THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CRIMINAL CODE AMENDMENT (SHARING OF ABHORRENT VIOLENT MATERIAL) BILL 2019

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Christian Porter MP)
## Abbreviations used in the Explanatory Memorandum

<table>
<thead>
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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>AFP</td>
<td>The Australian Federal Police</td>
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<tr>
<td>The Bill</td>
<td>Criminal Code Amendment Sharing of Abhorrent Violent Material) Bill 2019</td>
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<tr>
<td>Criminal Code</td>
<td>Schedule to the <em>Criminal Code Act 1995</em></td>
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<td>eSafety Commissioner</td>
<td>The statutory position created by Part 7 of the <em>Enhancing Online Safety Act 2015</em></td>
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GENERAL OUTLINE

1. The Christchurch terrorist attack on 15 March 2019 demonstrated the potential for live streaming and other video sharing platforms to be abused by extremist perpetrators to amplify their messages in the immediate aftermath of these incidents. In that case, the perpetrator streamed the attack in real-time. The video was then widely re-shared across a number of social media platforms.

2. The Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019 (Bill) will address significant gaps in Australia’s current criminal laws by ensuring that persons who are internet service providers, or who provide content or hosting services, take timely action in relation to abhorrent violent material that can be accessed using their services. This will ensure that online platforms cannot be exploited and weaponised by perpetrators of violence.

3. This Bill will make amendments to the Criminal Code Act 1995 to introduce new offences to ensure that internet, hosting or content services are proactively referring abhorrent violent material to law enforcement, and that hosting and content services are expeditiously removing abhorrent violent material that is capable of being accessed within Australia.

4. To achieve this, the Bill would place obligations on:
   - internet service providers, hosting service providers and content service providers to refer the details of abhorrent violent material that records or streams abhorrent violent conduct that has occurred, or is occurring, in Australia to the Australian Federal Police within a reasonable time of becoming aware of the existence of the material, and
   - hosting service providers and content services providers to expeditiously remove from, or cease hosting on, their services abhorrent violent material that is reasonably capable of being accessed within Australia.

5. Abhorrent violent material is audio, visual, or audio-visual material that is recorded or streamed by the perpetrator(s) or their accomplices. Furthermore, it must be material that reasonable persons would regard as being offensive, and is recorded or streamed in the course of:
   - engaging in a terrorist act (involving serious physical harm or death, and otherwise within the meaning of section 100.1 of the Criminal Code),
   - the murder of another person,
   - the attempted murder of another person,
   - the torture of another person,
   - the rape of another person, or
   - the kidnapping involving violence of another person.

6. The Bill would provide a new power to the eSafety Commissioner to issue a written notice to a provider of a content service or hosting service notifying them that
abhorrent violent material can be accessed by or is hosted on their service. The effect of this notice, in relation to the offence for failure to remove or cease hosting, is to:

- put the provider on notice that their service is being used to access specified material
- put the provider on notice that the specified material that can be accessed on their service is abhorrent violent material
- create a presumption for the purpose of any future prosecution that the provider was reckless as to whether the specified material could be accessed from the provider’s service, and
- create a presumption for the purpose of any future prosecution that the provider was reckless as to whether the specified material that could be accessed on their service was abhorrent violent material.

Financial Impact Statement

7. The Bill is unlikely to have a significant impact on consolidated revenue.

Regulation Impact Statement

8. The Prime Minister has granted an exemption from the need to complete a Regulatory Impact Statement.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

1. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

2. The objective of the Bill is to address significant gaps in Australia’s current criminal laws by 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.

3. To this end, the Bill introduces Commonwealth offences into the Criminal Code Act 1995 (Criminal Code) that will apply to persons that provide internet, hosting or content services who fail to refer details of abhorrent violent material that records or streams conduct that has occurred, or is occurring, in Australia to the AFP within a reasonable time after becoming aware of the existence of the material. The Bill will also introduce new offences that will apply to persons who provide content or hosting services who fail to remove from, or cease hosting, on their services abhorrent violent material that is capable of being accessed within Australia.

4. Under the Bill, the eSafety Commissioner will have the power to issue a notice to a content service provider or hosting service stating that at the time of the notice the abhorrent violent material could be accessed using, or was hosted, on the person’s service.

Human rights implications

5. This Bill engages the following rights:

- the right to procedural guarantees in article 14 of the International Covenant on Civil and Political Rights [1976] ATS 5 (ICCPR)
- the right to freedom from interference in privacy and correspondence in article 17 of the ICCPR
- the right to freedom of expression in article 19(2) of the ICCPR,
- the right to freedom from propaganda, discrimination and hatred in article 20 of the ICCPR, and
- the right of the child to be protected from all forms of physical and mental violence including sexual abuse in articles 19 and 34 of the Convention on the Rights of the Child [1991] ATS 4 (CRC).

Schedule 1—Sharing of abhorrent violent material

6. The primary objectives of Schedule 1 to this Bill are to ensure that:

- persons who are internet service providers, or who provide hosting or 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 (AFP), and

- persons who provide content services or hosting services are acting expeditiously to remove from or cease hosting abhorrent violent material on their services.

7. Schedule 1 will introduce new offences that will apply to persons who provide internet, hosting or content services who fail to refer details of abhorrent violent material that records or streams conduct that has occurred, or is occurring, in Australia to the AFP within a reasonable time after becoming aware of the existence of the material. A maximum penalty of 800 penalty units will attach to these offences. These offences will apply to hosting services and content services irrespective of whether the person provides these services within or outside of Australia. A defence to these offences is that if there are reasonable grounds to believe the AFP is already aware of the details of the material, the obligation to refer those details will not apply. A defendant would bear the evidential burden to establish this belief.

8. Schedule 1 will also introduce new offences that will apply to persons that provide content or hosting services who fail to remove or cease hosting abhorrent violent material that is capable of being accessed within Australia. A maximum penalty of 3 years imprisonment or 10,000 penalty units, or both, will attach to these offences where an individual is found guilty. Where a body corporate is found guilty, the maximum penalty that will apply will be the greater of 50,000 penalty units or 10% of the annual turnover of the body corporate. Defences to these offences will be available in respect of abhorrent violent material that is related to assisting law enforcement, reporting of news and current affairs, public policy advocacy, good faith artistic work, research purposes, court or tribunal proceedings, and the performance by public officials of their duties (and individuals assisting these officials in their duties). These offences will not apply to internet service providers or providers of relevant electronic services such as chat and instant messaging services.

The right to procedural guarantees in article 14 of the ICCPR

9. Article 14 of the ICCPR establishes the rights courts and tribunals should provide to all persons, including procedural guarantees, the universality of the rule of law and the presumption of innocence. The United Nations Human Rights Committee has stated that ‘article 14 of the Covenant aims at ensuring the proper administration of justice and to this end guarantees a series of specific rights’. The engaged right is provided for in paragraph 2 of article 14. It states that ‘everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’.

10. This right is engaged by sections @474.35 and @474.36 of the Bill, which set out the eSafety Commissioner notice regime and have the effect of placing an evidential burden on defendants in limited circumstances in respect of proving the offences under section @474.34. These sections provide that, in prosecutions where the defendant is accused of an offence under subsections @474.34(1) or (5), and the eSafety Commissioner has issued a written notice under subsections @474.35(1) or @474.36(1), it must be presumed that the person was reckless as to whether the specified material could be accessed using, or was hosted on, their service at the time the notice was issued. To overcome this presumption, the defendant must adduce or
point to evidence that suggests a reasonable possibility that the person was not reckless as to this matter.

11. Article 14 is not an absolute right, it is subject to permissible measures that restrict rights provided they are prescribed by law and are reasonable, necessary and proportionate means for pursuit of a legitimate objective. While section @474.35 and @474.36 would engage the rights afforded by article 14 of the ICCPR, the sections would do so in a manner that is tailored to achieving a legitimate goal. The Bill’s objective is to reduce the impact and reach of abhorrent violent material sought by perpetrators who intend to spread their violent and extreme propaganda. Abhorrent violent material produced by perpetrators and their accomplices has objectionable value as it often constitutes propaganda or recruitment material for further criminal activity, prejudices the dignity of the victims and has the potential to cause harm and distress to vulnerable sections of the community.

12. The offences included in the Bill are appropriately connected to the Bill’s objective because reasonably limiting the rights provided by article 14 allows for the offences to operate as deterrents to content service and hosting service providers who fail to act in relation to abhorrent violent material.

13. The eSafety Commissioner notice regime not only operates to put content and hosting services on notice as to the existence of the abhorrent violent material that can be accessed using their platform but also reverses the evidential burden in respect of two elements of the offences. This has the effect of incentivising providers to comply with their obligations under the new offences.

14. As is the case in the Bill, the evidential burden is often reversed in circumstances where information pertaining to a defence is:
   - peculiarly within the knowledge of the defendant, and
   - it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

15. Where a notice has been issued under @474.35 or @474.36, information that would prove the mental state of a person in relation to:
   - the accessibility of material using or hosting of material on a service, and
   - that the material was abhorrent violent material
satisfies the above circumstances to justify a reversal in evidential burden. These are reasonably limited and proportionate presumptions.

16. Additionally, the presumptions are not sufficient to prove an offence under section @474.34. A further element of that offence, that the person does not ensure the expeditious removal of the material, or expeditiously cease hosting the material, would also need to be proved by the prosecution.

The right to freedom from interference in privacy and correspondence in article 17 of the ICCPR

17. Article 17 of the ICCPR establishes the right to freedom from interference and correspondence in that ‘no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence’. The remit of this right is established in greater detail by General Comment No. 16 of the Human Rights Committee. It states that such protections ‘are required to be guaranteed against all
such interferences and attacks whether they emanate from State authorities or from natural or legal persons’.

