



The Australian Industry Group
Level 2, 441 St Kilda Road
Melbourne VIC 3004
PO Box 7622
Melbourne VIC 3004
Australia
ABN 76 369 958 788

20 October 2021

Mr Julian Simmonds MP, Chair
Parliamentary Joint Committee on Law Enforcement
Email: le.committee@aph.gov.au

Dear Mr Simmonds

INQUIRY INTO THE CRIMINAL CODE AMENDMENT (SHARING OF ABHORRENT VIOLENT MATERIAL) ACT 2019 (CTH)

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission on the inquiry into the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Cth) (AVM Act)* by the Parliamentary Joint Committee on Law Enforcement (PJCLE).

Ai Group's membership comes from a broad range of industries and includes businesses of all sizes. Given the growing engagement across the business community with every business having the capability of having an online business or platform, we are particularly focussed on the implications for the broader cross-section of Australian businesses. This is not limited to only large technology companies, but also SMEs and businesses from a range of sectors that are not traditionally subject to these types of reforms.

Overall, industry recognises the importance of protecting the safety and security of the Australian community, both in the physical and online realm. Indeed, Ai Group works closely with governments and their agencies on improving Australia's safety and security in a diverse range of areas. In this mix, the eSafety Commissioner has an important specific role to promote a safe online environment.

Our submission therefore does not object to the underlying intention behind the legislation, which is to provide appropriate online safety protections for the Australian community against sharing of abhorrent violent material (AVM). Instead, we seek improvements in the legislation to enable procedural fairness, and clarity on scope and various other aspects regarding the legislation that may not have been previously taken into account when the AVM Act was originally passed through Parliament.

1. Consultation and procedural fairness

We note that this inquiry occurs following the AVM Act being rushed through Parliament in April 2019, with very limited stakeholder consultation (if any).¹ More than two years later, this inquiry provides the first real opportunity for stakeholders to provide formal comments.

Setting aside the process in which the AVM legislation was rushed through, we consider that this inquiry presents a unique and critical opportunity to revisit the legislation to ensure proper due process be given that takes into consideration relevant and legitimate stakeholder concerns that were never previously afforded.

As a matter of good regulatory practice, any proposed changes to existing laws and regulations, or the creation of new, should be rigorously reviewed and properly consulted on. This should include a proper analysis and assessment of issues, underlying causes, options to address these issues, as well as a robust and considered cost-benefit assessment for any proposed regulatory or legislative change. In the context of this inquiry, the same level of scrutiny should be given to this legislation.

¹ Note: The AVM Bill was introduced into Parliament on 3 April 2019, passed on 4 April 2019 and received Royal Assent on 5 April 2019, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1201.

2. Scope

As noted earlier, many businesses have the capability of having an online business or platform, with online services delivered via various digital media (e.g. websites, social media, apps and other digital or online platforms) which are B2C or B2B in nature, and affect businesses of all sizes. We recommend that the PJCLE review the scope of the AVM Act to ensure that it does not inadvertently and unintentionally capture a wide range of businesses than was originally intended.

For instance, the original intention of the AVM Act is to specifically target instances relating to consumer engagement in the widespread public sharing of AVM. If such dissemination were unlikely to occur in the business environment, the legislation should be proportionate in scope and not applicable (or automatically assumed to be applicable) for B2B companies. Otherwise, B2B companies will be subject to unnecessary regulatory burden and compliance costs.

Further, if AVM content were to be shared in the business environment, the transmission of offensive content in the workplace context could already be captured under employment law as valid reasons for employee dismissal. While the AVM Act takes a different approach, the AVM Act should avoid eroding or restricting an employer's ability to remedy such employee conduct online.

Regarding potential breadth of businesses captured under the AVM Act, there are similar issues that we previously raised in our submissions on the Online Safety Bill to the Department of Infrastructure, Transport, Regional Development and Communications, and Senate Standing Committees on Environment and Communications that may equally apply to the AVM Act.²

In addition to a potentially wide range of businesses that could be captured under the AVM Act, its interactions with the recently passed Online Safety Act should be properly taken into consideration. With respect to this, we note that there are concurrent consultations by the Department of Infrastructure, Transport, Regional Development and Communications on its Draft Online Safety (Basic Online Safety Expectations) Determination 2021, and eSafety Commissioner on developing industry codes under the *Online Safety Act* (Cth) 2021.³

Given the potential overlap in regulatory scope including scope creep between the AVM Act and Online Safety Act, we also recommend that consideration be given to improved coordination within Government on these matters.

