



Senate Legal and Constitutional Affairs Committee

Submission to the Crimes Legislation Amendment
(Sexual Crimes Against Children and Community
Protection Measures) Bill 2017 [Provisions] Inquiry



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Anti-Slavery Australia- Submission to the Senate Legal and Constitutional Affairs Committee

Anti-Slavery Australia welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 [Provisions].

Established in 2003, Anti-Slavery Australia is a research, policy and legal centre at the University of Technology Sydney with the mission to abolish human trafficking, organ trafficking, slavery and slavery-like practices such as forced labour and forced marriage in Australia. Anti-Slavery Australia provides legal advice and representation to men, women and children who have experienced human trafficking, slavery, slavery-like conditions and forced marriage in Australia.

This submission draws upon the research and findings of Anti-Slavery Australia's report, Behind the Screen: Online Child Exploitation in Australia released on 25 May 2017. The full report and summary is attached to this submission.

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EXECUTIVE SUMMARY

The Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 proposes to amend a range of criminal justice legislation to strengthen protections against child sexual exploitation. Anti-Slavery Australia commends the Government's commitment to enhancing the Australian criminal justice response to this developing crime-type.

Anti-Slavery Australia's submission is limited to select proposed amendments in Schedule 4, 5, and 6 concerning online child exploitation or abuse materials, and live-streamed child abuse. This submission draws extensively upon Anti-Slavery Australia's research and findings from the report *Behind the Screen: Online Child Exploitation in Australia* (2017).

In addressing these proposed amendments, Anti-Slavery Australia makes the following key recommendations:

1. Anti-Slavery Australia endorses the removal of the term 'child pornography' from all Commonwealth legislation. This term is inappropriate and does not reflect the impact of the horrendous crimes depicted in this material.

- 1.1. The proposed term 'child abuse material', while significantly more appropriate than 'child pornography', represents one subset of the broader category of 'child exploitation material'. Anti-Slavery Australia recommends that the Bill be amended to use the internationally accepted term 'child exploitation material'.

2. Anti-Slavery Australia supports Item 20, which proposes to introduce an offence of providing an electronic service with the intention that the service will facilitate the dissemination of child abuse material. This amendment would address significant, developing gaps in the law regarding the administration of online child abuse material networks.

3. Anti-Slavery Australia commends Items 1, 22 and 23 which strengthen and clarify the law to reflect the growing practice of live-streamed child abuse.

- 3.1. Anti-Slavery Australia recommends that the definitional clarification of 'engage in sexual activity' in Item 1 of the Bill also applies to the offence of sexual intercourse with child outside Australia under subsection 272.8 of the Criminal Code.

4. Anti-Slavery Australia recommends that the committee consider the need for further consultation concerning Schedule 6, particularly the introduction of mandatory minimum sentences for online child abuse materials offences. The introduction of a mandatory

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minimum custodial sentence for child abuse materials offences does not reflect the spectrum of material offending. Mandatory minimum custodial sentences may also serve to reduce the incentive for defendants to assist police in ongoing investigations.

5. Anti-Slavery Australia recommends that the Bill be expanded to repeal the defence based on a valid and genuine marriage contained in subsection 272.17 of the Commonwealth Criminal Code. The purpose of this defence is unclear. It also appears to be inconsistent with the Commonwealth offence of forced marriage.

1. TERMINOLOGY

Anti-Slavery Australia commends the Government's initiative to remove the term 'child pornography' from Commonwealth legislation. This reflects the opinion of a number of experts interviewed for *Behind the Screen: Online Child Exploitation*:¹

*"[T]he term 'child pornography', just immediately lessens the impact. I mean, these are children who are being sexually assaulted, these are child sexual assault images, this is child exploitation material. [These] are really serious crimes...."*²

*"There's an international movement to call it what it is, and it is not pornography. I mean honestly, it is not pornography... Anything like that is a move in the right direction. You'll never hear me, publically or in the media refer to it as child pornography, or 'kiddie porn' which I've heard people call it as well. It's just bloody ignorant."*³

This amendment reflects the growing international consensus that the term 'child pornography' is unacceptable, as it risks trivialising or legitimising the depiction of serious crimes against children.⁴ It is also representative of the movement within the law enforcement community to characterise these materials as forensic evidence of the sexual exploitation or abuse of children.⁵

1.1. Child abuse materials and child exploitation materials

The 'Luxembourg Guidelines' define child abuse materials as a subcategory of child exploitation materials. Child exploitation material is defined as a broader category of sexualised content depicting or representing children,⁶ whereas child abuse material is defined more narrowly as depiction of child sexual abuse.⁷ Anti-Slavery Australia recommends that the Bill be amended to use the term 'child exploitation material', to reflect the international standard and to reflect the spectrum of material offences that are contemplated by these provisions.

¹ 'Behind the Screen: Online Child Exploitation in Australia' (Anti-Slavery Australia, 2017) <<http://www.antislavery.org.au/images/behind%20the%20screen%20-%20report.pdf>> xii.

² Interview with a representative from an NGO (Telephone interview 8 August 2016).

³ Interview with a Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016).

⁴ Susanna Greijer and Jaap Doek, 'Terminology Guidelines For the Protection of Children from Sexual Exploitation and Sexual Abuse' (Guidelines, Terminology and Semantics Interagency Working Group on Sexual Exploitation of Children, 28 January 2016) (hereinafter Luxembourg Guidelines), 38-40.

⁵ Ibid, 39.

⁶ Ibid.

⁷ Ibid.

Recommendation:

Anti-Slavery Australia strongly endorses the removal of the term ‘child pornography’ from all Commonwealth legislation. This term is inappropriate and does not reflect the impact of the horrendous crimes depicted in this material.

Anti-Slavery Australia recommends that the Bill be amended to use the internationally accepted term ‘child exploitation material’.

2. ELECTRONIC SERVICES AND SYSTEM ADMINISTRATORS

Anti-Slavery Australia commends the introduction of a new offence of conduct for the purposes of electronic service used for child abuse material. This will fill a significant gap in the Commonwealth criminal justice framework and ensure that the law reflects the harm inflicted by Australia-based administrators of vast online child exploitation material networks.

Interviews with law enforcement officers conducted for *Behind the Screen* identified the substantial need for Commonwealth legislation which targeted head administrators of online networks that distributed child exploitation material.⁸

“[T]he legislation wasn’t really written to address these head administrators... [they] are not only proliferating sexual abuse material of children, but in many cases they are administering networks that demand ongoing abuse of children to maintain membership.”⁹

The need for further criminalisation of these types of offences can also be seen in the recent high profile cases of *Graham* and *McCoole*¹⁰. These cases illustrate the ways in which new developments in online, anonymising technologies has facilitated the mass possession and distribution of images and videos that comprise online child exploitation material. These cases also provide examples of how these networks encourage the further abuse and exploitation of children in Australia and overseas.

⁸ ‘Behind the Screen: Online Child Exploitation in Australia’ (Anti-Slavery Australia, 2017)

<http://www.antislavery.org.au/images/behind%20the%20screen%20-%20report.pdf> 68-69.

⁹ Interview with a Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016).

¹⁰ Discussed in Section 2.1.

2.1. Australian network administrators

R v Shannon Grant McCooles¹¹

In 2014, police became aware of child exploitation images that were identified as having been photographed by an Australian offender, Shannon Grant McCooles. These images were posted and distributed through website ‘Q’, an anonymised service which could be accessed through the a Darknet.¹²

The children were identified in the images taken by McCooles on his own digital camera, as children who were left in the offender’s care, in the context of his employment under Families South Australia and Nanny South Australia.¹³

McCooles ultimately pleaded guilty to 18 State offences and 2 Commonwealth offences, relating to sexual offending against children and the production, dissemination and possession of child exploitation material. Of the Commonwealth offences, one related to the transmission of child pornography using a carriage service and the other offence involved urging or inciting the transmission of child pornography over the internet, with the intention that the offence incited would be committed.¹⁴

The sentencing judge, in discussing the Commonwealth charges, outlined that website ‘Q’ was:

“A website that functioned for the sole purpose of facilitating the distribution of child pornography material and encouraging discussion about child abuse amongst its significant number of members.”

“...The head administrator was responsible for the administration of the board by enabling others to distribute child exploitation material through it, encouraging the production of child exploitation material and causing child exploitation material to be transmitted to yourself and others.”¹⁵

McCooles’s position as head administrator was evidenced by a post published by him on website Q, reminding members of the requirement that they upload to the website child

¹¹ (Unreported, District Court of South Australia, Rice DCJ, 7 August 2015).

¹² The name of the network in question has been suppressed.

¹³ Ibid

¹⁴ *Criminal Code Act 1995* (Cth) Div 474.19 (iii) and Div 11.4 (for Incitement Provisions).

¹⁵ *R v Shannon Grant McCooles* (Unreported, District Court of South Australia, Rice DCJ, 7 August 2015) 5-6.

exploitation material at least once a month. At the point that this post was published, the website had approximately 45,000 members.¹⁶

The sentencing judge, His Honour Judge Rice, observed that McCoolle did not administer the website for financial gain, but to satisfy his deviant sexual appetites and those of other likeminded people. Administrators of large networks housing child exploitation material use the images themselves as a form of online currency to expand their online communities, encouraging and facilitating extreme abuse of children.

Regarding the two counts related to Commonwealth offences, McCoolle was sentenced to a minimum of three years for the transmission of child pornography, and a minimum of one year for the offence of incitement, to be served cumulatively.

The Queen v Graham¹⁷

Graham was the administrator of a series of online websites and forums between 2012 and 2014. Through these websites Graham, under the pseudonym 'Lux', connected with other online offenders and was linked to prolific Australian offenders, such as Shannon McCoolle. During this time period, Graham administered hundreds of thousands of images, including videos of the torture and rape of a toddler in the Philippines, and in one instance encouraged the rape and murder of a child in Russia. The United States Federal Bureau of Investigations (FBI) described Graham's network as "one of the largest and most extreme in the world."¹⁸

The matter was referred to the AFP and Victoria Police by FBI officers. Graham was arrested in 2014 and ultimately pleaded guilty to 13 Commonwealth charges. He was sentenced to 15 years and 6 months, with a non-parole period of 10 years.¹⁹

2.2. State-based legislation concerning network administrators

The introduction of a Commonwealth offence of conduct for the purposes of electronic service used for child abuse material (child exploitation material) is also consistent with new legislation in Victoria and Queensland which further criminalise individuals found to be administrators of online child exploitation networks.²⁰

In Victoria, it is an offence to administer or encourage the use of a "child pornography website",²¹ and it is also an offence to provide information to a person that is likely to assist

¹⁶ 'Behind the Screen: Online Child Exploitation in Australia' (Anti-Slavery Australia, 2017) 123.

¹⁷ [2016] VCC 305.

¹⁸ *Ibid*, [56].

¹⁹ *Ibid*, [29]-[54].

²⁰ 'Behind the Screen: Online Child Exploitation in Australia' (Anti-Slavery Australia, 2017) 71-72.

²¹ *Crimes Act 1958* (Vic) ss 70AAAB and 70AAAC.

them in avoiding capture or prosecution for committing one of these offences.²² The legislation provides examples of this latter offence, including circumstances where:²³

1. A provides information to B about how to use a website to deal with child pornography anonymously or how to encrypt electronic files containing child pornography.
2. A provides information to B about how to delete electronic data that records information about B's identity.

In 2016, similar provisions were added to Queensland legislation.²⁴ Where a hidden network or anonymising service is used to commit an offence under these new provisions, the maximum penalty will increase from 14 years to 20 years.²⁵ The proposed amendments in the Bill will ensure that there is consistency throughout Australia in the criminalization of child exploitation material network administrators.

Recommendation:

Anti-Slavery Australia supports the creation of the new offence of conduct for the purposes of electronic service used for child abuse material. This new offence will reflect the role of network administrators in the proliferation of online child exploitation materials, and their complicity in the further abuse and exploitation of children in Australia and overseas.

3. LIVE-STREAMED CHILD ABUSE

Anti-Slavery Australia also commends Items 1, 22 and 23 to the Committee, which strengthen and clarify the law to reflect the growing practice of live-streamed child abuse.

Non-government organisations report that children in the Philippines are lured to sex tourism “hot spots”, such as Angeles City, Metro Manila and Cebu City on the promise of legitimate jobs in the city. Thereafter they are physically and/or emotionally coerced into working in the sex industry including, increasingly, online exploitation dens, where they are made to perform on webcams to foreign online sex tourists. In 2013, it was estimated that tens of

²² *Crimes Act 1958* (Vic) s 70AAAD(1).

²³ *Ibid.*

²⁴ *Criminal Code Act 1899* (QLD) ss 228DA, 228DB and 228DC.

²⁵ *Ibid.*

thousands of boys and girls were in the webcam sex tourism trade alone, with that number predicted to increase.²⁶

Unlike saved videos and pictures, streamed videos used in the webcam online child exploitation industry are far more difficult for law enforcement to identify and investigate. There are indications that not all live-streamed child abuse occurs for financial remuneration.²⁷ It may involve multiple perpetrators using video streaming programs to stream the simultaneous abuse of children in a variety of locations.

Live-streamed child abuse has also been associated with child trafficking and slavery in the Asia Pacific region. As other forms of slavery and trafficking are being combatted in countries like the Philippines, there has been an increase in trafficking activity for the sole or primary purpose of online child exploitation. This industry is driven by the financial support from Australian offenders who encourage the production of online sexual exploitation materials.

There have been several high-profile Australian cases of live-streamed child abuse. In July 2014, Patrick Goggins was convicted by the Victorian County Court of over 20 sex offences involving the systemic sexual abuse of Filipino children, in particular causing children to engage in sexual intercourse, streamed over webcam, in his presence. Goggins paid more than \$15,000 to view live-streamed abuse, which was streamed to his location in Melbourne.²⁸

In August 2014 Brett Le Gassick was sentenced to over 20 sex offences, including making transfers of \$3,676.90 as payment for online live sex shows performed by children in the Philippines and causing children to engage in sexual intercourse outside of Australia.²⁹ Le Gassick was refused entry to the Philippines and the Court heard that Le Gassick had plans to meet with girls for sex, which is just one of many examples of online child exploitation materials offenders progressing into contact crimes.

Both Goggins and Le Gassick were successfully prosecuted under Australian child sex laws, which have since 2010 been applicable to extraterritorial conduct. Though not directly responsible for the transport and detention of their victims, their custom supports the trafficking of children in the Philippines.

²⁶ Terre Des Hommes, 'Webcam Child Sex Tourism', (2013) <<http://www.terredeshommes.org/wp-content/uploads/2013/11/Webcam-child-sex-tourism-terre-des-hommes-NL-nov-2013.pdf>> 35.

²⁷ Behind the Screen: Online Child Exploitation in Australia' (Anti-Slavery Australia, 2017) 98-99.

²⁸ *R v Goggins* [2014] VCC 1086.

²⁹ *DPP v Le Gassick* [2014] VCC 1288.

The clarification of the meaning of sexual conduct will ensure that the harm inflicted by Australia-based offenders engaging in live-streamed child abuse is correctly characterised as sexual conduct.

3.1. Extending the definitional clarification to subsection 272.8.

Anti-Slavery Australia recommends that the definitional clarification of 'engage in sexual activity' in Item 1 of the Bill also applies to the offence of sexual intercourse with child outside Australia under subsection 272.8 of the Criminal Code.

Anti-Slavery Australia recommends that a definitional clarification, of the kind proposed in Schedule 4, Item 1, is also added to subsection 272.8 of the Criminal Code. This will ensure that an Australian directing and engaging in live-streamed, serious sexual abuse of a child overseas,³⁰ is properly characterised as culpable for the significant harm caused to the child.

Recommendation:

Anti-Slavery Australia commends Items 1, 22 and 23 to the Committee, which strengthen and clarify the law to reflect the growing practice of live-streamed child abuse.

Anti-Slavery Australia recommends that the definitional clarification of 'engage in sexual activity' in Item 1 of the Bill also applies to the offence of sexual intercourse with child outside Australia under subsection 272.8 of the Criminal Code.

4. MINIMUM SENTENCES

Anti-Slavery Australia recommends that the Committee consider engaging in further consultation regarding the proposed amendments in Schedule 6 of the Bill, particularly the introduction of mandatory minimum sentences for online child abuse materials offences.

The introduction of a mandatory minimum custodial sentence will not reflect the spectrum of child exploitation material offending. This spectrum is evidenced by the categorisation system used in Australia, the Child Exploitation Tracking System ('CETS') Scale, used in the Australian National Victim Image Library (ANVIL).³¹ The scale categories child exploitation material from Level 1, depictions of children with no sexual activity to Level 5, which involves sadism, bestiality, humiliation or child abuse. The scale also captures depictions of fictional

³⁰ As defined in *Criminal Code Act 1995* (Cth) sch 1, s 272.4(1).

³¹ Cybercrime Convention, Explanatory Report, cited in Jonathan Clough, *Principles of Cybercrime* (Cambridge University Press, 1st ed, 2010) 303.

children under Level 6, defined as anime, cartoons, comics and drawings depicting child or children engaged in sexual poses or activity.³²

Mandatory minimum custodial sentences may reduce the incentive for defendants to assist police in ongoing investigations. This may be particularly damaging to police investigations concerning online child exploitation, as defendants have no incentive to voluntarily provide passwords to encrypted devices and systems.

The importance of this kind of information to police investigations in this area can be seen through the investigations surrounding the arrest of Shannon McCoolle.³³ This operation began with evidence provided to Queensland Police Taskforce Argos following the arrest of a man who owned a company that distributed child exploitation films in Canada. This information led to the investigation and arrest of a number of people in Australia. One of the Australians arrested was a member of a bulletin board website on a Darknet. Membership of the website was closely controlled. Inactive accounts raised suspicion and could be suddenly terminated. Members were required to upload new material frequently. More than 45,000 people complied with these rules. Following his arrest, officers of Argos assumed the offender's membership and investigated those using the website.³⁴

In this case, Danish authorities provided information that the administrator of the website was located somewhere in Australia, probably in Adelaide. Argos officers used their membership of the website to search for clues into the administrator's identity. The investigation led to the identification and arrest of Shannon McCoolle, a 32 year old childcare worker for Families SA in Adelaide.³⁵ McCoolle was sentenced in August 2015 to 35 years imprisonment with a 28 year non-parole period for 18 State and two Federal offences he committed between 2011 and 2014. The charges included persistent sexual exploitation of children, sexual intercourse with children, aggravated indecent assault, and the production and dissemination of images of child abuse.³⁶ McCoolle's arrest was suppressed allowing Argos officers to secretly take control of the bulletin board website as the administrator.³⁷

Taskforce Argos' investigation lead to the rescue of 85 child victims and the arrest of hundreds of offenders across the globe.³⁸ One of the offenders arrested was Richard Huckle from the United Kingdom. Huckle abused children in Malaysia and was arrested at Gatwick

³² *DPP v Zarb*, [2014] VCC 1517, [5].

³³ (Unreported, District Court of South Australia, Rice DCJ, 7 August 2015).

³⁴ *Ibid*

³⁵ *Ibid*.

³⁶ *R v Shannon Grant McCoolle* (Unreported, District Court of South Australia, Rice DCJ, 7 August 2015).

³⁷ *Ibid*.

³⁸ Michael Safi, 'The Takeover: how police ended up running a paedophile site' *The Guardian*, 13 July 2016 (online) < <https://www.theguardian.com/society/2016/jul/13/shining-a-light-on-the-dark-web-how-the-police-ended-up-running-a-paedophile-site>>.

airport in December 2014. Upon arrest, over 20,000 indecent images of children were found on hardware owned by Huckle, including approximately 1,000 images of children that he had abused.³⁹ Huckle has refused to provide access to various encrypted files found on his personal laptop, which is suspected to contain images and videos, including images of additional victims.⁴⁰

Recommendation:

Anti-Slavery Australia recommends that the committee consider the need for further consultation concerning Schedule 6, particularly the introduction of mandatory minimum sentences for online child abuse materials offences. The introduction of a mandatory minimum custodial sentence for child abuse materials offences does not reflect the spectrum of material offending. Mandatory minimum custodial sentences may also serve to reduce the incentive for defendants to assist police in ongoing investigations.

5. DEFENCE OF A VALID MARRIAGE

Anti-Slavery Australia recommends that the Bill be expanded to repeal the defence based on a valid and genuine marriage contained in subsection 272.17 of the Commonwealth Criminal Code. This subsection provides a defence to a number of overseas child sex offences, and offences involving procuring or "grooming" a child for sexual activity.⁴¹ The subsection states that it is a defence to these offences if:

- (a) at the time he or she committed the offence, there existed between the defendant and the child a marriage that was valid, or recognised as valid, under the law of:
 - (i) the place where the marriage was solemnised; or
 - (ii) the place where the offence was committed; or
 - (iii) the place of the defendant's residence or domicile; and
- (b) when it was solemnised, the marriage was genuine.⁴²

It appears that this defence may be available in a situation of overseas child sexual abuse in which the offender legally marries the young person who is below the legal age of consent in Australia. Globally, the minimum legal age of marriage varies widely. In Sudan, girls can legally marry at 10 years old. In the Philippines couples must be 21 to marry without

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ *Criminal Code Act 1995* (Cth) sch 1, ss 272.17(1) and (2).

⁴² Ibid, ss 272.17(1)(a) and (2)(a).

permission, whereas Muslim girls can marry at puberty. Muslim and Hindu girls can marry at 12 in Tanzania, as long as the marriage is not consummated until the girl is 15.⁴³ It is unclear if this defence would be available to an offender of overseas child sex abuse who was legally married to a child as young as 10 or 12 years old in a country where that marriage is legally permitted.

This defence also appears to be inconsistent with the definition of the Commonwealth offence of forced marriage under subsection 270.7A of the Commonwealth Criminal Code. Subsection 270.7A defines forced marriage as:

- 1) A marriage is a forced marriage if one party to the marriage (the victim) entered into the marriage without freely and fully consenting:
 - (a) because of the use of coercion, threat or deception; or
 - (b) because the party was incapable of understanding the nature and effect of the marriage ceremony.⁴⁴

A person under 16 is presumed to be incapable of understanding the nature and effect of a marriage ceremony, unless it is proved otherwise.⁴⁵

Recommendation:

Anti-Slavery Australia recommends that the Bill be expanded to repeal the defence based on a valid and genuine marriage contained in subsection 272.17 of the Commonwealth Criminal Code. The purpose of this defence is unclear. It also appears to be inconsistent with the Commonwealth offence of forced marriage.

⁴³ Aleksandra Sandstrom and Angelina E. Theodorou, *Many countries allow child marriage* (12 September 2016) Pew Research Center <<http://www.pewresearch.org/fact-tank/2016/09/12/many-countries-allow-child-marriage/>>.

⁴⁴ *Criminal Code*, s 270.7A(1).

⁴⁵ *Ibid*, s 270.7A(4).

Behind the Screen

Online Child Exploitation in Australia



Report summary and recommendations

Behind the Screen:

Online Child Exploitation in Australia

Behind the Screen: Online Child Exploitation in Australia represents the first report of its kind in Australia. The report brings together data and statistics previously unavailable to the public, provides expert commentary drawn from interviews with representatives from leading law enforcement and non-government agencies and draws on primary and secondary research, to provide a comprehensive summary of Australia's response to the issue of online child exploitation.

The need for research into this area is pressing due to the alarming scope of online child exploitation. As of 1 January 2017, more than 10,000 victims of child exploitation have been identified through INTERPOL's International Child Sexual Exploitation ('ICSE') image database since its inception.¹ The United States National Centre for Missing and Exploited Children has reportedly processed over 150 million images and videos through its Child Recognition and Identification System.² The Australian Federal Police received 11,000 online child exploitation reports in 2015.³ ICMEC reports indicate that as of 1 June 2016, there have been 194 identified Australia-based child victims and 102 identified Australian offenders.⁴

In reviewing and evaluating the development of Commonwealth, State and Territory legislation and its history, sentencing outcomes for offenders and the role of Internet Service Providers in assisting law enforcement agencies, the report identifies critical issues relevant to an effective response. The report provides an overview of key international and domestic agencies that form the framework for the investigation and prosecution of online child exploitation offences in Australia and overseas.

Our research and findings confirm how modern technology and ease of access to the internet has resulted in the proliferation of child exploitation materials now available online. Court decisions support this conclusion and reveal how offenders now have access to tens of thousands of images of child exploitation and abuse, with commentators suggesting that such high demand will result in the further growth of the online child exploitation industry.

AT A GLANCE

Over **150 million** online images and videos **depicting child exploitation**

194 Australian children have been identified in **online exploitation material** as of 1 June 2016

102 Australian offenders have been identified as of 1 June 2016

11,000 reports made to the Australian Federal Police in 2015

"[There is] an increasing amount of research out there, that people that are online image offenders can quite often also be contact offenders."

- Senior Officer with ARGOS (Qld Police)

¹ *Online child abuse Q&As*, (Undated) INTERPOL <<https://www.interpol.int/Crime-areas/Crimes-against-children/Online-child-abuse-Q-As>>.

² 'Emerging Global Threats Related to the Sexual Exploitation of Children Online' (Briefing Paper, ECPAT, Undated) <http://www.ecpat.org/wp-content/uploads/2016/05/Briefing-Paper_Emerging-global-threats-related-to-the-sexual-exploitation-of-children-online.pdf>.

³ Interview conducted with a Senior officer with the Australian Federal Police (AFP) (Telephone interview, 14 September 2016).

⁴ Data provided to the report writers from one Interviewee. Data was provided in the form of a table from the INTERPOL operated International Child Sexual Exploitation database.

Legislation

The report outlines State and Commonwealth criminal legislation and the legislative history of criminal law reform in these jurisdictions. It incorporates an overview of recent amendments, relevant reports and second reading speeches. The report reveals how multiple amendments to both State and Commonwealth legislation have resulted in laws that address a multitude of offences relating to online child exploitation crimes.

