purposes of this section, a person (the *first person*) murders
3 another person if:
4 (a) the first person's conduct causes the death of the other
5 person; and
6 (b) the conduct constitutes an offence.

7 *Torture*

- 8 (3) For the purposes of this section, a person (the *first person*) tortures
9 another person if:
10 (a) the first person inflicts severe physical or mental pain or
11 suffering upon the other person; and
12 (b) the other person is in the custody, or under the control, of the
13 first person; and
14 (c) the pain or suffering does not arise only from, and is not
15 inherent in or incidental to, lawful sanctions that are not
16 inconsistent with the Articles of the International Covenant
17 on Civil and Political Rights (a copy of the English text of
18 which is set out in Schedule 2 to the *Australian Human*
19 *Rights Commission Act 1986*).

20 *Rape*

- 21 (4) For the purposes of this section, a person (the *first person*) rapes
22 another person if:
23 (a) the first person sexually penetrates the other person without
24 the consent of the other person; or
25 (b) the first person causes the other person to sexually penetrate
26 the first person without the consent of the other person.

27 *Kidnapping*

- 28 (5) For the purposes of this section, a person (the *first person*) kidnaps
29 another person if:
30 (a) the first person takes or detains the other person without the
31 other person's consent; and
32 (b) the first person takes or detains the other person in order to:
33 (i) hold the other person to ransom or as a hostage; or
-

- 1 (ii) murder, torture or rape the other person or a third
2 person; or
3 (iii) cause serious harm to the other person or a third person;
4 and
5 (c) the taking or detention of the other person involves violence
6 or a threat of violence.

7 *Interpretation*

8 (6) In this section:

9 *sexually penetrate* means:

- 10 (a) penetrate (to any extent) the genitalia or anus of a person by
11 any part of the body of another person or by any object
12 manipulated by that other person; or
13 (b) penetrate (to any extent) the mouth of a person by the penis
14 of another person; or
15 (c) continue to sexually penetrate as defined in paragraph (a) or
16 (b).

17 *terrorist act* has the same meaning as in section 100.1. For this
18 purpose, disregard paragraphs 100.1(2)(b), (d), (e) and (f).

19 (7) For the purposes of this section, the genitalia or other parts of the
20 body of a person include surgically constructed genitalia or other
21 parts of the body of the person.

22 **474.33 Notification obligations of internet service providers, content**
23 **service providers and hosting service providers**

24 (1) A person commits an offence if:

- 25 (a) the person:
26 (i) is an internet service provider; or
27 (ii) provides a content service; or
28 (iii) provides a hosting service; and
29 (b) the person is aware that the service provided by the person
30 can be used to access particular material that the person has
31 reasonable grounds to believe is abhorrent violent material
32 that records or streams abhorrent violent conduct that has
33 occurred, or is occurring, in Australia; and

1 (c) the person does not refer details of the material to the
2 Australian Federal Police within a reasonable time after
3 becoming aware of the existence of the material.

4 Penalty: 800 penalty units.

5 (2) For the purposes of this section:

6 (a) it is immaterial whether the content service is provided
7 within or outside Australia; and

8 (b) it is immaterial whether the hosting service is provided
9 within or outside Australia.

10 (3) Subsection (1) does not apply if the person reasonably believes that
11 details of the material are already known to the Australian Federal
12 Police.

13 Note: A defendant bears an evidential burden in relation to the matters in
14 this subsection: see subsection 13.3(3).

15 **474.34 Removing, or ceasing to host, abhorrent violent material**

16 *Content service*

17 (1) A person commits an offence if:

18 (a) the person provides a content service; and

19 (b) the content service can be used to access material; and

20 (c) the material is abhorrent violent material; and

21 (d) the person does not ensure the expeditious removal of the
22 material from the content service.

23 (2) For the purposes of subsection (1), it is immaterial whether the
24 content service is provided within or outside Australia.

25 (3) Subsection (1) does not apply to material unless the material is
26 reasonably capable of being accessed within Australia.

27 (4) The fault element for paragraphs (1)(b) and (c) is recklessness.

28 *Hosting service*

29 (5) A person commits an offence if:

30 (a) the person provides a hosting service; and

- 1 (b) material is hosted on the hosting service; and
2 (c) the material is abhorrent violent material; and
3 (d) the person does not expeditiously cease hosting the material.

