The government's rush to criminalise online content will have consequences

Christchurch has spurred the government to rush through laws on sharing and hosting violent content, but their haste has left some gaping holes with potentially dire outcomes.

On Wednesday night the Senate passed, without debate or amendment, the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill*. It flew through the House of Reps yesterday and is now law.

The new set of crimes is the government's response to the real-time streaming of the Christchurch shootings on Facebook. Facebook took too long to take it down, and there's no doubt that the incident has crystallised the debate over the legal and social responsibilities of social media platform providers.

Social media giants and popular video streaming sites possess the technological means to shut content down when they choose to; it just hasn't suited their commercial interests up until now to do so.

However, as the Law Council said yesterday, "bad and ineffective legislation is enacted when it is a knee-jerk emotional reaction to a tragic event". True, but this isn't emotional, it's calculated. And recklessly irresponsible — the opposite of good government. There has been no consultation with the industry, the media or lawyers.

The law makes it a crime to post or host, on a social media platform or any other website, material which contains "abhorrent violent conduct". This is defined as a terrorist act, murder, attempted murder, torture, rape or kidnapping. Each of these is further defined: murder in this context means any unlawful conduct which causes someone's death, meaning it doesn't just cover murder. It would include a video of someone driving negligently and causing a fatal accident, or a workplace accident which triggered the strict liability offence provisions of workplace safety laws. The point here is that the rush to legislate will have unintended consequences.

There are two criminal offences under the new law: failing to report abhorrent material to the federal police once you're aware of it on your service, and failing to expeditiously remove the material if it can be accessed using your service.

This applies to internet service providers, content service providers (social media platforms and anyone who operates a website except for messaging services, gaming sites and on-demand streaming services) and hosting service providers (anyone who electronically warehouses material online). So it's not just Facebook and Co. Not just Google. It applies to every media company, social organisation, business, not-for-profit, advocacy organisation, bible study group and book club which operates a website.

For most of the above, the likelihood of their accidentally hosting a snuff movie is negligible, and they can go back to sleep. But let's look at one serious case study: the mainstream media.

The offence of not telling the AFP about material on your site arises if you have reasonable grounds to believe that it contains "abhorrent violent conduct". You bear the onus of proving that you didn't have such reasonable grounds.

The offence of not taking the material down is committed if you are reckless as to its presence on your service and as to whether it is abhorrently violent, and if you don't move with expedition. Again, the onus of disproving all these elements is on you.

These are reverse onuses; a relatively rare thing in criminal law. Usually, the prosecution has to prove each element of the crime, physical and mental, beyond reasonable doubt. Here, the accused has to prove the elements don't exist. There's no rational basis for this extreme approach.
The penalties are terrifying. For individuals, they include three year prison terms and fines up to $2.1 million. For companies, it's a fine of $10.5 million or 10% of the global annual turnover of the entire corporate group. If you're wondering, Facebook's total revenue in 2018 was US$55.8 billion.

A media company, such as *news.com.au*, is susceptible to the new law. There is a specific defence for media in relation to the take-down offence, which is that it doesn't apply if the material in question relates to a news or current affairs report that is in the public interest and is "made by a person working in a professional capacity as a journalist". The media company has the onus of proving that the defence applies to it.

Given that much of what a site like *news.com.au* publishes online these days is not touched by any actual journalists — due to modern media being much more than conventional news reporting — it's easy to imagine a scenario in which some offending content gets posted to which the defence doesn't apply at all.

More importantly, the reversal of onus means that the media companies must be much more careful about what they post or host. There is no problem with the argument that media companies have a legal and social responsibility to exercise good judgement about what is in the legitimate public interest and use their power with care. Or that they should face consequences when they are reckless about this. However, it is absolutely bad policy to make the consequences of an exercise of bad judgement by a media company a crime punishable by prison sentences for its employees and fines which could bankrupt it. In terms of a "chilling effect" on media, this law is just awful.

With time, more gaping holes will be found. It's already obvious that the law is bad; poorly conceived and rushed through for no reason other than political optics.
Has the government failed the mainstream media on this one? Write to boss@crikey.com.au to let us know your thoughts.