



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

No. 38, 2019

An Act to amend the *Criminal Code Act 1995*, and for related purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (<https://www.legislation.gov.au/>)

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No. 38, 2019

An Act to amend the *Criminal Code Act 1995*, and for related purposes

[Assented to 5 April 2019]

The Parliament of Australia enacts:

1 Short title

This Act is the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	The day after this Act receives the Royal Assent.	6 April 2019

Note: This table relates only to the provisions of this Act as originally enacted.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

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

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Sharing of abhorrent violent material

Criminal Code Act 1995

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

Add:

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

474.30 Definitions

In this Subdivision:

abhorrent violent conduct has the meaning given by section 474.32.

abhorrent violent material has the meaning given by section 474.31.

consent means free and voluntary agreement.

content service means:

- (a) a social media service (within the meaning of the *Enhancing Online Safety Act 2015*); or
 - (b) a designated internet service (within the meaning of the *Enhancing Online Safety Act 2015*).

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

474.31 Abhorrent violent material

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

 - (a) is:
 - (i) audio material; or

- (ii) visual material; or
 - (iii) audio-visual material;
- that records or streams abhorrent violent conduct engaged in by one or more persons; and
- (b) is material that reasonable persons would regard as being, in all the circumstances, offensive; and
 - (c) is produced by a person who is, or by 2 or more persons each of whom is:
 - (i) a person who engaged in the abhorrent violent conduct; or
 - (ii) a person who conspired to engage in the abhorrent violent conduct; or
 - (iii) a person who aided, abetted, counselled or procured, or was in any way knowingly concerned in, the abhorrent violent conduct; or
 - (iv) a person who attempted to engage in the abhorrent violent conduct.
- (2) For the purposes of this section, it is immaterial whether the material has been altered.
- (3) For the purposes of this section, it is immaterial whether the abhorrent violent conduct was engaged in within or outside Australia.

474.32 Abhorrent violent conduct

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

Murder

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

Torture

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

Rape

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

Kidnapping

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

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

Interpretation

- (6) In this section:

sexually penetrate means:

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

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

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

474.33 Notification obligations of internet service providers, content service providers and hosting service providers

- (1) A person commits an offence if:

- (a) the person:
 - (i) is an internet service provider; or
 - (ii) provides a content service; or
 - (iii) provides a hosting service; and
- (b) 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

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

Penalty: 800 penalty units.

- (2) For the purposes of this section:
 - (a) it is immaterial whether the content service is provided within or outside Australia; and
 - (b) it is immaterial whether the hosting service is provided within or outside Australia.
- (3) Subsection (1) does not apply if the person reasonably believes that details of the material are already known to the Australian Federal Police.

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

474.34 Removing, or ceasing to host, abhorrent violent material

Content service

- (1) A person commits an offence if:
 - (a) the person provides a content service; and
 - (b) the content service can be used to access material; and
 - (c) the material is abhorrent violent material; and
 - (d) the person does not ensure the expeditious removal of the material from the content service.
- (2) For the purposes of subsection (1), it is immaterial whether the content service is provided within or outside Australia.
- (3) Subsection (1) does not apply to material unless the material is reasonably capable of being accessed within Australia.
- (4) The fault element for paragraphs (1)(b) and (c) is recklessness.

Hosting service

- (5) A person commits an offence if:
 - (a) the person provides a hosting service; and

- (b) material is hosted on the hosting service; and
 - (c) the material is abhorrent violent material; and
 - (d) the person does not expeditiously cease hosting the material.
- (6) For the purposes of subsection (5), it is immaterial whether the hosting service is provided within or outside Australia.
- (7) Subsection (5) does not apply to material unless the material is reasonably capable of being accessed within Australia.
- (8) The fault element for paragraphs (5)(b) and (c) is recklessness.

Penalty for individual

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

Penalty for body corporate

- (10) An offence against subsection (1) or (5) committed by a body corporate is punishable on conviction by a fine of not more than the greater of the following:
- (a) 50,000 penalty units;
 - (b) 10% of the annual turnover of the body corporate during the period (the *turnover period*) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.
- (11) For the purposes of this section, the *annual turnover* of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than the following supplies:
- (a) supplies made from any of those bodies corporate to any other of those bodies corporate;
 - (b) supplies that are input taxed;
 - (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*);