4 (6) For the purposes of subsection (5), it is immaterial whether the
5 hosting service is provided within or outside Australia.

6 (7) Subsection (5) does not apply to material unless the material is
7 reasonably capable of being accessed within Australia.

8 (8) The fault element for paragraphs (5)(b) and (c) is recklessness.

9 *Penalty for individual*

10 (9) An offence against subsection (1) or (5) committed by an
11 individual is punishable on conviction by imprisonment for a
12 period of not more than 3 years or a fine of not more than 10,000
13 penalty units, or both.

14 *Penalty for body corporate*

15 (10) An offence against subsection (1) or (5) committed by a body
16 corporate is punishable on conviction by a fine of not more than
17 the greater of the following:

- 18 (a) 50,000 penalty units;
19 (b) 10% of the annual turnover of the body corporate during the
20 period (the *turnover period*) of 12 months ending at the end
21 of the month in which the conduct constituting the offence
22 occurred.

23 (11) For the purposes of this section, the *annual turnover* of a body
24 corporate, during the turnover period, is the sum of the values of all
25 the supplies that the body corporate, and any body corporate
26 related to the body corporate, have made, or are likely to make,
27 during that period, other than the following supplies:

- 28 (a) supplies made from any of those bodies corporate to any
29 other of those bodies corporate;
30 (b) supplies that are input taxed;
31 (c) supplies that are not for consideration (and are not taxable
32 supplies under section 72-5 of the *A New Tax System (Goods
33 and Services Tax) Act 1999*);

-
- 1 (d) supplies that are not made in connection with an enterprise
2 that the body corporate carries on.
- 3 (12) For the purposes of subsection (11), it is immaterial whether the
4 supplies were made, or are likely to be made, within or outside
5 Australia.
- 6 (13) Expressions used in subsections (11) and (12) that are also used in
7 the *A New Tax System (Goods and Services Tax) Act 1999* have the
8 same meaning in those subsections as they have in that Act.
- 9 (14) The question whether 2 bodies corporate are related to each other
10 is to be determined for the purposes of this section in the same way
11 as for the purposes of the *Corporations Act 2001*.

12 *When material is removed from a content service*

- 13 (15) For the purposes of this section, material is **removed** from a content
14 service if the material is not accessible to any of the end-users
15 using the service.

16 **474.35 Notice issued by eSafety Commissioner in relation to a**
17 **content service—presumptions**

- 18 (1) The eSafety Commissioner may issue a written notice stating that,
19 at the time the notice was issued:
- 20 (a) a specified content service could be used to access specified
21 material; and
22 (b) the specified material was abhorrent violent material.
- 23 (2) The eSafety Commissioner must not issue a notice under
24 subsection (1) unless the eSafety Commissioner is satisfied on
25 reasonable grounds that, at the time the notice was issued:
- 26 (a) the specified content service could be used to access the
27 specified material; and
28 (b) the specified material was abhorrent violent material.
- 29 (3) As soon as practicable after issuing a notice under subsection (1),
30 the eSafety Commissioner must give a copy of the notice to the
31 person who provides the content service concerned.

1 (4) The eSafety Commissioner is not required to observe any
2 requirements of procedural fairness in relation to the issue of a
3 notice under subsection (1).

4 *Presumptions*

5 (5) If:
6 (a) a notice under subsection (1) is issued in relation to a content
7 service provided by a person; and
8 (b) in a prosecution of the person for an offence against
9 subsection 474.34(1), it is proven that the content service
10 could be used to access the material specified in the notice at
11 the time the notice was issued;

12 then, in that prosecution, it must be presumed that the person was
13 reckless as to whether the content service could be used to access
14 the specified material at the time the notice was issued, unless the
15 person adduces or points to evidence that suggests a reasonable
16 possibility that the person was not reckless as to whether the
17 content service could be used to access the specified material at the
18 time the notice was issued.