18. The offences under section @474.34 will deter content service and hosting service providers from failing to take action in relation to abhorrent violent material that can be accessed using, or is hosted on, their services. These offences criminalise failure to expeditiously remove or cease hosting abhorrent violent material from their services. This regime would indirectly limit the nature and volume of content that end-users are able to access and share with each other. This is because content service hosts and content service providers that provide or host content would become more proactive in ensuring they expeditiously remove or ceasing hosting abhorrent violent material. This would engage the rights provided by article 17 because it may affect the nature and feasibility of correspondence between Australian citizens, albeit only for a narrow and specific type of objectionable material.

19. The Bill’s objective is to reduce the impact and reach of abhorrent violent material sought by perpetrators who intend to spread their violent and extreme propaganda. The audio and visual content produced by perpetrators has objectionable value as it often constitutes propaganda or recruitment material for further criminal activity, prejudices the dignity the victims and has the potential to cause harm and distress to vulnerable sections of the community. The Bill’s engagement with article 17 is a necessary consequence of the pursuit of this objective.

20. In order to limit the reach of objectionable material, correspondence between individuals must, by definition, be limited to exclude the material in question. By targeting only the conduct of hosting service providers and content service providers instead of the conduct of end-users, the Bill would indirectly limit the correspondence of private citizens as a proportionate and necessary consequence of pursuing its primary objective.

21. It is also reasonable to argue that readily sharing objectionable material is not the type of correspondence article 17 aims to protect. In its preamble, the ICCPR states that ‘the individual [has] duties to other individuals and to the community to which he belongs’ and that ‘freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights’. The unchecked proliferation of abhorrent violent material, which would include terrorist attack propaganda and audio and visual content depicting objectionable acts, is incompatible with the goals of the ICCPR and all other international human rights instruments.

22. The legitimacy of the Bill’s objective in the context of its interaction with article 17 is further supported by the general comments of the Human Rights Committee. Paragraph 3 of General Comment No. 16 states that the ‘term ‘unlawful’ means that no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.’ In this case, the laws proposed by the Bill are compatible with the tenets laid out by the preamble of the ICCPR. Again, limiting the reach of objectionable material promotes the objectives of ‘freedom from fear’ and fosters conditions ‘whereby everyone may enjoy his civil and political rights’. The rational connection between the limitation imposed by the Bill and its objective is established in the pursuit of the ICCPR’s overarching goals.

23. Following the logic of the general comments from the Human Rights Committee and considering the nature of the content, it is reasonable to conclude that indirectly
restricting access to objectionable material is a reasonable, necessary and proportionate means to achieving a legitimate objective reducing the impact and reach of abhorrent violent material sought by perpetrators who intend to spread their violent and extreme propaganda.

The right to freedom of expression in Article 19 of the ICCPR

24. Article 19 of the ICCPR provides for the right to freedom of expression. Article 19(2) of the ICCPR recognises the right to receive and impart information and ideas through any medium, including written and oral communication, the media, broadcasting and commercial advertising.

25. The right to freedom of expression is not an absolute right. Article 19(3) stipulates that this right may be restricted by law if necessary:
   - for the respect of the rights or reputations of others, or
   - for the protection of national security or of public order, or of public health or morals.

26. New section @474.34 introduces an offence that would apply to hosting or content services that fail to expeditiously remove or cease hosting abhorrent violent material from their services. This will have the indirect effect of limiting individuals’ ability to share and disseminate abhorrent violent material on these services.

27. Terrorism threatens Australia’s national security and the rights and freedoms of Australians. It is essential that our laws evolve to reflect the current threat posed by terrorism. The attack in Christchurch of 15 March 2019 demonstrates that content services and hosting services can be used and are being used to publish material that records or streams terrorist attacks and may be used to spread other abhorrent violent material. The audio and visual content produced by perpetrators often constitutes propaganda or recruitment material for further criminal activity, prejudices the dignity the victims and has the potential to cause harm and distress to vulnerable sections of the community. The sharing and dissemination of such material increases the potential for harm to Australians and our national security.

28. Regulating the public’s access to abhorrent violent material through section @474.34 is a legitimate and necessary measure to protect the safety of Australians. Requiring content services and hosting services to remove or cease hosting this material is likely to achieve this objective because it inhibits platforms from providing access to and hosting this material.

29. Indirectly limiting how private citizens may express their opinions is a proportionate and necessary consequence of pursuing the objective of this Bill. The offences do not criminalise an individual’s expression; they simply limit the individual’s access to platforms on which this expression may take place. Sharing abhorrent violent material can have a negative impact on well-being and could incite further violence. These measures are proportionate to the risk from abhorrent violent material. It is necessary to limit individuals’ access to the materials to prevent the material from inciting further criminal offences, and to prevent harm to vulnerable people who access or inadvertently access the abhorrent violent material.

30. Further, these offences are entirely consistent with Article 19(3), which stipulates that the right to freedom of expression established by Article 19(2) may be restricted for the protection of national security, public order or public health or morals.
Disseminating abhorrent material on content services and internet host services may threaten national security by serving as propaganda or recruitment material for further criminal activity, prejudice the dignity of the victims and has the potential to cause harm and distress to vulnerable sections of the community. The ability to readily share objectionable material is not a desirable outcome of a robust freedom of expression right. Requiring content services and hosting services to remove abhorrent violent material is consistent with the special responsibilities attached to article 19.

31. The Bill is proportionate and not arbitrary because it applies a defence in respect of abhorrent violent material, contained in section @474.37. Section @474.37 would not prohibit the sharing of abhorrent violent material or the freedom of expression in all circumstances, instead it would limit how this expression is disseminated. The offences under section @474.34 would not apply if access to abhorrent violent material is necessary to:

- enforce the law
- investigate or monitor compliance with the law
- conduct proceedings in a court or tribunal
- conduct scientific, medical, academic or historical research
- report on news and current affairs in the public interest
- assist public officials in exercising their duties
- advocate for changes to laws, or
- develop, perform, exhibit or distribute, in good faith, artistic work.

32. These defences mean that the new offences in section @474.34 would have a direct correlation with the objective of limiting the sharing of abhorrent violent material. The offences are not overreaching and will not catch instances where abhorrent violent material is accessible for a legitimate purpose.

The right to freedom from propaganda, discrimination and hatred in article 20 of the ICCPR

33. Article 20 of the ICCPR provides that ‘any propaganda for war’ and ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.

34. The objective of the Bill advances the rights contained in article 20. By limiting the availability of abhorrent violent material that may be used to promote or glorify discrimination, hatred and organised violence, the Bill espouses the inclusive and safe environment article 20 hopes to foster.

35. The events in Christchurch that precipitated the drafting of this Bill mirror the examples of hatred and incitement given by paragraph 2 of article 20. Restricting access to the audio and visual content produced by perpetrators of such events diminishes the potential for a perpetrator to advocate for further attacks and protects the targeted groups from discrimination, hostility and violence.

36. In adhering to article 20, the Bill also supports freedom of speech guarantees under article 19. General Comment No. 11 by the Human Rights Committee states that the prohibitions required by article 20 are ‘fully compatible with the right of freedom of
expression as contained in article 19, the exercise of which carries with it special duties and responsibilities’. Protecting vulnerable sections of the community from the damage of abhorrent violent material would constitute one of those special duties and responsibilities.

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

37. The primary objective of Schedule 2 is to ensure that sufficiently high penalties are operating to deter internet services providers and internet content hosts from failing to refer details of child pornography material and child abuse material to the Australian Federal Police.

38. Schedule 2 contains an amendment to section 474.25 of the Criminal Code it which would increase the maximum penalty that can be imposed for breach of this section from 100 penalty units to 800 penalty units.

Right of the child to be protected from sexual abuse in articles 19 and 34 of the CRC

39. Article 19 of the CRC provides that:
States Parties shall take all appropriate legislative … measures to protect the child from all forms of physical or mental violence, injury or abuse, … including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child.

40. Article 34 similarly provides that “State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse”, including taking all appropriate measures to prevent “the exploitative use of children in pornographic performances and materials”.

41. Schedule 2 promotes articles 19 and 34 of the CRC by ensuring that the maximum penalties for failure to refer child pornography and child abuse material to the Australian Federal Police more appropriately reflect the serious consequences for victims, their families and the community, particularly where there is underlying conduct of sexual abuse.

Conclusion

42. For the reasons given above, the Bill is compatible with human rights. Where it seeks to restrict 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 AFP
- persons who provide content services and hosting services are acting expeditiously to remove or cease hosting abhorrent violent material from their services, and
- sufficiently high penalties are operating to deter internet services providers and internet content hosts from failing to refer details of child pornography material and child abuse material to the Australian Federal Police.
NOTES ON CLAUSES

Clause 1: Short title

43. This clause provides that the Bill, when enacted, is the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (the Act).

Clause 2: Commencement

44. This clause contains a table that provides when the Bill would commence. Item 1 of the table provides that the whole of the Bill would commence on the day after the Act receives Royal Assent.

Clause 3: Schedule

45. Clause 3 provides that amendments to, or repeal of, legislation specified in the Act are set out in the Schedules to the Act and any other item in a Schedule to the Act has effect according to its terms.
Schedule 1—Sharing of abhorrent violent material

Criminal Code Act 1995

Item 1—At the end of Division 474 of the Criminal Code

1. Item 1 inserts a new Subdivision H—Offences relating to use of carriage service for sharing of abhorrent violent material into Part 10.6 of the Criminal Code. This subdivision contains new offences that will apply to internet service providers, hosting service providers and content service providers who fail to refer details of abhorrent violent material that records or streams conduct that has occurred or is occurring in Australia to the AFP within a reasonable time after becoming aware of the existence of the material. The subdivision also contains new offences that will apply to hosting service providers and content service providers who fail to remove from or cease hosting on their services abhorrent violent material that is capable of being accessed within Australia.