The report identifies a lack of uniformity in the way that online child exploitation offences are referred to in both State and Commonwealth legislation. For example, Commonwealth *Criminal Code Act 1995* provisions under Division D refer to 'possessing, controlling, and producing, supplying or obtaining child pornography' and 'child abuse material' as separate offences. The New South Wales legislation refers to 'child abuse material',⁵ while the Northern Territory legislation has provisions relating to 'child abuse materials' and 'indecent articles'.⁶ Meanwhile, Victoria's current legislative provisions on these offences have only recently been amended by a bill assented to in September, 2016 that refers to 'child abuse material'.⁷

Uniform terminology in legislation across Australia will ensure consistency between jurisdictions, and reflect that the term "child pornography" is insufficient in conveying the seriousness and gravity of the offences depicted and harm faced by victims. Media guidelines should be developed to ensure these crimes are reported consistently and appropriately across all media platforms. Consistent terminology will also assist with the implementation of national child protection systems such as Working with Children Checks,⁸ and facilitate the compilation of national data.

In June 2016, the Interagency Working Group, coordinated by End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes ('ECPAT'), released the "Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse", also known as the "Luxembourg Guidelines".⁹ These guidelines were created to address the lack of consensus, at an international level, on the terminology to be used in reference to the sexual exploitation and sexual abuse of children. We recommend that these terminology guidelines be used in the wording of all relevant State and Territory legislation, to ensure greater conceptual clarity across all Australian jurisdictions.¹⁰

Sentencing

The report identifies factors relevant to the sentencing process for those convicted of online child exploitation offences:

- Alleged offenders may be charged with both Commonwealth and State crimes
- Courts may impose cumulative or concurrent sentences, and must take into account the principle of totality in sentencing
- There is a lack of clarity between existing legislative and common law sentencing principles relating to online child exploitation offences

"[T]here's not a police officer you'll find in this area that's happy with the sentencing."

- Senior Officer with the Sex Crimes Squad (NSW Police)

⁵ *Crimes Act 1900* (NSW) s 91FB.

⁶ *Criminal Code Act 1983* (NT) Sch 1, Div 2, Subdiv 1.

⁷ *Crimes Act 1958* (Vic) ss 68 to 70AAAE.

⁸ Consistency in the area was a recommendation of the Royal Commission to Institutional Responses into Child Sexual Abuse, and may reflect potential recommendations to come out of South Australia's Child Protection Systems Royal Commission. Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report* (2015).

⁹ Interagency Working Group, 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse' (ECPAT, June 2016) <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/instructionalmaterial/wcms_490167.pdf>.

¹⁰ For further discussion of the Luxembourg Guidelines, see section 6.1.9 of the report.

- Consideration of the harm suffered by the victims of online child exploitation crimes varies between courts and jurisdictions
- There is often a distinction made between online child exploitation images and the crimes that they depict

People charged with crimes of online child exploitation are often charged under both State or Territory and Commonwealth criminal law provisions. While offences across jurisdictions share some commonality, state offences do not exclusively refer to the use of the internet to procure/groom or transmit, produce or distribute child exploitation materials. For example, offences related to possession of child exploitation material in NSW, refer to the “possession or control of data”¹¹ defined in the act as including:¹²

- (a) Possession of a computer or data storage device holding or containing the data or of a document in which the data is recorded, and
- (b) Control of data held in a computer that is in the possession of another person (whether the computer is in this jurisdiction or outside this jurisdiction).

In contrast, Commonwealth provisions more broadly refer to offences that involve using a carriage service,¹³ where possession is simply described as the “possession and control of material”.¹⁴ As the focus of this report is primarily an examination of internet-based offences, it addresses sentencing proceedings under these Commonwealth provisions. Commonwealth legislation is crucial to the prosecution of online offending including the two broad categories of crimes examined in the report: online child exploitation material offences and grooming/procuring offences.

Our findings, based on a review of recent case law, indicate that on average, defendants charged and convicted under Commonwealth provisions receive at most 2 to 3 years imprisonment, and where multiple charges are involved, these sentences are served concurrently. Even in cases where offenders have vast collections of child exploitation material, and have used internet services to groom and procure more than one child for the purposes of contact offending, the case law indicates that such aggravating elements increase the overall sentence only marginally.

Further, as one interviewee said, the current Commonwealth legislative provisions when applied to those who administer online child exploitation networks are “lacking any teeth.”¹⁵ In some cases, online network administrators distribute child exploitation materials to extremely large national and international networks.¹⁶ While Commonwealth legislation provides that offences of this nature committed on 3 or more separate occasions constitute aggravated offences,¹⁷ and includes provisions relating to the possession of child exploitation material outside of Australia,¹⁸ there are no specific provisions that reflect the prominent role of administrators in the distribution of materials, and in some cases incitement, of child exploitation, or the extent of distribution as aggravating factors.

This research has highlighted the need for a more comprehensive study into sentencing practices, including the development of sentencing guidelines, minimum non-parole periods, sentencing factors, factors relevant to harm, and aspects of offender profiling. Anti-Slavery Australia recommends that there is an imperative need for further research into the sentencing process, which will focus on changing perceptions of the harm that stems from production and dissemination of online child exploitation materials.

¹¹ *Crimes Act 1900* (NSW) s 91H.

¹² *Crimes Act 1900* (NSW) s 308F.

¹³ *Criminal Code Act 1995* (Cth) Division 474 (Telecommunications offences)

¹⁴ *Criminal Code Act 1995* (Cth) s 474.20(1)(a)(i).

¹⁵ Interview with a Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016).

¹⁶ *R v Shannon Grant McCoolle* (Unreported, District Court of South Australia, Rice DCJ, 7 August 2015).

¹⁷ *Criminal Code Act 1995* (Cth) ss 273.5, 273.6 and 273.7.

¹⁸ *Ibid.* s 474.24A.

“Lawfully, I mean lawfully we’re not on fishing expeditions here... These are legitimate investigative lines of enquiry and their [ISPs’] level of compliance for mobile data is about 20 or 30 per cent, which is disgraceful...”

- Senior Officer with ARGOS (Qld Police)

Internet Service Providers

Both the interviews conducted and research undertaken confirm that social networking websites (such as Facebook, Twitter and Instagram) as well as search engines are voluntarily working with law enforcement to prevent online child exploitation through the development of internal policies, although further examination and expansion of these policies is required. However, the report highlights problems regarding Internet Service Providers (‘ISPs’) and the assistance provided to law enforcement for matters relating to online child exploitation offences.

The report identifies key areas of reform required to ensure that online content regulation mechanisms in Australia effectively address the proliferation of child exploitation material through emerging online technologies and tools. This includes the need to update schedules 5 and 7 of the *Broadcasting Services Act 1992* (Cth), which create the Online Content Scheme. Such amendments are necessary to ensure that schedules 5 and 7 apply to new and emerging technologies. Existing industry codes should also be reviewed and updated in this process.

ISPs such as Telstra, Optus, iiNet and TPG, all hosted in Australia, are subject to provisions under the *Criminal Code Act 1995* (Cth) and the *Telecommunications Act 1997* (Cth). Of particular interest are the provisions of the latter piece of legislation, requiring ISPs to “do [their] best to prevent telecommunications networks and facilities from being used in, or in relation to, the commission of offences against the laws of the Commonwealth or of the States and Territories,”¹⁹ and “give officers and authorities of the Commonwealth and of the States and Territories such help as is reasonably necessary”.²⁰ It should be noted that telecommunications companies (‘Telcos’) in Australia have tended to transfer their general legislative obligations to their users through user agreements, which are examined in more depth within the report.

The ‘do your best’ provisions are vague and as such, ineffective at ensuring the obligations of ISPs are met. While legislative reform is an option, it would be arguably more effective for an industry regulator, such as the ACMA, to develop a code that clearly articulates the obligations outlined in the *Telecommunications Act*.

We propose that an industry code be created in relation to section 313 of the *Telecommunications Act* that would outline the standards required of the ‘do your best’ provisions, or a code that specifically relates to the use of services for child exploitation purposes.²¹ This would provide guidance to Telcos on the way that they should assist Commonwealth and State law enforcement to gather information on networks and facilities used in the commission of online child exploitation offences. It would also assist in removing some of the uncertainty surrounding privacy obligations.

¹⁹ *Telecommunications Act 1997* (Cth) s 313.

²⁰ *Ibid.*

²¹ See for example, ‘Handling of Life Threatening and Unwelcome Communications’ (Industry Code C525:2010, Communications Alliance Ltd) <<http://www.acma.gov.au/theACMA/Library/Corporate-library/Forms-and-registers/register-of-codes>>.

Online Child Exploitation and Trafficking

Recent court decisions confirm the link between domestic online child exploitation offences and human trafficking. One such case is the case of *DPP (Cth) v McIntosh*,²² wherein a man trafficked his twin surrogate daughters into Australia for the purposes of sexual exploitation. This matter resulted in multiple convictions, including one of trafficking.

However, the report also observes the practice of Australians who carry out offences of online child exploitation in overseas jurisdictions as a significant area of concern. The emergence of 'Live-Distant-Child Abuse' as an insidious and inconspicuous form of exploitation further demonstrates the complex connection between online child exploitation and trafficking. This form of exploitation has been described as "Cybersex Trafficking" by organisations such as the International Justice Mission.²³ Moreover, in the Philippines, perpetrators who exploit children online under the instruction of Australian based offenders have been charged with crimes under the nation's trafficking legislation.²⁴ This type of offending emphasises the impact, and culpability, of Australian perpetrators who view or request access to violent images of child abuse online and who are thereby fuelling an international industry of online child exploitation materials.

However, this is an under-researched area. Anti-Slavery Australia recommends that substantial further research is required to understand the link between online child exploitation and trafficking or slavery offences.

International and Domestic Frameworks

The report outlines a number of national and international networks, incorporating international treaties and conventions, as well as international organisations (comprised of law enforcement, NGO or combinations of both). This project, including secondary research, as well as interviews undertaken with various representatives from law enforcement and NGOs, indicates the need for considerable global and national cooperation on the issue of online child exploitation.

Official networks, such as those provided through Mutual Legal Assistance Treaties ('MLAT'), are an invaluable resource for law enforcement, although some interviewees raised concerns that the processes of these treaties could be streamlined for effectiveness and efficiency.

McIntosh Case

A Victorian man entered into a surrogacy arrangement (as the sperm donor) to produce twin babies to bring to Australia in order to be sexually exploited. Not only did the defendant sexually abuse the newborn babies from 27 days old, he produced and distributed child pornography depicting these offences.

The Court found that the defendant:

- viewed child pornography material for around 20 years
- accessed and shared child pornography material over the internet for more than 5 years
- had created pornographic materials, including of his nieces.

"His spiral, from being a casual observer of child abuse material, to someone who discussed the material on the dark web, to sexually abusing children himself, was particularly concerning" - Judge Susan Cohen

The defendant pleaded guilty to 38 charges including child trafficking, incest, producing, accessing, or transmitting child abuse material

Penalty: The defendant was imprisoned with a fifteen and a half year non-parole period

²² *DPP (Cth) v McIntosh* [2016] VCC 622 ('McIntosh').

²³ International Justice Mission, 'Cybersex Trafficking' (Factsheet, September 2016)

<https://www.ijm.org/sites/default/files/IJM_2016_Casework_FactSheets_CybersexTrafficking.pdf>.

²⁴ *An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for its Violations, and for Other Purposes* Republic Act No. 9208 Congress of the Philippines 26 May 2003 s 3(f) defines "sexual exploitation" as "participation by a person in prostitution or the production of pornographic materials as a result of being subjected to a threat, deception, coercion, abduction, force, abuse of authority, debt bondage, fraud or through abuse of a victim's vulnerability"; and s 3(h) defines pornography as "any representation, through publication, exhibition, cinematography, indecent shows, information technology, or by whatever means, of a person engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a person for primarily sexual purposes."

Education and Prevention

Interviewees noted the necessity of further education programmes, training, and technology development, to ensure the protection of children throughout Australia, and overseas. Anti-Slavery Australia notes that while there are various initiatives throughout Australia, there is a confusing duplication of efforts between government bodies and non-government organisations, as well as reliance on prevention models with little evidence basis. This issue could be overcome through a centralised, national programme.

This report also identifies a significant gap in education in this area, as there are currently no programmes operating in Australia to promote the primary prevention of online child exploitation. Primary prevention programmes recognise the social factors that facilitate the online exploitation of children, and that contribute to the increased publication of online exploitation materials. These programmes address underlying social factors to encourage cultural change. The current gap could potentially be addressed by integrating online child exploitation education into current, national primary prevention models such as respectful relationship education and child abuse prevention programmes. However, substantial further research is required to evaluate and assess the style of programmes best suited to prevent online child exploitation.

Key Recommendations

In light of our findings, Anti-Slavery Australia makes the following recommendations:

1. To ensure an effective legal and community response to online child exploitation in Australia, the Australian government should create a peak national body comprising representatives of government departments, law enforcement agencies and key stakeholders at State, Territory and Commonwealth levels. This body would draw on the expertise of existing bodies and provide official channels for the exchange of information.
 - a. This national body should seek to engage with COAG to revise the language of all relevant State, Territory and Commonwealth legislation to reflect the 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse'. This will include a review of relevant State and Territory child protection legislation.
2. To facilitate effective online content regulation in Australia the *Broadcasting Services Act 1992 (Cth)* should be updated to reflect the emergence of new technologies and further ensure that instances of online child exploitation material hosted in Australia and overseas are effectively identified and investigated.
3. To enhance cooperation between ISPs and law enforcement, internet industry codes should be reviewed and amended. In particular, an industry code, guideline or standard should be developed by the ACMA to assist telecommunications providers to 'do [their] best' under the provisions of the *Telecommunications Act 1997 (Cth)*.
4. In developing an effective national response to online child exploitation in Australia, COAG should implement a nationwide child exploitation primary prevention education programme, supported through training and technology development, with consistent and proven results. This should be integrated with existing nationwide education programmes.
5. To overcome the significant research gaps identified in the report, substantial further research should be conducted into the following areas:
 - a. Sentencing outcomes for online child exploitation offences;
 - b. The relationship between human trafficking and online child exploitation in order to facilitate the development of a coordinated Australian response to these emerging crimes; and
 - c. Victim and offender behaviours, in order to prevent the future exploitation of child online.



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Behind the Screen

Online Child Exploitation in Australia



Acknowledgements

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Foreword

Who can imagine life without the internet? The ability to communicate with virtually anyone in the world instantly. An endless stream of entertainment options, largely free, at the mere movement of a finger. Amateur photographers and filmmakers with access to a global audience. Yet this same extraordinary human enabler, that we celebrate with wonder, has a troubling and disturbing underside.

Online child sexual abuse is a topic most of us would prefer not think about, we would like to believe it doesn't really happen or at least that it only happens elsewhere - the unfortunate truth is that online exploitation of children is undoubtedly prevalent in Australia and it is increasing in levels which can be described as a pandemic. Affected children are getting younger and the crimes against them are getting more violent.

Australian law enforcement and non-government agencies are doing an exceptional job in seeking to identify and rescue the children that have been harmed and capture the perpetrators causing the harm. But it isn't enough - these crimes are increasing with some statistics suggesting the volume of child sexual abuse imagery increasing as much as 400% between 2013 and 2015. And those that are detected and prosecuted are only a fraction of total offences committed.

Australian offenders - those producing or viewing child abuse material - are being caught with not just an 'album' of online images but tens of thousands if not hundreds of thousands of images and videos. That is, hundreds of thousands of crime scenes; scenes where real children (and increasingly prepubescent children, toddlers and babies) are experiencing real abuse.

This research was undertaken fundamentally to help protect children from sexual abuse. To do this, we need to better understand the facts about online child abuse in Australia - how many children are being abused, how offenders are getting access to children, who the offenders producing and viewing these abuse images are, and why they do it.

A problem of this magnitude indicates that multiple points of vulnerability exist and need to be addressed with a comprehensive and coordinated set of responses, many of which have been proposed at a high level in this report.

The recent Royal Commission into Institutional Responses to Child Sexual Abuse has clearly evidenced the long term damage to victims of child sexual abuse over their lifetimes. With evidence of this abuse expanding and deepening online, action is required now to ensure this dark and devastating history is not repeated. We can't say we didn't know.

Sally Treeby

Rainbow Fish Foundation

Executive Summary

Behind the Screen: Online Child Exploitation in Australia represents the first report of its kind in Australia. The report brings together data and statistics previously unavailable to the public, provides expert commentary drawn from interviews with representatives from leading law enforcement and non-government agencies and draws on primary and secondary research, to provide a comprehensive summary of Australia's response to the issue of online child exploitation.

The need for research into this area is pressing due to the alarming scope of online child exploitation. As of 1 January 2017, more than 10,000 victims of child exploitation have been identified through INTERPOL's International Child Sexual Exploitation image database ('**ICSE**') since its inception, and subsequently removed from harm.¹ On average, seven victims are identified on this database each day.² The United States National Centre for Missing and Exploited Children ('**NCMEC**') has reported processing over 150 million images and videos through its Child Recognition and Identification System.³ The Australian Federal Police ('**AFP**') received 11,000 online child exploitation reports in 2015.⁴ ICSE reports indicate that as of 1 June 2016, there were 194 identified Australia-based child victims and 102 identified Australian offenders.⁵

In reviewing and evaluating the development of Commonwealth, State and Territory legislation and its history, sentencing outcomes for offenders and the role of Internet Service Providers in assisting law enforcement agencies, the report identifies critical issues relevant to an effective response. The report provides an overview of key international and domestic agencies that form the framework for the investigation and prosecution of online child exploitation offences in Australia and overseas.

Our research and findings confirm how modern technology and ease of access to the internet has resulted in the proliferation of child exploitation materials now available online. Court decisions support this conclusion and reveal how offenders now have access to tens of thousands of images of child exploitation and abuse, with commentators suggesting that such high demand will result in the further growth of the online child exploitation industry.

Legislation

The report outlines State and Commonwealth criminal legislation and the legislative history of criminal law reform in these jurisdictions. It incorporates an overview of recent amendments, relevant reports and second reading speeches. The report reveals how

¹ *Online child abuse Q&As*, (Undated) INTERPOL <<https://www.interpol.int/Crime-areas/Crimes-against-children/Online-child-abuse-Q-As>>.

² INTERPOL, *Rescuing online child sexual abuse victims spotlighted at INTERPOL meeting*, (Media Release, 18 November 2015) <<https://www.interpol.int/News-and-media/News/2015/N2015-196>>.

³ 'Emerging Global Threats Related to the Sexual Exploitation of Children Online' (Briefing Paper, ECPAT, Undated) <http://www.ecpat.org/wp-content/uploads/2016/05/Briefing-Paper_Emerging-global-threats-related-to-the-sexual-exploitation-of-children-online.pdf>.

⁴ Interview conducted with a Senior officer with the Australian Federal Police (AFP) (Telephone interview, 14 September 2016).

⁵ Data provided to the report writers from one Interviewee. Data was provided in the form of a table from the INTERPOL operated International Child Sexual Exploitation database.

multiple amendments to both State and Commonwealth legislation have resulted in laws that address a multitude of offences relating to online child exploitation crimes.

The report identifies a lack of uniformity in the way that online child exploitation offences are referred to in both State and Commonwealth legislation. For example, Commonwealth *Criminal Code Act 1995* provisions under Division D refer to ‘possessing, controlling, and producing, supplying or obtaining child pornography’ and ‘child abuse material’ as separate offences. The New South Wales legislation refers to ‘child abuse material’,⁶ while the Northern Territory legislation has provisions relating to ‘child abuse materials’ and ‘indecent articles’.⁷ Meanwhile, Victoria’s current legislative provisions on these offences have only recently been amended by a bill assented to in September, 2016 that refers to ‘child abuse material’.⁸

Uniform terminology in legislation across Australia will ensure consistency between jurisdictions, and reflect that the term “child pornography” is insufficient in conveying the seriousness and gravity of the offences depicted and harm faced by victims. Media guidelines should be developed to ensure these crimes are reported consistently and appropriately across all media platforms. Consistent terminology will also assist with the implementation of national child protection systems such as Working with Children Checks,⁹ and facilitate the compilation of national data.

In June 2016, the Interagency Working Group, coordinated by End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (**ECPAT**), released the “Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse”, also known as the “Luxembourg Guidelines”.¹⁰ These guidelines were created to address the lack of consensus, at an international level, on the terminology to be used in reference to the sexual exploitation and sexual abuse of children. We recommend that these terminology guidelines be used in the wording of all relevant State and Territory legislation, to ensure greater conceptual clarity across all Australian jurisdictions.¹¹

Sentencing

The report identifies factors relevant to the sentencing process for those convicted of online child exploitation offences:

- Alleged offenders may be charged with both Commonwealth and State crimes
- Courts may impose cumulative or concurrent sentences, and must take into account the principle of totality in sentencing

⁶ *Crimes Act 1900* (NSW) s 91FB.

⁷ *Criminal Code Act 1983* (NT) Sch 1, Div 2, Subdiv 1.

⁸ *Crimes Act 1958* (Vic) ss 68 to 70AAAE.

⁹ Consistency in the area was a recommendation of the Royal Commission to Institutional Responses into Child Sexual Abuse, and may reflect potential recommendations to come out of South Australia’s Child Protection Systems Royal Commission. Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report* (2015).

¹⁰ Interagency Working Group, ‘Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse’ (ECPAT, June 2016) <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---jpec/documents/instructionalmaterial/wcms_490167.pdf>.

¹¹ For further discussion of the Luxembourg Guidelines, see [section 6.1.9](#) of this report.

- There is a lack of clarity between existing legislative and common law sentencing principles relating to online child exploitation offences
- Consideration of the harm suffered by the victims of online child exploitation crimes varies between courts and jurisdictions
- There is often a distinction made between online child exploitation images and the crimes that they depict

People charged with crimes of online child exploitation are often charged under both State or Territory and Commonwealth criminal law provisions. While offences across jurisdictions share some commonality, state offences do not exclusively refer to the use of the internet to procure/groom or transmit, produce or distribute child exploitation materials. For example, offences related to possession of child exploitation material in NSW, refer to the “possession or control of data”¹² defined in the act as including:¹³

- (a) Possession of a computer or data storage device holding or containing the data or of a document in which the data is recorded, and
- (b) Control of data held in a computer that is in the possession of another person (whether the computer is in this jurisdiction or outside this jurisdiction).

In contrast, Commonwealth provisions more broadly refer to offences that involve using a carriage service,¹⁴ where possession is simply described as the “possession and control of material”.¹⁵ As the focus of this report is primarily an examination of internet-based offences, it addresses sentencing proceedings under these Commonwealth provisions. Commonwealth legislation is crucial to the prosecution of online offending including the two broad categories of crimes examined in the report: online child exploitation material offences and grooming/procuring offences.

Our findings, based on a review of recent case law, indicate that on average, defendants charged and convicted under Commonwealth provisions receive at most 2 to 3 years imprisonment, and where multiple charges are involved, these sentences are served concurrently. Even in cases where offenders have vast collections of child exploitation material, and have used internet services to groom and procure more than one child for the purposes of contact offending, the case law indicates that such aggravating elements increase the overall sentence only marginally.

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occasions constitute aggravated offences,¹⁸ and includes provisions relating to the possession of child exploitation material outside of Australia,¹⁹ there are no specific provisions that reflect the prominent role of administrators in the distribution of materials, and in some cases incitement, of child exploitation, or the extent of distribution as aggravating factors.

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¹⁸ *Criminal Code Act 1995* (Cth) ss 273.5, 273.6 and 273.7.

¹⁹ *Ibid.* s 474.24A.

²⁰ A recent report released by the Australian National University Cybercrime Observatory touches upon issues of offender profiling and the connection between online and offline offending; Maxim, D. J. A., Orlando, S. M., Skinner, K. L., & R. G. Broadhurst, 'Online Child Exploitation Material – Trends and Emerging Issues' (Australian National University Cybercrime Observatory, 2016) <<http://sociology.cass.anu.edu.au/story/online-child-exploitation-material-research-project>>.

²¹ *Telecommunications Act 1997* (Cth) s 313.

²² *Ibid.*

more effective for an industry regulator, such as the Australian Communications and Media Authority ('the ACMA'), to develop a code that clearly articulates the obligations outlined in the *Telecommunications Act*. Section 118 of the *Telecommunications Act* allows the ACMA to request that a body or association to develop an industry code that deals with one or more specified matters relating to telecommunications activities. Under the legislation, the ACMA may determine an industry standard if a request for an industry code is not complied with, if industry codes fail, or if directed by the minister.²³

We propose that an industry code be created in relation to section 313 of the *Telecommunications Act* that would outline the standards required of the 'do your best' provisions, or a code that specifically relates to the use of services for child exploitation purposes.²⁴ This would provide guidance to Telcos on the way that they should assist Commonwealth and State law enforcement to gather information on networks and facilities used in the commission of online child exploitation offences. It would also assist in removing some of the uncertainty surrounding privacy obligations.

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²³ *Telecommunications Act 1997* (Cth) ss123, 125 and 125 AA respectively.

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Official networks, such as those provided through Mutual Legal Assistance Treaties ('MLAT'), are an invaluable resource for law enforcement, although some interviewees raised concerns that the processes of these treaties could be streamlined for effectiveness and efficiency.

Education and Prevention

Interviewees noted the necessity of further education programmes, training, and technology development, to ensure the protection of children throughout Australia, and overseas. Anti-Slavery Australia notes that while there are various initiatives throughout Australia, there is a confusing duplication of efforts between government bodies and non-government organisations, as well as reliance on prevention models with little evidence basis. This issue could be overcome through a centralised, national programme.