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

When material is removed from a content service

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

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

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

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

Presumptions

- (5) If:
- (a) a notice under subsection (1) is issued in relation to a content service provided by a person; and
 - (b) in a prosecution of the person for an offence against subsection 474.34(1), it is proven that the content service could be used to access the material specified in the notice at the time the notice was issued;
- then, in that prosecution, it must be presumed that the person was reckless as to whether the content service could be used to access the specified material at the time the notice was issued, unless the person adduces or points to evidence that suggests a reasonable possibility that the person was not reckless as to whether the content service could be used to access the specified material at the time the notice was issued.
- (6) If a notice under subsection (1) is issued in relation to a content service provided by a person, then, in a prosecution of the person for an offence against subsection 474.34(1), it must be presumed that, at the time the notice was issued, the person was reckless as to whether the material specified in the notice was abhorrent violent material, unless the person adduces or points to evidence that suggests a reasonable possibility that, at the time the notice was issued, the person was not reckless as to whether the specified material was abhorrent violent material.

Other evidentiary matters

- (7) A document purporting to be a notice issued under subsection (1) must, unless the contrary is established, be taken to be such a notice and to have been properly issued.
- (8) The eSafety Commissioner may certify that a document is a copy of a notice issued under subsection (1).
- (9) Subsections (5), (6) and (7) apply to the certified copy as if it were the original.
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Application

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

474.36 Notice issued by eSafety Commissioner in relation to a hosting service—presumptions

- (1) The eSafety Commissioner may issue a written notice stating that, at the time the notice was issued:
 - (a) specified material was hosted on a specified hosting service; and
 - (b) the specified material was abhorrent violent material.
- (2) The eSafety Commissioner must not issue a notice under subsection (1) unless the eSafety Commissioner is satisfied on reasonable grounds that, at the time the notice was issued:
 - (a) the specified material was hosted on the specified hosting service; and
 - (b) the specified material was abhorrent violent material.
- (3) As soon as practicable after issuing a notice under subsection (1), the eSafety Commissioner must give a copy of the notice to the person who provides the hosting service concerned.
- (4) The eSafety Commissioner is not required to observe any requirements of procedural fairness in relation to the issue of a notice under subsection (1).

Presumptions

- (5) If:
- (a) a notice under subsection (1) is issued in relation to a hosting service provided by a person; and
 - (b) in a prosecution of the person for an offence against subsection 474.34(5), it is proven that the material specified in the notice was hosted on the hosting service at the time the notice was issued;
- then, in that prosecution, it must be presumed that the person was reckless as to whether the specified material was hosted on the hosting service at the time the notice was issued, unless the person adduces or points to evidence that suggests a reasonable possibility
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that the person was not reckless as to whether specified material was hosted on the hosting service at the time the notice was issued.

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

Other evidentiary matters

- (7) A document purporting to be a notice issued under subsection (1) must, unless the contrary is established, be taken to be such a notice and to have been properly issued.
- (8) The eSafety Commissioner may certify that a document is a copy of a notice issued under subsection (1).
- (9) Subsections (5), (6) and (7) apply to the certified copy as if it were the original.

Application

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

474.37 Defences in respect of abhorrent violent material

Content service

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

- (v) a part of a foreign country; or
- (b) the accessibility of the material is necessary for monitoring compliance with, or investigating a contravention of, a law of:
 - (i) the Commonwealth; or
 - (ii) a State; or
 - (iii) a Territory; or
 - (iv) a foreign country; or
 - (v) a part of a foreign country; or
- (c) the accessibility of the material is for the purposes of proceedings in a court or tribunal; or
- (d) both:
 - (i) the accessibility of the material is necessary for, or of assistance in, conducting scientific, medical, academic or historical research; and
 - (ii) the accessibility of the material is reasonable in the circumstances for the purpose of conducting that scientific, medical, academic or historical research; or
- (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; or
- (f) both:
 - (i) the accessibility of the material is in connection with the performance by a public official of the official's duties or functions; and
 - (ii) the accessibility of the material is reasonable in the circumstances for the purpose of performing that duty or function; or
- (g) both:
 - (i) the accessibility of the material is in connection with an individual assisting a public official in relation to the performance of the public official's duties or functions; and
 - (ii) the accessibility of the material is reasonable in the circumstances for the purpose of the individual assisting

the public official in relation to the performance of the public official's duties or functions; or

- (h) the accessibility of the material is for the purpose of advocating the lawful procurement of a change to any matter established by law, policy or practice in:
- (i) the Commonwealth; or
 - (ii) a State; or
 - (iii) a Territory; or
 - (iv) a foreign country; or
 - (v) a part of a foreign country;
- and the accessibility of the material is reasonable in the circumstances for that purpose; or
- (i) the accessibility of the material relates to the development, performance, exhibition or distribution, in good faith, of an artistic work.