2. These offences are intended to ensure that internet service providers, hosting service providers and content service providers are taking responsibility for referring to the AFP and removing abhorrent violent material than can be accessed using or is hosted on their services. The offences are intended to have the effect of reducing the impact and reach of abhorrent violent material sought by perpetrators who intend to spread their violent and extreme propaganda.

Section @474.30—Definitions

3. New section @474.30 would insert new definitions for the purposes of new Subdivision H of Part 10.6 of the Criminal Code.

Abhorrent violent conduct

4. Abhorrent violent conduct would take the meaning given by new section @474.32, and is discussed further below.

Abhorrent violent material

5. Abhorrent violent material would take the meaning given by section @474.31 and is discussed further below.

Consent

6. Consent is defined to mean free and voluntary agreement. Consent is used in Subdivision H in relation to rape and kidnapping. These two aspects of an agreement are commonly used in State and Territory Acts to define consent in relation to sexual offences.¹

Content service

7. Content service is defined to mean either a social media service (paragraph (a)) or a designated internet service (paragraph (b)) within the meaning of those terms in the Enhancing Online Safety Act 2015.

¹ See, for example, subsection 61HE(2) of the Crimes Act 1900 (NSW), subsection 348(1) of the Criminal Code 1899 (Qld), paragraph 319(2)(a) of the Criminal Code Act Compilation Act 1913 (WA), subsection 46(2) of the Criminal Law Consolidation Act 1935 (SA).
‘Social media service’ is defined in the *Enhancing Online Safety Act 2015* to mean an electronic service that satisfies a number of conditions including that the sole or primary purpose of the service is to enable online social interaction between two or more end-users.

‘Designated internet service’ is defined under the *Enhancing Online Safety Act 2015* to mean a service that allows end-users to access material using an internet carriage service, or a service that delivers material to persons having equipment appropriate for receiving that material where the delivery of the service is by means of an internet carriage service. The definition in section 9A of that Act, provides that a ‘designated internet service’ does not include a social media service, a relevant electronic service, an on-demand program service or a service specified by legislative instrument under subsection 9A(2) of that Act. Furthermore, a person does not provide a designated internet service if they merely provide a billing service, or a fee collection service, in relation to the designated internet service (per subsection @474.39(2)). A website is an example of a content service that is a designated internet service.

**Hosting service**

‘Hosting service’ has the same meaning as the definition of ‘hosting service’ under section 9C of the *Enhancing Online Safety Act 2015* except that under the Bill it is limited to the hosting of stored material that has been or is posted on a social media service or a designated internet service. The definition does not require the hosting service provider to be providing one of those services (although often a hosting service provider may also provide one of those services). An example of a hosting service is a service that stores material or content for a website (a website being a designated internet service).

The definition of ‘hosting service’ under section @474.30 expressly provides that for the purposes of Subdivision H, the definition of hosting service does not include the hosting of stored material that has been posted on a relevant electronic service. Relevant electronic services includes Short Message Service (SMS), Multimedia Messaging Service (MMS), chat and instant messaging that are not used as repositories of content, but are instead used to transmit content one to one or one to many. As the content distribution mode of these services is via directed communications rather than public or broad private publishing, they are outside the scope of Subdivision H.

A search engine which merely indexes content and makes it searchable would not meet the definition of a hosting service.

**Section @474.31—Abhorrent violent material**

New section @474.31 would define the term ‘abhorrent violent material’ to mean material that is audio, visual, or audio-visual material that records or streams abhorrent violent conduct engaged in by one or more persons where a reasonable person would regard the material as being, in all the circumstances, offensive.

Audio material, visual material and audio-visual material is intended to capture live-streamed and recorded video footage, live-streamed and recorded audio recordings (which do not need to be accompanied by visual material), as well as photographs including still images taken from video footage.

In determining whether material is ‘offensive’ for the purpose of meeting the requirements under the definition of abhorrent violent material, section 473.4 of the
Criminal Code should be consulted. Section 473.4 sets out matters to be taken into account in deciding for the purposes of Part 10.6 (which will include the new offences under sections @474.33-34) whether reasonable persons would regard particular material as being in all the circumstances offensive. These include:

- the standards of morality, decency and propriety generally accepted by reasonable adults; and
- the literary, artistic or educational merit (if any) of the material; and
- the general character of the material (including whether it is of a medical, legal or scientific character).

16. The definition of abhorrent violent material is not intended to capture footage of violent sporting events (for example, boxing), medical procedures, or consensual sexual acts that involve elements of violence.

17. Additionally, the material must be produced by a person who is, or by two or more persons each of whom is:

- a person who engaged in the abhorrent violent conduct
- a person who conspired to engage in the abhorrent violent conduct
- a person who aided, abetted, counselled or procured, or was in any way knowingly concerned in, the abhorrent violent conduct, or
- a person who attempted to engage in the abhorrent violent conduct.

18. This requirement is intended to ensure that only material recorded or streamed by the perpetrator(s) and their accomplice(s) will be captured by the definition of abhorrent violent material. Material recorded or streamed by other persons, such as victims of the conduct, bystanders who are not complicit in the conduct, or media organisations, will not be considered to be caught by this definition even though such material may record or stream abhorrent violent conduct. Material recorded or streamed by persons who are not the perpetrator(s) or their accomplice(s) will therefore not be captured by the new offences under sections @474.33–@474.34.

19. In some circumstances it may be difficult to determine whether material recorded or streamed by a third party has been produced by an accomplice or by an innocent bystander. However, the offences in the Bill will only be made out if the prosecution can prove that the person had reasonable grounds to believe that the material had been produced by a perpetrator(s) or their accomplice(s) (in relation to offences under sections @474.33), or that the person was reckless as to whether the material had been produced by a perpetrator(s) or their accomplice(s) (in relation to offences under section @474.34). Therefore, if a person believed on reasonable grounds that the material had not been produced by an accomplice, or the person was not aware that there was a substantial risk that material has been produced by an accomplice, the prosecution would be unlikely to prove this element of the offences.

20. New subsection @474.31(2) provides that, for the purposes of this section, it is immaterial whether the material has been altered. This subsection operates to ensure that abhorrent violent material material that has been edited into a new form but still includes its original content would continue to be abhorrent violent material. For example, video footage that is abhorrent violent material could be edited in respect of its length, edited to appear in colour or monochrome, or have unrelated images or text.
superimposed onto the footage. This content would remain abhorrent violent material to the extent it continued to fulfil the definition of abhorrent violent material.

21. New subsection @474.31(3) provides that it is immaterial whether the abhorrent violent conduct was engaged in within or outside of Australia. This is consistent with the objective of the Bill in ensuring that content service providers and hosting service providers will proactively remove and cease hosting abhorrent violent material, no matter where the underlying conduct is committed.

Section @474.32—Abhorrent violent conduct

22. New section @474.32 would define the term ‘abhorrent violent conduct’. This term further limits the scope of the definition of abhorrent violent material for the purposes of the new offences.

23. New subsection @474.32(1) would provide that a person engages in abhorrent violent conduct if the person does any of the following:

- engages in a terrorist act (involving serious physical harm or death, and otherwise within the meaning of section 100.1 of the Criminal Code)
- murders another person
- attempts to murder another person
- tortures another person
- rapes another person, or
- kidnaps another person.

24. The common theme in these categories is that the recording or streaming of these violent acts could be used to publicise violent propaganda, promote terror, incite further violence, or cause harm or distress to the community.

25. It is not necessary for a prosecution to prove that conduct under one or more of these categories constitutes an offence. It is enough that the conduct has met the definitions under @474.32 of engaging in a terrorist act, murder, torture, rape or kidnapping. This is to ensure that internet service providers, hosting service providers and content service providers have clarity as to the threshold for reporting abhorrent violent material to the AFP, or in the case of hosting service and content providers, have clarity as to the threshold for when abhorrent violent material should be removed from or cease to be hosted on their services.

26. For example, new subsection @474.32(2) states that, for the purposes of new section @474.32, a person murders another person if their conduct causes the death of the other person and that conduct constitutes an offence. The requirement that the conduct constitute an offence is necessary to distinguish from cases where, for example, it might be clear from the video that a person may be acting lawfully in killing another person (for example, a scenario where a police officer shoots a perpetrator in self-defence).

27. New subsection @474.32(3) would state that, for the purposes of this section, a person (the first person) tortures another person if:

- the first person inflicts severe physical or mental pain or suffering upon the other person, and
• the other person is in custody, or under the control, of the first person, and
• 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 (ICCPR).

This definition is consistent with the definition of the offence of Crime against humanity—torture in section 268.13 of the Criminal Code, and it is intended that the definition of torture in the Bill will be interpreted in the same way. However, as discussed above it is not intended that the offence of torture would need to be proved for such conduct to satisfy the definition of abhorrent violent conduct.

28. If the conduct that constitutes torture arises from lawful sanctions that are inconsistent with the Articles of the ICCPR, such conduct may meet the definition of torture for the purposes of subsection @474.32(3) notwithstanding the fact that the sanctions may be lawful. This limitation is also contained in subsection 274.2(4) in respect of the offence for torture under of the Criminal Code. This limitation is intended to ensure that material that records or streams torture that has been lawfully sanctioned is still capable of meeting the definition of abhorrent violent material if the sanctions are inconsistent with the Articles of the ICCPR.