This report also identifies a significant gap in education in this area, as there are currently no programmes operating in Australia to promote the primary prevention of online child exploitation. Primary prevention programmes recognise the social factors that facilitate the online exploitation of children, and that contribute to the increased publication of online exploitation materials. These programmes address underlying social factors to encourage cultural change. The current gap could potentially be addressed by integrating online child exploitation education into current, national primary prevention models such as respectful relationship education and child abuse prevention programmes.

However, substantial further research is required to evaluate and assess the style of programmes best suited to prevent online child exploitation.

Key Recommendations

In light of our research, Anti-Slavery Australia makes the following recommendations:

1. To ensure an effective legal and community response to online child exploitation in Australia, the Australian government should create a peak national body comprising representatives of government departments, law enforcement agencies and key stakeholders at State, Territory and Commonwealth levels. This body would draw on the expertise of existing bodies and provide official channels for the exchange of information.
 - a. This national body should seek to engage with the Council of Australian Governments ('COAG') to revise the language of all relevant State, Territory and Commonwealth legislation to reflect the 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse'. This will include a review of relevant State and Territory child protection legislation.
2. To facilitate effective online content regulation in Australia the *Broadcasting Services Act 1992* (Cth) should be updated to reflect the emergence of new technologies and further ensure that instances of online child exploitation material hosted in Australia and overseas are effectively identified and investigated.
3. To enhance cooperation between ISPs and law enforcement, internet industry codes should be reviewed and amended. In particular, an industry code, guideline or standard should be developed by the ACMA to assist telecommunications providers to 'do [their] best' under the provisions of the *Telecommunications Act 1997* (Cth).
4. In developing an effective national response to online child exploitation in Australia, COAG should implement a nationwide child exploitation primary prevention education programme, supported through training and technology development, with consistent and proven results. This should be integrated with existing nationwide education programmes.
5. To overcome the significant research gaps identified in the report, substantial further research should be conducted into the following areas:
 - a. Sentencing outcomes for online child exploitation offences;
 - b. The relationship between human trafficking and online child exploitation in order to facilitate the development of a coordinated Australian response to these emerging crimes; and
 - c. Victim and offender behaviours, in order to prevent the future exploitation of child online.

Definitions

A Note on Terminology

A number of expert participants interviewed for this study expressed concern about the use of the phrase “child pornography” to describe online child exploitation materials.

“[T]he term ‘child pornography’, just immediately lessens the impact. I mean, these are children who are being sexually assaulted, these are child sexual assault images, this is child exploitation material. [These] are really serious crimes....”²⁸

“There’s an international movement to call it what it is, and it is not pornography. I mean honestly, it is not pornography... Anything like that is a move in the right direction. You’ll never hear me, publically or in the media refer to it as child pornography, or ‘kiddie porn’ which I’ve heard people call it as well. It’s just bloody ignorant.”²⁹

This report discusses the importance of consistent terminology to ensure that the seriousness of online child exploitation crimes is reflected to the public and in legislative reform. Therefore, the report writers have used the term “online child exploitation” to refer to all types of online child exploitation crimes, including procuring, grooming, possession, production, dissemination, Live-Distant-Child Abuse offences and other types of relevant offences.

Due to existing discrepancies in the way that these offences are referred to in legislation, data and other sources, where the source material uses different terminology, such as “child pornography” the writers have used that term for consistency.³⁰ Noted in the recommendations, Anti-Slavery Australia advocates that government, non-government and media agencies refer to these crimes as crimes of online child exploitation.

Carriage services:	A service that carries communications, which includes both telephone services and internet services.
Child:	A person under 18 years of age (unless otherwise specified).
Child abuse material:	A term increasingly being used to describe child pornography. It is preferred because it identifies children as a victim of torture, cruelty or physical abuse rather than the term “pornography” which can be associated with legitimate material with consenting subjects.
Child exploitation material:	Another term increasingly being used to describe child pornography. It is often defined to include representations of children as a victim of torture, cruelty or physical abuse.
Child pornography:	Visual representations of a sexually explicit nature involving a child. This can include photographs, videos,

²⁸ Interview with a representative from an NGO (Telephone interview 8 August 2016).

²⁹ Interview with a Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016).

³⁰ Susanna Greijer and Jaap Doek, ‘Terminology Guidelines For the Protection of Children from Sexual Exploitation and Sexual Abuse’ (Guidelines, Terminology and Semantics Interagency Working Group on Sexual Exploitation of Children, 28 January 2016) (hereinafter Luxembourg Guidelines), see section 2.6.

	and computer generated images.
Commercial sexual exploitation of children:	A commercial transaction involving the sexual exploitation of a child (such as profit obtained through child abuse material or prostitution).
Cybersex Trafficking:	The commercial sexual exploitation of children, conducted through live, online video feeds and recordings, for a paying audience.
Darknet:	An overlay network built on the internet that can only be accessed through specific software, configurations and authorisation. Two typical forms of Darknet are friend-to-friend networks and privacy networks such as The Onion Router, commonly abbreviated to Tor, which use anonymity tools and encryption to hide users' IP addresses. The opposite of the Darknet is the Clearnet, which is the traditional, unencrypted World Wide Net.
Dark web:	Content on the worldwide web that exists on Darknets. The dark web forms a small part of the deep web
Deep web:	The part of the World Wide Web that is not indexed by search engines.
Distribution:	The dissemination, supply or transmission of child abuse material. This can include the sharing of images and videos, the sale of images or videos, uploading or streaming of material to or through websites, or any agreement to do one of those.
Grooming:	Where a person over 18 years old makes contact with a child, forming a relationship of trust, with the intention of later engaging in sexual acts or communications. The offender often falsifies their age and/or gender in this process to assist in building trust.
Internet Service Providers:	Companies which provides services for accessing and using the internet.
Live-Distant-Child Abuse:	The commercial live-streaming of child physical or sexual abuse over the internet.
Online:	Acts which take place on a computer or other technological device, which are connected to the internet or other computer networks or devices. This includes material that is stored on such a device.
Online Child Exploitation:	A term used throughout this report to cover all forms of the online crimes of a sexual nature committed by a person towards a child including grooming, procuring and Live-Distant-Child Abuse, as well as those who publish or store child exploitation materials online.
Procuring:	Where a person over 18 years old contacts a child and through this communication they encourage, entice, recruit or induce the child to engage in sexual activity.
Production:	The creation of child abuse material.

Sexting:	Sending sexually explicit photos, images, emails, text or videos via telephone or the internet.
Sextortion:	Where a person threatens the victim (often the release of sexual images or information they have already acquired) in order to extort further sexual images or favours from the victim.
Telecommunications Companies 'Telcos':	Companies which provide telephone and data services (e.g. phone and internet companies).
Trafficking:	At International Law, the recruitment, transportation, transfer, harbouring or receipt of a person for the purpose of exploiting that person through slavery, forced labour, sexual servitude, debt bondage, organ removal or other forms of exploitation.

Acronyms and Abbreviations

This report outlines a number of key government, nongovernment and law enforcement agencies along with multiple agreements and programs that have been developed to combat online child exploitation in Australia and overseas. This following is a summary of the relevant abbreviations used throughout this report.

ACCC	Australian Competition and Consumer Commission
ACF	Australian Childhood Foundation
ACIC	Australian Criminal Intelligence Commission
ACMA	Australian Communications and Media Authority
ACORN	Australian Cybercrime Online Reporting Network
AFP	Australian Federal Police
ANCOR	Australian National Child Offender Register
ANVIL	Australian National Victim Image Library
APAC-FCACP	Asia-Pacific Financial Coalition Against Child Pornography
CECC	Council of Europe Convention on Cybercrime
CEIU	NSW Child Exploitation Internet Unit
CEOP	Child Exploitation and Online Protection centre
CES	Child Exploitation System scale
CETS	Child Exploitation Tracking System
COAG	Council of Australian Governments
CPO	The AFP's Child Protection Operations
CRC	United Nations Convention on the Rights of the Child
CRF	Carly Ryan Foundation
CSSCG	Child Safety and Sexual Crime Group
ECPAT	End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes
FCACP	Financial Coalition Against Child Pornography
GMCN	Global Missing Children's Network
ICHs	Internet Content Hosts
ICSE	International Child Sexual Exploitation database
IJM	International Justice Mission
INHOPE	International Association of Internet Hotlines
ISPs	Internet Service Providers
JACET	Joint Anti Child Exploitation Team agreements
MLAT	Mutual Legal Assistance Treaties
MPS	Managed Person System

NAPCAN	National Association for Prevention of Child Abuse and Neglect
NCMEC	National Centre for Missing and Exploited Children
NCOS	National Child Offender System
OCEANZ	Online Child Exploitation across New Zealand
OCEC	Office of the eSafety Commissioner
OCES	WA's Online Child Exploitation Squad
QCCC	Queensland Crime and Corruption Commission
QPS	Queensland Police Service
TCP	Telecommunications Consumer Protections code
TIO	Telecommunications Industry Ombudsman
VCAC	Violent Crimes Against Children programme
VCACITF	Violent Crimes Against Children International Taskforce
VGT	Virtual Global Taskforce
WACCC	WA's Corruption and Crime Commission
YTVCC	Youth, Technology and Virtual Communities Conference

Introduction

Every image of online child exploitation is an image of a serious crime.³¹ Not only are children physically and sexually abused in order to produce exploitation material, but the subsequent distribution of images through the internet means that documentation of this abuse is circulated in perpetuity. Online technologies allow for the distribution and circulation of harmful material and the procurement and grooming of young victims for sexual abuse purposes.

A key concern regarding crimes of online child exploitation in Australia is the lack of national data. A recent report highlights issues with obtaining data in Australia due to difference in “definitions of child sexual abuse, the age of consent or the age of a child, and child abuse reporting laws” and goes on to state that this prohibits any meaningful comparison between Australian jurisdictions.³² In light of these concerns, the overriding aim of this report is to reveal the relationship between criminal legislation at State, Territory and Commonwealth levels as well as sentencing outcomes. It also highlights the role of various law enforcement and non-government agencies in identifying and combatting online child exploitation crimes in Australia.

The report also aims to identify whether there is a growth in Australian-based online offending and places this offending in a global context. Through data analysis, interviews with key actors in the area, reviews of case reports and secondary research, the report hopes to highlight the position of Australian offenders in the global, pandemic exploitation of children, as not only viewers and distributors of online material, but as consumers of materials that encourage the growing demand for increasingly explicit and violent content. Another area of increasing concern is the formation of online abuse networks. More Australian based offenders are regularly accessing, downloading from, or even administering vast international networks that encourage the distribution of materials.³³

INTERVIEW

Back in the early 2000s we were dealing with kilobytes and megabytes. Now we are dealing with petabytes, mainly terabytes now when we do our seizures. You know, so, the cheaper cost of storage whether it be cloud based or hard disk based is creating obviously, larger seizures on our front.

Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016)

These networks can also be used to facilitate Live-Distant-Child Abuse, a term used to describe the live streaming of child sexual and physical abuse from locations both within

³¹ This was a recurring theme of the April 2016, *Youth, Technologies and Virtual Communities Conference*, hosted by the Queensland Police Service State Crime Command’s Task Force Argos.

³² Genevieve Cameron, Ellie Mendez Sayer, Louisa Thomson, Sophie Wilson, David N Jones and Anton Florek, *Child Sexual Exploitation: A Study of International Comparisons*, (July 2015) Virtual Staff College UK

³³ http://www.virtualstaffcollege.co.uk/wpcontent/uploads/CSE_main_final_publish_1.0.pdf, 34.

³³ The recent high profile cases, examined in this report, of South Australian paedophile Shannon Grant McCooles and Victorian man Matthew David Graham reveal how Australian offenders interact with other online child exploitation offenders around the world, including as administrators of vast online networks.

Australia, and overseas. Of note, the research outlined in this report suggests that the majority of these networks and online distribution of child exploitation materials in general, are not for commercial purposes. As such, the report discusses the need for legislation and sentencing outcomes to reflect this emerging understanding of the nature of online offending, recognising the significance of online networks and the role that they play in the widespread abuse and torture of children.

The electronic form of evidence relevant to these serious online crimes makes the detection of offenders more difficult, as information can be removed, stored or concealed. Therefore, ISPs, those who commercially provide internet access services, represent “gateways to communication for the mass public” and subsequently form “part of a chain which contributes to the distribution of child pornography on the internet.”³⁴ This report looks at the role of ISPs in monitoring and providing assistance to law enforcement. It explores the levels of compliance from each type of ISP, including search engines, social media providers, file sharing services and telecommunications providers. ISPs are placed within a framework of key actors in this area of online offending, who are working toward the identification and location of victims.

Moreover, the report attempts to outline further areas of research, including existing education programmes available to victims, parents/caregivers and offenders, and whether a national consolidated programme is required. It also examines the transnational aspects of this crime which indicate a link between online child exploitation and child trafficking. This link is made clearer through the recent Australian case of *McIntosh*.³⁵ Online crimes of exploitation and trafficking are further examined through several recent cases in the Philippines of child trafficking, which have been prosecuted against local and Australian offenders who have broadcast, filmed and/or distributed online exploitation materials from the Philippines to viewers in Australia and around the world. This includes the recent case of a notorious online and contact offender, Peter Scully, an Australian who was taken into custody in the Philippines for crimes including child trafficking, child sexual abuse, torture and murder, and filmed his crimes for distribution online.

INTERVIEW

The material these days is extremely sadistic, brutal... INTERPOL put out a statement a number of years ago that the majority of material these days was between the ages of zero and five, and they believed that was because the victim could not voice or speak for themselves, difficult to identify... We are seeing, and know that some of the children that have been videoed have since been killed.

Member of the New Zealand Government’s Internal Affairs team (Telephone interview, 27 July 2016)

Research Approach

Anti-Slavery Australia has coordinated research conducted by its staff members with work by Norton Rose Fulbright and Salesforce.org, and we are grateful for their

³⁴ Yaman Akdeniz, *Internet Child Pornography and the Law: National and International Responses*, (Routledge Press, 1st ed, 2016) 227.

³⁵ *McIntosh* [2016] VCC 622.

significant contributions. The report combines a review of existing studies and academic discourse in the area with previously unpublished data obtained from various government agencies, and telephone interviews conducted with representatives of government, law enforcement and nongovernment organisations.

Statistics

Statistics in the report have been drawn from a variety of sources, both primary and secondary. Primary statistics were obtained from various government departments at both state and federal levels, with specific information requested and received from NSW and Commonwealth prosecutions offices. It was not possible to obtain information from all jurisdictions and it is important to note that there is no central database for crime statistics in Australia. The data requested related to the prosecution of various online child exploitation crimes, and includes an overview of sentencing outcomes at the Commonwealth level, characterisation of pleas and a breakdown of charges under each offence category.

Interviews

Ethics approval was obtained to conduct interviews with various participants from government, law enforcement and nongovernment organisations. Due to the highly sensitive aspects of crimes against children, Anti-Slavery Australia chose to de-identify interview participants. This has allowed for invaluable insights into the responses against online child exploitation crimes, as well as perceptions on the efficacy of legislation, sentencing outcomes and the role of ISPs. The report relies on comments from interviewees from various agencies to complement research compiled from primary and secondary sources.

Interview participants were invited to attend interviews conducted over the phone with Senior Academic, Ian Dobinson. Information was gathered through open-ended and semi-structured telephone interviews, which were recorded and subsequently transcribed. It should be noted that interviews were conducted with a number of individuals based in New Zealand, including representatives from Online Child Exploitation Across New Zealand ('**OCEANZ**'), an organisation discussed in detail in this report. Due to their work in the Asia-Pacific region, these interviewees have provided invaluable insights into crimes of online child exploitation generally.

Cases

A number of case examples are used throughout the report to illustrate the operation of State, Territory and Commonwealth legislation in this area of online child exploitation. In particular, a case report review forms the basis for Chapter 3 where recent cases are used in an attempt to identify sentencing guidelines, principles and outcomes for offences of online child exploitation.

These reports have been gathered from various sources, both published and unreported. Sentencing remarks are included with case reports, and requests to obtain these remarks were made directly from the relevant court registry.

Legislation

Report researchers conducted a comprehensive, thematic comparison of all national, State and Territory legislation relevant to online child exploitation and the online abuse of children.

1. Chapter I: Online Child Exploitation Statistics and Trends

1.1. Overview

*[A]s the internet and other forms of information and communications technology advance, opportunities for child sexual offenders and other financially-motivated cybercriminals to sexually exploit children will increase.*³⁶

Putt and Kim-Kwang, *Trends and Issues in Crime and Criminal Justice* (2009)

New online technologies have facilitated the operation of global paedophile networks and increased opportunities for offenders to commit crimes of online child exploitation.³⁷ This has also resulted in the increased commercial exploitation of children and young people, an area of concern which has expanded at both global and national levels.³⁸ In our modern-day online environment offenders are equipped with technology that enables them to easily access children in real time, anonymously and remotely from locations all over the world.³⁹

It is important to recognise that the data outlined in this chapter should be read with an understanding of the sophisticated technologies engaged by offenders who commit crimes related to online child exploitation material. The statistics cannot be taken as a holistic representation of the scale and hierarchy of the vast online networks that have been developed by sophisticated websites and users under the relative protection and anonymity of the Darknet.⁴⁰

Statistics gathered from State, Territory, Commonwealth and International jurisdictions illustrate, to some extent, the prevalence of online child exploitation as a crime within Australia. Australia-based research and official crime statistics indicate that the

³⁶ Kim-Kwang Raymond Choo, 'Trends and Issues in Crime and Criminal Justice, Responding to Online Child Sexual Grooming: An Industry Perspective' (Report 379, Australian Institute of Criminology, July 2009) <http://aic.gov.au/media_library/publications/tandi_pdf/tandi379.pdf>, 1.

³⁷ Deborah Muir, 'Violence Against Children in Cyberspace: A Contribution to the United Nations Study on Violence Against Children' (Report, EPACT International, September 2005) <http://www.ecpat.org/wp-content/uploads/2016/04/Cyberspace_ENG_0.pdf>, 30; Gareth Griffith and Lenny Roth, 'Protecting Children from Online Sexual Predators' (Report, New South Wales, September 2007)

<<https://www.parliament.nsw.gov.au/researchpapers/Documents/protecting-children-from-online-sexual-predators/Dealing%20with%20Online%20PredatorsFINALandINDEX.pdf>> 1.

³⁸ Mark Capaldi, 'Unfinished Business Ending Child Prostitution, Child Pornography and Child Trafficking for Sexual Purposes' (Report, EPACT International, December 2014) <http://www.ecpat.org/wp-content/uploads/2016/04/UNFINISHED%20BusinessReport_2015.pdf>, 3; Muir, above n 37, 9.

³⁹ Eliana Riggio and Mark Erik Hecht, Power, Impunity and Anonymity: Understanding the Forces Driving the Demand for Sexual Exploitation of Children (Report, EPACT International, March 2016) <<http://www.ecpat.org/wp-content/uploads/2016/05/PowerImpunityandAnonymity.pdf>>, 47.

⁴⁰ Michael Byrne, 'Queensland Organised Crime Commission of Inquiry' (Report, Queensland Organised Crime Commission of Inquiry, October 2015) <http://www.organisedcrimeinquiry.qld.gov.au/__data/assets/pdf_file/0017/935/QOCCI15287-ORGANISED-CRIME-INQUIRY_Final_Report.pdf>, 5.

prosecution of online child exploitation crimes is increasing,⁴¹ although data suggests that the number of offenders who have been charged over the last decade has remained relatively stable. The increase in offence numbers, however, suggests growth in this area of criminality and reveals a greater need to deter offenders from engaging in these crimes.⁴²



*These figures reflect the total number of Australian children and the total number of Australian offenders identified through the ICSE database since its establishment in 2009.

This chapter provides an overview of the extent of online child exploitation both globally and domestically. The information gathered demonstrates what can only be described as a crime epidemic that has grown alongside the proliferation of online technologies and the ease with which online child exploitation offenders are able to access, store, produce and disseminate huge volumes of material. As this report reveals, these images increasingly depict crimes committed against young children, and highly depraved acts of sexual violence and torture.

⁴¹ Choo, above n 36, 1.

⁴² For a review of the risks posed by online child sex offenders, including repeat offenders, see Tony Krone and Russell G Smith, *Australian Institute of Criminology, Trajectories in online child sexual exploitation offending in Australia*, No. 524 (January 2017).

1.2. The Global Picture

INTERVIEW

Certainly the type of images has got more severe, so we're seeing more with younger children and more sexual torture... The other thing too is the sheer volume... [I]n 2009 when the unit was set up, we dealt with a case that had 50,000 images and we thought: 'this is really significant.' But as time's gone on, that's a small seizure now.

Officer in Charge, Online Child Exploitation Across New Zealand (OCEANZ)
(Telephone interview, 11 July 2016)

1.2.1. Reported statistics

Online child exploitation crimes are evidently a global issue that demands a global response.⁴³ On a global scale, the reported amount of online child sexual abuse material has spiked in recent years.⁴⁴ The figures set out below demonstrate the enormity of the problem in terms of numbers of child abuse/exploitation images, victims and offenders. However, due to the clandestine nature of this type of abuse and offending, these figures may represent only a small portion of criminal activity.

- INHOPE, a global network of internet hotline providers that collaboratively work together in order take down and notify police of child sexual material, reported a 47 per cent increase of child sexual abuse material from 2012-3.⁴⁵
- In 2014, NCMEC received 78,946 reports from the public and 1,027,126 reports from Electronic Service Providers about the presence of child abuse material online.⁴⁶
- NCMEC's Child Victim Identification Program has also reported processing over 150 million images and videos through its Child Recognition and Identification System in 2014'.⁴⁷
- The Internet Watch Foundation, an organisation working internationally to minimise the availability of online sexual abuse content noted a 417 per cent increase in reports of child sexual abuse imagery from 2013 to 2015.⁴⁸ In 2015, 68,543 of these reports were confirmed as containing criminal content, an increase of 118 per cent on 2014.⁴⁹

⁴³ INHOPE, 'Anticipate, Adapt and Take Action: INHOPE Annual Report 2013 2014' (Report, 2013-2014) <http://www.inhope.org/Libraries/Annual_reports/INHOPE_Annual_Report_2013.sflb.ashx>, 20.

⁴⁴ Ibid., 23.

⁴⁵ Ibid.

⁴⁶ 'Emerging Global Threats Related to the Sexual Exploitation of Children Online', above n 3, 2

⁴⁷ Ibid.

⁴⁸ *About Us* (Undated) Internet Watch Foundation <<https://www.iwf.org.uk/about-iwf>>; Lisa Stacey, 'Annual Report 2015' (Report, Internet Watch Foundation, 2016)

<<https://www.iwf.org.uk/assets/media/annual-reports/IWF%202015%20Annual%20Report%20Final%20for%20web.pdf>>, 8.

⁴⁹ Stacey, Ibid.

- In 2016, INTERPOL noted that, in 2015, an average of seven identifications of child sexual exploitation victims were made per day which led to the arrest of more than 4,000 offenders in 2015.⁵⁰ To date, INTERPOL's International Child Sexual Exploitation database has led to the identification of approximately 9,500 victims.⁵¹

1.2.2. Content hosting

Technology has facilitated the volume and scale of child exploitation material, allowing for numerous platforms to be used to distribute and share the material. The advent of the Darknet and similar encrypted software techniques have allowed perpetrators to easily access and distribute child exploitation material anonymously, and to some extent avoid detection and investigation by law enforcement.⁵²

Since 2012, there has been a rise in the number of "hidden services" on the Darknet that are dedicated to child sexual exploitation material.⁵³ In 2015, the Internet Watch Foundation became aware of about 79 previously unseen hidden services, an increase of 55 per cent since 2014.⁵⁴ In addition to the above mentioned anonymous file share platforms, offenders also utilise platforms such as file and image hosting services.⁵⁵ The organisation ECPAT has noted that:

- There has been a significant increase in the use of live video streaming of child sexual abuse, referred to in this report as 'Live-Distant-Abuse';⁵⁶
- INHOPE, through reports from member hotlines, have identified 83,644 unique URLs confirmed to contain offending from 45 countries;⁵⁷ and
- In 2014, the United Kingdom's Internet Watch Foundation received 31,443 reports of child abuse material, indicating a wide circulation of this type of material through more conspicuous platforms.⁵⁸

The Internet Watch Foundation highlights that in 2015, 'image hosts'⁵⁹ were used by offenders uploading child sexual abuses images and videos significantly more than other services'.⁶⁰ The Internet Watch Foundation notes that this trend is consistent with previous years, and that it has seen a gradual rise every year: 'in 2013, Image Hosts made up 42 per cent (5,594) of all confirmed child sexual abuse reports. In 2015, this increased to 78 per cent of the total (53,218 reports)'.⁶¹

⁵⁰ *Internationally Wanted Paedophile Behind Bars Thanks to Swift Police Action by Cambodia and Belgium via INTERPOL* (30 March 2016) INTERPOL <<http://www.interpol.int/Member-countries/News/N201605>>.

⁵¹ *Victim Identification* (Undated) INTERPOL <<https://www.interpol.int/Crime-areas/Crimes-against-children/Victim-identification>>.

⁵² 'Emerging Global Threats Related to the Sexual Exploitation of Children Online', above n 3, 1.

⁵³ Lisa Stacey, above n 48, 18.

⁵⁴ *Ibid.*

⁵⁵ 'Emerging Global Threats Related to the Sexual Exploitation of Children Online', above n 3, 1.