Without properly considering the scope, we consider that such legislation could create unnecessary regulatory compliance burden and costs for a wide range of businesses that would also be inconsistent with the Australian Government's deregulation agenda.⁴

And from a global perspective, the speed and lack of due process of many of these legislative changes risk creating the perception that Australia is not a favourable destination for digitally focused companies, and undermine the otherwise great work that Australia is doing in global digital trade rules, namely with Digital Free Trade Agreements and at the World Trade Organisation.

3. Clarity on various aspects of the AVM Act

According to the Terms of Reference for this inquiry:

Pursuant to subsection 7(1) of the *Parliamentary Joint Committee on Law Enforcement Act 2010*, the Committee will inquire into and report on the operation and effectiveness of Subdivision H of Division 474 of the Schedule to the *Criminal Code Act 1995* (Cth), with particular reference to:

² Ai Group submission to Senate Standing Committees on Environment and Communications inquiry on Online Safety Bill (Submission No. 42, 5 March 2021), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/OnlineSafety/Submissions; Ai Group submission to Department (12 February 2021), <https://www.aigroup.com.au/news/submissions/2021/exposure-draft-of-online-safety-bill/>; Ai Group submission to Department (21 February 2020), <https://www.aigroup.com.au/news/submissions/2020/proposed-new-online-safety-act/>.

³ <https://www.infrastructure.gov.au/have-your-say/draft-online-safety-basic-online-safety-expectations-determination-2021-consultation>; <https://www.esafety.gov.au/about-us/consultation-cooperation/industry-codes-position-paper>.

⁴ <https://deregulation.pmc.gov.au/>.

- a) the effectiveness of the AVM Act in 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; and/or,
- b) the effectiveness of the AVM Act in reducing the incidence of misuse of online platforms by perpetrators of violence;
- c) the appropriateness of the roles and responsibilities of the eSafety Commissioner and Australian Federal Police under the AVM Act;
- d) the appropriateness of the obligations placed on persons who are internet service providers, or who provide content or hosting services, under the AVM Act;
- e) the definition of abhorrent violent material under the AVM Act; and,
- f) any related matter.

For reforms under the umbrella of national security, we have observed on several occasions a sense of Government urgency in passing through legislation. However, this has been at the risk to stakeholders of not being provided sufficient consultation, clarity, certainty and regulatory safeguards, leading to potential regulatory burden and complexity and unintended consequences. With respect to the AVM Act, we strongly encourage the PJCLE to have regard to these various considerations.

Building on the Terms of Reference for this inquiry, we consider particular questions should be asked with respect to the operation of the AVM Act, including:

- As noted above, are the entities targeted in the legislation clear or open to interpretation?
- Are the legislative/regulatory obligations and definitions for targeted entities clearly defined and appropriately scoped to enhance the likelihood of compliance?
- Are the legislative/regulatory obligations properly targeting the underlying public policy objective(s)?
- Are the regulated entities afforded with procedural fairness including sufficient regulatory oversight, sufficient notice, right to a fair hearing regarding regulator decisions, and transparency in the regulatory decision maker's decisions?
- Are the penalties for non-compliance with the legislation proportionate? If not, should a graduated approach be introduced?
- Have targeted entities that fall within scope of "designated internet service" (especially SMEs and wider industry that have not been traditionally captured under these type of reforms – not necessarily about large technology companies) been given transition support such as funding from Government to uplift their capabilities to meet the requirements under the AVM Act?

We suggest that the above questions will likely require improvements to the AVM Act, given the manner in which the legislation was passed. We encourage the PJCLE give weight to the views of affected stakeholders in this regard. By appropriately addressing these issues, it will help to increase stakeholder confidence in legislation and regulation related to this domain.

If you would like clarification about this submission, please do not hesitate to contact me or our adviser Charles Hoang [REDACTED]

Yours sincerely,

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Louise McGrath
Head of Industry Development and Policy