29. New subsection @474.32(4) provides that, for the purposes of this section, a person (the first person) rapes another person if they sexually penetrate the other person without the consent of that persons, or causes the other person to sexually penetrate the first person without the consent of the other person. ‘Consent’ is defined in the Bill to mean ‘free and voluntary agreement’. This definition also applies in respect of offences for Crime against humanity–rape under section 268.14 and War crime–rape under section 268.50 of the Criminal Code. Sections 268.14 and 268.59 of the Criminal Code each contain a list of examples of circumstances in which a person does not consent to an act, which may be of further use in interpreting the definition of consent under the Bill. Examples of where a person does not consent to an act include where:

• the person submits to the act because of force or the fear of force to the person or to someone else
• the person submits to the act because the person is unlawfully detained
• the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting
• the person is incapable of understanding the essential nature of the act
• the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes)
• the person submits to the act because of psychological oppression or abuse of power, or
• the person submits to the act because of the perpetrator taking advantage of a coercive environment.

New subsections @474.32(6)-(7) also provide additional interpretive guidance for this section.

30. New subsection @474.32(5) would provide that, for the purposes of this section, a person (the first person) kidnaps another person if:
• the first person takes or detains the other person without the other person’s consent, and
• the first person takes or detains the other person in order to:
  o hold the other person ransom or as hostage, or
  o murder, torture or rape the other person or a third person; or
  o cause serious harm to the other person or a third person; and
• the taking or detention of the other person involves violence or a threat of violence.

‘Consent’ is defined under the Bill to mean free and voluntary agreement. Subparagraphs 474.32(5)(b)(i),(ii) and (iii) are intended to operate so as to capture conduct that is more than merely holding someone against their will.

31. New subsection 474.32(6) provides a definition of ‘sexually penetrate’ for the purposes of new subsection 464.32(4), and a definition of ‘terrorist act’ for the purposes of new paragraph 474.32(1)(a).

32. The definition for ‘sexually penetrate’ is the same definition of sexually penetrate as used in section 268.14 of the Criminal Code which contains the offence of Crime against humanity–rape. It is intended that the term in the Bill would be interpreted in the same way.

33. The definition of ‘terrorist act’ has the same meaning as in section 100.1 of the Criminal Code, except that paragraphs 100.1(2)(b),(d),(e) and (f) should be disregarded. This exception operates to exclude actions that:
• cause serious damage to property
• endanger a person’s life, other than the life of the person taking the action
• create a serious risk to the health or safety of the public or a section of the public, or
• seriously interfere with, seriously disrupt or destroy an electronic system including but not limited to an information system, telecommunications system, financial system, a system used for the delivery of essential government services, a system used for, or by, an essential public utility or a system used for, or by, a transport system from the definition of ‘terrorist act’. These exclusions recognise that not all acts committed as a terrorist act should be captured by the definition of abhorrent violent conduct.

34. New subsection 474.32(7) would clarify that for the purposes of section 474.32 ‘genitalia’ includes the genitalia or other parts of the body of a person including surgically constructed genitalia or other parts of the body of the person. This is relevant to paragraph (a) of the definition of sexually penetrate in subsection 474.32(6). This clarification of the meaning of genitalia mirrors the same clarification found under section 268.14(6) of the Criminal Code and is intended to be interpreted in the same way.
Section @474.33—Notification obligations of internet service providers, content service providers and hosting service providers

35. Subsection @474.33(1) creates a new offence where:
   - a person is an internet service provider, or provides a content service or a hosting service, and
   - 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
   - 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.

36. This offence is intended to ensure that where an internet service provider, content service provider or a hosting service provider becomes aware (whether due to a complaint, self-auditing or otherwise) that their service can be used to access abhorrent violent material that records or streams abhorrent violent conduct that has occurred or is occurring in Australia, the provider will refer the details of that material (for example, the material itself or a website address that can be used to access the material) to the AFP.

37. The purpose of the new offence under subsection @474.33(1) is to ensure that the AFP is notified by providers of both the existence of the underlying abhorrent violent conduct (for example, a terrorist act that is being live-streamed) as well as the existence and accessibility of the abhorrent violent material itself online.

38. Section 473.1 of the Criminal Code provides that ‘internet service provider’ has the same meaning as in Schedule 5 to the Broadcasting Services Act 1992. Clause 8 of Schedule 5 of the Broadcasting Services Act 1992 provides that if a person supplies, or proposes to supply, an internet carriage service to the public, the person is an ‘internet service provider’. As an internet carriage service has the same meaning as a ‘listed carriage service’ under the Telecommunications Act 1992 (which is limited to carriage services between one or more points that includes at least one point in Australia) the scope of the definition of ‘internet service providers’ is limited to internet service providers who provide a service in Australia.

39. A ‘reasonable time’ is not defined. A number of factors and circumstances could indicate whether a person had referred details of abhorrent violent material within a reasonable time after becoming aware of the existence of the material. For example, the type and volume of the material, and the capabilities of and resourcing available to the provider may be relevant factors. In a prosecution for an offence against section @474.33, the determination of whether material was referred within a reasonable time will be a matter for the trier of fact.

40. The maximum penalty that can be imposed if a natural person fails to comply with section @474.33 is 800 penalty units. The maximum penalty that can be imposed if a body corporate fails to comply with this section is 4000 penalty units pursuant to the corporate multiplier rule under section 4B of the Crimes Act 1914. These penalties are justified because there may be strong incentives for persons, particularly large corporations, to fail to commit the offences by failing to take action in respect of the underlying content recorded or streamed as abhorrent violent material. Furthermore,
the consequences of the commission of the offences are dangerous and damaging
given the potential for the underlying conduct to go undetected by law enforcement
and the material itself to be shared and disseminated quickly, further spreading and
publicising the propaganda of the perpetrator.

41. The fault elements for an offence under section @474.33 are the fault elements found
in section 5.6 of the Criminal Code.

42. As a consequence of items 3 and 4 of Schedule 1 to the Bill, the offence in section
@474.33 is not subject to the standard geographical jurisdiction or to Category A
geographical jurisdiction listed in Part 2.7 of the Criminal Code, the latter being the
geographical jurisdiction that applies to the other subdivisions in Part 10.6. As such,
paragraph @474.33(1)(b) contains the only jurisdictional limit on the offence in that
there must be reasonable grounds to believe the material is abhorrent violent material
that records or streams abhorrent violent conduct that has occurred or is occurring in
Australia. There is a further limit on geographical jurisdiction is that the definition of
internet service provider will only capture persons that provide an internet service in
Australia and not in a foreign country.

43. Building jurisdictional limits into the offence itself is an approach supported by the
Guide to framing Commonwealth offences, infringement notices and enforcement
powers (the Guide) in circumstances where, as in this case, the offence is designed to
capture a limited scope of conduct.

44. Subsection @474.33(2) provides that it is immaterial whether the content service or
the hosting service is provided within or outside Australia. This subsection clarifies
that any content service or hosting service provider, including content or hosting
service providers that are not Australian entities or based in Australia, can be captured
by this offence. The only nexus with Australia that is required is that per paragraph
@474.33(1)(b), the person must have reasonable grounds to believe that the material
is abhorrent violent material that records or streams abhorrent violent conduct that has
occurred or is occurring in Australia.

45. Where the conduct constituting the alleged offence under @474.33 occurs wholly in a
foreign country, and the person alleged to have committed the offence is neither an
Australian citizen not a body corporate incorporated by or under a law of the
Commonwealth or of a State or Territory, section @474.42 requires the Attorney-
General’s written consent prior to the commencement of proceedings for prosecution.

46. Subsection @474.33(3) provides that the offence under subsection @474.33(1) does
not apply if the provider reasonably believes that the details of the material are
already known to the AFP. This is consistent with the purpose of the offence being to
ensure that providers notify the AFP of both the existence of the underlying abhorrent
violent conduct as well as the existence and accessibility of the abhorrent violent
material itself. If the underlying abhorrent violent conduct or the material that records
or streams that conduct has already been brought to the attention of the AFP, for
example through previous instances of reporting the material (noting it is immaterial
whether the material has been altered, as set out in subsection @474.31(2)) or
extensive media coverage of the existence, providers should not be required to refer
that material to the AFP.

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2 See page 36 of the Guide.
47. Subsection @474.33(3) would provide a defence for a person who failed to report abhorrent violent material to the AFP because they reasonably believed that the AFP was already aware of the material. This has been expressed as a defence rather than as an element of the offence as the defendant’s beliefs are peculiarly within the knowledge of the defendant.

48. The note under subsection @474.33 clarifies that the evidential burden falls on the defendant if they wish to rely on the defence in subsection @474.33(2).

Section @474.34—Removing, or ceasing to host, abhorrent violent material

49. Subsection @474.34(1) creates a new offence where:
   - a person provides a content service (as defined in new section @474.30), and
   - the content service can be used to access material
   - the material is abhorrent violent material, and
   - the person does not ensure the expeditious removal of the material from the content service.

50. This offence is intended to limit the accessibility, sharing and dissemination of abhorrent violent material by limiting the time that material can be accessed using a content service.

51. ‘Expeditious’ is not defined and would be determined by the trier of fact taking account of all of the circumstances in each case. A number of factors and circumstances could indicate whether a person had ensured the expeditious removal of the material. For example, the type and volume of the abhorrent violent material, or the capabilities of and resourcing available to the provider may be relevant factors.

52. New subsection @474.34(2) provides that it is immaterial whether the service is provided within or outside Australia. This subsection clarifies that any content service provider, including content service providers that are not Australian entities or based in Australia, can be captured by this offence. The only nexus with Australia that is required is that, per subsection @474.34(3), the material is reasonably capable of being accessed in Australia.