⁵⁶ *Ibid.*, 2.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ 'An image hosting service lets users upload images and they are then available through a unique URL. This URL can be used to make online links, or be embedded in other websites, forums and social networking sites.' Lisa Stacey, above n 48, 18.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

INHOPE also recognises this trend, noting that file hosting sites (also known as cyber lockers) are a popular way in which offenders are able to share the child sexual abuse material.⁶²

Commercial and non-commercial hosting

*[T]here are fewer instances of commercial websites offering child abuse material, and more investigations into online networks of paedophiles using technology to access and abuse children, record that abuse and share it with others.*⁶³

United Kingdom Home Office, *Child Exploitation and Online Protection Centre* (2010)

Online child exploitation has been recognised as a multi-billion dollar enterprise, and previously was amongst the fastest growing commercial endeavours on the internet.⁶⁴ Interestingly, recent research has identified that the majority of online child exploitation is non-commercial, which means that offenders can access the material at no cost.⁶⁵ This trend has been recognised by a number of sources;

- INHOPE who have estimated that approximately 87 per cent of websites hosting child sexual abuse material identified by the network, were non-commercial.⁶⁶
- The Internet Watch Foundation note that of the 68,092 webpages that they had confirmed as containing child sexual abuse imagery in 2015, approximately 79 per cent were non-commercial.⁶⁷

1.2.3. Profiles of victims

The construction of victim profiles for crimes of online child exploitation is extremely difficult, and varies between sources. This stems from issues of victim identification where the age and gender of victims, particularly very young victims, may not easily be decipherable from material viewed. The Internet Watch Foundation found from its 2015 data that:⁶⁸

- 69 per cent of victims were assessed as aged 10 or under;
- 3 per cent of victims were assessed as aged 2 or under, which is equal to 1,788 victims; and

⁶² INHOPE, above n 43, 23.

⁶³ United Kingdom Home Office, 'Child Exploitation and online Protection Centre (CEOP): The Way Forward' (Report Cm 7785, United Kingdom Home Office, January 2010) .

⁶⁴ 'Child Pornography: Model Legislation and Global Review 8th Edition' (Review 8th ed, International Centre for Missing & Exploited Children, 2016) <<http://www.icmec.org/wp-content/uploads/2016/02/Child-Pornography-Model-Law-8th-Ed-Final-linked.pdf>>, iii.

⁶⁵ Shimali Senanayake and Alison Raphael, 'ECPAT International Annual Report July 2014 - June 2015' (Report 2014-2015, ECPAT International) <http://www.ecpat.org/wp-content/uploads/2016/05/Annual-Report_Y2014-2015Final.pdf>, 20.

⁶⁶ Lisa Stacey, above n 48, 23.

⁶⁷ INHOPE, above n 43, 19.

⁶⁸ Ibid.

- 34 per cent of images were assessed as 'Category A' images, depicting the rape or sexual torture of children.⁶⁹

In 2014 INHOPE reported that 'a worrying and developing trend is the increasing incidence of very young children,' where 13 per cent of all children sexual abuse images viewed by analysts depicted infants and/or toddlers.⁷⁰

A recent report from the Canadian Centre for Child Protection found that:

- Approximately 78 per cent of the images and videos assessed depicted very young, prepubescent children under 12 years old;
- Approximately 63 per cent of those children under 12 years old appeared to be under 8 years of age;
- Approximately 7 per cent of those children under 8 years old appeared to be babies or toddlers;
- 50 percent of the images and videos involved explicit sexual activity/assaults and extreme sexual assaults; and
- Approximately 60 per cent of the abuse acts against babies and toddlers involved explicit sexual activity assaults and extreme sexual assaults.⁷¹

Data from the ICSE database reveals that in 2015 the database held 6,672 unique identified victims in different age ranges, with approximately 40,000 victims who were yet to be identified and who were very young children.⁷² Recent figures from the ICSE database⁷³ indicate that approximately seven new child victims are identified daily. The number of new images uploaded daily is also enormous with a total figure of 8510 in April 2016.⁷⁴

⁶⁹ It should be noted that the report uses UK Sentencing Guidelines to categorise images; INHOPE, above n 43, 19.

⁷⁰ Ibid., 24.

⁷¹ 'Child Sexual Abuse Images on the Internet: a Cybertip.ca Analysis: Summary of Key Findings' (Report, Canadian Centre for Child Protection, January 2016)

https://cybertip.ca/pdfs/CTIP_CSAResearchReport_Summary_2016_en.pdf, 2.

⁷² 'Emerging Global Threats Related to the Sexual Exploitation of Children Online', above n 3, 3.

⁷³ INTERPOL database ICSE operated by INTERPOL. Many countries are signatories who send images to database. Figures provided by Cecelia Wallin at Conference

⁷⁴ Given that there are many countries which don't report to ICSE, this figure is likely a significant understatement of the real numbers.

The table below provides very recent ICSE data on the number of victims identified and the number of offenders found in countries around the world, including Australia.

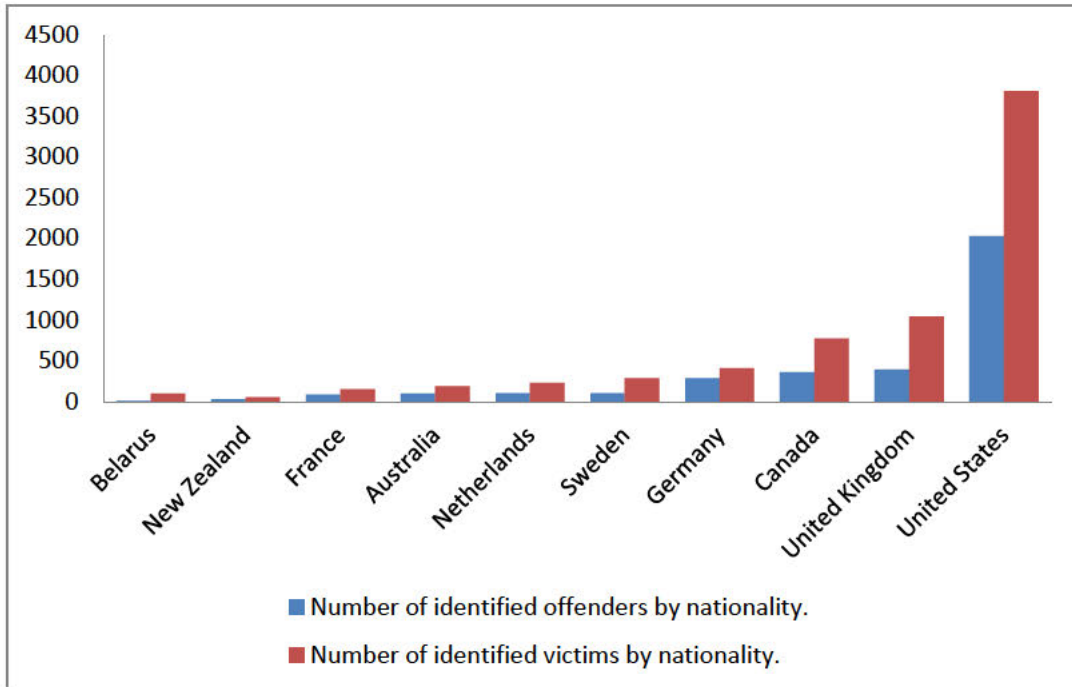


Figure 1.1 Total number of identified offenders and victims by nationality from the beginning of the ICSE database until 1 June 2016 (Source: INTERPOL ICSE).

1.3. Australia

As can be seen from the above figures, the most recent ICSE reports indicate that as of 1 June 2016, there were 194 Australia based child victims and 102 known Australian offenders. Outlined in the case studies throughout this report, Australia-based offenders are not only viewers of online child exploitation material, but procurers, groomers and administrators of vast online child exploitation networks. Australia-based offenders are also major contributors to these networks, and have been known to drive the exploitation of children both locally, and in countries overseas such as the Philippines and areas of Eastern Europe.

INTERVIEW

[T]he terminology we've come up with for that is called 'Live-Distant-Child Abuse'. And you know, a couple of years ago we talked about it as an emerging trend. But it's actually... an established crime now; it's not a trend anymore. And certainly while that has been previously linked to the Philippines predominantly, we have cases involving countries in Eastern Europe... In particular the Ukraine has come up in one of our investigations. So once again I wonder if, because NGOs perhaps have become more effective in countries like the Philippines and there's more law enforcement focused on it... You know we've seen more people move to this live distant child abuse because it's just too risky to actually travel to a country to offend. I mean, we're still obviously seeing a lot of offenders traveling to Indonesia and to other South East Asian countries. But we're equally seeing quite a big increase in terms of offenders using their webcam to abuse a child virtually.

Officer in Charge, Online Child Exploitation Across New Zealand (OCEANZ)
(Telephone interview, 11 July 2016)

This report details a number of domestic cases involving the physical abuse of children as well as the production and dissemination of child exploitation images in Australia. Set out below are offence and court statistics for State, Territory and Commonwealth jurisdictions. The statistics reflect domestic trends in relation to those offences which are the focus of this report, namely all offences involving online possession and dissemination of child exploitation materials and online procuring and grooming offences. For some jurisdictions, this also includes court statistics and data on sentencing outcomes.

Chapter 3 of the report explores how offenders are regularly charged with a combination of Commonwealth and State or Territory online child exploitation offences. This joint approach is facilitated through co-operation between the AFP and the Joint Anti Child Exploitation Team ('JACET') operating through State police.

INTERVIEW

I think the combined approach actually works well. That way we do cover the spectrum of offending. There's a bit of a demarcation between Commonwealth offences and State. With State, we're dealing with the possession offences, but more importantly State offences also deal with contact offending. And we rely on their expertise and their legislation and their trained officers when we're dealing with that contact offending versus the Commonwealth charges that are dealing with the offences that are occurring over the internet as opposed to the individual.

Senior officer with the Australian Federal Police (AFP) (Telephone interview, 14 September 2016)

1.3.1. Commonwealth

Online procuring and grooming charges are charged under Commonwealth legislation, while offences involving child exploitation material are much more varied in terms of the jurisdiction under which they are prosecuted. Charges are determined according to

individual cases and further research is required to obtain a clearer understanding of charging practices.

INTERVIEW

Where it is online, you're relying on the [Commonwealth] telecommunication offences which we have. And as I said, there's substantial penalties attached to those, and we can also apply those offences regardless of what jurisdiction we're dealing with. So if it goes across a couple of different state jurisdictions it's not a problem when using the Commonwealth legislation... Really it's a case by case basis, and it depends on the evidence available – hence the joint operating model that we have.

Senior officer with the Australian Federal Police (AFP) (Telephone interview, 14 September 2016)

Number of Offences and Charges

Over the past five years there has been a significant increase in the number of charges against online child exploitation offenders in the Commonwealth jurisdiction.⁷⁵ It is important to note that the number of defendants has not increased during this time, with the number being charged remaining relatively stable.⁷⁶ This reveals that defendants are being charged with more offences each year. The most common Commonwealth offence charged in the 2015-16 financial year was s474.19, using a carriage service for child pornography material. This offence, however, covers a variety of offending including accessing, transmitting and soliciting child pornography material.

⁷⁵ Statistics provided to Anti-Slavery Australia by a request of information the Commonwealth Director of Public Prosecution, conclusion drawn from the table titled 'Number of Charges and Defendants against Cybersex offences by Financial Year (as at 04.07.2016)'.

⁷⁶ Statistics provided to Anti-Slavery Australia by a request of information the Commonwealth Director of Public Prosecution, conclusion drawn from the table titled 'Number of Defendants found proven (convicted) of Child Cybersex offences by Financial Year (as at 04.07.2016)'.

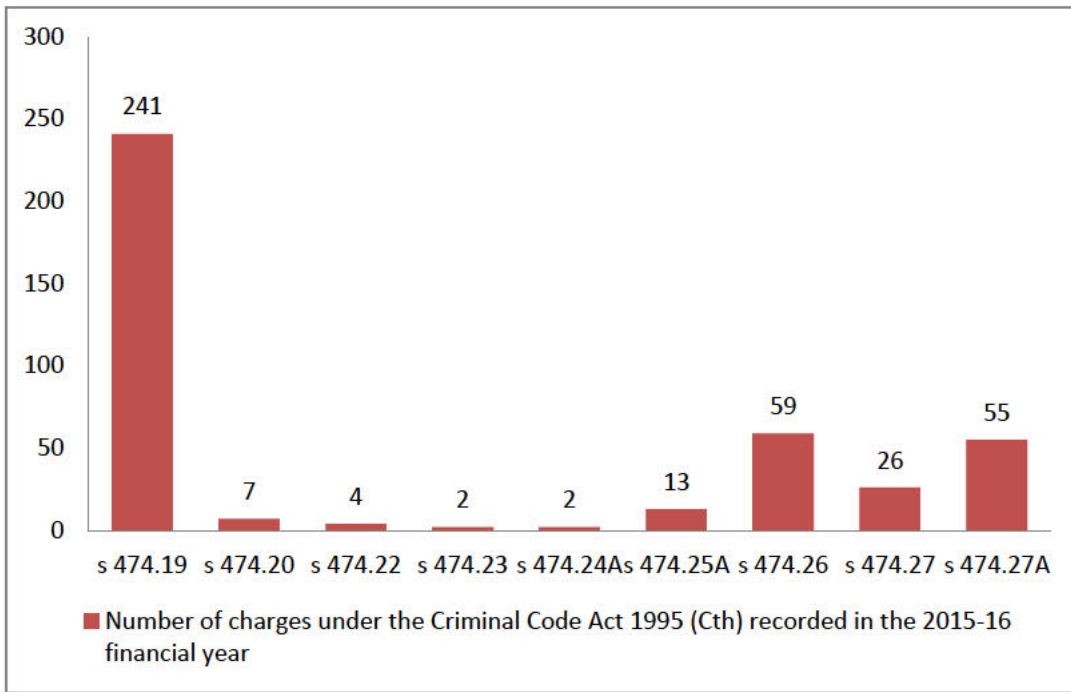


Figure 1.2 Number of charges for offences under the *Criminal Code Act 1995 (Cth)* in the 2015-16 Financial Year (Source: CDPP)⁷⁷

The graph below sets out the data for offenders charged under section 474.19 of the Commonwealth *Criminal Code 1995*, using a carriage service for child pornography material.

⁷⁷ Statistics provided to Anti-Slavery Australia by a request of information the Commonwealth Director of Public Prosecution, conclusion drawn from the table titled 'Number of Charges and Defendants against Child Cybersex offences Financial Year and Plea (as at 04.07.2016)'.

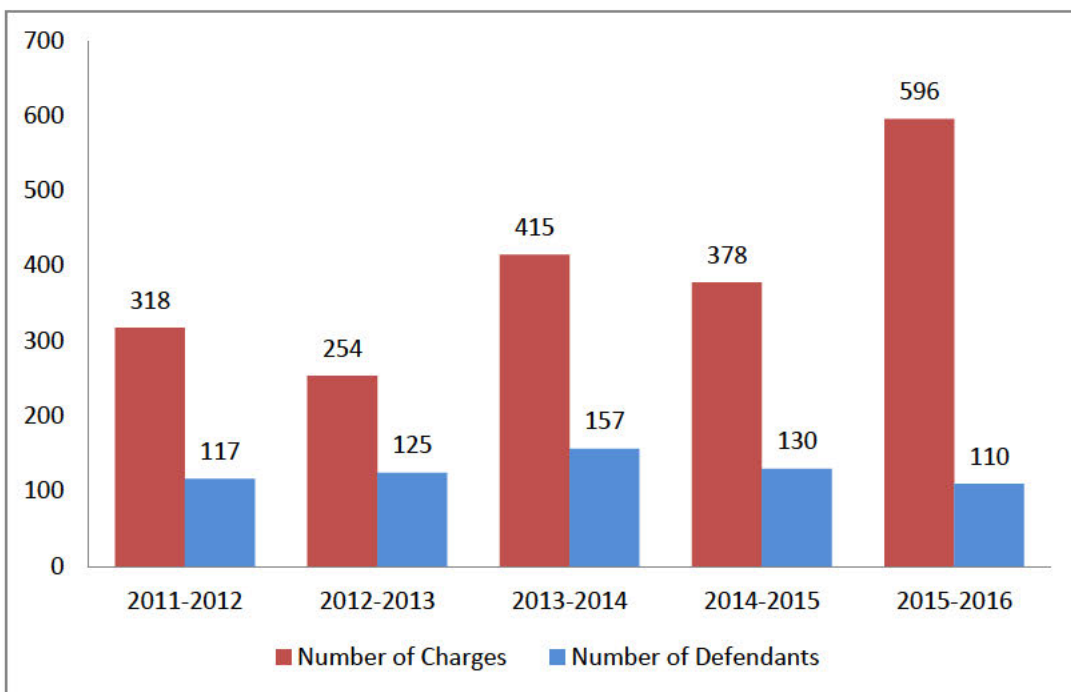


Figure 1.3 Number of charges and number of defendants charged with offences under section 471.19 of the *Criminal Code Act 1995 (Cth)* by Financial Year.

The table indicates that while the number of defendants has remained stable, over time, increasing technological capacity along with storage availability has meant that there is an increase in the production, dissemination and access to child exploitation material, and therefore an increase in the number of offences charged against individual defendants.⁷⁸

Guilty Pleas

The vast majority of individuals who are charged with online child exploitation offences plead guilty.⁷⁹ Table 1.1 below provides the charge, number of defendants and plea data for Commonwealth offences of online child exploitation, where a conviction was made.

⁷⁸ Commonwealth Director of Public Prosecutions 2014-2015 Annual Report' (Report 2014-2015, Commonwealth Director of Public Prosecutions, 30 September 2015) <https://www.cdpp.gov.au/sites/g/files/net391/f/15205%20CDPP%20Annual%20Report%202014-15_web_accessible_FINAL.pdf>, 65.

⁷⁹ Statistics provided to Anti-Slavery Australia by a request of information the Commonwealth Director of Public Prosecution, conclusion drawn from the table titled 'Number of Charges and Defendants against Child Cybersex offences Financial Year and Plea (as at 04.07.2016)'.

Section	Plea	2011-12	2012-13	2013-14	2014-15	2015-16
474.19	Total	682 (210)	188 (141)	222 (152)	205 (150)	241 (161)
	Guilty	667 (209)	188 (141)	213 (145)	205 (150)	230 (156)
	Not Guilty	15 (1)	0	9 (7)	0	11 (5)
474.20	Total	5 (4)	7 (3)	1 (1)	4 (3)	7 (3)
	Guilty	5 (4)	7 (3)	1 (1)	4 (3)	7 (3)
	Not Guilty	0	0	0	0	0
474.22	Total	11 (3)	2 (2)	4 (4)	2 (2)	4 (3)
	Guilty	11 (3)	2 (2)	3 (3)	2 (2)	4 (3)
	Not Guilty	0	0	1 (1)	0	0
474.23	Total	0	0	0	1 (1)	2 (1)
	Guilty	0	0	0	1 (1)	2 (1)
	Not Guilty	0	0	0	0	0
474.26	Total	46 (27)	45 (22)	45 (32)	24 (18)	59 (25)
	Guilty	46 (27)	45 (22)	43 (31)	24 (18)	59 (25)
	Not Guilty	0	0	2 (1)	0	0
474.27	Total	47 (31)	22 (19)	30 (23)	17 (15)	26 (18)
	Guilty	46 (30)	22 (19)	29 (22)	16 (14)	26 (18)
	Not Guilty	1 (1)	0	1 (1)	1 (1)	0
474.24A	Total	1 (1)	3 (3)	3 (3)	2 (1)	2 (2)
	Guilty	1 (1)	3 (3)	3 (3)	2 (1)	2 (2)
	Not Guilty	0	0	0	0	0
474.25A	Total	6 (2)	5 (1)	6 (5)	10 (1)	13 (4)
	Guilty	6 (2)	5 (1)	6 (5)	10 (1)	13 (4)
	Not Guilty	0	0	0	0	0
474.27A	Total	36 (16)	45 (20)	65 (39)	37 (23)	55 (28)
	Guilty	36 (16)	43 (18)	63 (38)	37 (23)	53 (27)
	Not Guilty	0	2 (2)	2 (1)	0	2 (1)

Table 1.1 Number of charges under Commonwealth online child exploitation offences and number of defendants charged with offences (in brackets) by Financial Year and plea.⁸⁰

These statistics reveal that a majority of defendants accused of online child exploitation offences under Commonwealth provisions plead guilty to the crime. It is worthwhile noting that where charges involve online communications, the apparent practice is that Commonwealth legislation is used alongside State or Territory offences.

⁸⁰ Ibid.

1.3.2. State and Territory Statistics

As noted above State and Territory data is not readily available across all jurisdictions. Interviews were primarily conducted with individuals from agencies and organisations located on the east coast of Australia (New South Wales, Victoria and Queensland) and the below statistics concentrate on these jurisdictions. In terms of offence data, these three jurisdictions also account for the vast majority of online child exploitation offenders prosecuted nationally. Data from these jurisdictions is also more readily available than other States and Territories. Due to the overlap with prosecution at Commonwealth levels, the following data specifically relates to crimes involving child abuse or child exploitation materials.

1.3.3. New South Wales

New South Wales data was provided by the Bureau of Crime Statistics and Research ('BOCSAR'). While sections 91G and 91H of the *Crimes Act 1900* (NSW) now refer to these offences with the term 'child abuse materials', the phrase 'child pornography' has been used in the graph below, consistent with the legislation used for state prosecuted Commonwealth offences related to child pornography.

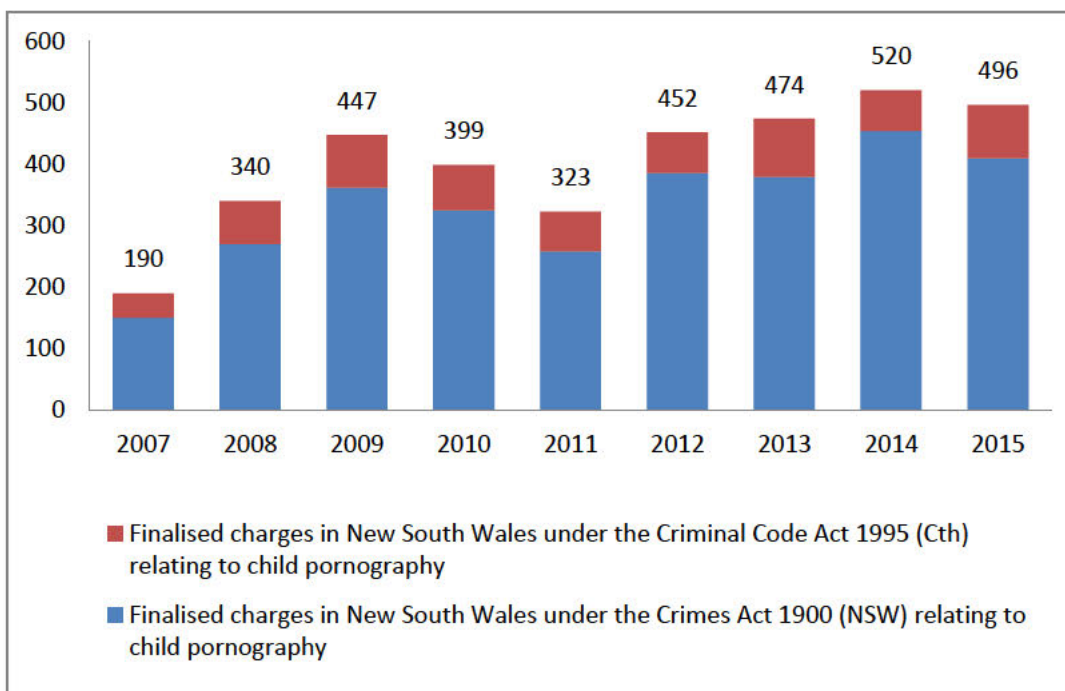


Figure 1.4 Number of finalised charges relating to online child abuse material/child pornography offences, prosecuted in NSW under State and Commonwealth legislation from 2007 to 2015 (Source: NSW Bureau of Crime Statistics and Research).⁸¹

The above figure indicates that there has been a significant increase in the number of finalised charges between 2007 and 2015 prosecuted in New South Wales. The statistics

⁸¹ Offences considered are those outlined under the *Crimes Act 1900* (NSW) ss 91H(2), 91H(3), 310A, 578B(2) and 578C(2A); and the *Criminal Code Act 1995* (Cth) ss 474.19(1), 474.19(1)(a)(i), 474.19(1)(a)(ii), 474.19(1)(a)(iii), 474.19(1)(a)(iv), 474.19(1)(a)(v), 474.22(1), 474.22(1)(a)(i), 474.22(1)(a)(iii), 474.22(1)(a)(iv), 474.23(1) and 474.24A(1).

illustrate that in 2007 there were 190 finalised charges, rising to 496 in 2015, representing an increase of 161 per cent. It is important to note that while the above figures demonstrate an increase in offences finalised, they do not indicate whether there has been an increase in the numbers of defendants who have been convicted.

