**7 Abhorrent Violent Material**

**How Abhorrent Violent Material emerged**

In response to the Christchurch massacre, the Australian government passed an amendment to the *Criminal Code Act 1995* (Cth) in 2019 to regulate abhorrent material.[[1]](#footnote-1)

In Christchurch, New Zealand on 15 March 2019 an Australian gunman, Brenton Tarrant, entered two Mosques massacring 51 individuals and injuring an additional 49. Tarrant wore a GoPro attached to his head, recording and live streaming the entire massacre to his personal Facebook page. The live stream lasted 17 minutes and was initially viewed by 4,000 users but was later re-produced and shared in 1.5 million videos within 24 hours of the incident. It took approximately one hour from the start of the streaming for Facebook to remove the original video off the platform.

**Definition**

Abhorrent violent material is defined by section 474.31 of the *Criminal Code Amendment Act (Sharing of Abhorrent Violent Material) Act 2019* (Cth) (the **AVM Act**) as audio, visual, or audio-visual material that records or streams abhorrent violent conduct being engaged in by one or more persons. Section 474.32 of the AVM Act classifies that a person engages in abhorrent violent conduct if the person:

1. engages in a terrorist act;
2. murders another person;
3. attempts to murder another person;
4. tortures another person;
5. rapes another person; or
6. kidnaps another person.

These offences target content that is reasonably capable of being accessed within Australia, regardless of where the material was created or where the platform operator is located. The offences include substantial penalties if individuals and companies do not remove or report such classified material: fines up to 10% of annual global turnover for companies, and up to 3 years imprisonment for individuals.

There are a few defences to the new offences, including:

* material necessary for law enforcement,
* material distributed by journalists,
* material used for scientific, medical, academic or historical research, and
* the exhibition of artistic works.

**Criticisms of the AVM Act**

The AVM Act has been criticised for drafting deficiencies.[[2]](#footnote-2) The AVM Act came into effect on 6 April 2019, just under a month after the Christchurch Massacre. In the Second Reading of the AVM Bill, Mr Bandt, leader of the Greens Party, in highlighting the government’s haste to pass the Bill noted that it may undermine the legitimacy of the Bill further down the track and there could be unintended consequences.[[3]](#footnote-3) The President of the Law Council of Australia echoed this sentiment, describing the legislation “knee jerk reaction to tragic event”.[[4]](#footnote-4)

***“As soon as reasonably possible”***

Under section 474.33(c) of the AVM Act, it is an offence for a person who has reasonable grounds to believe that certain material is abhorrent violent material, and fails to report the details to the Australian Federal Police within a "reasonable time" after becoming aware of its existence. The AVM Act does not specify what will constitute a “reasonable time”. However, the Attorney-General deemed it “unacceptable” that the Christchurch Massacre livestream was available for over an hour before first attempts were taken to remove the content.[[5]](#footnote-5) This points to the conclusion that it is likely that the timeframes would be measured in hours and minutes rather than days.[[6]](#footnote-6) The United Nations has expressed concerns that the wording of “reasonable time” is ambiguous and in practice will cause hasty decisions made by content services or hosting services.[[7]](#footnote-7)

**The *Online Safety Act 2021* (Cth)**

The eSafety Commissioner has wide-ranging powers to under the *Online Safety Act 2021* (Cth) to order the removal of certain online material.

Under section 109, the Commission can issue a removal notice when they are satisfied the material is or was class 1 material; the material can be accessed by end-users in Australia, and that once issued a removal notice the service provider must take ‘all reasonable steps’ to ensure removal of the material.

Under s 95 of the eSafety Commissioner can issue a provider with a blocking request, requesting that they to take steps to disable access to the material if the:

1. material can be accessed using an internet carriage service supplied by an internet service provider;
2. Commissioner is satisfied that the material that promotes, instructs, incites or depicts abhorrent violent conduct; and
3. Commissioner is satisfied that the availability of the material online is likely to cause significant harm to the Australian community.

**Case Study: *eSafety Commissioner v X Corp* [2024] FCA 499**

The recent case of *eSafety Commissioner v X Corp* [2024] FCA 499tested the powers and limits of the *Online Safety Act* (**the Act**) in relation to the Commissioner’s powers under section 109.

***Facts***

On 15 April 2024, in the Sydney suburb of Wakeley, Bishop Mar Mari Emmanuel was attacked and stabbed while delivering a service that was being live streamed by the church. The Bishop, along with a priest, a member of the congregation, and the suspected attacker, all sustained injuries in the incident.