19 (6) If a notice under subsection (1) is issued in relation to a content
20 service provided by a person, then, in a prosecution of the person
21 for an offence against subsection 474.34(1), it must be presumed
22 that, at the time the notice was issued, the person was reckless as to
23 whether the material specified in the notice was abhorrent violent
24 material, unless the person adduces or points to evidence that
25 suggests a reasonable possibility that, at the time the notice was
26 issued, the person was not reckless as to whether the specified
27 material was abhorrent violent material.

28 *Other evidentiary matters*

29 (7) A document purporting to be a notice issued under subsection (1)
30 must, unless the contrary is established, be taken to be such a
31 notice and to have been properly issued.

32 (8) The eSafety Commissioner may certify that a document is a copy
33 of a notice issued under subsection (1).

34 (9) Subsections (5), (6) and (7) apply to the certified copy as if it were
35 the original.

1 that the person was not reckless as to whether specified material
2 was hosted on the hosting service at the time the notice was issued.

3 (6) If a notice under subsection (1) is issued in relation to a hosting
4 service provided by a person, then, in a prosecution of the person
5 for an offence against subsection 474.34(5), it must be presumed
6 that, at the time the notice was issued, the person was reckless as to
7 whether the material specified in the notice was abhorrent violent
8 material, unless the person adduces or points to evidence that
9 suggests a reasonable possibility that, at the time the notice was
10 issued, the person was not reckless as to whether the specified
11 material was abhorrent violent material.

12 *Other evidentiary matters*

13 (7) A document purporting to be a notice issued under subsection (1)
14 must, unless the contrary is established, be taken to be such a
15 notice and to have been properly issued.

16 (8) The eSafety Commissioner may certify that a document is a copy
17 of a notice issued under subsection (1).

18 (9) Subsections (5), (6) and (7) apply to the certified copy as if it were
19 the original.

20 *Application*

21 (10) This section extends to matters and things outside Australia.

22 **474.37 Defences in respect of abhorrent violent material**

23 *Content service*

24 (1) Subsection 474.34(1) does not apply to material that can be
25 accessed using a service if:
26 (a) the accessibility of the material is necessary for enforcing a
27 law of:
28 (i) the Commonwealth; or
29 (ii) a State; or
30 (iii) a Territory; or
31 (iv) a foreign country; or

- 1 (v) a part of a foreign country; or
2 (b) the accessibility of the material is necessary for monitoring
3 compliance with, or investigating a contravention of, a law
4 of:
5 (i) the Commonwealth; or
6 (ii) a State; or
7 (iii) a Territory; or
8 (iv) a foreign country; or
9 (v) a part of a foreign country; or
10 (c) the accessibility of the material is for the purposes of
11 proceedings in a court or tribunal; or
12 (d) both:
13 (i) the accessibility of the material is necessary for, or of
14 assistance in, conducting scientific, medical, academic
15 or historical research; and
16 (ii) the accessibility of the material is reasonable in the
17 circumstances for the purpose of conducting that
18 scientific, medical, academic or historical research; or
19 (e) the material relates to a news report, or a current affairs
20 report, that:
21 (i) is in the public interest; and
22 (ii) is made by a person working in a professional capacity
23 as a journalist; or
24 (f) both:
25 (i) the accessibility of the material is in connection with the
26 performance by a public official of the official's duties
27 or functions; and
28 (ii) the accessibility of the material is reasonable in the
29 circumstances for the purpose of performing that duty or
30 function; or
31 (g) both:
32 (i) the accessibility of the material is in connection with an
33 individual assisting a public official in relation to the
34 performance of the public official's duties or functions;
35 and
36 (ii) the accessibility of the material is reasonable in the
37 circumstances for the purpose of the individual assisting

- 1 the public official in relation to the performance of the
2 public official's duties or functions; or
3 (h) the accessibility of the material is for the purpose of
4 advocating the lawful procurement of a change to any matter
5 established by law, policy or practice in:
6 (i) the Commonwealth; or
7 (ii) a State; or
8 (iii) a Territory; or
9 (iv) a foreign country; or
10 (v) a part of a foreign country;
11 and the accessibility of the material is reasonable in the
12 circumstances for that purpose; or
13 (i) the accessibility of the material relates to the development,
14 performance, exhibition or distribution, in good faith, of an
15 artistic work.

16 Note: A defendant bears an evidential burden in relation to the matters in
17 this subsection (see subsection 13.3(3)).