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

Hosting service

- (2) Subsection 474.34(5) does not apply to material that is hosted on a hosting service if:
- (a) the hosting of the material is necessary for enforcing a law of:
 - (i) the Commonwealth; or
 - (ii) a State; or
 - (iii) a Territory; or
 - (iv) a foreign country; or
 - (v) a part of a foreign country; or
 - (b) the hosting of the material is necessary for monitoring compliance with, or investigating a contravention of, a law of:
 - (i) the Commonwealth; or
 - (ii) a State; or
 - (iii) a Territory; or
 - (iv) a foreign country; or
 - (v) a part of a foreign country; or

- (c) the hosting of the material is for the purposes of proceedings in a court or tribunal; or
- (d) both:
 - (i) the hosting of the material is necessary for, or of assistance in, conducting scientific, medical, academic or historical research; and
 - (ii) the hosting of the material is reasonable in the circumstances for the purpose of conducting that scientific, medical, academic or historical research; or
- (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; or
- (f) both:
 - (i) the hosting of the material is in connection with the performance by a public official of the official's duties or functions; and
 - (ii) the hosting of the material is reasonable in the circumstances for the purpose of performing that duty or function; or
- (g) both:
 - (i) the hosting of the material is in connection with an individual assisting a public official in relation to the performance of the public official's duties or functions; and
 - (ii) the hosting of the material is reasonable in the circumstances for the purpose of the individual assisting the public official in relation to the performance of the public official's duties or functions; or
- (h) the hosting of the material is for the purpose of advocating the lawful procurement of a change to any matter established by law, policy or practice in:
 - (i) the Commonwealth; or
 - (ii) a State; or
 - (iii) a Territory; or
 - (iv) a foreign country; or
 - (v) a part of a foreign country;

and the hosting of the material is reasonable in the circumstances for that purpose; or

- (i) the hosting of the material relates to the development, performance, exhibition or distribution, in good faith, of an artistic work.

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

Functions

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

Application

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

474.38 Implied freedom of political communication

- (1) This Subdivision does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.
- (2) Subsection (1) does not limit the application of section 15A of the *Acts Interpretation Act 1901* to this Act.

474.39 Provider of content service

- (1) For the purposes of this Subdivision, a person does not provide a content service merely because the person supplies a carriage service that enables material to be accessed.
- (2) For the purposes of this Subdivision, a person does not provide a content service merely because the person provides a billing service, or a fee collection service, in relation to a content service.

474.40 Service of copies of notices by electronic means

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

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

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

Contact person

(1) If:

- (a) a copy of a notice under subsection 474.35(1) is required to be given to the provider of a content service that is a social media service (within the meaning of the *Enhancing Online Safety Act 2015*); and
- (b) there is an individual who is:
 - (i) an employee or agent of the provider; and
 - (ii) designated as the service's contact person for the purposes of that Act; and
- (c) the contact details of the contact person have been notified to the eSafety Commissioner;

the copy of the notice is taken to have been given to the provider if it is given to the contact person.

Agent

(2) If:

- (a) a copy of a notice under subsection 474.35(1) or 474.36(1) is required to be given to a body corporate incorporated outside Australia; and
 - (b) the body corporate does not have a registered office or a principal office in Australia; and
 - (c) the body corporate has an agent in Australia;
- the copy of the notice is taken to have been given to the body corporate if it is given to the agent.

Other matters

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

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

474.42 Attorney-General's consent required for prosecution

Offence against section 474.33

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

Offence against section 474.34

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

474.43 Compensation for acquisition of property

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

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

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

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

474.45 Review of this Subdivision

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

Report

- (2) A report of the review must be given to the Minister within 12 months after the end of the 2-year period mentioned in subsection (1).
- (3) The Minister must cause copies of a report under subsection (2) to be tabled in each House of the Parliament within 15 sitting days of that House after the Minister receives the report.

2 Section 475.2 of the *Criminal Code*

Before “Section 15.1”, insert “(1)”.

3 Section 475.2 of the *Criminal Code*

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

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

Add:

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

Schedule 2—Obligations of internet service providers and internet content hosts

Criminal Code Act 1995

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

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

*[Minister’s second reading speech made in—
Senate on 3 April 2019
House of Representatives on 4 April 2019]*

(81/19)