53. New subsection @474.34(3) provides that the offence in subsection @474.34(1) does not apply to material unless the material is reasonably capable of being accessed within Australia. As a consequence of items 3 and 4 of Schedule 1 to the Bill the offence in subsection @474.34(1) is not subject to the standard geographical jurisdiction or to Category A geographical jurisdiction listed in Part 2.7 of the Criminal Code, the latter being the geographical jurisdiction that applies to the other subdivisions in Part 10.6 of that Code. As such, paragraph @474.34 (3) provides the jurisdictional limit on the offence.

54. Building jurisdictional limits into the offence itself is an approach supported by the Guide to framing Commonwealth offences, infringement notices and enforcement powers in circumstances where, as in this case, the offence is designed to cover a limited kind of conduct.3

55. Under section @474.42, the Attorney-General’s written consent is required prior to the commencement of proceedings for an offence under section @474.34(1).

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3 See page 36 of the Guide.
56. Subsection @474.34(4) provides that the fault element for new paragraphs @474.34(1)(b) and (c) is recklessness. As paragraphs @474.34(1)(b), and (c) both refer to a circumstance rather than conduct, recklessness is the appropriate fault element. This is consistent with the default fault elements that would otherwise apply per section 5.6 of the Criminal Code. It would not be appropriate to restrict the fault element to knowledge, as this could incentivise content service providers to be wilfully blind to the content provided on their service, rather than proactively engage with the removal of abhorrent violent material.

57. As no fault elements are defined for the purposes of the other elements of the offence, the default fault elements found in section 5.6 of the Criminal Code would apply to those elements.

58. New subsection @474.34(5) would create a similar offence to subsection @474.34(1) that applies to hosting service providers. The offence would apply when:
   - a person provides a hosting service (as defined in new section @474.30), and
   - the hosting service can be used to access material
   - the material is abhorrent violent material, and
   - the person does not expeditiously cease hosting the material.

59. This offence is intended to limit the accessibility, sharing and dissemination of abhorrent violent material by limiting the time that material is hosted on a service.

60. ‘Expeditious’ is not defined. A number of factors and circumstances could indicate whether a person had ensured the expeditious removal of the material. For example, the type and volume of the abhorrent violent material, or the capabilities of and resourcing available to the provider may be relevant factors. In a prosecution for an offence against section @474.34(5), the determination of whether removal was expeditious will be a matter for the trier of fact.

61. New subsection @474.34(6) provides that it is immaterial whether the service is provided within or outside Australia. This subsection clarifies that any hosting service provider, including hosting service providers that are not Australian entities or based in Australia, can be captured by this offence. The only nexus with Australia that is required is that, per subsection @474.34(7), the material is reasonably capable of being accessed in Australia.

62. New subsection @474.34(7) provides that the offence in subsection @474.34(5) does not apply to material unless the material is reasonably capable of being accessed within Australia. As a consequence of items 3 and 4 of Schedule 1 to the Bill the offence in subsection @474.34(5) is not subject to the standard geographical jurisdiction or to Category A geographical jurisdiction listed in Part 2.7 of the Criminal Code, the latter being the geographical jurisdiction that applies to the other subdivisions in Part 10.6 of that Code. As such, paragraph @474.34(7) provides the jurisdictional limit on the offence.

63. Building jurisdictional limits into the offence itself is an approach supported by the Guide to framing Commonwealth offences, infringement notices and enforcement powers in circumstances where, as in this case, the offence is designed to cover a limited kind of conduct.

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4 See page 36 of the Guide.
64. Under section 474.42, the Attorney-General’s written consent is required prior to the commencement of proceedings for an offence under section 474.34(5).

65. New subsection 474.34(8) would provide that the fault element for new paragraphs 474.34(5)(b) and (c) is recklessness. As paragraphs 474.34(5)(b), and (c) both refer to a circumstance rather than conduct, recklessness is the appropriate fault element. This is consistent with the default fault elements that would otherwise apply per section 5.6 of the Criminal Code. It would not be appropriate to restrict the fault element to knowledge, as this could incentivise hosting service providers to be wilfully blind to the content provided on their service, rather than proactively engage with the removal of abhorrent violent material.

66. As no fault elements are defined for the purposes of the other elements of the offence, the default fault elements found in section 5.6 of the Criminal Code would apply to those elements.

67. Subsection 474.34(9) provides that the maximum penalty for an individual who commits an offence against subsections 474.34(1) or (5) is imprisonment for 3 years, or a fine of 10,000 penalty units, or both. This maximum penalty is justified because of the need to deter persons, including large corporations, from failing to take action in respect of abhorrent violent material and to commit the offences under subsections 474.34(1) or (5). Furthermore, the consequences of the commission of the offences are dangerous and damaging given the potential for the material to be shared and disseminated quickly, further spreading and publicising the propaganda of the perpetrator. A high maximum penalty is also appropriate in order to punish malicious conduct by a provider, for example, where the provider deliberately seeks further access and distribution of the material in order to obtain a financial or reputational advantage.

68. New subsection 474.34(10) would provide that the penalty for a body corporate that commits an offence against subsection 474.34(1) or (5) is not more than the greater of 50,000 penalty units, or 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

69. The maximum penalty 50,000 penalty units for a body corporate is consistent with the corporate multiplier rule under subsection 4B(3) of the Crimes Act 1914. However, body corporates that operate content and hosting services are often large corporations with a very high annual turn-over, such that a maximum penalty of 50,000 penalty units may not act as a sufficient deterrent for those body corporates to comply with the obligations created by the introduction of these new offences. Furthermore, in failing to remove from or cease hosting the material from their services, body corporates may stand to gain a financial advantage through increased usage of the service by members of the public. A maximum penalty of 10% of the annual turnover of the body corporate is appropriate as it is scalable penalty according to the size of the body corporate will can act an appropriate deterrent regardless of the size of the body corporate. The annual turnover includes the annual global turnover of the body corporate.

70. New subsections 474.34(11)-(14) set out how the annual turnover of a body corporate is to be determined for the purposes of subsection 474.34(10). These
subsections are modelled on similar provisions in the *Criminal Code*,\(^5\) and are intended to operate in a similar fashion.

72. Subsection @474.34(15) provides that material is taken to be removed from a content service if the material is not accessible to any of the end-users of that service. Given the purpose of the offence is to limit the distribution of the content, it is sufficient that the content is no longer being distributed to the end-users of the service.

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

73. New section @474.35 creates a process by which the eSafety Commissioner can provide a written notice to a content service provider stating that, at the time the notice was issued, their service could be used to access specified abhorrent violent material. The issuing of such a notice would create rebuttable presumptions for the purpose of any future prosecution that the person was reckless as to certain matters.

74. This notice would put the content service provider on notice that their service is being used to access abhorrent violent material. In effect, the notice would also put the provider on notice that they may commit an offence if they have not removed or do not remove it expeditiously.

75. New subsection @474.35(1) would authorise the eSafety Commissioner to issue a written notice stating that at the time the notice was issued, the specified content service could be used to access specified material that was abhorrent violent material.

76. New subsection @474.35(2) would require the eSafety Commissioner to not issue a notice under subsection @474.35(1) unless satisfied on reasonable grounds that at the time the notice was issued the specified content service could be used to access the specified material, and that the specified material was abhorrent violent material.

77. New subsection @474.35(3) requires the eSafety Commissioner to, as soon as practicable after issuing a notice under subsection @474.35(1) provide the person who provides the content service with a copy of the notice.

78. New subsection @474.35(4) provides that the eSafety Commissioner is not required to observe the requirements of procedural fairness in relation to the issuing of a notice under subsection @474.35(1). The reason for excluding procedural fairness in relation to the issuing of the notice is to enable the eSafety Commissioner to issue a notice as quickly as possible. This is particularly important in circumstances where there is widespread dissemination and sharing of abhorrent violent material that has the potential to incite further violence and cause harm to victims, their families and the broader community if the material is not subject to expeditious removal.

79. Furthermore, the exclusion of procedural fairness will not have a significant effect on the legal rights of the content service provider. If prosecution proceedings are not commenced, the notice does not have any legal effect. If prosecution proceedings are commenced, the only legal effect of the notice is that it establishes presumptions (contained in subsections @474.35(5)-(6)) as to certain fault elements for an offence under section @474.34(1). This means that if the defendant did not consider the notice had been properly issued, the defendant would have the opportunity to challenge the issuing of the notice as part of the proceedings. For example, the defendant could adduce or point to evidence that there was a reasonable possibility

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\(^5\)*See, for example, subsections 70.2(6), 141.1(7), and section 490.3 of the *Criminal Code*.\)
the defendant was not reckless as to certain matters because the notice had not been properly issued.

80. Subsection @474.35(5) would apply in a prosecution for an offence against subsection @474.34(1) where a notice has been issued under subsection @474.35(1) to the person who is the defendant. In these circumstances, subsection @474.35(5) would create a presumption that the defendant was reckless as to whether material specified in the notice could be accessed using the content service at the time the notice was issued. In order to overcome this presumption, the defendant would have to adduce or point to evidence that suggests a reasonable possibility that at the time the notice was issued the person was not reckless as to whether the content service could be used to access the specified material.

81. It is appropriate to place an evidential burden on the defendant as to whether at the time the notice was issued the defendant was reckless as to whether their content service could be used to access the specified material. This is because at the time of issue of the notice, the eSafety Commissioner is required under subsection @474.35(2) to be satisfied on reasonable grounds that the content service could be used to access the specified material. Any evidence to the contrary is therefore likely to be peculiarly within the knowledge of the defendant. Furthermore, it would be significantly more difficult and costly for the prosecution to prove the person had been reckless as to whether the content service could be used to access the specified material, than for the defendant to raise evidence indicating the defendant was not reckless as to this matter.