18 *Hosting service*

- 19 (2) Subsection 474.34(5) does not apply to material that is hosted on a
20 hosting service if:
21 (a) the hosting of the material is necessary for enforcing a law
22 of:
23 (i) the Commonwealth; or
24 (ii) a State; or
25 (iii) a Territory; or
26 (iv) a foreign country; or
27 (v) a part of a foreign country; or
28 (b) the hosting of the material is necessary for monitoring
29 compliance with, or investigating a contravention of, a law
30 of:
31 (i) the Commonwealth; or
32 (ii) a State; or
33 (iii) a Territory; or
34 (iv) a foreign country; or
35 (v) a part of a foreign country; or

- 1 (c) the hosting of the material is for the purposes of proceedings
2 in a court or tribunal; or
3 (d) both:
4 (i) the hosting of the material is necessary for, or of
5 assistance in, conducting scientific, medical, academic
6 or historical research; and
7 (ii) the hosting of the material is reasonable in the
8 circumstances for the purpose of conducting that
9 scientific, medical, academic or historical research; or
10 (e) the material relates to a news report, or a current affairs
11 report, that:
12 (i) is in the public interest; and
13 (ii) is made by a person working in a professional capacity
14 as a journalist; or
15 (f) both:
16 (i) the hosting of the material is in connection with the
17 performance by a public official of the official's duties
18 or functions; and
19 (ii) the hosting of the material is reasonable in the
20 circumstances for the purpose of performing that duty or
21 function; or
22 (g) both:
23 (i) the hosting of the material is in connection with an
24 individual assisting a public official in relation to the
25 performance of the public official's duties or functions;
26 and
27 (ii) the hosting of the material is reasonable in the
28 circumstances for the purpose of the individual assisting
29 the public official in relation to the performance of the
30 public official's duties or functions; or
31 (h) the hosting of the material is for the purpose of advocating
32 the lawful procurement of a change to any matter established
33 by law, policy or practice in:
34 (i) the Commonwealth; or
35 (ii) a State; or
36 (iii) a Territory; or
37 (iv) a foreign country; or
38 (v) a part of a foreign country;
-

- 1 and the hosting of the material is reasonable in the
2 circumstances for that purpose; or
3 (i) the hosting of the material relates to the development,
4 performance, exhibition or distribution, in good faith, of an
5 artistic work.

6 Note: A defendant bears an evidential burden in relation to the matters in
7 this subsection (see subsection 13.3(3)).

8 *Functions*

- 9 (3) The references in this section to function or functions do not, by
10 implication, affect the meaning of the expressions duty or duties
11 when used in any other provision of this Code.

12 *Application*

- 13 (4) This section extends to matters and things outside Australia.

14 **474.38 Implied freedom of political communication**

15 (1) This Subdivision does not apply to the extent (if any) that it would
16 infringe any constitutional doctrine of implied freedom of political
17 communication.

18 (2) Subsection (1) does not limit the application of section 15A of the
19 *Acts Interpretation Act 1901* to this Act.

20 **474.39 Provider of content service**

21 (1) For the purposes of this Subdivision, a person does not provide a
22 content service merely because the person supplies a carriage
23 service that enables material to be accessed.

24 (2) For the purposes of this Subdivision, a person does not provide a
25 content service merely because the person provides a billing
26 service, or a fee collection service, in relation to a content service.

27 **474.40 Service of copies of notices by electronic means**

28 Paragraphs 9(1)(d) and (2)(d) of the *Electronic Transactions Act*
29 *1999* do not apply to a copy of a notice under subsection 474.35(1)
30 or 474.36(1) of this Act.

1 Note: Paragraphs 9(1)(d) and (2)(d) of the *Electronic Transactions Act 1999*
2 deal with the consent of the recipient of information to the information
3 being given by way of electronic communication.

4 **474.41 Giving a copy of a notice to a contact person etc.**

5 *Contact person*

- 6 (1) If:
- 7 (a) a copy of a notice under subsection 474.35(1) is required to
8 be given to the provider of a content service that is a social
9 media service (within the meaning of the *Enhancing Online*
10 *Safety Act 2015*); and
- 11 (b) there is an individual who is:
- 12 (i) an employee or agent of the provider; and
13 (ii) designated as the service's contact person for the
14 purposes of that Act; and
- 15 (c) the contact details of the contact person have been notified to
16 the eSafety Commissioner;
- 17 the copy of the notice is taken to have been given to the provider if
18 it is given to the contact person.

