

To: Australian Parliamentary Joint Committee on Law Enforcement

Regarding: Inquiry into law enforcement capabilities in relation to child exploitation

Authors:

Dr. Ian Warren

Dr. Clare Allely

Dr. Sally Kennedy

The authors write this submission to the Australian Parliament and Joint Committee on Law Enforcement for the inquiry into ‘law enforcement capabilities in relation to child exploitation’ as interested individuals with expertise in understanding the hazards of criminal enforcement on particularly vulnerable groups, such as those who experience autism spectrum disorders (ASDs). Our research integrates this knowledge with a detailed understanding of the enhanced push for transnational information sharing to deal with the online production and use of child exploitation material (CEM), and the problematic aspects of enforcing national criminal laws through vague, ambiguous or intrusive transnational legal processes.

In line with several recent inquiries, the emphasis of future approaches should be on enhanced regulation of digital platforms to moderate the distribution of CEM through the open web. This aligns with the need for enhanced regulation and enforcement of content rules identified by the Australian Competition and Consumer Commission (ACCC) in its Digital Platforms Inquiry (2019, see especially Recommendation 6 dealing with the need for enhanced regulation, Recommendation 8 dealing with mandatory independent takedown by the Australian Communications and Media Authority [ACMA] to enhance copyright enforcement, and Recommendation 12 relating to improving digital literacy in the community). Our submission proposes that by placing greater emphasis on platform regulation to restrict the distribution of CEM on the open web, more targeted enforcement can be undertaken to restrict production and distribution through other sources, such as the dark web which represents more insidious threats to potential victims of child abuse. Much like the area of illicit drug supply, this approach aims to target producers and distributors of CEM, because, as we demonstrate in this submission, the criminalisation of possessing and viewing CEM has highly problematic impacts for those with ASD, who are not necessarily

capable of discerning their actions as unlawful due to the innate vulnerabilities of the condition.

The views expressed in this submission are not representative, or made on behalf of, the respective workplaces or any other organisation associated with any of the authors. Information on each of the relevant terms of reference is presented below.

a. trends and changes in relation to the crime of online child exploitation

AND

f. considering the link between accessing online child abuse material and contact offending, and the current state of research into and understanding of that link

There has been increasing recognition of the various innate vulnerabilities or features of ASD, which is a neurodevelopmental disorder that may provide context associated with the vulnerability of viewing CEM online. It is reported by numerous clinicians and other criminal justice professionals globally that a large proportion of individuals with ASD receive convictions for the possession of CEM. However, individuals with ASD generally do not appreciate that what they were doing was illegal and a number of innate vulnerabilities or features of ASD have contributed to this. Some of the key innate vulnerabilities or features of ASD that have been identified include: “Counterfeit deviance”, social maturity, literal thinking, impaired Theory-of-Mind (ToM), impaired ability to correctly guess age, impaired ability to recognise negative facial expressions in CEM, and the ritualistic nature of collecting CEM. Each of these have been discussed in detail in relation to their problematic treatment under United Kingdom (UK), United States (US) and Australian criminal law over the last few years, and are important considerations when discussing trends in relation to online CEM and the relationship between online CEM and contact offending (Freckelton & List, 2009; Freckelton, 2011; Allely & Dubin, 2018; Allely, Kennedy, & Warren, 2019; Allely, 2020). They will be briefly outlined here.

- “*Counterfeit Deviance*” - The viewing of sexual material which is extreme is not always a reflection of the presence of deviant sexuality. Rather it may be “counterfeit deviance”, in other words, naïve, unbridled curiosity, in individuals with ASD who engage with CEM.