82. Subsection @474.35(6) would apply in a prosecution for an offence under @474.34(1) where a notice had been issued under subsection @474.35(1) to a person who is the defendant. In these circumstances, subsection @474.35(6) creates a presumption that the person was reckless as to whether the material was abhorrent violent material. In order to overcome this presumption, the defendant must adduce or point 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.

83. It is appropriate to place an evidential burden on the defendant to prove that at the time the notice was issued the defendant was not reckless as to whether the material was abhorrent violent material, because at the time of issue, the eSafety Commissioner was required under subsection @474.35(2) to be satisfied on reasonable grounds that the specific material was abhorrent violent material. Any evidence to the contrary is therefore likely to be peculiarly within the knowledge of the defendant. Furthermore, it would be significantly more difficult and costly for the prosecution to prove the defendant had been reckless as to whether the material was abhorrent violent material, than for the defendant to raise evidence indicating the defendant was not reckless as to this matter.

84. Additionally, the presumptions are not sufficient to prove an offence under subsection @474.34(1). A further element of that offence, that the person does not ensure the expeditious removal of the material from the content service (paragraph @474.34(1)(d)) would also need to be proved by the prosecution.

85. It is intended that the issuing of the notice would act as a warning to the content provider that they may commit an offence if they do not expeditiously remove the material. In most circumstances, if the content service provider were to ensure the
expeditious removal of the material after receiving the notice, a prosecution would be unlikely. However in some circumstances, such as where the content had been available for a significant period prior to the Commissioner issuing the notice, a prosecution may be appropriate notwithstanding the expeditious removal of the abhorrent violent material after receipt of the notice.

86. Subsection @474.35(7) provides that a document purporting to be a notice under subsection (1) must be taken to be such a notice, unless the contrary is established. This is intended to ensure that a person cannot seek to rebut the presumptions of the notice by claiming that they were unsure if the notice was legitimate.

87. Subsections @474.35(8) and (9) provide the eSafety Commissioner with the authority to produce certified copies of notices issued under subsection 474.35(1), and for certified copies to have an equal effect under subsections 474.35(5) and (6). This is intended to ensure that a provider cannot attempt to rebut the presumption by claiming that they had only sighted a copy of the notice and that they could not be sure as to its legitimacy.

88. Subsection @474.35(10) provides that section @474.35 extends to matters and things outside Australia. Subsection @474.35(10) is intended to overcome the presumption in subsection 21(1)(b) of the Acts Interpretation Act 1901 that a reference to localities jurisdictions and other matters and things shall be construed as references to such localities, jurisdictions and other matters and things in and of the Commonwealth. The effect of overcoming this presumption is to make clear that the eSafety Commissioner can issue notifications to persons that provide content services outside Australia and to persons that provide content services who are located or incorporated outside of Australia.

89. However, subsection @474.35(10) does not overcome the limitation contained in subsection @474.34(3) that subsection @474.34(1) does not apply to material unless the material is reasonably capable of being accessed in Australia. This means that even when the presumptions under subsections @474.35(5) and @474.35(6) can be applied, if the material was not reasonably capable of being accessed within Australia then the defendant will not be guilty of an offence under @474.34(1).

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

90. New section @474.36 would create a process by which the eSafety Commissioner can provide a written notice to a hosting service that, at the time the notice was issued, their service hosted specified abhorrent violent material. The issuing of such a notice would create rebuttable presumptions for the purpose of any future prosecution that the person was reckless as to certain matters.

91. This notice would put the hosting service provider on notice that their service was being used to host abhorrent violent material. In effect, the notice would also put the provider on notice that they may commit an offence if they have not expeditiously ceased or do not expeditiously cease hosting the material.

92. New subsection @474.36(1) would authorise the eSafety Commissioner to issue a written notice stating that at the time the notice was issued, the specified hosting service hosted material that was specified abhorrent violent material.

93. New subsection @474.36(2) would require the eSafety Commissioner to not issue a notice under subsection @474.36(1) unless satisfied on reasonable grounds that at the
time the notice was issued the specified material was hosted on the specified hosting service, and that the specified material was abhorrent violent material.

94. New subsection @474.36(3) requires the eSafety Commissioner to, as soon as practicable after issuing a notice under subsection @474.36(1) provide the person who provides the hosting service with a copy of the notice.

95. New subsection @474.36(4) provides that the eSafety Commissioner is not required to observe the requirements of procedural fairness in relation to the issuing of a notice under subsection @474.36(1). The reason for excluding procedural fairness in relation to the issuing of the notice is to enable the eSafety Commissioner to issue a notice as quickly as possible. This is particularly important in circumstances where there is widespread dissemination and sharing of abhorrent violent material that has the potential to incite further violence and cause harm to victims, their families and the broader community if the material is not subject to expeditious removal.

96. Furthermore, the exclusion of procedural fairness will not have a significant effect on the legal rights of the hosting service provider. If prosecution proceedings are not commenced, the notice does not have any legal effect. If prosecution proceedings are commenced, the only legal effect of the notice is that it establishes presumptions (contained in subsections @474.36(5)-(6)) as to certain fault elements for an offence under section @474.34(5). This means that if the defendant did not consider the notice had been properly issued, the defendant would have the opportunity to challenge the issuing of the notice as part of the proceedings. For example, the defendant could adduce or point to evidence that there was a reasonable possibility the defendant was not reckless as to certain matters because the notice had not been properly issued.

97. Subsection @474.36(5) would apply in a prosecution for an offence against subsection @474.34(5) where a notice has been issued under subsection @474.36(1) to the person who is the defendant. In these circumstances, subsection @474.36(5) would create a presumption that the defendant was reckless as to whether material specified in the notice was hosted on the service. In order to overcome this presumption, the defendant would have to adduce or point to evidence that suggests a reasonable possibility that at the time the notice was issued the person was not reckless as to whether the material was hosted on their service.

98. It is appropriate to place an evidential burden on the defendant to prove that the defendant was not reckless as to whether the material was hosted on the hosting service at the time the notice was issued. This is because at the time of issue of the notice, the eSafety Commissioner is required under subsection @474.36(2) to be satisfied on reasonable grounds that the specific material was hosted on the specified hosting service. Any evidence to the contrary is therefore likely to be peculiarly within the knowledge of the defendant. Furthermore, it would be significantly more difficult and costly for the prosecution to prove the person had been reckless as to whether the material was hosted on the defendant’s service, than for the defendant to raise evidence indicating the defendant was not reckless as to this matter.

99. Subsection @474.36(6) would apply in a prosecution for an offence under @474.34(5) where a notice had been issued under subsection @474.36(1) to a person who is the defendant. In these circumstances, subsection @474.36(6) creates a presumption that the person was reckless as to whether the material was abhorrent violent material. In order to overcome this presumption, the defendant must adduce or
point 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.

100. It is appropriate to place an evidential burden in the defendant to prove that at the time the notice was issued the defendant was not reckless as to whether the material was abhorrent violent material, because at the time of issue, the eSafety Commissioner was required under subsection @474.36(2) to be satisfied on reasonable grounds that the specific material was abhorrent violent material. Any evidence to the contrary is therefore likely to be peculiarly within the knowledge of the defendant. Furthermore, it would be significantly more difficult and costly for the prosecution to prove the defendant had been reckless as to whether the material was abhorrent violent material, than for the defendant to raise evidence indicating the defendant was not reckless as to this matter.

101. Additionally, the presumptions are not sufficient to prove an offence under subsection @474.34(5). A further element of that offence, that the person does not expeditiously cease hosting the material (paragraph @474.34(5)(d)) would also need to be proved.

102. It is intended that the issuing of the notice would act as a warning to the hosting service provider to cease hosting the material. In most circumstances, if the hosting service provider were to expeditiously cease hosting the material after receiving the notice, a prosecution would be unlikely. However in some circumstances, such as where the content had been available for a significant period prior to the eSafety Commissioner issuing the notice, a prosecution may be appropriate notwithstanding the person has expeditiously ceased hosting the abhorrent violent material after receipt of the notice.

103. Subsection @474.36(7) provides that a document purporting to be a notice under subsection (1) must be taken to be such a notice, unless the contrary is established. This is intended to ensure that a person cannot seek to rebut the presumptions of the notice by claiming that they were unsure if the notice was legitimate.

104. Subsections @474.36(8) and (9) provide the eSafety Commissioner with the authority to produce certified copies of notices issued under subsection 474.36(1), and for certified copies to have an equal effect under subsections 474.36(5) and (6). This is intended to ensure that a provider cannot attempt to rebut the presumption by claiming that they had only sighted a copy of the notice and that they could not be sure as to its legitimacy.

105. Subsection @474.36(10) provides that section @474.36 extends to matters and things outside Australia. Subsection @474.36(10) is intended to overcome the presumption in subsection 21(1)(b) of the Acts Interpretation Act 1901 that a reference to localities, jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth. The effect of overcoming this presumption is to make clear that the eSafety Commissioner can issue notifications to persons that provide hosting services outside Australia and to persons that provide hosting services who are located or incorporated outside of Australia.

106. However, subsection @474.36(10) does not overcome the limitation contained in subsection @474.34(7) that subsection @474.34(5) does not apply to material unless the material is reasonably capable of being accessed in Australia. This means that
even when the presumptions under subsections 474.36(5) and 474.36(6) can be applied, if the material was not reasonably capable of being accessed within Australia then the defendant will not be guilty of an offence under 474.34(5).

Section @474.37—Defences in respect of abhorrent violent material

107. New section @474.37 sets out defences available in relation to an offence under new section @474.34. Each of the defences is in respect to providing access to or the hosting of abhorrent violent material.

Content service

108. Subsection @474.37(1) relates to offences under subsection @474.34(1). Each of the paragraphs to subsection @474.37(1) contains an individual defence, providing a circumstance in which subsection @474.34(1) would not apply to the material.