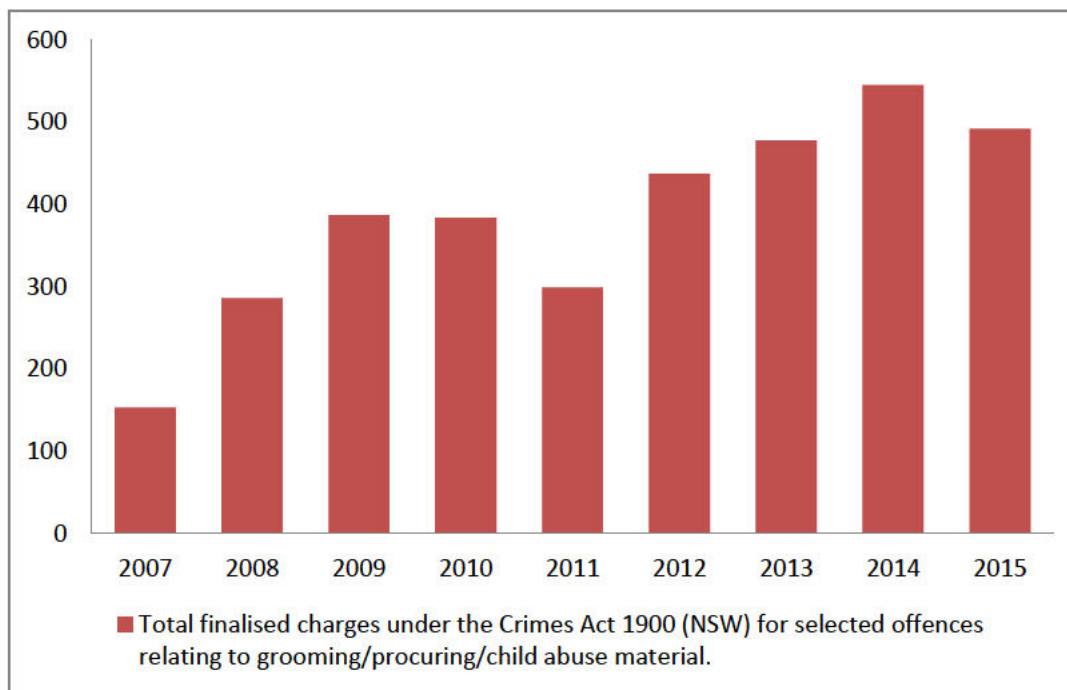


Figure 1.5 Total finalised charges under the Crimes Act 1900 (NSW) for selected offences relating to grooming/procuring/child abuse materials (Source: NSW Bureau of Crime Statistics and Research).

The above table indicates the gradual increase in charges related to offences under the Crimes Act 1900 (NSW) for crimes of child exploitation.⁸²

The figure below outlines data relating to the conviction and sentencing of offenders in New South Wales under section 91H of the *Crimes Act 1900* (NSW), relating to the production, dissemination or possession of child abuse material. This data indicates that since April 2008 there have been a relatively steady number of offenders convicted under this legislation, although on average less than half of offenders are penalised with imprisonment.

⁸² Offences considered were those outlined under the *Crimes Act 1900* (NSW) ss 66EB(2), 66EB(2A), 66EB(3), 91G(1)(a), 91G(1)(b), 91G(1)(c), 91G(2)(a), 91G(2)(b), 91H(2) and 91H(3).

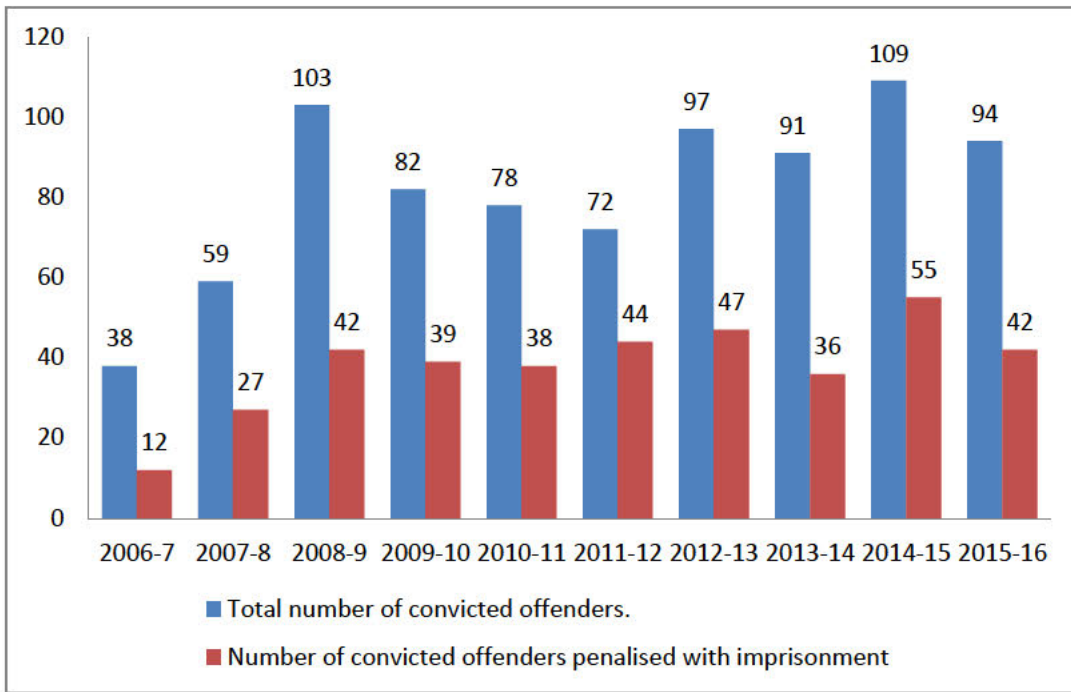


Figure 1.6 Total number of convicted offenders charged with the production, dissemination or possession of child abuse material in NSW and total number of these offenders penalised with imprisonment (Source: NSW Bureau of Crime Statistics and Research).

The data indicates that the average length of imprisonment for those convicted in the last year was 11.5 months.

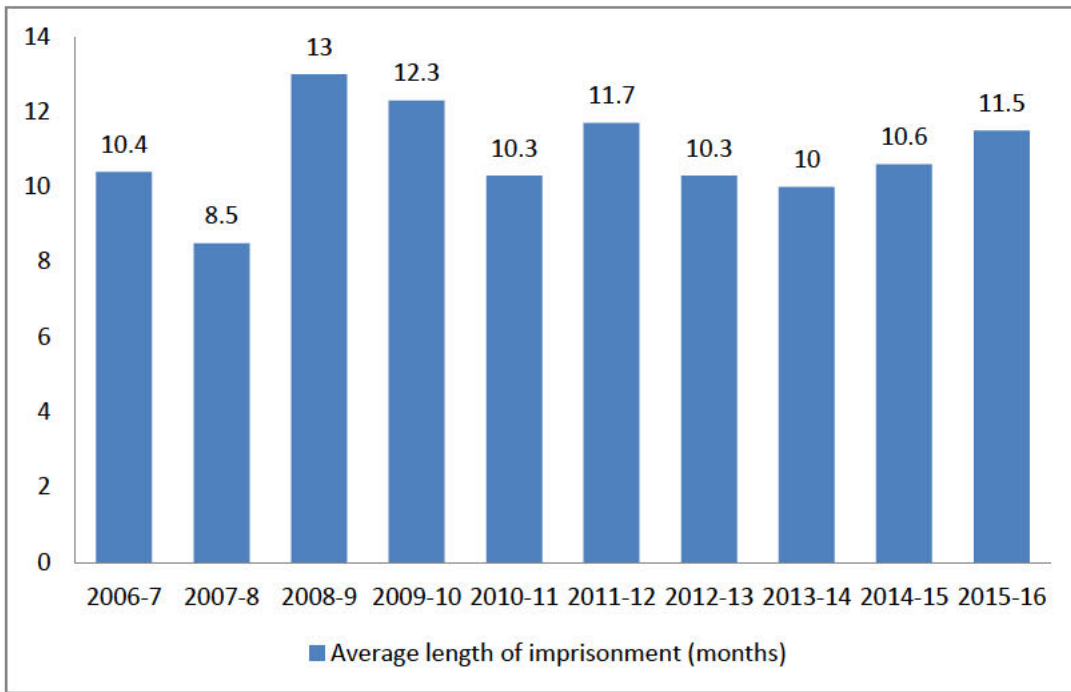


Figure 1.7 Average length of sentence for offenders convicted with an offence pursuant to section 91H of the *Crimes Act 1900* (NSW) (Source: NSW Bureau of Crime Statistics and Research).

Orders

Offenders convicted for crimes of production, dissemination or possession of child abuse material face various penalties including imprisonment, periodic detention, home detention, intensive correction order, suspended sentence with or without supervision, Community Service Orders, juvenile probation order, bonds with or without supervisions, fines, nominal penalties, bonds without convictions, no convictions recorded or others.

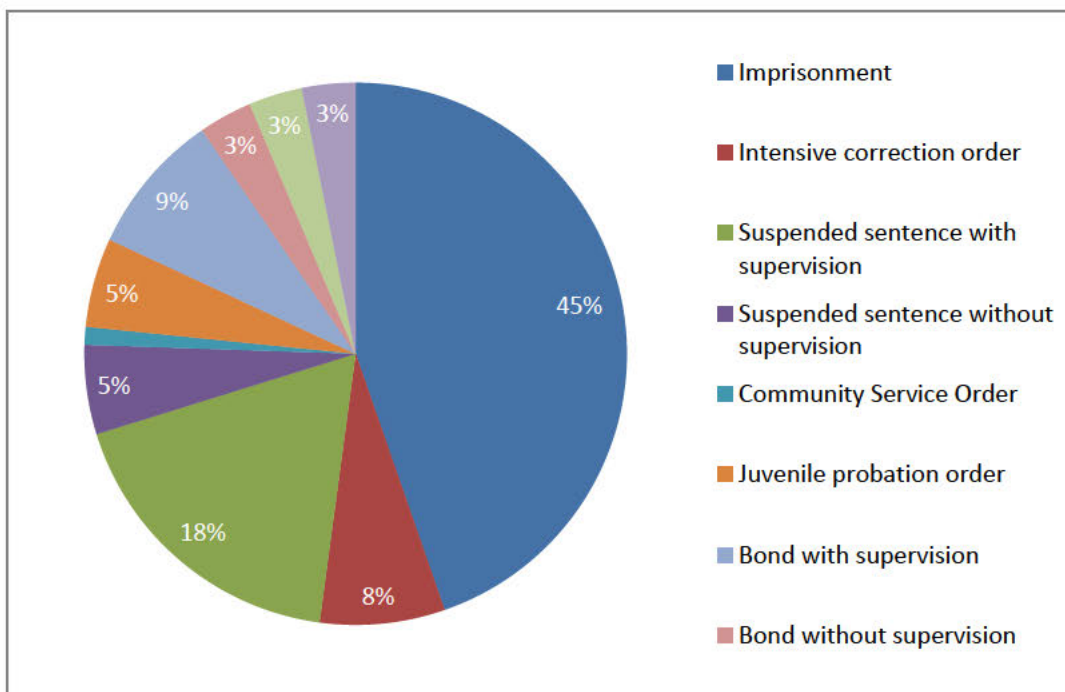


Figure 1.8 Penalties imposed on offenders convicted in NSW for the production, dissemination or possession of child abuse materials pursuant to s91H of the *Crimes Act 1900* (NSW) between April 2015 and March 2016 (Source: NSW Bureau of Crime Statistics and Research).

1.3.4. Victoria

Since 2006 offences of:⁸³

- ‘Knowingly possessing child pornography’ has increased 54 per cent;
- ‘Make/produce child pornography’ has increased 25 per cent; and
- ‘Procure minor for making / producing child porn’ has increased 69 per cent.

This is consistent federal trends as outlined above. The Victorian Police have noted that “at any one time up to 4000 people in Victoria are sharing child pornography images”.⁸⁴ Taskforce Astraea (now the JACET), which was established in 2012 to respond to the increase in internet child exploitation in Victoria, has removed about 100 children from sexual or physical harm.⁸⁵ Outlined in the table below the majority of child exploitation offences recorded in Victoria relate to the possession and production of child exploitation materials.

⁸³ Crimes Statistics Agency: Noted in Chapter 2, the legislation in Victoria was only recently amended to remove reference to the phrase “child pornography.”

⁸⁴ Stephen Fotana, *Cops and Bloggers: Child Exploitation: The Sickening Scourge* (11 September 2015) Victorian Police Force <<https://www.vicpolice.com.au/cops-and-bloggers/blogs/child-exploitation-the-sickening-scurge>>.

⁸⁵ Ibid.

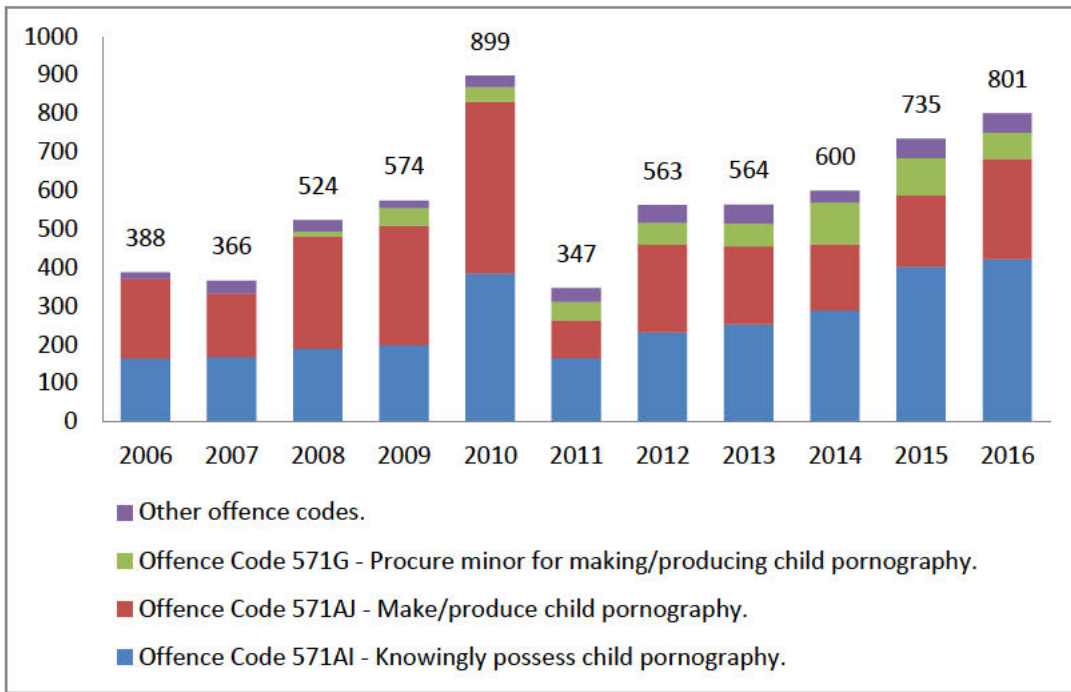


Figure 1.9 Number of selected child exploitation offences recorded for each year between April 2005 and March 2016 in Victoria (Source: Crimes Statistics Agency).⁸⁶

⁸⁶ Other offences include those identified by offence codes 137AO, 137CU, 137DM, 139AV, 139AW, 139AX, 139AY, 139AZ, 139BA, 139BJ, 139BK, 571AK, 571AM, 571B, 571C, 571D and 571I, by the Crimes Statistics Agency.

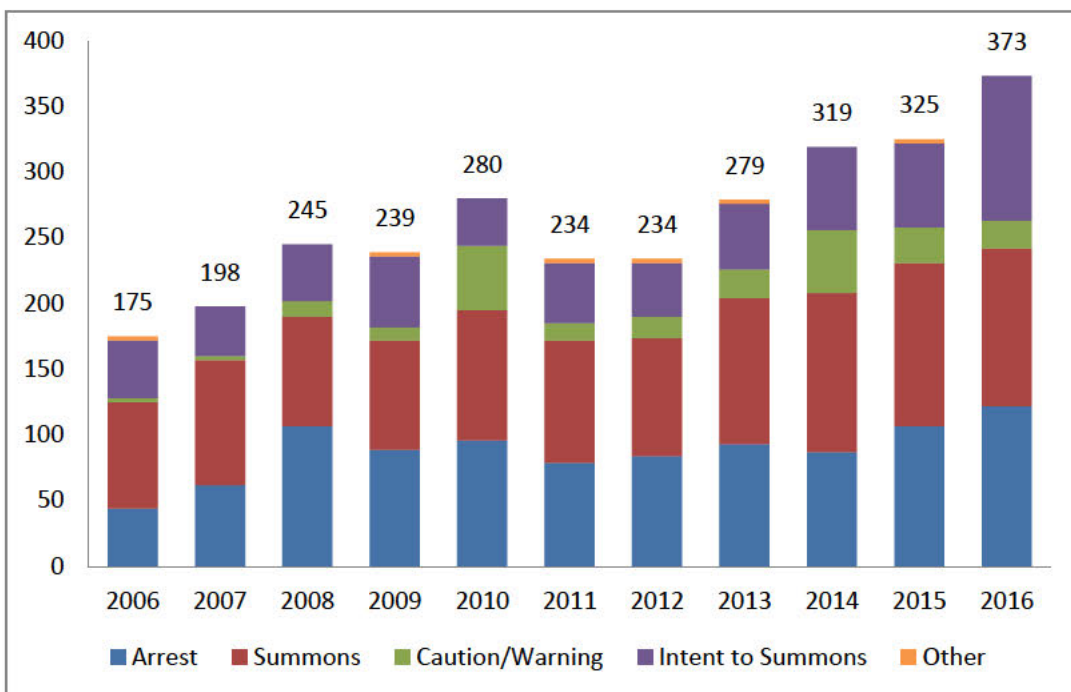


Figure 1.10 Number of offender incidents by selected offence codes⁸⁷ and investigation status recorded for each year between April 2005 and March 2016 in Victoria (Source: Crimes Statistics Agency).

Offender statistics are outlined in terms of the offender incidents recorded for a variety of offence codes relating to the sexual abuse or exploitation of children in Victoria. While the above figure does not identify specific offender numbers for each year, it does indicate an increase in ‘offender incidents’ where individuals come into contact with law enforcement and subsequently face arrest, summons, caution or intent to summons. It is worthwhile noting that individual offenders may appear more than once in this table depending on their interactions with law enforcement within or across years.

1.3.5. Queensland

Sections 228A to 228H of the Criminal Code Act 1899

The Queensland offence provisions relating to child exploitation materials are set out in sections 228A – 228H of the Criminal Code.

Statistics in this section illustrate an increase in the number of offences charged under Queensland legislation. The 2015 Queensland Organised Crime Commission of Inquiry heard that there was ‘alarming demand for increasingly depraved material involving the abuse of children’.⁸⁸ The Commission was also informed that ‘membership of some

⁸⁷ Includes offender incidents for offence codes 137AO, 137CU, 137DB, 137DM, 139AV, 139AW, 139AX, 139AY, 139AZ, 139BA, 139BJ, 139BK, 139F, 571AI, 571AJ, 571AK, 571AM, 571B, 571C, 571D, 571G and 571I.

⁸⁸ Byrne, above n 40, 5.

highly networked child exploitation material sites requires the production and uploading of new material – on a regular basis – increasing the demand for child victims’.⁸⁹

While the number of offences has risen significantly, the figure below demonstrates that the number of defendants convicted in Queensland courts has remained relatively stable over the last five years.

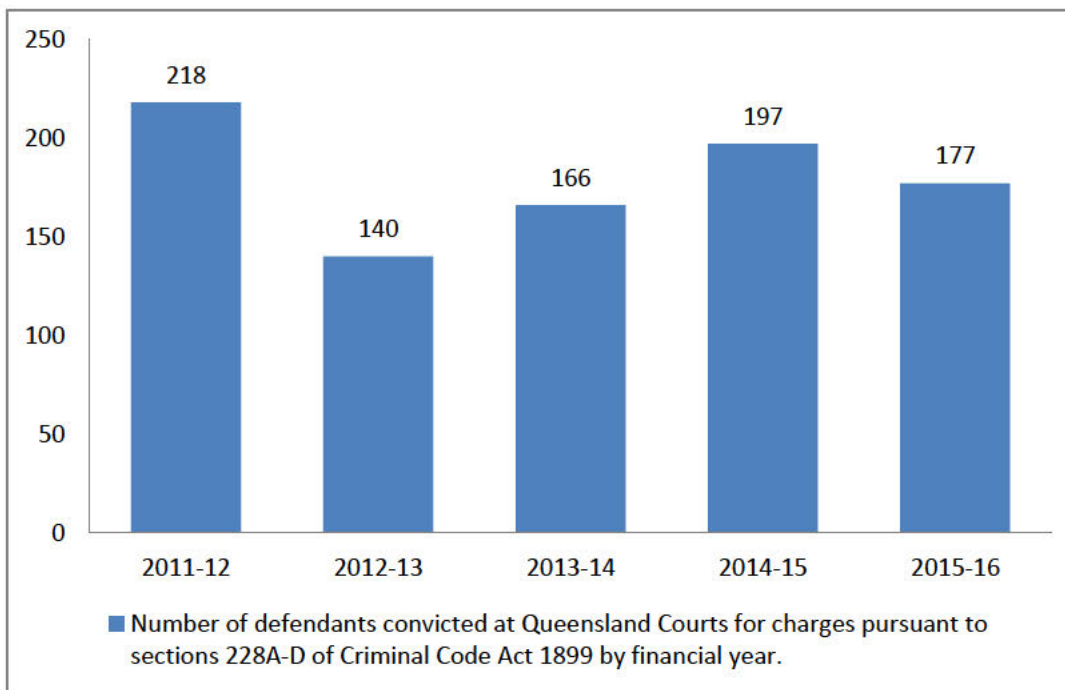


Figure 1.11 Number of defendants convicted in Queensland for charge/s pursuant to sections 228A, 228B, 228C and 228D of the *Criminal Code Act 1899* (Qld) per financial year (Source: Queensland Wide Inter-linked Courts).⁹⁰

It is important to recognise that not all defendants who are convicted are sentenced to imprisonment.⁹¹ A portion of the number of defendants are subject to orders such as custody in the community, community services orders, probation orders, monetary orders, or good behaviour orders, and not further punished.⁹²

⁸⁹ Ibid.

⁹⁰ These sections relate to: 228A Involving child in making child exploitation material; 228B Making child exploitation material; 228C Distributing child exploitation material; and 228D Possessing child exploitation material of the *Criminal Code Act 1899* (Qld).

⁹¹ Queensland Wide Inter-linked Courts (QWIC).

⁹² Queensland Wide Inter-linked Courts (QWIC).

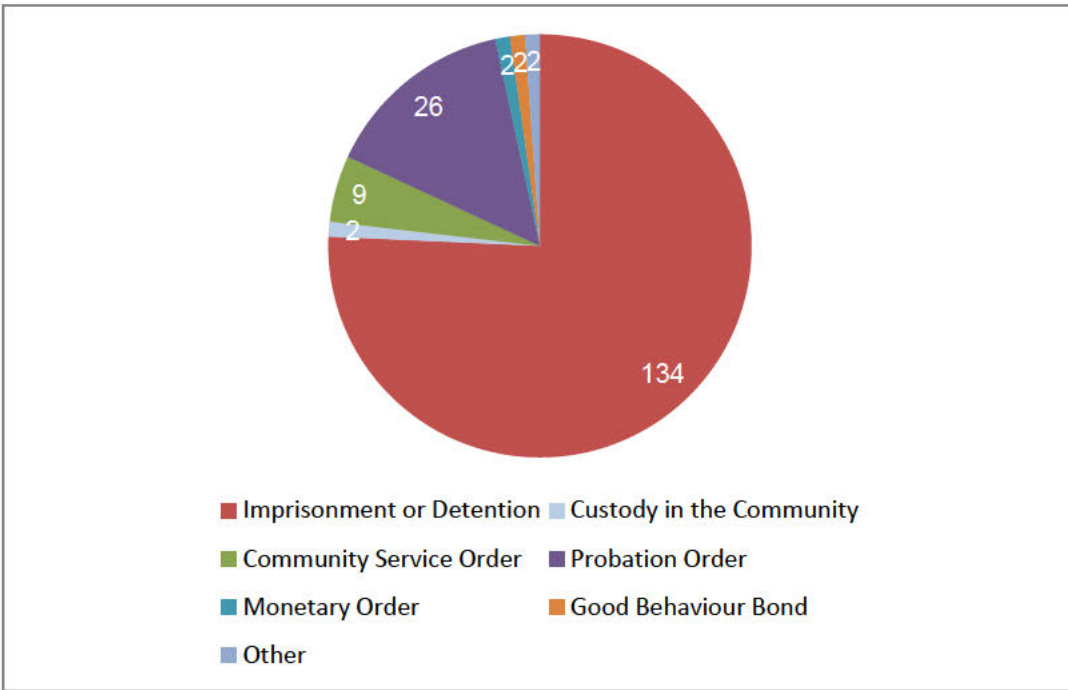


Figure 1.12 Orders given to defendants convicted in Queensland for charge/s pursuant to sections 228A, 228B, 228C and 228D of the *Criminal Code Act 1899* (Qld) in the 2015-16 financial year (Source: Queensland Wide Inter-linked Courts).

Sections 218A of the Criminal Code Act 1899

Section 218A prohibits the use of an electronic communication, either in Queensland or elsewhere, with the intent to procure a child to engage in a sexual act, and was introduced as a response to the ease of with which the internet can facilitate child abuse.

Interestingly, in Queensland, the number of defendants convicted of a charge pursuant to section 218A of the Qld Code has decreased since 2011.⁹³ The data itself does not demonstrate any reason for this decrease. Discussed in Chapter 3, the reason for this decrease may be the result of online procuring and grooming offences being increasingly charged under Commonwealth legislation.

⁹³ Queensland Wide Inter-linked Courts (QWIC).