The footage that was captured through the live stream was available instantly. Following its online livestream, the footage was reduced to a shorter clip of roughly 11 seconds, which depicted the suspected attacker approaching the Bishop and striking him several times in a downward motion. No highly graphic details were visible (i.e., no blood or wounds), however the audio captured the sounds of the impacts between the weapon and the Bishop, and the shocked and distressed reactions of witnesses can be heard. The clip was subsequently shared across various mainstream social media sites, including X (*formerly Twitter*).

***The Commissioner’s Response***

The day following the incident, the eSafety Commissioner deemed the clip as ‘class 1 material’, and through invoking her powers pursuant to section 109 of the Act*,* issued a formal notice (**the notice**) to X Corp (**X**) requiring them to take *all reasonable steps* to remove the footage from their platforms. The notice did not apply to *all* copies of the footage, but rather only to a set of 65 links which contained footage of the incident and were posted to X. The justification being that the material was deemed to be of class 1 classification under the Act, which depicted ‘crime, cruelty and real violence’, such that it ‘offends against the standards of morality, decency and propriety generally accepted by reasonable adults’.

X subsequently responded to the notice by geo blocking each of the specified posts for Australian users; meaning that users who had their IP address set to an Australian location, were unable to access the content. However, the eSafety Commissioner was not satisfied that X’s response in geo blocking the material constituted compliance with the notice, as Australians could still access the URLs via a VPN.

***Proceedings***

On 22 April 2024, the Commissioner commenced proceedings in the Federal Court, seeking injunctive relief that would require X to remove the material from its platform or make them inaccessible to all users. The eSafety Commissioner was successful - *at least temporarily* - as the Federal Court ordered an interim injunction against X, which remained in effect until 13 May. The injunction required X to hide the material identified by the Commissioner behind a separate notice, such that X users would instead only see the notice blocking the material (rather than the material itself), which could not be removed.

On 13 May 2024, the Federal Court of Australia handed down its [judgment](https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0499). In delivering the judgment, his Honour Justice Kennett considered two key issues, including:

1. whether the removal notice was a valid exercise of the eSafety Commissioner’s power under section 109 of the Act; and
2. whether, given the notice only requires X to take “reasonable steps” to ensure the removal of the material, the proposed final injunction goes further than what is required for compliance with the notice.

In relation to the second issue, at the core of the dispute was that the eSafety Commissioner argued it was insufficient for X to simply ‘geo-block’ the material for Australian users, and that the 65 URLs should be removed from the platform altogether. The Commissioner argued that such action is within the “all reasonable steps” that the notice required to be taken. X argued that a requirement to remove the material worldwide, goes beyond what could be considered “reasonable”.

Justice Kennett held that it would be reasonable for X Corp to remove the content, but *unreasonable* for the Commissioner to compel removal through section 109 of the Act. The injunction was thus denied. Further observations were made that, had the injunction been ordered, it would have:

* Had a ‘global effect’, impacting X and many other organisations who have no real connection to Australia or its interests.
* Impacted the interests of individuals globally who have no connection to the proceedings.
* Been ineffective in preventing people from watching the video elsewhere.
* Been highly unlikely to be enforced by a US court.

On 5 June 2024, the eSafety Commissioner discontinued the proceedings in the Federal Court.

The Federal Court has deemed this case to be of ‘public interest’, meaning that an almost complete public record of the documentation can be accessed [here](https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/esafety-commissioner-v-x-corp).

1. Explanatory Memorandum, Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019 (Cth) 2. [↑](#footnote-ref-1)
2. Peter Vickery ‘Response to Christchurch – Towards a federal religious vilification law in the age of technology’ (2019) 23 *Media & Arts Law Review* 132. [↑](#footnote-ref-2)
3. Commonwealth, *Parliamentary Debates,* House of Representatives, 4 April 2019, 1855 (Adam Bandt). [↑](#footnote-ref-3)
4. Evelyn Douek ‘Australia’s “Abhorrent Violent Material” Law: Shouting “Nerd Harder” and Drowning Out Speech” (2020) 94 *Australian Law Journal* 41. [↑](#footnote-ref-4)
5. Commonwealth, *Parliamentary Debates,* House of Representatives, 4 April 2019, 1849 (Christian Porter). [↑](#footnote-ref-5)
6. Evelyn Douek ‘Australia’s “Abhorrent Violent Material” Law: Shouting “Nerd Harder” and Drowning Out Speech” (2020) 94 *Australian Law Journal* 45. [↑](#footnote-ref-6)
7. D Kaye, F Ní Aoláin, ‘Mandates of 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*’* (2019) *OL AUS* 5. [↑](#footnote-ref-7)