109. Paragraph @474.37(1)(a) would provide that subsection @474.34(1) does not apply if the accessibility of the material is necessary for enforcing a law of the Commonwealth, a State, a Territory, a foreign country or a part of a foreign country. This is intended to avoid situations where a conflict of laws requires the material to both be removed from access by end-users and retained in order to assist law enforcement. Paragraph @ 474.37(1)(a) resolves this conflict in favour of retaining the material.

110. Paragraph @474.37(1)(b) would provide that subsection @474.34(1) does not apply if accessibility of the material is necessary for monitoring compliance with, or investigating a contravention of a law of the Commonwealth, a state, a Territory, a foreign country, or part of a foreign country. This is intended to ensure that the offence does not compromise legitimate law enforcement procedures or operations. For example, it may be necessary for a person to maintain access to abhorrent violent material in a situation where access may assist in identifying the perpetrators of the abhorrent violent conduct.

111. Paragraph @474.37(1)(c) provides that subsection @474.34(1) does not apply if the accessibility of the material is for the purposes of proceedings in a court or tribunal. This paragraph serves as a constitutional safeguard to ensure a court’s or tribunal’s access to material is not restricted by the operation of the offence under new section @474.34 (1).

112. Paragraph @474.37(1)(d) would provide that subsection @474.34(1) does not apply if accessibility of the material is necessary for, or of assistance in, conducting scientific, medical, academic or historical research and that accessibility is reasonable in the circumstances for the purpose of conducting that research. For example, this may include where the material is included in academic papers, or where research is being conducted into contemporary reactions to historical case studies of terrorism or other violent events.

113. Paragraph @474.37(1)(e) would provide that subsection @474.34(1) does not apply if the material relates to a news report, or a current affairs report, that is in the public interest and is made by a person working in a professional capacity as a journalist. This paragraph is intended to exempt bona fide journalism from the effect of the offence. The public interest requirement and requirement that the journalist is working in a professional capacity are intended to operate to exclude material that has been published by organisations for the purpose of, for example, inciting violence or promoting terror, but which purports to be journalism.
Paragraph 474.37(1)(f) would provide that subsection 474.34(1) does not apply if accessibility of the material is in connection with the performance by a public official of that official’s duties or functions and the accessibility is reasonable in the circumstances for the purpose of performing those duties or functions. For example, it may be necessary for a public official to maintain access to abhorrent violent material for security intelligence purposes.

Paragraph 474.37(1)(g) would provide that subsection 474.34(1) does not apply if accessibility of the material is in connection with an individual assisting a public official in relation to the performance of public official’s duties or functions and the accessibility is reasonable in the circumstances for the purpose of assisting the public official. This could include, for example, where accessibility is in connection with a person assisting a security intelligence officer with the performance of the security intelligence officer’s official duties or functions.

Paragraph 474.37(1)(h) would provide that subsection 474.34(1) does not apply if accessibility of the material is for the purpose of advocating a lawful procurement of a change to any matter established by law, policy or practice in any Australian jurisdiction or in a foreign country (or part thereof), and the accessibility of the material is reasonable in the circumstances for that purpose. This could include, for example, material published by a civil society body for the purpose of denouncing the laws, policy or practice that enabled the conduct recorded or streamed in that material.

Paragraph 474.37(1)(i) would provide that subsection 474.34(1) does not apply if accessibility of the material relates to the development, performance, exhibition or distribution, in good faith, of an artistic work. This could include, for example a still image recording abhorrent violent material that is published as part of an online photography exhibition catalogue.

Hosting Services

Subsection 474.37(2) relates to offences under subsection 474.34(5). Each of the paragraphs to subsection 474.37(2) contains an individual defence, providing a circumstance in which subsection 474.34(5) would not apply to the material.

Paragraph 474.37(2)(a) would provide that subsection 474.34(5) does not apply if the hosting of the material is necessary for enforcing a law of the Commonwealth, a State, a Territory, a foreign country or a part of a foreign country. This is intended to avoid situations where a conflict of laws requires the material to both be removed from access by end-users and retained in order to assist law enforcement. Paragraph 474.37(2)(a) resolves this conflict in favour of retaining the material.

Paragraph 474.37(2)(b) would provide that subsection 474.34(5) does not apply if the hosting of the material is necessary for monitoring compliance with, or investigating a contravention of a law of the Commonwealth, a State, a Territory, a foreign country or part of a foreign country. This is intended to ensure that the offence does not interrupt legitimate law enforcement procedures. For example, it may be necessary for a person to host abhorrent violent material in a situation where access may assist in identifying the perpetrators of the abhorrent violent conduct.

Paragraph 474.37(2)(c) would provide that subsection 474.34(5) does not apply if the hosting of the material is for the purposes of proceedings in a court or tribunal. This paragraph serves as a constitutional safeguard to ensure a court’s or tribunal’s
access to material is not restricted by the operation of the offence under new section @474.34.

122. Paragraph @474.37(2)(d) would provide that subsection @474.34(5) does not apply if hosting of the material is necessary for, or of assistance in, conducting scientific, medical, academic or historical research and that the hosting is reasonable in the circumstances for the purpose of conducting that research. For example, this may include where the material is published in hosted academic papers, or where the provider hosts a website that is being utilised to conduct research into contemporary reactions to historical case studies of terrorism or other violent events.

123. Paragraph @474.37(2)(e) would provide that subsection @474.34(5) does not apply if the material relates to a news report, or a current affairs report, that is in the public interest and is made by a person working in a professional capacity as a journalist. This paragraph is intended to exempt bona fide journalism from the effect of the offence. The public interest requirement and requirement that the journalist is working in a professional capacity are intended to operate to exclude material that has been published by organisations for the purpose of, for example, inciting violence or promoting terror, but which purports to be journalism.

124. Paragraph @474.37(2)(f) would provide that subsection @474.34(5) does not apply if hosting of the material is in connection with the performance by a public official of that official’s duties and the hosting is reasonable in the circumstances for the purpose of performing those duties. For example, it may be necessary for a public official to maintain access to abhorrent violent material for security intelligence purposes.

125. Paragraph @474.37(2)(g) would provide that subsection @474.34(5) does not apply if the hosting of the material is in connection with an individual assisting a public official in relation to the performance of public official’s duties and the hosting is reasonable in the circumstances for the purpose of assisting the public official. This could include, for example, where accessibility is in connection with a person assisting a security intelligence officer with the performance of the security intelligence officer’s official duties.

126. Paragraph @474.37(2)(h) would provide that subsection @474.34(5) does not apply if the hosting of the material is for the purpose of advocating a lawful procurement of a change to any matter established by law, policy or practice in any Australian jurisdiction or in a foreign country (or part thereof), and the hosting of the material is reasonable in the circumstances for that purpose. This could include, for example, material published by a civil society body for the purpose of denouncing the laws, policy or practice that enabled the conduct recorded or streamed in that material.

127. Paragraph @474.37(2)(i) would provide that subsection @474.34(5) does not apply if the hosting of the material relates to the development, performance, exhibition or distribution, in good faith, of an artistic work. This could include, for example a still image recording abhorrent violent material that is published as part of an online photography exhibition catalogue.

128. Subsection 474.37(3) is intended to clarify that references in this section to ‘functions’ (in the contest of ‘duties and functions’) are not intended to impact on the interpretation of other defences in the Criminal Code that only refer to ‘duties’ without any reference to ‘functions’.
Section @474.38—Implied freedom of political communication

129. Subsection @474.38(1) makes clear that new Subdivision H would not apply to the extent that it would infringe any constitutional doctrine of implied freedom of political communication.

130. New section @474.38(1) clarifies the application of existing section 15A of the Acts Interpretation Act 1901 (AIA) to the extent that it operates with respect to the implied freedom of political communication. Section 15A of the AIA reflects the fact that legislation should be read and construed subject to the Constitution. Where Parliament enacts legislation that would be construed as exceeding the legislative power of the Commonwealth, it is nevertheless a valid enactment to the extent it is not in excess of that power.

131. Subsection @474.38(1) makes clear that new Subdivision H is not intended to operate to the extent it might impermissibly burden the implied constitutional freedom of political communication, and preserves the operation of the Subdivision to the extent it is not in excess of Commonwealth constitutional power.

132. Subsection @474.38(2) is included in the Bill to ensure that subsection @474.38(1) would not affect the interpretation of, or limit the scope of, section 15A of the AIA.

Section @474.39—Provider of content service

133. New section @474.39 would set out circumstances in which a person does not provide a content service for the purposes of this subdivision.

134. New subsection @474.39(1) would provide that a person does not provide a content service merely because the person supplied a carriage service that enables material to be accessed.

135. New subsection @474.39(2) would provide that 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.

136. Section @474.39 is intended to exclude from liability content service providers who do not have control of the content available on content service. As these providers do not control the content available on their services, the objective of the Bill would not be served by holding them liable in the same way as a content provider who has direct control of the content on the service.

Section @474.40—Service of copies of notices by electronic means

137. New section @474.40 would provide that paragraphs 9(1)(d) and (2)(d) of the Electronic Transactions Act 1999 do not apply to a copy of a notice issued under new subsections @474.35(1) or @474.36(1).

138. Paragraphs 9(1)(d) and (2)(d) of the Electronic Transactions Act 1999 provide that where the Commonwealth is permitted or required to give information to a person in writing, and the Commonwealth seeks to provide that information electronically, the person to whom the information is being must consent to the information being given electronically.

139. The intention of these provisions not applying to a notice issued under new subsections @474.35(1) or @474.36(1), is to allow a content service provider to remove, or the hosting service to cease hosting, the abhorrent violent material as quickly as possible.
Noting the widespread use of electronic communications, most content and hosting service providers will prefer communications to be provided in electronic form. Electronic notices would also be of higher utility as they could include (for example) hyperlinks to the relevant material.