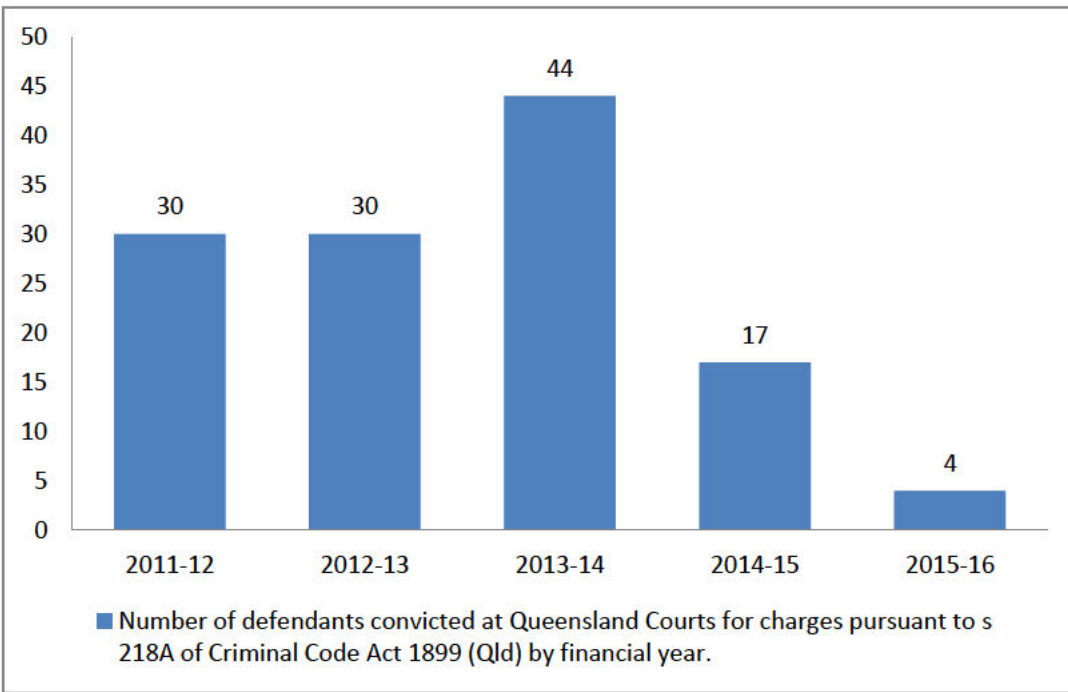


Figure 1.13 Number of defendants convicted in Queensland for charge/s pursuant to section 218A of the *Criminal Code Act 1899* (Qld) per financial year (Source: Queensland Wide Inter-linked Courts).

Orders

With respect to the sentencing of offenders charged under 218A, the majority of the defendants convicted under a charge pursuant to this section were detained and sentenced to imprisonment.⁹⁴ Relevantly, there were other circumstances in which a defendant was ordered to a community service probation, or monetary order.⁹⁵ Orders other than imprisonment and detention are outlined in Figure 1.12 below, which when compared to Figure 1.11 reveals that these orders form a minority of those handed to convicted offenders under s218A of the *Criminal Code Act 1899* (Qld).

⁹⁴ Queensland Wide Inter-linked Courts (QWIC).
⁹⁵ Queensland Wide Inter-linked Courts (QWIC).

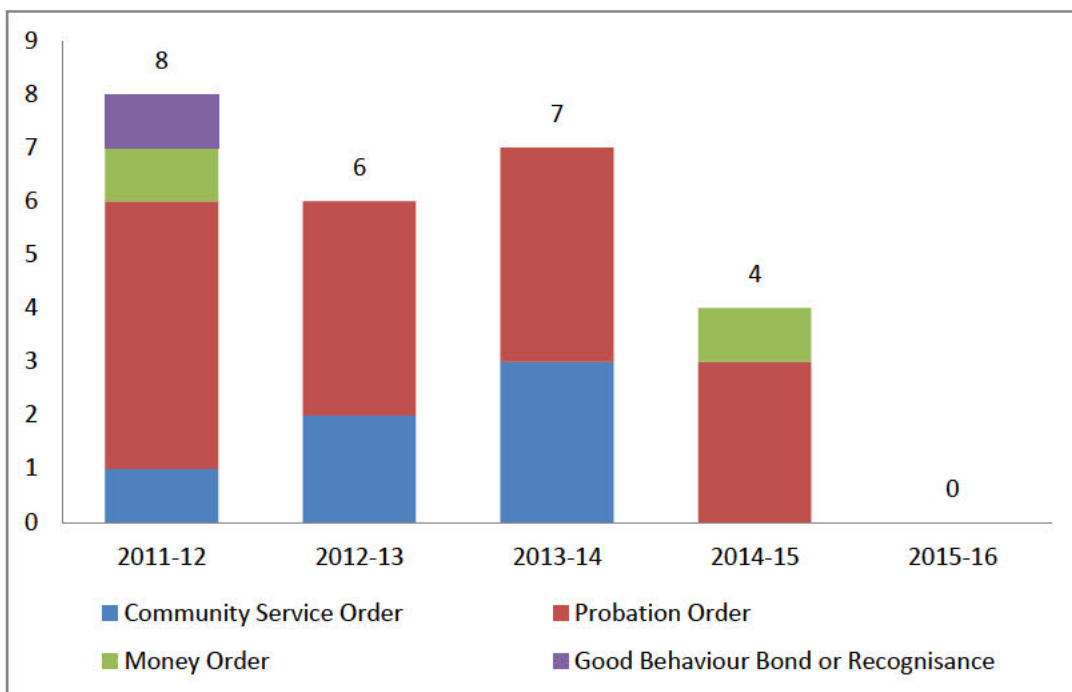


Figure 1.14 Number of defendants convicted at Queensland courts for charge/s pursuant to section 218A of the Criminal Code Act 1899 (Qld) by order (other than imprisonment or detention) and financial year (Source: Queensland Wide Inter-linked Courts).

1.4. Recommendations

The data collated in this chapter provides some insight into the scale and prevalence of online child exploitation offences both in Australia and overseas. Australian data collected from the CDPP and east-coast jurisdictions (New South Wales, Queensland and Victoria) indicates that while the overall number of offences relating to online child exploitation has increased, the number of defendants in each jurisdiction has remained relatively stable.

A key issue raised by the research in this area is the lack of centrally available data on crimes of online child exploitation in Australia, an issue compounded by the differences between jurisdictions, definitions of statutory offences and the terminology used in Commonwealth, State and Territory legislation. These key differences make cross-jurisdictional comparison virtually impossible, and limit the ability of researchers to identify nation-wide trends in online child exploitation.

A national database for crime statistics would facilitate the easy collation, assessment and comparison of data relating to crimes of online child exploitation throughout Australian jurisdictions.

Key Recommendation

To ensure an effective legal and community response to online child exploitation in Australia, the Australian government should create a peak national body comprising representatives of government departments, law enforcement agencies and key stakeholders at State, Territory and Commonwealth levels. This body would draw on the expertise of existing bodies and provide official channels for the exchange of information.

2. Chapter II: Legislative Framework and History

2.1. Overview

Online child exploitation has been recognised as a serious crime internationally, as well as in Australia's Commonwealth, State and Territory jurisdictions. In order to place Australia's domestic legal framework within a global context, this chapter will provide an overview of the relevant international instruments to which Australia is a party. This is followed by a comparative analysis of Australia's Commonwealth, State and Territory legislative frameworks, including an overview of recent amendments, relevant reports and second reading speeches. This chapter will demonstrate the lack of uniformity between State and Commonwealth legislation in the language used to denote online child exploitation offences.

2.2. International Law

There are a number of international conventions and treaties to which Australia is a party that contributes to the international legal framework addressing online child exploitation material. These include the:

- *United Nations Convention on the Rights of the Child*;
- *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*;
- *United Nations Protocol to Prevent, Suppress and Punish Trafficking against Persons, Especially Women and Children*;
- *Council of Europe Convention on Cybercrime*; and
- Mutual Legal Assistance Treaties.

There are also other relevant conventions that constitute the international body of law relating to this crime to which Australia is not a party, such as the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

2.2.1. Conventions and Treaties

United Nations Convention on the Rights of the Child

The *Convention on the Rights of the Child* ('**CRC**') came into force in 1989 and was ratified in Australia in December 1990. A child is defined in Article 1 of CRC as anyone under the age of 18 years old.

Article 19 of the CRC outlines the right of all children to be protected from all forms of violence and asks Governments to ensure that the children are properly cared for. Article 34 of the CRC provides that State parties shall undertake to protect children from all forms of sexual exploitation and sexual abuse. State parties agree to take measures to prevent the:

- a) Inducement or coercion of a child to engage in unlawful sexual activity;
- b) Exploitative use of children in prostitution or other unlawful practices; and

c) Exploitative use of children in pornographic performances and materials.⁹⁶

These measures are further defined under Article 35, as all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of, or traffic in children for any purpose or in any form. State parties to the CRC are expected to base domestic legislation targeting child sexual exploitation on the provisions of the CRC itself.

The CRC has three optional protocols that were negotiated by countries after the treaty was adopted and they have the status of independent treaties. The *Optional Protocol on the Participation of Children in Armed Conflict* was adopted in 2000. The *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* was also adopted in 2000. This optional protocol is discussed in more detail below. The *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* was adopted in 2011, although at the time of writing, this Optional Protocol has not yet been signed or ratified by Australia.

The Committee on the Rights of the Child ('the Committee') is an internationally elected body of independent experts which monitors the implementation of the CRC by member States.⁹⁷ As well as government reports from State parties, independent reports from NGOs and the UN can also be submitted to the Committee. The Committee reviews and comments on these reports and encourages State parties to take special measures and to develop special institutions for the promotion and protection of children's rights. The Committee has twice issued their Concluding Observations on Australia, in 2005 and 2012.⁹⁸

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

The *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* ('the Protocol') was implemented to extend the CRC, and provide greater protection of children from the sale of children, child prostitution or child pornography.⁹⁹

The Protocol entered into force on 18 January 2002, after concern over the widespread and continuing practice of sex tourism, the increase in international trafficking of children, and the growing availability of child abuse materials on the Internet. Australia signed the Protocol on 18 December 2001 and ratified it on 8 January 2007.

Under Article 3, each State Party agrees to ensure, at a minimum, that certain acts are fully covered under criminal or penal law, whether the offences are committed domestically or transnationally, on an individual or organized basis. Relevant to this report is the inclusion of:

- 1) Offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child;

⁹⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 34.

⁹⁷ *Ibid.*, art 43.

⁹⁸ *Consideration of reports submitted by States parties under article 44 of the Convention Concluding observations: Australia*, CRC Res, 60th sess, 1725th mtg, UN Doc CRC/C/AUS/CO/4 <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf>.

⁹⁹ *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).

- 2) Offering, obtaining, procuring or providing a child for child prostitution; and
- 3) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing child pornography.

In the Protocol:

- 'Sale of children' means 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.'
- 'Child prostitution' is defined as 'the use of a child in sexual activities for remuneration or any form of consideration.'
- 'Child pornography' is defined as 'any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.'

While the Protocol has many positives, ECPAT also identifies a number of weaknesses.¹⁰⁰

United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, ('**the Trafficking Protocol**'), supplements the UN Convention against Transnational Organised Crime. Its purpose is to prevent and combat trafficking in persons, particularly women and children, and to facilitate cooperation among states to prevent and combat trafficking.

Under the Trafficking Protocol, 'trafficking in persons' means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. In the case of children, the Protocol does not require that the action of trafficking occurred through the aforementioned means, only that the action occurred for the purpose of exploitation.

Australia ratified the Trafficking Protocol on 14 September 2005.

Regarding child trafficking, the Trafficking Protocol provides

- 'Child' shall mean any person under 18 years of age;
- Each State party shall take into account, in applying the provisions of Article 6, assistance to and protection of victims of trafficking in persons, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care; and
- State Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially

¹⁰⁰ 'Optional Protocol on the Sale of Children, Prostitution and Child Pornography (OPSC) to the Convention on the Rights of the Child' (Fact Sheet, ECPAT) <http://www.ecpat.org/wp-content/uploads/legacy/Legal%20Factsheet%20-%20CRC%20OPSC_0.pdf>.

women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

Council of Europe Convention on Cybercrime

The first States signed the *Council of Europe Convention on Cybercrime* ('CECC') in 2001. In total there are 49 ratifications and 6 signatories. The CECC has been signed by all members of the Council of Europe except Russia and San Marino. The parties which signed but did not ratify the convention are Andorra, Greece, Ireland, Monaco, South Africa and Sweden.

Non-Council of Europe parties who have ratified the CECC are Australia, Canada, Dominican Republic, Israel, Japan, Mauritius, Panama, Sri Lanka and the USA.

The CECC requires that State Parties:

- 1) Establish specific types of conduct as criminal offences in domestic legislation (including offences related to child pornography);
- 2) Provide criminal justice authorities with effective means for investigations; and
- 3) Engage in efficient international police and judicial cooperation.

Australia ratified the CECC and the *Cybercrime Legislation Amendment Act 2011* was enacted to implement that convention. The Act amended the Criminal Code offences in sections 477 (Serious computer offences) and 478 (Other computer offences) to remove any requirement that the offence relates to Commonwealth property or be conducted via a telecommunications service.¹⁰¹ The intention is that State and Territory legislation continues to apply concurrently. In addition, the Act amends the *Telecommunications Act 1997*, the *Telecommunications (Interception and Access) Act 1979* and the *Mutual Assistance in Criminal Matters Act 1987* to improve the ability of Australian law enforcement to detect and investigate cyber criminals, for example by providing for means to preserve communications for access under warrant and to facilitate cooperation with overseas partners.¹⁰²

2.3. Australian Law

The focus of this project is online child exploitation offences and includes the production and dealing with child abuse materials but also online activities such as grooming and procurement. We note that the scope of this report excludes review of direct contact sexual crimes against children. We also note that while State child protection laws contain relevant provisions, they are outside the scope of this criminal legislative review.

This section will review the scope of the Commonwealth online child exploitation crimes legislation; and consider the scope of State and Territory crimes legislation, including any special provisions peculiar to particular these jurisdictions.

Due to the Commonwealth's constitutional right to legislate on "postal, telegraphic, telephonic and other like services"¹⁰³ (which includes the internet and mobile

¹⁰¹ Explanatory Memorandum, *Cybercrime Legislation Amendment Bill 2011* (Cth), 47.

¹⁰² Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 2011, 6822 (Robert McClelland, Attorney-General).

¹⁰³ *Australia Constitution Act* (Cth) s 51(v).

communications) and “external affairs”¹⁰⁴ (which includes giving effect to international agreements), the Commonwealth is able to legislate on certain matters concerning child sexual exploitation and materials using a carriage service and also in respect of ISPs. Accordingly Commonwealth legislation covers most aspects of online child exploitation offences.

However, the Commonwealth cannot legislate on conduct which occurs purely in an intrastate context and legislation dealing with child sexual abuse (irrespective of whether such occurs online or offline) was typically the preserve of the States and Territories. Accordingly, there is substantial overlap between the scope of Commonwealth legislation and State and Territory law and in some cases the same offence can be prosecuted separately under federal and State/Territory laws.

In general, the interviewees from this project and commentators consider the scope and strength of legislation pertaining to online child exploitation offences in the Commonwealth, States and Territories to be relatively robust according to international standards. The legislative frameworks have been amended repeatedly since inception and are largely consistent between jurisdictions.

2.3.1. Comparison of scope of legislation in the nature of online child exploitation crimes

Offence (in broad terms)	Cth	NSW	Vic	Qld	SA	Tas	WA	NT	ACT
Child exploitation material									
Producing child exploitation material	✓	✓	✓	✓	✓	✓	✓	✓	✓
Involving child in making child exploitation material		✓	✓	✓		✓	✓	✓	✓
Distributing, dissemination and/or publishing child exploitation material	✓	✓	✓	✓	✓	✓	✓	✓	✓
Possession of child exploitation material	✓	✓	✓	✓	✓	✓	✓	✓	✓
Accessing child exploitation material	✓					✓			
Administering child exploitation material website			✓						
Encouraging use of a website for child exploitation material			✓						
Using carriage services for advertising or promotion, solicitation of child exploitation material	✓								
Child sexual exploitation with online aspects									
Grooming	✓	✓	✓	✓	✓	✓			
Procurement of child to engage in sexual activity	✓	✓	✓	✓	✓	✓	✓	✓	✓
Meeting child following grooming		✓		✓					
Exposing child to indecent material	✓	✓	✓	✓		✓	✓	✓	✓
Making communication with intent to expose minor to indecent material						✓			
Other									
Extraterritoriality of some offences	✓		✓	✓		✓	✓	✓	
Obligations for internet service providers or internet content hosts	✓								

Table 2.1 Comparison of the scope of legislation for various child exploitation offences across jurisdictions. Wording and scope of legislation varies between jurisdictions.

¹⁰⁴ Ibid., s 51 (xxix).

2.4. Commonwealth Jurisdiction

2.4.1. Overview

The *Criminal Code Act 1995* (Cth) (**'the Criminal Code'**) is the key piece of Commonwealth legislation that deals with crimes of online child exploitation. The Commonwealth enacted the *Crimes Legislation Amendment (Telecommunications offences and other measures) Act 2004* (Cth) (**2004 Act**), which amended the Criminal Code to include online child exploitation crimes for the first time, which came into force on 1 March 2005.¹⁰⁵ A further major amendment to the Criminal Code took place in 2010 with the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (**2010 Act**), which was broadly directed to updating legislation to ensure that it remained effective in the context of contemporary offending.¹⁰⁶

As noted in the Explanatory Memorandum for the corresponding Bill (emphasis added):

The Bill contains important new offences that will prescribe appropriate penalties for persons involved in the sexual abuse of children in a number of different contexts. Producing, distributing and accessing child pornography and child abuse material rightly outrages the Australian community. New offences targeting the exploitation of children in this way are included in the Bill. The proposed offences prohibiting child pornography and child abuse material focus on the use offenders make of the anonymity of new technological tools, such as the Internet, to further their exploitative ends... [N]ew offences will also target online 'grooming' activities by sexual predators. **Unfortunately, adults are increasingly exploiting the anonymity of the Internet to forge relationships with children as a first step in luring them for sexual abuse.** The Bill provides a responsible criminal law response to these abhorrent practices.¹⁰⁷

The Criminal Code includes a number of online exploitation offences, each involving the use of "carriage services", being:

- The access, transmission, making available, publication, distribution, advertising or promotion, or solicitation of child pornography material or child abuse material through a carriage service,¹⁰⁸
- The possession, controlling, producing, supplying or obtaining of child pornography material or child abuse material through a carriage service;¹⁰⁹
- Using carriage services to procure a person under 16 years of age to engage in sexual activity or groom (intention to make it easier to procure),¹¹⁰ and
- Using carriage services to transmit indecent communications to a person under 16 years of age.¹¹¹

¹⁰⁵ Commonwealth Department of Public Prosecutions, *Child Exploitation*

<<https://www.cdpp.gov.au/crimes-we-prosecute/child-exploitation>>.

¹⁰⁶ Second Reading Speech: Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Cth), 4 February 2010.

¹⁰⁷ Explanatory Memorandum: Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No.2) 2004 (Cth).

¹⁰⁸ *Criminal Code Act 1995* (Cth) Section 474.19 and 474.22.

¹⁰⁹ *Criminal Code Act 1995* (Cth) Section 474.20 and 474.23.

¹¹⁰ *Criminal Code Act 1995* (Cth) Section 474.25 and 474.26.

¹¹¹ *Criminal Code Act 1995* (Cth) Section 474.25A.

The scope of the offences is tied closely to the definitions used within the legislation.¹¹² Key legislative definitions are outlined below.

Access

“Access” is broadly defined so that it includes, amongst other things, the display of or any other output of the material on a computer, the copying or moving of the material to any place in a computer or to a data storage device (for example, downloading material, printing material into hard copy or copying material onto a storage device).¹¹³

“Child pornography material” and “child abuse material”

“Child pornography material” is broadly defined to cover a range of material including that depicts or describes persons under the age of 18 engaged in a sexual pose or sexual activity, or in the presence of a person who is engaged in a sexual pose or sexual activity. The definition also covers material the dominant characteristic of which depicts, for a sexual purpose, the sexual organs, the anal region or the breasts (in the case of a female) of a person who is under 18.

“Child abuse material” is also very broadly defined. It covers material that depicts or describes a person who is under 18, or who appears or is implied to be under 18, as a victim of torture, cruelty or physical abuse, and does so in a way that reasonable persons would regard as being, in all the circumstances, offensive.

The references to ‘depictions’ in each definition are intended to cover all visual images, both still and motion, including representations of children, such as cartoons or animation. The references to ‘descriptions’ are intended to cover all word-based material, such as written text, spoken words and songs.¹¹⁴

Material that does not contain actual images of children is covered by the definition in recognition that its availability may fuel further demand for similar material which in turn may lead to greater abuse of children in the production of material to meet this demand.¹¹⁵

The qualification requiring that reasonable persons must regard the material, given all the circumstances, as offensive is intended to allow community standards and common sense to be imported into a decision on whether material is offensive.

Section 473.4 of the Criminal Code sets out the matters to be taken into account in deciding whether reasonable persons would regard particular material as offensive, which includes for example consideration of generally accepted standards and the literary, artistic or educational merit (if any) of the material and its general character. It is irrelevant to consider who the child pornography and child abuse material was intended for, given the nature of the internet.¹¹⁶

¹¹² *Criminal Code Act 1995* (Cth) Section 473.1.

¹¹³ Explanatory Memorandum: Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No.2) 2004 (Cth) 5.

¹¹⁴ *Ibid.*, 6.

¹¹⁵ *Ibid.*, 6

¹¹⁶ *Ibid.*, 14-15.

Sexual activity

“Sexual activity” is currently defined to mean sexual intercourse or any other activity of a sexual or indecent nature (including an indecent assault) that involves the human body, or bodily actions or functions (whether or not that activity involves physical contact between people).

The definition of ‘sexual activity’ was originally inserted into the Criminal Code in 2004 when the online child exploitation offences were first added to the Criminal Code and was extended in 2010. Previously, the definition was based on the definitions of ‘sexual intercourse’ and ‘act of indecency’ found in the *Crimes Act 1914* (Cth), both of which consider sexual conduct offences which criminalise engaging in, or submitting to, acts. By contrast, the current, broader definition covers any act of a sexual or indecent nature, whether or not the activity involves physical contact between people.¹¹⁷

Procurement

To “procure a person to engage in sexual activity” includes a range of activities reflecting the fact that a sender may encourage a recipient to engage in ‘consensual’ sexual activity, but may also coerce a person into engaging in ‘non-consensual’ activity.¹¹⁸ The second limb of the definition is consistent with the definition of ‘induce’ in section 50AA of the *Crimes Act 1914* (induce means induce by threats, promises or otherwise), which regulates the federal child sex tourism offences.¹¹⁹

2.4.2. Legislative Provisions

Section 474.19 – Using a carriage service for child pornography material

Section 474.19(1) makes it an offence for a person to use a carriage service to access, transmit to him or herself, transmit generally, make available, or publish or otherwise distribute child pornography material.¹²⁰ Originally, this offence was particularly aimed at use of the Internet, email and other online applications to trade or traffic in child pornography and intended to cover the range of activities that a person can engage in when using these applications, including viewing, copying or downloading, sending and exchanging.¹²¹ Importantly, this provision permits prosecution where an offender has accessed child pornography but not separately downloaded the material.

Section 474.19(2) and (3) specify that there is a fault element of intention or recklessness, which avoids liability for persons who accidentally or unintentionally come across child pornography on the Internet and so that the offence provision does not deter people from reporting Internet child pornography to the appropriate authorities.¹²²

¹¹⁷ Explanatory Memorandum: Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No.2) 2004 (Cth) 19.

¹¹⁸ *Criminal Code Act 1995* (Cth) Dictionary.

¹¹⁹ Explanatory Memorandum: Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No.2) 2004 (Cth) 49.

¹²⁰ *Ibid.*, 34-35.

¹²¹ *Ibid.*, 35.

¹²² *Ibid.*

In 2010, the Act was amended to:

- Extend the offence to include the use of a carriage service to advertise or promote child pornography material or to solicit for it, even if the advertiser/promoter/solicitor does not themselves engage in transmitting or making available actual child pornography; and
- Increase the maximum penalty from 10 to 15 years to reflect the Government's position on the level of seriousness which it believes befits this particular conduct.^{123, 124} It was also noted in the Explanatory Memorandum that the Internet is being used to access and distribute child pornography on a massive global scale and that offending had become more pervasive and widespread (than it was in 2004).¹²⁵

Section 474.20 – Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service

Section 474.20 makes it an offence for a person to possess, control, produce, supply or obtain child pornography material with the intention that it be used, by that person or another person. This covers a broad range of *preparatory* conduct undertaken with the intention to commit the primary offence (above, section 474.19). For example, the offence applies to the possession of a pornographic photograph of a child, the actual production of child pornography, each where the persons involved intended for the material to be made available on the Internet.¹²⁶ As a preparatory offence, liability can be found even if the person did not ultimately use the Internet to distribute the material.¹²⁷

In 2010, this section was amended to increase the maximum penalty from 10 to 15 years.¹²⁸

***Section 474.22 – Using a carriage service for child abuse material, and
Section 474.23 – Possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service***

These offences relating to child abuse material substantially mirror the above offences in relation to child pornography. They were similarly amended in 2010 to increase the maximum penalty from 10 to 15 years.¹²⁹

Section 474.24A and 474.25B - Aggravated offences

In 2010, the Criminal Code was amended to introduce a number of aggravated offences directed at specific circumstances which reflect a higher level of culpability on the part of the offender in respect of the above crimes relating to child pornography and child abuse material. For example:

1. If the offending conduct occurs on three or more occasions; or

¹²³ Ibid.; Second Reading Speech, above n 106.

¹²⁴ Second Reading Speech, above n 106.

¹²⁵ Explanatory Memorandum: Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No.2) 2004 (Cth), 81.

¹²⁶ Ibid., 35-36.

¹²⁷ *Criminal Code Act 1995* (Cth) Subsection 474.20(2).

¹²⁸ Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Cth).

¹²⁹ Second Reading Speech: above n 106.