19 *Agent*

- 20 (2) If:
- 21 (a) a copy of a notice under subsection 474.35(1) or 474.36(1) is
22 required to be given to a body corporate incorporated outside
23 Australia; and
- 24 (b) the body corporate does not have a registered office or a
25 principal office in Australia; and
- 26 (c) the body corporate has an agent in Australia;
- 27 the copy of the notice is taken to have been given to the body
28 corporate if it is given to the agent.

29 *Other matters*

- 30 (3) Subsections (1) and (2) have effect in addition to section 28A of
31 the *Acts Interpretation Act 1901*.

32 Note: Section 28A of the *Acts Interpretation Act 1901* deals with the service
33 of documents.

1 **474.42 Attorney-General's consent required for prosecution**

2 *Offence against section 474.33*

- 3 (1) Proceedings for an offence against section 474.33 must not be
4 commenced without the Attorney-General's written consent if:
5 (a) the conduct constituting the alleged offence occurs wholly in
6 a foreign country; and
7 (b) at the time of the alleged offence, the person alleged to have
8 committed the offence is neither:
9 (i) an Australian citizen; nor
10 (ii) a body corporate incorporated by or under a law of the
11 Commonwealth or of a State or Territory.
- 12 (2) However, a person may be arrested for, charged with, or remanded
13 in custody or released on bail in connection with, an offence
14 against section 474.33 before the necessary consent has been
15 given.

16 *Offence against section 474.34*

- 17 (3) Proceedings for an offence against section 474.34 must not be
18 commenced without the Attorney-General's written consent.
- 19 (4) However, a person may be arrested for, charged with, or remanded
20 in custody or released on bail in connection with, an offence
21 against section 474.34 before the necessary consent has been
22 given.

23 **474.43 Compensation for acquisition of property**

- 24 (1) If the operation of this Subdivision would result in an acquisition
25 of property (within the meaning of paragraph 51(xxxi) of the
26 Constitution) from a person otherwise than on just terms (within
27 the meaning of that paragraph), the Commonwealth is liable to pay
28 a reasonable amount of compensation to the person.
- 29 (2) If the Commonwealth and the person do not agree on the amount
30 of the compensation, the person may institute proceedings in:
31 (a) the Federal Court of Australia; or
32 (b) the Supreme Court of a State or Territory;

1 for the recovery from the Commonwealth of such reasonable
2 amount of compensation as the court determines.

3 **474.44 This Subdivision does not limit Schedule 5 or 7 to the**
4 ***Broadcasting Services Act 1992***

5 This Subdivision does not limit the operation of Schedule 5 or 7 to
6 the *Broadcasting Services Act 1992*.

7 **474.45 Review of this Subdivision**

8 (1) After the end of the 2-year period beginning at the commencement
9 of this section, the Minister must cause to be conducted a review of
10 the operation of this Subdivision.

11 *Report*

12 (2) A report of the review must be given to the Minister within 12
13 months after the end of the 2-year period mentioned in
14 subsection (1).

15 (3) The Minister must cause copies of a report under subsection (2) to
16 be tabled in each House of the Parliament within 15 sitting days of
17 that House after the Minister receives the report.

18 **2 Section 475.2 of the *Criminal Code***

19 Before “Section 15.1”, insert “(1)”.

20 **3 Section 475.2 of the *Criminal Code***

21 After “Part”, insert “(other than Subdivision H of Division 474)”.

22 **4 At the end of section 475.2 of the *Criminal Code***

23 Add:

24 (2) Section 14.1 (standard geographical jurisdiction) does not apply to
25 an offence against Subdivision H of Division 474.

1 **Schedule 2—Obligations of internet service**
2 **providers and internet content hosts**
3

4 ***Criminal Code Act 1995***

5 **1 Section 474.25 of the *Criminal Code* (penalty)**

6 Omit “100 penalty units”, substitute “800 penalty units”.