- *Social Maturity* - Some individuals with ASD may feel more comfortable and naturally gravitate towards individuals who are at the same level as them socially and emotionally. Individuals with ASD can have average or above average intelligence while their social and emotional maturity can be closer to a much younger person, which can often lead to them preferring the company of younger people. Exploring sexuality on the internet through CEM is one way some individuals with ASD can understand relationships and sexuality rather than being a precursor to sexual offending towards a minor.
- *Literal Thinking* - To an individual with ASD, the mere presence of CEM on the internet gives the message of legality of the material. Given that individuals with ASD tend to have a literal view of the world, they may fail to consider or appreciate that something that is freely accessible online could be illegal (Mesibov & Sreckovic, 2017).
- *Impaired Theory-of-Mind (ToM)* - Individuals with ASD may genuinely be unaware of broader contextual issues such as where and how CEM originated, who else might be able to gain access to the files, and what the implications and consequences are for the minors in the images and videos (Mesibov & Sreckovic, 2017). This would be associated with their impaired ToM, which explains the diminished ability to appreciate and understand what someone else might be thinking, feeling, and expressing. If people with ASD are enjoying something, they will not necessarily appreciate that someone else might be having a different experience.
- *Impaired Ability to Correctly Guess Age* - Some individuals with ASD may inadvertently view CEM due to an impaired ability to correctly estimate the age of the individuals in the images and videos. This is exacerbated by the fact that much of the media includes images where the boundaries and distinction between an adult and a child are blurry.
- *Impaired Ability to Recognise Negative Facial Expressions in CEM* - Many individuals with ASD may not be aware viewing CEM is a criminal offence. Their impaired ability to recognise the facial expressions of minors in the material may be a key factor. In particular, a large body of empirical literature has shown an impaired ability to correctly discern negative emotional expressions such as fear and distress. This has obvious implications when such individuals are viewing CEM.

- *Ritualistic Nature of Collecting CEM* - Exploring sexuality on the internet through CEM is one way for some individuals with ASD to try to understand relationships and sexuality. It is not a precursor to engaging in sexual offending behaviour with a minor. The desire for viewing CEM can become excessive and compulsive in individuals with ASD. A large number of individuals with ASD who are found with substantial collections of CEM have thousands of files which have been collected ritualistically, the majority of which are not even opened (Mesibov & Sreckovic, 2017). Under the criminal law, it is assumed there is an association between the level of risk of the individual and the quantity or nature of the content of the CEM that they possess, which can lead to disproportionately long jail terms that magnify the stress, anxiety and management of any ASD symptoms. However, no studies support this assumption in neurotypical populations (Mahoney, 2009). This association may be even more inappropriate for individuals with ASD as it does not take into consideration the relationship between the volume of collected CEM and the compulsive and obsessive features associated with ASD.

We recommend that these innate vulnerabilities of individuals with ASD who view illegal material such as CEM emphasises the need for greater responsibility to be placed on technology companies which either host or make searchable CEM on the open web. This favours imposing greater power on Australian law enforcement and communications regulators to examine and take down this material, rather than devoting increased resources to the surveillance and policing of individuals who might simply possess this material without further evidence of their propensity to engage in actual harm or the production and distribution of CEM.

b. reviewing the efficacy of and any gaps in the legislative tools and tactics of law enforcement used to investigate and prosecute offenders

Investigating crimes with digital and transnational elements is complicated because the processes can easily undermine traditional theories and practices of territorial sovereignty. Continuing to rely on current transnational legal procedures ensures the process remains slow, complicated, technical, and legally ambiguous (Svantesson, 2017; Daskal, 2018). Some progress has been made associated with extraterritorial processes and transnational investigations involving drug and arms trafficking and the trade in unlawfully obtained

identity documents in both the open and dark webs (Ghappour, 2017; Kerr & Murphy, 2017; Mann & Warren, 2018). However, these investigations often focus on identifying new processes to fast-track evidence exchange to keep up with the speed of digital communications (Daskal, 2018). This can magnify delays, legal technicalities, and the politicised nature of these cases once they reach court. In addition, while recent moves associated with enhanced transnational evidence exchange through the *Telecommunications Legislation Amendment (International Production Orders) Bill* (2020) and the *Surveillance Legislation (Identify and Disrupt) Bill* (2020) offer some robust protections through administrative warrants, the involvement of independent judicial oversight remains limited until a prosecution reaches a criminal court (Bowling & Sheptycki, 2015; Warren, 2015; Bleahey, 2018; Kennedy & Warren, 2020). Moreover, proposed reforms to surveillance legislation confer expansive powers to the Australian Federal Police (AFP) and the Australian Criminal Intelligence Commission (ACIC) to remotely monitor, intercept and alter digital communications. While accompanied by robust oversight protections, there are enormous risks associated with the operation of these surveillance powers that can have highly problematic effects on citizens who are unable to discern the criminal consequences of their open web browsing behaviour.

We recommend any proposals to enhance transnational surveillance, evidence exchange, or the domestic surveillance, monitoring and alteration of digital communications, including the use of undercover operations or ‘stings’, relating to child exploitation must be accompanied by a holistic process of reform that opens up the possibility for greater transparency in operations involving Australian police agencies and international partners. There are two objectives for these protections. The first is to enhance due process for people suspected of involvement in minor forms of offending that are confined to the mere possession or consumption of CEM, where law, surveillance and criminal prosecutions should be strictly limited. The second is to ensure the integrity and admissibility of digital evidence in serious cases involving child exploitation as demonstrated through the production and distribution of CEM.