2. If the offending conduct involves two or more people; or
3. If the sexual activity involves a child with a mental impairment; or
4. If the sexual activity involves a child who is under the care, supervision or authority of the defendant.¹³⁰

These aggravating circumstances increase the maximum penalty from 15 years to 25 years imprisonment.¹³¹

Section 474.25 – Obligation of internet service providers and internet content hosts

This section provides that ISPs and Internet content hosts ('**ICHs**') who become aware that the service they provide may be used to access material that may be child pornography material or child abuse material are required to refer the details of that material to the AFP within a reasonable time.¹³²

An ISP or ICH will only be under this obligation where they have *reasonable grounds to believe* the material is child pornography material or child abuse material. For example, if a person makes a complaint to an ISP or ICH about material that is obviously not child pornography or child abuse material, they will be under no obligation to refer the material.¹³³

Non-compliance with this obligation will be an offence punishable by a maximum penalty of 100 penalty units.¹³⁴

How ISPs deal with their obligations under this provision (and others) is discussed in Chapter 4.

Section 474.25A – Using carriage service for sexual activity with a child who appears to be under 16

The 2010 Act created two new offences relating to the use of a carriage service involving sexual activity with person under 16:

1. Under section 474.25A(1), it is an offence for a person of at least 18 years of age to engage in sexual activity with a child under 16 years of age using a carriage service; and
2. Under subsection 474.25A(2), it is an offence for a person to engage in conduct in relation to a child under the age of 16 years that causes the child to engage in sexual activity with another person of at least 18 years of age using a carriage service.¹³⁵

The offences are intended to capture sexual activity that occurs online in 'real time' and to criminalise such conduct in a comparable way to equivalent 'real life' activity.¹³⁶ For

¹³⁰ Commonwealth Department of Public Prosecutions, above n 105.

¹³¹ Explanatory Memorandum: Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Cth), 58.

¹³² Explanatory Memorandum: Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No.2) 2004 (Cth), 43.

¹³³ *Ibid.*, 43-44.

¹³⁴ *Ibid.*, 43.

¹³⁵ *Ibid.*, 58.

¹³⁶ Second Reading Speech: above n 106.

example, an offender who masturbates in front of a web cam while a child watches online, or vice versa, commits a 'real time' offence and may be prosecuted under this section.

The fault elements are intention (as to the conduct) and recklessness (as to the age of the victim).

This offence is punishable by a maximum penalty of 15 years imprisonment.

Sections 474.26 and 27 – Using carriage services to procure/groom person who the sender believes to be under 16

The grooming and procuring offences are targeted at offenders, who use the anonymity of the Internet to win the trust of a child as a first step to the future sexual abuse of the child, and to allow law enforcement to intervene before a child is actually assaulted.¹³⁷

The Commonwealth recognised that there are two steps routinely taken by adult offenders leading up to a real life meeting between an adult and child victim that results in child sexual abuse:

1. The adult wins the trust of a child over a period of time. Adults often use 'chat rooms' on the Internet to do this. They may pose as another child, or as a sympathetic 'parent' figure. Paedophiles often expose children to pornographic images as part of this 'grooming' process. This practice is specifically criminalized by this provision, removing any doubt about whether online 'grooming' of a child before actual contact is 'mere preparation' (that is, not a criminal offence) or an unlawful attempt to commit child sexual abuse.
2. With the child's trust won, adults often use telecommunications services to set up a meeting with the child. This is separately criminalised through an offence for 'procurement'. This is consistent with the underlying rationale for the new offences which is to allow law enforcement to intervene before a child is actually abused.¹³⁸

Procurement

Section 474.26 contains three separate 'procuring' offences:

1. Procuring a child (under 16) to engage in sexual activity with the sender;
2. Procuring a child (under 16) to engage in sexual activity with another adult; and
3. Procuring a child (under 16) to engage in sexual activity with another child (under age 18) in the presence of the sender or another adult.¹³⁹

The procurement offences only target adult offenders and not senders who are less than 18 years of age on the basis that sexual activity between children should continue to be a responsibility for State and Territory governments.¹⁴⁰

¹³⁷ Second Reading Speech: *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No.2) 2004* (Cth), 4 August 2004; Commonwealth Department of Public Prosecutions, above n 105.

¹³⁸ Explanatory Memorandum: *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No.2) 2004* (Cth), 44.

¹³⁹ *Ibid.*, 45.

¹⁴⁰ *Ibid.*

The ages referred to above refer to actual ages or the apparent age believed by the sender. References to the belief of the sender is necessary to cater for a standard investigatory technique, whereby an investigator assumes the identity of a fictitious child, interacting with potential predatory adults over the internet, and arresting a predatory adult before they have an opportunity to sexually abuse a real child that they are also 'grooming'.¹⁴¹

Grooming

Similarly, the 2004 Act introduced three offences under section 474.27 specifically targeting 'grooming' children (under 16) for sexual activity with either the offender, another adult, or with another child (under 18) in the presence of the offender or another adult.

As noted above, grooming refers to transmissions of communications with the recipient with the intention of "making it easier to procure" the recipient to engage in sexual activity. As outlined in *R v Engeln*, this is easier to prove than the procurement offences in section 474.26.¹⁴²

The mechanics of the offence otherwise mirror the 'procuring' offences in section 474.26.

The 2004 Act required communication sent as part of the grooming process to include 'indecent' material¹⁴³ (by reference to the standards of ordinary people and having regard to context).¹⁴⁴ However, in 2010 the Criminal Code was amended to remove the requirement that the material be indecent. This was because it was shown that the practice of grooming encompasses a wide range of activity designed to build a relationship of trust with the child for the purposes of later sexually exploiting the child. As such, the content of communications between the offender and the child may not always be indecent, but is just as likely to involve platonic, 'innocent' exchanges.¹⁴⁵

The 2010 Act also amended the offence so that the burden of proof for the applicable belief about age defence was changed from an evidential to a legal burden on the defendant.¹⁴⁶

Section 474.27A – Using carriage services to transmit indecent communications to person under 16

The 2010 Act inserted this offence in order to capture situations where an adult sends a child (under 16) sexually explicit material (e.g. adult pornography) without any intent to commit a further offence (e.g. a grooming or procuring offence).¹⁴⁷

The offence carries a maximum penalty of seven years imprisonment.¹⁴⁸

¹⁴¹ Ibid.

¹⁴² *R v Engeln* [2014] QCA 313, 39 ('Engeln').

¹⁴³ Explanatory Memorandum: *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No.2) 2004* (Cth), 47.

¹⁴⁴ Ibid.

¹⁴⁵ Explanatory Memorandum: *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010* (Cth), 58 and 92.

¹⁴⁶ Ibid., 58.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

Section 474.24C – Consent to commencement of proceedings where defendant under 18

The 2010 Act inserted a provision requiring the consent of the Attorney General in relation to the commencement of proceedings against persons under 18 for an offence against Subdivision D of Division 474.¹⁴⁹ This was to overcome the potential for unnecessary and unsuitable prosecution of those under 18 years of age (for example, in the context of young people who were sending messages of themselves) whilst appreciating that young people may send sexually explicit images of themselves or others in malicious or exploitative circumstances.

2.4.3. Other notable provisions and amendments

In addition to where indicated above, *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* also strengthened the laws in the following respects:

1. Extended the child pornography and child abuse material offences to operate extraterritorially. This means Australians and permanent residents engaging in offending behaviour overseas could be prosecuted in Australia (placing Australia on par with its international counterparts).¹⁵⁰ The Amendments also made it an offence to encourage or benefit from these types of offences or to do an act preparatory to committing a child sex tourism offence.¹⁵¹
2. Created new aggravated offences (for example, the offence of running or being involved in a child pornography network).
3. Introduced a scheme for the forfeiture of child pornography. Prior to this, the only way that such material could be forfeited was through a post-conviction application under the *Proceeds of Crime Act 2002* (Cth), which was a lengthy and unsuitable process.¹⁵²

2.5. State and Territory legislation - overview

Online child exploitation offences are principally dealt with in the criminal codes of each State and Territory, namely:

- *Crimes Act 1900* (NSW), within Division 10 (“Offences in the nature of rape, offences relating to other acts of sexual assault etc.”);
- *Crimes Act 1958* (Vic), within Part 1 (“Offences”);
- *Criminal Code Act 1899* (Qld), within Chapter 22 (“Offences Against Morality”);
- *Criminal Consolidation Act 1935* (SA), within Division 11A (“Child exploitation material and related offences”);

¹⁴⁹ See *Criminal Code Act 1995* (Cth) Section 474.24C(1); for an indepth discussion of contemporary attitudes, perceptions and response to sexting and young people, see Thomas Crofts, Murray Lee, Alyce McGovern and Sanja Milivojevic, *Sexting and Young People*, (Palgrave Macmillian, 2015).

¹⁵⁰ *Criminal Code Act 1995* (Cth) Divisions 272 (child sex offences outside Australia) and Division 273 (offences committed overseas involving child pornography material or child abuse material).

¹⁵¹ Explanatory Memorandum: *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010* (Cth).

¹⁵² Second Reading Speech: above n 106.

- *Crimes Act 1900* (ACT), within Part 3 (“Sexual Offences”);
- *Criminal Code Act Compilation Act 1913* (WA), within Chapter XIV (“Crimes Against Morality”);
- *Criminal Code Act 1924* (Tas), within Schedule 1, Chapter XIV (“Crimes Against Morality”); and
- *Criminal Code Act* (1983) (NT), within Schedule 1, Division 2, Subdivision 1 (“Child abuse material and indecent articles”).

State and Territory legislation is largely consistent in scope although it varies considerably in terms of definitions, structure and wording and maximum penalties. State and territory maximum penalties are generally lower than the maximum penalties for Commonwealth offences.¹⁵³ A senior NSW Police officer stated in an interview that charging under the Commonwealth Criminal Code provided the potential for more severe penalties. The Officer also stated that State police and Commonwealth police collaborate closely in prosecuting offences of online child exploitation.¹⁵⁴

INTERVIEW

...one of the benefits of us choosing that Commonwealth legislation regularly is that they have a set unit of, a set team that do the online matters and it's a relatively small team, so our guys and girls get to work closely with the Commonwealth DPP, you know the same ones over and over again regularly, which is very good.

Senior Officer with the Sex Crimes Squad of the NSW Police (Telephone interview, 6 July 2016)

Broadly, all States and Territories have legislation covering the following subject matter, although implemented in different ways:

- Production of child abuse material;¹⁵⁵
- Involving a child in the production of child abuse material;¹⁵⁶
- Dissemination (for example, distribution and/or publication) of child abuse material;¹⁵⁷
- Possession of child abuse material;¹⁵⁸

¹⁵³ See for example the crime of disseminating child abuse material under *Crimes Act 1900* (NSW), s91H(2) which carries a maximum of 10 years imprisonment, compared to a maximum of 15 years under s474.19 *Criminal Code Act 1995* (Cth).

¹⁵⁴ Interview with Senior Office of the NSW Police (Telephone Interview, 6 July 2016)..

¹⁵⁵ *Crimes Act 1900* (NSW) S91H; *Crimes Act 1958* (Vic) s68; *Criminal Code Act 1899* (Qld) s210(1)(f), s228B; *Criminal Consolidation Act 1935* (SA) s63; *Crimes Act 1900* (ACT) 64A; *Criminal Code Act Compilation Act 1913* (WA) s218; *Criminal Code Act 1924* (Tas) s130A; *Criminal Code Act 1983* (NT) s125B(1).

¹⁵⁶ *Crimes Act 1900* (NSW) S91G; *Crimes Act 1958* (Vic) s69; *Criminal Code Act 1988* (Qld) s228E; *Criminal Consolidation Act 1935* (SA) s63B; *Crimes Act 1900* (ACT); *Criminal Code Act Compilation Acts 1913* (WA) 217; *Criminal Code Act 1924* (Tas) s130; *Criminal Code Act 1983* (NT) s132.

¹⁵⁷ *Crimes Act 1900* (NSW) s91H; *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995* (NSW) s57A; *Crimes Act 1958* (Vic) s70AAAB, 70AAAC ; *Summary Offences Act 1996* (Vic) s41DA; *Criminal Code Act 1899* (Qld) s228, s228C; *Criminal Consolidation Act 1935* (SA) s63; *Crimes Act 1900* (ACT); *Criminal Code Act Compilation Act 1913* (WA) s219; *Criminal Code Act 1924* (Tas) s130B; *Criminal Code Act 1983* (NT) s125B, s125C.

- Procurement of child to engage in sexual activity, including using the internet (and separately in most, but not all, jurisdictions, grooming being a preparatory offence to procurement);¹⁵⁹ and
- Exposing child to indecent material, such as child abuse material.¹⁶⁰

The variation between the States and Territories relate to the age of the victim, and the consequential structure of offences and defences, for example, increased penalties for younger children, or a defence of reasonable mistake where the child is close to the cut-off age.

All States and Territories have recently amended their legislation addressing online child exploitation. A major theme in most of the parliamentary debates and reading speeches of the various amendments is the need for legislation to remain applicable in the face of technological development and relevant to the changing patterns of offending, as well as reflecting the seriousness of the offences. In Victoria, the *Crimes Amendment (Sexual Offences) Bill 2016* (assented to in September 2016) included wholesale changes to the legislation to account for changes in technology and new ways of offending.

The analysis in this chapter will focus on New South Wales, Queensland and Victoria as the majority of case law has emerged from these jurisdictions. However, for the sake of completeness we have outlined the legislative frameworks of the other States and Territories.

2.5.1. New South Wales

The legislative framework in New South Wales was amended in 2010 by the *Crimes Amendment (Child Pornography and Abuse Material) Act 2010*. The amendments were enacted in order to harmonise the New South and Commonwealth Legislation,¹⁶¹ recognising that offenders are often prosecuted under both jurisdictions.¹⁶² The amendments also increased the maximum penalty for possession of online child abuse material to 10 years.

The amendments also revised the definition of child abuse material to reflect the Commonwealth definition of child pornography, and removed the defence of artistic merit. In accordance with the Commonwealth model,¹⁶³ the artistic, literary, educational and

¹⁵⁸ *Crimes Act 1900* (NSW) s91H; *Crimes Act 1958* (Vic) s70; *Criminal Code Act 1899* (Qld) s228D; *Criminal Consolidation Act 1935* (SA) s63A; *Crimes Act 1900* (ACT); *Criminal Code Act Compilation Act 1913* (WA) s220; *Criminal Code Act 1924* (Tas) s130C and also s130D (regarding access); *Criminal Code Act 1983* (NT) s125B.

¹⁵⁹ *Crimes Act 1900* (NSW) s66EB (including grooming); *Crimes Act 1958* (Vic) s69, s58, s49B limited to procurement for child pornography; *Criminal Code Act 1899* (Qld) s210, s218A; *Criminal Consolidation Act 1935* (SA) s63B; *Crimes Act 1900* (ACT); *Criminal Code Act Compilation Act 1913* (WA) s204C limited to use of electronic communications; *Criminal Code Act 1924* (Tas) s125C; *Criminal Code Act 1983* (NT) s131 (attempting to procure) and s132 (procuring).

¹⁶⁰ *Crimes Act 1900* (NSW) s66EB(3); *Crimes Act 1958* (Vic) s49B (where further to facilitation for sexual offence); *Criminal Code Act 1899* (Qld) s210; no provision applicable in *Criminal Consolidation Act 1935* (SA); *Crimes Act 1900* (ACT); *Criminal Code Act Compilation Act 1913* (WA) s204B; *Criminal Code Act 1924* (Tas) s125D; *Criminal Code Act 1983* (NT) s132.

¹⁶¹ Explanatory Memoranda, *Crimes Amendment (Child Pornography and Abuse Material) Act 2010* (NSW), 1.

¹⁶² New South Wales, *Parliamentary Debates*, Legislative Council, 20 April 2010, 21820-21823 (Michael Veitch).

¹⁶³ *Ibid.*

journalistic merits are to be taken into consideration when determining whether or not a reasonable person would regard particular material as being offensive.¹⁶⁴ Notably, in the second reading speech and the final report of the Child Pornography Working Party, these changes are attributed to the seriousness of the exploitation of children that is inherent at all stages in child abuse material offences.

Artists found to legitimately exercise artistic purpose should not have their work legally defined in the same way as the horrific images that pervade the internet of child sexual abuse. To do otherwise is to undermine the gravamen of the exploitation and abuse of children that does occur in the creation, the possession and dissemination of child pornography, both in Australia and overseas.

Child Pornography Working Party, 'Report of the Child Pornography Working Party' (NSW Department of Justice and Attorney General, 10 January 2010), 22.

In New South Wales a child is defined in the context of possession, production and distribution of child abuse material as a person aged under, or apparently aged, or implied to be aged, under 16.¹⁶⁵ This is lower than some other States and Territories.

As stated above, the definition of "child abuse material" is subject to the objective 'reasonable person test'. The test requires a consideration of whether the material involves depictions that reasonable persons would regard as being, in all the circumstances, offensive. The relevant material covered by the definition includes, exhaustively, depictions or descriptions (whether apparent or implied) of:

- A child victim torture, cruelty or physical abuse;
- A child engaged in or apparently engaged in a sexual pose or sexual activity;
- A child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity;
- A child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity; or
- The private parts of a child.¹⁶⁶

There is a separate grooming offence in New South Wales which applies where a person engages in certain conduct that exposes a child to indecent material or provides a child with an intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity with the accused.¹⁶⁷ This grooming offence involves an extra element of exposing a child to indecent material as compared with the "intention to procure" offences found in some other States and Territories which do not include a similar requirement. However, the NSW application has a wider application in some circumstances (for example as compared with the Commonwealth offence) because it does not limit grooming and procuring offences to those undertaken using electronic communications.¹⁶⁸

¹⁶⁴ *Crimes Act 1900* (NSW) s91FB(2).

¹⁶⁵ *Criminal Code Act Complication Act 1913* (WA) s217A.

¹⁶⁶ *Crimes Act 1900* (NSW) s91FB.

¹⁶⁷ *Crimes Act 1900* (NSW) s66EB.

¹⁶⁸ NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 4011 (John Ajaca).

There is also a separate offence in Section 66EB of meeting a child or travelling to meet a child following grooming that child for sexual purposes. The offence carries a higher maximum penalty than the offence of grooming a child for sexual purposes. Section 66EB also explicitly identifies that the provision applies where the child is fictitious, which makes clear that police investigative work involving a fictitious child do not preclude the operation of this offence.

2.5.2. Victoria

In September 2016, the *Crimes Amendment (Sexual Offences) Bill 2016 (Vic)* received assent. The corresponding Act will commence on a day to be proclaimed, or 1 July 2017, whichever is the earlier. The Act contains a major amendment to the *Crimes Act 1958 (Vic)*. The Explanatory Memorandum to the Bill states that it will modernise and simplify numerous sexual offences, including online child exploitation.¹⁶⁹ The Bill will also improve jury directions relating to consent in sexual offence trials. These objectives are reflected in the purposes of the Bill, which include:

- To amend the *Crimes Act 1958 (Vic)* in relation to sexual and certain other offences;
- To amend the *Summary Offences Act 1966 (Vic)* in relation to sexual exposure and indecent, offensive and insulting behaviour; and
- To amend the *Jury Directions Act 2015 (Vic)* in relation to directions on consent, and reasonable belief in consent, in sexual offence cases.¹⁷⁰

The below section refers to Victorian legislation as it will soon be amended (though we indicate where provisions are yet to have commenced).

A child will be defined in the context of possession, production and distribution of “child abuse material”¹⁷¹ (when the 2016 Act commences) as a person aged under, or apparently aged, under 18.¹⁷² The definition of “child abuse material”,¹⁷³ when the 2016 Act commences, is more extensive and precise than the current definition of “child pornography”, and this reflects developments in other States and Territories. Child abuse material is subject to an objective test, in this case that whether a reasonable person would regard it as being, in the circumstances, offensive. The relevant material covered by the definition includes, material which depicts or describes:

- A child or apparent child:
 - As a victim of torture, cruelty or physical abuse, or sexual abuse;
 - Engaged in, or apparently engaging in, a sexual pose or sexual activity; or
 - In the presence of another person who is engaged in, or apparently engaged in, a sexual pose or sexual activity; or

¹⁶⁹ Explanatory Memorandum: Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2016 (Cth), 1-2.

¹⁷⁰ *Crimes Amendment (Sexual Offences) Bill 2016 (Vic)*, part 1.

¹⁷¹ Section 67 of the *Crimes Act 1968 (Vic)* (current), to be replaced by the new section 51A(1) when the act is amended.

¹⁷² Section 62, Criminal Law Consolidation Act 1935 (SA).

¹⁷³ *Crimes Amendment (Sexual Offences) Bill 2016 (Vic)*, part 1.

- The genital or anal region of a child or (in the case of a female child) the breast area.

The Victorian framework contains a number of unique provisions not provided for in other States and Territories, including administering a website used to deal with child abuse material¹⁷⁴ and encouraging use of a website to deal with child abuse material.¹⁷⁵ The Crimes Act also contains provisions allowing officers to access data held in or accessible from a relevant computer or storage device.¹⁷⁶

After the 2016 Act commences, provisions will be in force which specifically broaden traditional contact offences (such as sexual activity in the “presence of” a child or causing a child to “be present” during sexual activity)¹⁷⁷ to include situations where a child can be present in person or by means of an electronic communication¹⁷⁸ that is received by the accused in real time or close to real time, e.g. Facetime, Skype and other video chat applications. The provisions also have extra-territorial application, with only the accused required to be in Victoria at the time of the offence.

There are also special offences for distribution of an intimate image or threats to distribute an intimate image.¹⁷⁹ These offences introduce protections for young people which were identified from the 2011 Law Reform Committee ‘Inquiry into Sexting’,¹⁸⁰ which considered the risks associated with creating, sharing, sending or posting of sexually explicit messages or images via the Internet, mobile phones or other electronic devices by people, especially young people (known as ‘sexting’).

There is a separate grooming offence in Victoria which applies where an adult communicates, with a child under the age of 16 years or with a person who has that child under their care, supervision or authority, with the intention of facilitating the child’s engagement in or involvement in a sexual offence with that person or another adult.¹⁸¹

2.5.3. Queensland

The legislative framework in Queensland was amended in 2013 by the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act*.¹⁸² The Act significantly increased the maximum penalties available for child exploitation material offences: from five years to 14 years imprisonment for the offence of possession,¹⁸³ and 10 years to 14 years imprisonment for the offences of involving a child in the making of child exploitation material,¹⁸⁴ making child exploitation material¹⁸⁵ and distributing child exploitation

¹⁷⁴ Section 70AAAB of the *Crimes Act 1968* (Vic) (current), to be replaced by the new section 51E when the act is amended.

¹⁷⁵ Section 70AAAC of the *Crimes Act 1968* (Vic) (current), to be replaced by the new section 51F when the act is amended.

¹⁷⁶ Section 465AA of the *Crimes Act 1968* (Vic).

¹⁷⁷ Sections 49F, G, H and I when the *Crimes Act 1968* (Vic) is amended by the 2016 amending Act.

¹⁷⁸ Within the meaning of the *Electronic Transactions (Victoria) Act 2000* (Vic).

¹⁷⁹ *Summary Offences Act 1966* (Vic) s41DA and 41DB.

¹⁸⁰ Parliament of Victoria, Terms of Reference, Legislative Assembly, 1 September 2011.

¹⁸¹ *Crimes Act 1968* (Vic) s49B.

¹⁸² *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld).

¹⁸³ *Ibid.*, s 228D.

¹⁸⁴ *Ibid.*, s 228A.

¹⁸⁵ *Ibid.*, s 228B.

material.¹⁸⁶ The increase in maximum penalties across these offences to 14 years was intended to reflect that the possession of child exploitation material is not a victimless crime.¹⁸⁷

These types of offences are abhorrent and should not be considered as victimless crimes. Demand for the possession of these types of images creates a market for those who are actively involved in the making and the supply of such material. The making of child exploitation images results in children suffering at the hands of the deprived individuals who engage in the sexual activities which are often depicted in these images. It is therefore vital that this market is targeted by introducing tough new penalties.

The Hon. Mr Jarrod Bleijie, Second Reading Speech of the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013*, 29 November 2012.

The child in “child exploitation material” in the context of possession, production and distribution of that material is a person aged under, or apparently aged, under 16.¹⁸⁸

As with some other States and Territories, the definition of “child exploitation material” is subject to an objective test, in this case that the material is likely to cause offence to a reasonable adult. That objective test is a means to ensure that innocent material (such as family photographs) is not deemed to be ‘child exploitation material’ under the definition.¹⁸⁹ The relevant material covered by the definition includes, children in a sexual context, offensive or demeaning context or being subject to abuse, cruelty or torture. The 2013 Amendment added the “representation of a person” to the definition of child exploitation material,¹⁹⁰ so that the definition also encompasses computer generated images and animated images of children or virtual children.¹⁹¹

The age threshold which applies to use of indecent treatment of a child (including exposing them to indecent objects or taking indecent photographs or records) is also 16,¹⁹² with increased penalties where the child is younger than 12 years.¹⁹³ The increased penalties also apply in the case the child is of lineal descent, under the guardianship of the accused, or children with mental impairments.

Section 229 provides that it is immaterial, in the case of any of the “offences against morality” in the chapter, that the accused person did not know that the person was under relevant age specified in the offence, or believed that the person was not under that age.

In 2016, three new offences were introduced to the Queensland Criminal Code relating to the administration of and encouraging the use of a child exploitation material website, and the distribution of information about avoiding detection or prosecution for conduct

¹⁸⁶ *Ibid.*, s228C.

¹⁸⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 November 2012, 2952 (Jarrod Bleijie).

¹⁸⁸ *Criminal Code Act 1899* (Qld) s207A.

¹⁸⁹ Second reading speech, *Criminal Code (Child Pornography and Abuse) Amendment Bill*, as per Hon. R.J. Welford (Attorney-General and Minister for Justice) on 24 November 2004 at 3742.

¹⁹⁰ *Criminal Code Act 1899* (QLD) s 207A.

¹⁹¹ Explanatory Notes, *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld), 1.

¹⁹² *Criminal Code Act 1899* (QLD) s 204A.