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

Section 474.41 sets out the circumstances in which a copy of a notice issued by the eSafety Commissioner under subsections 474.35(1) or 474.36(1) is taken to have been given to a social media service or a body corporate incorporate outside Australia. This section should be read in addition to section 28A of the Acts Interpretation Act 1901 which provides for the service of documents.

Contact Person

Subsection 474.41(1) sets out the circumstances in which a copy of a notice required to be issued under 474.35(1) is taken to have been given to a content service provider that is a social media service.

Where an employee or agent of the social media service has been designated as a contact person as required by paragraph 21(1)(c) of the Enhancing Online Safety Act 2015, and the contact details of the contact person have been notified to the eSafety Commissioner (a requirement of paragraph 21(1)(d) of the Enhancing Online Safety Act 2015), the copy of the notice is taken to have been given to the provider of a content service that is a social media service if it is given to the contact person.

This provision is intended to provide certainty as to notification through utilisation of an existing communication channel between the eSafety Commissioner and a social media service required under section 21 of the Enhancing Online Safety Act 1901.

Agent

Subsection 474.41(2) sets out the circumstances in which a copy of a notice required to be issued under 474.35(1) or 474.36(1) is taken to have been given to a body corporate incorporated outside Australia.

Where a body corporate does not have a registered office or a principal office in Australia and the body corporate has an agent in Australia, a copy of the notice is taken to have been given to the body corporate if it is given to the agent.

This provision is intended to provide certainty as to notification where a notice is provided to an Australia-based agent of a body corporate incorporated outside Australia.

Section 474.42—Attorney-General’s consent required for prosecution if alleged conduct occurs wholly in a foreign country in certain circumstances

Section 16.1 of the Criminal Code provides for when the Attorney-General’s consent is required for a prosecution if the alleged conduct occurs wholly in a foreign country. However, under paragraph 16.1(1)(a) of the Criminal Code section 16.1 only applies where section 14.1, 15.1, 15.2, 15.3 or 15.4 of the Criminal Code applies to the offence.

Due to the combined effect of items 3 and 4 of Schedule 1 to the Bill, sections 14.1, 15.1, 15.2, 15.3 or 15.4 of the Criminal Code would not apply to the offences found in new Subdivision H of Part 10.6.
150. New subsections @474.42(1) and (2) would recreate the requirements for the Attorney-General’s consent to prosecute offences under section 474.33 where the alleged conduct occurs wholly in a foreign country.

151. New subsections @474.42(3) and (4) would require the Attorney-General’s consent before any prosecutions under the proposed offences in section @474.34 are commenced, irrespective of where the relevant conduct occurs. A different approach is necessary in relation to @474.34 because of the high penalties the offences in this provision may attract and the consequent greater need to guard against inappropriate prosecutions, irrespective of where the relevant conduct occurs.

Section @474.43—Compensation for acquisition of property

152. Under section 51(xxxi) of the Constitution, the Commonwealth has the power to acquire property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. New subsection @474.43(1) makes clear that, if the provisions of the Bill were to effect an acquisition of property from a person otherwise than on just terms, the Commonwealth would be liable to pay a reasonable amount of compensation to that person.

153. New subsection @474.43(2) would provide the mechanism by which a person can dispute the amount of compensation if agreement cannot be reached with the Commonwealth. In that case a person may institute proceedings in either the Federal Court of Australia (paragraph @474.43(2)(a)) or the Supreme Court of a State or Territory (paragraph @474.43(2)(b)). Given these cases are likely to be rare and involve the interpretation of constitutional principles, it is appropriate that they be limited to superior courts of record.

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

154. Schedule 5 to the Broadcasting Services Act 1992 sets up a system for regulating certain aspects of the internet industry. It requires the eSafety Commissioner to notify an Australian police force (including the AFP) and internet service providers where the eSafety Commissioner is satisfied that prohibited or potential prohibited content hosted outside Australia is of a sufficiently serious nature to warrant referral to law enforcement. This notification system allows internet service providers to deal with the content in accordance with procedures specified in an industry code or standard. ‘Prohibited content’ is a defined term under Schedule 7.

155. Schedule 7 to the Broadcasting Services Act 1992 sets up a regime for complaints to and investigations by the eSafety Commissioner in relation to prohibited or potential prohibited content. The eSafety Commissioner may take action to deal with prohibited or potential prohibited content. In the case of a hosting service, the eSafety Commissioner may issue a take-down notice. In the case of live content service, the eSafety Commissioner may issue a service-cessation notice. In the case of a links service, the eSafety Commissioner may issue of link-deletion notice.

156. Section @474.44 ensures that the operation of Schedules 5 and 7 to the Broadcasting Services Act 1992 will not be limited by the concurrent operation of new Subdivision H. It is intended that the new offences and notice issuing provisions will complement the existing notification system for internet service providers. Even though internet service providers will not be captured by the offences under new @474.34 or the notice issuing provisions under new sections @474.35 and @474.36,
the eSafety Commissioner will continue to be required to notify internet service providers where there is content of a sufficiently serious nature to warrant referral to law enforcement under Schedule 5 of the Broadcasting Services Act 1992.

Section @474.45—Review of this Subdivision

157. New section @474.45 would provide that at the end of the two year period beginning at the commencement of this section, the Minister must cause to be conducted a review of the operation of new Subdivision H. A report of this review must be given to the Minister within 12 months, and tabled in Parliament within 15 sitting days of the Minister receiving it.

Items 2, 3 and 4—Section 475.2 of the Criminal Code, Section 475.2 of the Criminal Code, At the end of section 475.2 of the Criminal Code

158. Section 475.2 provides that each offence in Part 10.6 is subject to extended geographical jurisdiction—Category A.

159. Item 2 would amend section 475.2 to turn existing section 475.2 into subsection 1 of the amended 475.2. This amendment is a consequence of the insertion of new subsection (2) by item 4 of Schedule 1 to the Bill.

160. Item 3 would amend section 475.2 to exempt the offences in new Subdivision H of Division 474 from the general application of section 475.2.

161. Item 4 would insert a new subsection 475.2(2) that would provide that section 14.1 (standard geographical jurisdiction) does not apply to an offence against Subdivision H of Division 474 (that is, the offences introduced by the Bill).

162. As a result of items 3 and 4 of Schedule 1 to the Bill, the offences in subsections @474.33(1), @474.34(1) and @474.34(5) are not subject to the standard geographical jurisdiction or to Category A geographical jurisdiction listed in Part 2.7 of the Criminal Code, the latter being the geographical jurisdiction that applies to the other subdivisions in Part 10.6. As such, these offences contain jurisdictional limits through the requirement that there must be reasonable grounds to believe the material is abhorrent violent material that records or streams abhorrent violent conduct that has occurred or is occurring in Australia (in the case of subsection @474.33) or that the material is reasonably capable of being accessed in Australia (in the case of subsections @474.34(1) and (5)).

163. Building jurisdictional limits into offences rather than relying on the Criminal Code general or extended geographic jurisdictions is an approach supported by the Guide⁶ in circumstances where, as in these cases, the offences are designed to cover a limited kind of conduct.

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⁶ See page 36 of the guide.
Schedule 2—Obligations of internet service providers and internet content hosts

Criminal Code Act 1995

Item 1—Section 474.25 of the Criminal Code (penalty)

164. Under section 474.25 of the Criminal Code it is an offence if a person who is an internet service provider or internet content host is aware that their service can be used to access material that they believe on reasonable grounds to be child pornography or child abuse material and fails within a reasonable time after becoming aware of the existence of the material to refer details of the material to the AFP. A maximum penalty of 100 penalty units currently attaches to this offence. If the person is a body corporate, a maximum penalty of 500 penalty units can be imposed pursuant to the corporate multiplier rule under section 4B of the Crimes Act 1914.

165. Item 1 of Schedule 2 would amend section 474.25 to increase the maximum penalty from 100 penalty units to 800 penalty units. For a body corporate found guilty of the offence under section 474.25, this would increase the maximum penalty that could be imposed from 500 penalty units to 4000 penalty units.

166. According to the Guide, a maximum penalty should aim to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme. The current maximum penalty of 100 penalty units attaching to the offence under section 474.25 does not adequately reflect the serious consequences for victims, their families and the community particularly where there is underlying conduct of sexual abuse. Furthermore, as a result of the failure to refer child pornography or child abuse material to police there is harm caused by continued public access to and online dissemination and proliferation of such material. A higher maximum penalty is also justified because there may be strong incentives for persons, particularly large corporations, to fail to take action in respect of child pornography and child abuse material and commit these offences. As such it is appropriate that the maximum penalty attaching to an offence against section 474.25 is raised to 800 penalty units.

167. An increase in the maximum penalty that can be imposed for an offence under section 474.25 from 100 penalty units to 800 penalty units is consistent with the maximum penalty of 800 penalty units that can be imposed for the offences under new sections @474.33, @474.34 and @474.35 in respect of failure to refer abhorrent violent material to the Australian Federal Police. It is appropriate that the maximum penalties are consistent across sections 474.25, @474.33 and @474.34 given that child pornography material, child abuse material and abhorrent violent material are all material of a similarly serious nature and which all have a nexus to criminal or potentially criminal conduct that should be brought to the attention of the Australian Federal Police.

168. An increase in the maximum penalty from 100 to 800 penalty units under section 474.25 would enliven section 11.5 of the Criminal Code in respect of the offence of conspiracy to commit an offence under section 474.25. This means that a person who conspired with another person to commit the offence under section 474.25 could be punished as if the offence under 474.25 had been committed.

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7 See page 38 of the Guide.