This process should involve the establishment of a think tank involving law enforcement, judicial professionals, and scholarly practitioners in the field to develop a blueprint for transnational justice reform applicable to CEM and other relevant offences, emphasising the

need for simpler procedures for both law enforcement agencies and suspects that have clear notions of due process of law and transparency in evidence collection and use in criminal trials. As part of this process, the tactical focus of investigations and prosecutions should be shifted from individual offenders who have accessed CEM, some of whom have intellectual disabilities like ASD, and instead focus on individuals producing and disseminating CEM.

e. considering the role technology providers have in assisting law enforcement agencies to combat child exploitation, including but not limited to the policies of social media providers and the classification of material on streaming services

Our core recommendation is to place more responsibility on technology companies and digital platforms which host or make CEM searchable (such as Google and PornHub). These companies should monitor for sexually explicit material involving children and quarantine the content when discovered so that it is not publicly accessible. We recommend this occurs in partnership with Australian state and federal law enforcement agencies, and other communications regulators such as the ACMA, to enable additional powers to investigate the original source of the material within or outside Australia. The aim of this proposal is to limit the visibility and accessibility of CEM, and instead enable law enforcement to focus on those producing and distributing this material. This is similar to the supply approach often advocated regarding illicit drugs, that devotes attention to producers and illicit drug traffickers rather than individual drug users who often have complicated reasons for consuming illicit drugs, such as mental illness and other psychological trauma.

We recommend broader discussion of a supply reduction model for CEM that places more responsibilities on digital platforms to take down illicit material, with enhanced cooperation between Australian law enforcement agencies, the ACMA and various international authorities. This cooperation should be subject to strict reporting protocols and open accountability processes when criminal investigations proceed. The overall aim should be to target producers and dissemination forums rather than consumers, unless clear evidence can be obtained to show certain consumers have a propensity to engage in harm or are contributing to the production and supply of CEM.

g. any related matters

The policing of online CEM must consider a complex range of issues associated with the potential for material, evidence, suspects, and the alleged harm to be located in different jurisdictions, and therefore subject to the authority of many separate law enforcement agencies. The primary way of addressing these complexities, particularly where the individual sought for the alleged criminal conduct is geographically located outside of the jurisdiction leading the investigation, is extradition. This process can also be complex and involve wide-ranging fairness and justice-related issues (Mann, Warren & Kennedy, 2018; Kennedy & Warren, 2020). Law enforcement must work closely with the relevant authorities involved in extradition (the judiciary and executive), to ensure all requirements are met and the alleged offender is treated fairly, commencing with a presumption of bail. The current inquiry could also explore an alternative to extradition known as the forum bar which is incorporated into the law of England and Wales. This enables a trial to occur within the UK if a substantial proportion of the offending took place within that territory (Efrat, 2017). This has previously been used as an alternative to extradition in cases involving serious online crimes, and can potentially mitigate concerns about ASD and mental health issues, including suicide (Mann, Warren & Kennedy, 2018). We suggest a similar approach within Australia could alleviate some of the complexities experienced during transnational investigations and prosecutions of individuals suspected of creating and disseminating online CEM.

Summary of recommendations

Due to the complex issues associated with online CEM, digital jurisdiction, cross-border law enforcement cooperation, and the added complexities of individuals with cognitive, social and intellectual differences, our main recommendation is to place more legal responsibility on technology providers to monitor and remove CEM before individuals have the opportunity to search for, access, view, and download this material. Our specific recommendations are:

1. There is an urgent need for the innate vulnerabilities associated with ASD which can contribute to the viewing of CEM to be recognised in criminal law.
2. Reform associated with transnational surveillance and evidence exchange should be holistic and include the development of a think tank to discuss simpler procedures and transparency associated with investigations and criminal trials related to CEM.

3. A supply reduction model should be discussed that places more responsibility on digital platforms to monitor content and remove CEM, including appropriate penalties for failure to comply with stronger regulatory requirements.
4. The emphasis in CEM investigations should focus on producers, suppliers and distributors of CEM. The targeting of individual consumers, particularly with little evidence of their propensity to cause harm and the issues identified related to ASD, should be a last resort.
5. Consideration of a forum bar which would alleviate some of the complexities of extradition seen in cases with digital and transnational elements. This could be beneficial for prosecutions involving individuals suspected of creating and disseminating CEM and consumers with ASD.

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