¹⁹³ *Criminal Code Act 1899* (QLD) s 210.

involving the commission of a child exploitation material offence.¹⁹⁴ As a consequence of this, section 228DA now creates the offence of administering a child exploitation material website.¹⁹⁵ The provisions provide for a maximum penalty of 14 years imprisonment. However, in circumstances where the offender has used hidden or anonymous networks or services to commit the offence, the maximum penalty is 20 years imprisonment.¹⁹⁶

There is a separate grooming offence in Queensland which applies where a person uses the internet with the intention of procuring a person under the age of 16 years or a person they believe to be under 16 years¹⁹⁷ (as distinct from actual procurement or an attempt to procure). The use of words regarding belief of age is to enable police officers to assume the identity of a fictitious child, to interact with potential predatory adults over the Internet, and arrest a predatory adult before they have an opportunity to sexually abuse any real children that they may be 'grooming'.

There is a defence available in Queensland where the conduct was, in the circumstances, reasonable for a genuine artistic purpose.¹⁹⁸

2.5.4. South Australia

The South Australian *Criminal Consolidation Act 1935* uses the term 'child exploitation material'.¹⁹⁹

In South Australia a child is defined, in the context of possession, production and distribution of "child exploitation material" as a person aged under, or apparently aged, under 17.²⁰⁰

The definition of child exploitation material is strictly limited to depictions of:

- A child engaging in sexual activity; or
- Images of bodily parts of a child or where the child is involved, of a "pornographic" nature, that is, where the apparent intention of the material is to excite or gratify sexual interest or sadistic or other perverted interest in violence or cruelty.²⁰¹

The production and possession offences require that the accused have knowledge of the pornographic nature of the "child exploitation material". This knowledge element is unique to South Australia. The production and possession offences also include increased penalties for repeat offenders and aggravated penalties where the child is younger than 14.²⁰²

2.5.5. Australian Capital Territory

The *Crimes Act 1900* (ACT) deals with online child exploitation in Part 3 ("Sexual Offences"). In the Australian Capital Territory a child is defined, in the context of

¹⁹⁴ *Serious and Organised Crime Legislation Amendment Act 2016* (QLD) s 91.

¹⁹⁵ *Criminal Code Act 1899* (QLD) s228DA.

¹⁹⁶ *Criminal Code Act 1899* (QLD) s228DA(1).

¹⁹⁷ *Criminal Code Act 1899* (QLD) s 218A.

¹⁹⁸ *Criminal Code Act 1899* (QLD) s 228E(1).

¹⁹⁹ *Criminal Consolidation Act 1935* (SA), Division 11A.

²⁰⁰ *Criminal Law Consolidation Act 1935* (SA) s 62.

²⁰¹ *Criminal Law Consolidation Act 1935* (SA) s 62.

²⁰² *Criminal Law Consolidation Act 1935* (SA) s 63, 63A.

possession, production and distribution of “child exploitation material”, as a person aged under the age of 18.²⁰³ However, in relation to production, there are separate offences for the same crimes where the child is under 12, which carry higher penalties and strict liability as to age (that is, it is not necessary to prove beyond reasonable doubt that the defendant had any knowledge (or any other fault element) about the age of the child. The defence of mistake of fact applies).²⁰⁴

The definition of “child exploitation material” is strictly limited to representations of:

- The sexual parts of a child;
- A child being engaged in activity of a sexual nature; or
- Someone else being engaged in an activity of a sexual nature in the presence of a child; and
- The material is substantially for the sexual arousal or sexual gratification of someone other than the child.²⁰⁵

“Representations” can include drawings and video games.²⁰⁶

This is a static and relatively restrictive definition compared to other States and Territories which normally define the term (or its equivalents) by reference to what is considered indecent or offensive to reasonable people.

The age threshold which applies to the use of electronic means to deprave (for example, to suggest that a young person commit or take part in, or watch someone else committing or taking part in, an act of a sexual nature) is 16.²⁰⁷ This is a type of grooming offence. This provision provides for increased penalties for second time offenders.

2.5.6. Western Australia

The Western Australian *Criminal Code Act Compilation Act 1913* uses the term ‘child exploitation material’. The definition of “child exploitation material” includes “material that, in a way likely to offend a reasonable person, describes, depicts or represents a person, or part of a person, who is, or appears to be, a child”.²⁰⁸ Uniquely to Western Australia, the definition specifies that the term applies when the material shows part, rather than the whole, of a person.²⁰⁹ The broad definitions also capture pictures of virtual children, due to the wording “represents”.

A child is defined, in the context of possession, production and distribution of “child exploitation material” as a person aged under, or apparently aged under 16.²¹⁰ The age threshold which applies to use of electronic communications to expose of a child to

²⁰³ *Crimes Act 1900* (ACT).

²⁰⁴ Pursuant to *Criminal Code 2002* (ACT) s 2. 36.

²⁰⁵ *Crimes Act 1900* (ACT) s 64.

²⁰⁶ *Crimes Act 1900* (ACT) s 64.

²⁰⁷ *Crimes Act 1900* (ACT) s 66.

²⁰⁸ *Criminal Code Act Compilation Act 1913* (WA) s 217A.

²⁰⁹ *Criminal Code Act Compilation Act 1913* (WA) s 217A. Explanatory Memorandum, *Child Pornography and Exploitation Material and Classification Legislation Amendment Bill 2009* (WA) pt 1 div 1 s 216.

²¹⁰ *Criminal Code Act Compilation Act 1913* (WA) s 217A.

indecent materials and procure them for sexual activity is also 16,²¹¹ with increased penalties where the child is younger than 13 years.²¹²

Sections 205 and 221(1A) confirm that there is no defence of mistake as to fact of age for any of the child exploitation materials offences - the fact an accused person did not know a person or child was under the relevant age set out in the offence is immaterial. There is also a specified defence available where the accused person did not know, and could not reasonably be expected to have known, that the material is likely to offend a reasonable person.²¹³ There is no similar defence in the other States and Territories which have definitions for “child abuse material” (or equivalent) that include an objective test of offensiveness.

Western Australia also retains the defence that the material is of a recognised literary, artistic or scientific merit.²¹⁴ This is a higher bar than some of the other artistic merit defences in other States and Territories because it requires that merit to be objectively recognised.

As noted above Western Australia is the only jurisdiction to have a form of public sex offender register.

2.5.7. Tasmania

In Tasmania, the *Criminal Code Act 1924* uses the term ‘child exploitation material’.²¹⁵ A child is defined, in the context of possession, production and distribution of “child exploitation material” as a person aged under, or apparently aged under 18.²¹⁶

There is a defence available in Tasmania where the conduct alleged to constitute an offence is for artistic purpose and the accused person’s conduct was, in the circumstances, reasonable for that purpose.²¹⁷

There is a separate grooming offence in Tasmania which applies where a person makes a communication the intention of procuring a person under the age of 17 years or a person they believe to be under 17 years²¹⁸ (as distinct from actual procurement or an attempt to procure).

An accused person cannot be excused by way of mistake as to fact of a victim’s age, where the child is under 13 years of age.²¹⁹

2.5.8. Northern Territory

A child is defined in the context of possession, production and distribution of child abuse material as a person aged under, or apparently aged under 18.²²⁰ An amendment lifted

²¹¹ *Criminal Code Act Compilation Act 1913* (WA) s 204A.

²¹² *Criminal Code Act Compilation Act 1913* (WA) s 204B.

²¹³ *Criminal Code Act Compilation Act 1913* (WA) s 221A(1)(b).

²¹⁴ *Criminal Code Act Compilation Act 1913* (WA) s 221A(1)(c).

²¹⁵ *Criminal Code Act 1924* (Tas) sch 1, s 1A.

²¹⁶ *Criminal Code Act 1924* (Tas) sch 1, s1A.

²¹⁷ *Criminal Code Act 1924* (Tas) sch 1, 130D(1)(c).

²¹⁸ *Criminal Code Act 1924* (Tas) sch 1, s 125D.

²¹⁹ *Criminal Code Act 1924* (Tas) sch 1, s 14B.

the age from 16 in 2004,²²¹ reflecting the requirements of the Optional Protocol to the Convention on the Rights of the Child and the sale of children, child prostitution and child pornography.²²² However the age threshold remains “under 16” in the context of indecent dealing with a child, including the exposure of a child to indecent materials.²²³

The definition for child abuse material includes material which “depicts, describes or represents in a manner that is likely to cause offence to a reasonable adult, a person who is a child or who appears to be a child”, including “material that contains data from which text, visual images or sound can be generated”.²²⁴ This was introduced by a 2004 amendment, in order to reflect changing patterns of offending.²²⁵ The definition of “represents” includes drawings and images of virtual children.

Section 125B(3) of the *Criminal Code Act* reverses the onus of proof. The section provides that proof that child abuse material was in a place, for which a person is the occupier or concerned in the management or control, is evidence of possession unless it is shown that the person neither knew nor had reason to suspect the child abuse material was in or on that place. This provision is controversial as it goes against the presumption of innocence and similar provisions are not found in the legislation of the other Australian jurisdictions. However, it was put in place to overcome problems where material is found stored on a computer or data storage device, and the accused claims that they accidentally downloaded the material, or that another person had access to their computer.²²⁶

2.6. Recommendations

In this chapter we have identified a lack of uniformity in the way that online child exploitation offences are referred to in both State and Commonwealth legislation.

Uniform legislation across Australia will ensure consistency between jurisdictions, and reflect the current understanding that the term “child pornography” does not convey the seriousness of both the offence and harm faced by the victims. Media guidelines should be developed to ensure these crimes are reported consistently and appropriately across all media platforms. A consistent approach to terminology is needed to facilitate a stronger and more coherent response to online child exploitation. Consistency in the area was also recommended by the Royal Commission to Institutional Responses into Child Sexual Abuse, and may reflect potential recommendations to come out of South Australia’s Child Protection Systems Royal Commission.

²²⁰ *Criminal Code Act 1983* (NT) s 125A. Note there is a separate offence for indecent dealing children under 16 years of age, including intentionally taking or recording an indecent visual image of a child) although production of child abuse materials is separately covered in section 125A.

²²¹ *Criminal Code Amendment (Child Abuse Material) Act 2004* (NT); Second Reading, Criminal Code Amendment (Child Abuse Material) Act 2004 (Act No. 55, 2004).

²²² Second Reading, Criminal Code Amendment (Child Abuse Material) Act 2004 (Act No. 55, 2004).

²²³ *Criminal Code Act 1983* (NT) s 132.

²²⁴ *Criminal Code Act 1983* (NT) s 125A(1).

²²⁵ Second Reading, Criminal Code Amendment (Child Abuse Material) Act 2004 (Act No. 55, 2004).

²²⁶ Second reading speech, *Criminal Code Amendment (Child Abuse Material) Bill 2004*, as per Dr Toyne (Justice and Attorney-General) in Legislative Assembly on 6 October 2004 (parliamentary record number 22).

We recommend that the “Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse” (**‘the Luxembourg Guidelines’**),²²⁷ developed by the Interagency Working Group be followed in order to ensure greater conceptual clarity regarding terminology across Australian jurisdictions.²²⁸ Consistent terminology will assist with the implementation of national child protection systems such as Working with Children Checks.²²⁹ The use of consistent terminology will also facilitate national data collection.

Key Recommendation

COAG should work to revise the language of all relevant State, Territory and Commonwealth legislation to reflect the ‘Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse’. This will include a review of relevant State and Territory child protection legislation.

²²⁷ Luxembourg Guidelines, above n 10.

²²⁸ For further discussion of the Luxembourg Guidelines, see [section 6.1.9](#) of this report.

²²⁹ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report* (2015).

3. Chapter III: Sentencing

3.1. Overview

There are few areas where the age of the Internet has impacted upon the criminal law more severely than in the field of child pornography offences... At the same time as maximum penalties for these offences have been increased, the courts have made clear that the ready availability of material of this type has warranted substantial penalties with general deterrence and denunciation being paramount considerations.

Justice Johnson, *R v Porte* [2015] NSWCCA 174, at [51] and [59].

There has been extensive reform of the legislation surrounding online child exploitation offences at both State, Territory and Commonwealth levels. Many of the recent amendments discussed in Chapter 2, have significantly increased the maximum prison terms available. To understand the operation of these laws in a practical sense requires an examination of sentencing practices and outcomes for offenders convicted of the crimes.

In Chapter 1, data is outlined which demonstrates for example, that the majority of those charged with online child exploitation offences under Commonwealth legislation pleaded guilty and that, for certain offences, a majority of offenders received a custodial sentence. Data provided by the Commonwealth, however, does not indicate the length of custodial sentences and the extent to which there has been any increase in sentence length over time. This chapter identifies a significant gap in the research regarding sentencing practice and principles in the area of online child exploitation.

A number of interviewees considered current Australian sentencing for online child exploitation to be inadequate.

INTERVIEW

[T]here's not a police officer you'll find in this area that's happy with the sentencing. That is an issue for us; we would love to see the penalties increase. Certainly, when I say increase, the penalties there are probably ok, the maximums are ok... They're just not being imposed. That's a frustration.

Senior Officer with the Sex Crimes Squad of the NSW Police (Telephone interview, 6 July 2016)

This chapter examines sentencing case law for online child exploitation offences and identifies principles for guiding sentence outcomes. Court cases have been selected which represent some of the most recent sentences imposed as well as being indicative of sentencing practice and principles. This analysis demonstrates that sentences, particularly for cases involving child exploitation material, often do not reflect the maximum available penalty. In general agreement with those interviewed, this chapter concludes that there is a discrepancy between sentencing of online child exploitation materials offences and the severity of the crimes depicted in the images concerned. This finding is connected to the lack of consideration given to the harm suffered by victims of child exploitation material offences.

3.2. Sentencing Guidelines and Principles

3.2.1. Introduction

This section discusses a number of selected sentencing and sentencing appeal case reports in NSW, Victoria and Queensland.

In addition, this section also discusses cumulative and concurrent sentencing practices and the principle of totality. Aggravating and mitigating factors are also considered, where available.

3.2.2. Offences of procuring and grooming

Procuring and grooming charges which involve online interaction between the offender and potential victims are generally brought under the Commonwealth Criminal Code, notably s474.26 and 474.27,²³⁰ discussed in Chapter 2. These charges also provide for a maximum penalty of 15 years, which is greater than most State and Territory offences.²³¹

Recent online crimes of procuring and grooming indicate imprisonment for periods of less than two years, although there is considerable variation depending on the extent of the offending, other related charges and personal mitigating circumstances.

The case examples below provide factual accounts of the type of offending as well as sentencing outcomes. These cases also demonstrate that there are often additional charges involving child abuse materials, some of which had resulted from the procuring/grooming. Other cases also involve procuring/grooming that had led to actual hands-on abuse. The use of online persona by police in such cases is a common investigative tool.

KEY CASE EXAMPLE

*R v Tahiraj*²³²

Tahiraj involved two counts of procuring of real victims under s474.26 but also Commonwealth and Queensland offences relating to child pornography and child exploitation material. After trial, the accused was convicted on all counts and cumulatively sentenced to 12 years imprisonment with a 6 year non-parole period. Tahiraj appealed against his conviction and sentence.

Having dismissed his appeal against conviction the Court of Appeal turned to his appeal against sentence. The Court noted that the accused was only 19 at the time of the offending and that the victims were 13 and 14 respectively. The objective seriousness of the procuring offences, however, was very high and involved the production of images that were then placed on the internet and had been accessed by others. In addition to this, there were 181 images which formed the basis of the child pornography and child exploitation material charges. These included 78 images which were low or medium to low level; 44 which were medium to high level (penetrative sexual activity between

²³⁰ These are separate offences but are considered together here for convenience.

²³¹ Exception is NSW: *Crimes Act 1900* (NSW) s66EB(2)(a) where the maximum is 15 years in the case of a child under 14 years of age.

²³² [2014] QCA 353, [128].

children and adults); three which were high level (sadism or bestiality) and 56 which were animated or virtual.²³³

Given all of the above, the trial judge concluded that cumulative sentences were appropriate. The Court on appeal considered the trial judge's remarks on sentencing:

The total maximum sentence for these three groups would be 40 years imprisonment but this would be disproportionate and unwarranted. His Honour recited the sentences suggested by the prosecution. No sentence other than imprisonment was appropriate. The appellant's youth was an important factor. Ignoring questions of totality, his Honour would have imposed eight years imprisonment for count 6; with five years' imprisonment for each of counts 1 and 2 concurrent with each other but cumulative on count 6; and a further five years cumulative imprisonment for count 3, producing a total of 18 years imprisonment. That would not be a crushing sentence as the appellant would be released on parole aged 33 and continue his life. It would however be more than his criminality warranted and should be moderated. The appropriate total sentence was 12 years imprisonment.²³⁴

Of significance here were two prior NSW cases, *Tector* and *Asplund*,²³⁵ where the accused ultimately received sentences of 8 years with a non-parole period of 5 years, and 7 years with a non-parole period of 4 years respectively. The Court of Appeal, noted here, however that both of these cases involved offenders who were significantly older (54 with a victim aged 12, and 61 with a victim aged 13 respectively) than Tahiraj. It was for this reason that the appeal against sentence was allowed, Tahiraj's sentence being reduced to 8 years imprisonment with a 4 year non-parole period. In conclusion the court stated that;

This remains a severe penalty for any 19 year old first offender of this kind. It stands as a firm deterrent to him and others who would use the internet to criminally prey on young people, whilst still reflecting his youthfulness and supporting his rehabilitative prospects.²³⁶

*R v Sparrow*²³⁷

The case of *Asplund*, referred to in *Tahiraj*, was also significant in the case of *Sparrow*. *Sparrow* is an example of where procuring actually led to the indecent and sexual assault of the victim, a girl aged 12. In relation to this offending, Sparrow "pleaded guilty to ten charges which can be summarised as follows;

- Counts 1 and 10 – Using a carriage service to procure a person under 16 years of age to engage in sexual activity;
- Counts 2, 5, 6, 7 & 9 – Indecent treatment of a child under 16 years;
- Counts 3 and 8 – Sodomy of a person under 18 years; and
- Count 4 – Unlawful carnal knowledge of a child under 16 years.

Sparrow was sentenced to 8 years imprisonment with a non-parole period of 4 years and six months. He appealed against the severity of this sentence. In the dismissing his appeal, the Court of Appeal noted the determinative nature of *Asplund*.

²³³ *Ibid.*, [115].

²³⁴ *R v Tahiraj* [2014] QCA 353, [128].

²³⁵ *Tector v R* [2008] NSWCCA 151 ('Tector'), *R v Asplund* [2010] NSWCCA 316 ('Asplund').

²³⁶ *R v Tahiraj* [2014] QCA 353, [147].

²³⁷ [2015] QCA 271, 9.

3.2.3. Classification of child exploitation materials

The offences relating to both child pornography (as it is described in the Commonwealth Legislation) and child exploitation materials are numerous and varied across all jurisdictions. As discussed in Chapter 2, all State and Territory provisions refer to the material as either child abuse or child exploitation material, with Victoria recently assenting to amendments that will change the language of State legislation. This section will discuss those offences relating to production, dissemination and possession.

As Australia has acceded to the Cybercrime Convention,²³⁸ child pornography and child exploitation materials are classified according to national standards.²³⁹ Such material encompasses “sexually explicit conduct” which includes (real or simulated):

- a) Sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between minors, or between an adult and a minor, of the same or opposite sex;
- b) Bestiality;
- c) Masturbation;
- d) Sadistic or masochistic abuse in a sexual context; or
- e) Lascivious exhibition of the genitals or the pubic area of a minor.²⁴⁰

From 2002, materials were categorised according to the UK developed Oliver Scale. More recently, however, Australia has moved to its own national guidelines based on the Child Exploitation Tracking System (‘CETS’) Scale and the Australian National Victim Image Library (‘ANVIL’).²⁴¹ CETS is the software that forms the database that constitutes ANVIL. The classification of a large number of child exploitation images in the course of an investigation represents a significant occupational health risk.²⁴² In response to this risk, jurisdictions such as NSW and Victoria have adopted a process whereby investigators examine and classify a randomised sample of up to 10 000 images from the suspect’s collection.²⁴³

In the case of the *DPP v Zarb*,²⁴⁴ the accused pleaded guilty to one charge of accessing child pornography and two of transmitting child pornography contrary to s474.19(1) *Criminal Code 1995* (Cth). The images were assessed according to the Child Exploitation System (‘CES’) Scale.²⁴⁵

²³⁸ *Convention on Cybercrime*, opened for signature 23 November 2001, ETS 185 (entered into force on 1st July 2004)

²³⁹ Jonathan Clough, *Principles of Cybercrime* (Cambridge University Press, 1st ed, 2010) 255.

²⁴⁰ Cybercrime Convention, Explanatory Report, cited in Clough 302-3. In terms of Australian legislation, minor is determined by the relevant legislative provisions.

²⁴¹ *Ibid.* 303.

²⁴² ‘Report of the Child Pornography Working Party’ (Report, New South Wales Department of Justice and Attorney General, 10 January 2010), <http://www.justice.nsw.gov.au/justicepolicy/Documents/final_child_pornography_working_party_report_8jan.pdf>, 31.

Crimes Amendment (Child Pornography and Abuse Material) Act 2010 (NSW) Part 4A; *Crimes Amendment (Child Pornography and Other Matters) Act 2015* (Vic) s 70AAAE..

²⁴⁴ [2014] VCC 1517 (‘Zarb’).

²⁴⁵ This scale is identical to the CETS.

According to the CES scale, 310 of the images were Level 1 (depictions of children with no sexual activity); 15 of the images were Level 2 (solo masturbation by a child, or sex acts between children); 20 of the images were Level 3 (non-penetrative sexual activity between a child or children and adult or adults); 57 of the images were Level 4 (penetrative sexual activity between a child or children and adult or adults); 11 of the images were Level 5 (sadism, bestiality, humiliation or child abuse); and 2 of the images were Level 6 (anime, cartoons, comics and drawings depicting child or children engaged in sexual poses or activity).

Judge Hogan, *DPP v Zarb*, [2014] VCC 1517, para 5.

The case of *Martin v R*²⁴⁶ provides an example of the ANVIL scale. Martin pleaded guilty to five charges, one of possessing child pornography contrary to the *Crimes Act 1900* (NSW), s 91H(2); two charges of using a carriage service to access child pornography contrary to the *Criminal Code 1995* (Cth), s 474.19(1)(a)(i); one of producing child abuse material contrary to the *Crimes Act*, s 91H(2); and one of making available child pornography material using a carriage service contrary to the *Criminal Code 1995* s 474.19(1)(a)(iii). Martin was sentenced to 3 years imprisonment with a non-parole period of 18 months. The Crown appealed on the basis of the inadequacy of the sentence for each offence and the absence of accumulation of the sentences. In referring to the categorisation of material, Beazley P noted;

Child pornography material is categorised by reference to two scales, one being the Australian National Victim Image Library (ANVIL) and the other being the Child Exploitation Tracking System (CETS). Both scales categorise material according to the following categories: category one: sexually suggestive posing with no sexual activity; category two: non-penetrative sexual activity between children, or solo masturbation by a child; category three: non-penetrative sexual activity between adult(s) and child(ren); category four: penetrative sexual activity between adult(s) and child(ren); category five: sadism, humiliation or bestiality; and category six: animated or virtual depictions of children engaged in activity covered by categories one to five.²⁴⁷

It is worthwhile noting some of the evidence relevant to the charges. For count 1, the Crown stated that there were approximately 50,000 child victims, girls and boys, ranging in age from newborn to 15 years. This number was later reduced to 13,000 as many of the images were duplicates. In terms of the period of offending, count 2 ranged from 2005 to 2009 and count 3 between 9 May 2012 and 9 August 2012. Count 4 related to the production of child abuse material involving three videos of a male child being filmed by Martin. The child, who was the son of a friend of Martin, was not aware he was being recorded. Finally, count 5 involved the sharing of 47,773 files over a 6 month period.²⁴⁸

The Court ruled that the sentence for count 5 was inadequate and that the trial judge had erred in ruling that all sentences be served concurrently. As a result Martin was re-sentenced to a term of 4 years and 6 months with a non-parole period of 3 years.

In *R v McKenna*²⁴⁹ the accused pleaded guilty to one offence of possessing child abuse material contrary to s 91H(2) of the *Crimes Act 1900* (NSW); one offence of using a carriage service to groom a person under sixteen years, contrary to s 474.27 (1) of the

²⁴⁶ [2014] NSWCCA 283 ('Martin').

²⁴⁷ *Martin v R* [2014] NSWCCA 283 per Beazley P at [10].

²⁴⁸ *Ibid.*, [13-16].

²⁴⁹ *R v McKenna* [2015] NSWDC 250 ('McKenna').

Criminal Code 1995 (Cth); one offence of using a carriage service to procure a person under sixteen years for sexual activity, contrary to s 474.26(1) of the *Criminal Code 1995* (Cth); and two offences of using a carriage service to cause child pornography to be transmitted to self, contrary to s 474.19 (1)(a)(ii) of the *Criminal Code 1995* (Cth).

In accordance with guidance from the NSW Court of Criminal Appeal, Judge Colefax viewed a representative sample of the child exploitation material in McKenna's collection. In sentencing, his Honour provided graphic detail of the acts of exploitation material collected by McKenna, which included Category Five videos depicting a child between four and six years old being raped. His Honour goes on to describe these materials as being slightly below the middle range of objective seriousness for offences of that type. Which provide insight into the grave seriousness of online child exploitation at the highest level of offending.

The classification of materials is undertaken by law enforcement officers in preparation for trial. A number of the police officers interviewed specifically referred to the problems that have arisen due to the system of classification, as well as the occupational health risk.

INTERVIEW

A lot of judges aren't so keen on actually looking at the images; they don't really want to see them. And I don't blame them. But young police have got to see them. So we're doing some work around categorisation, trying to simplify the categorisation process. One image might take a person 1, 2, 3 minutes trying to determine which category it fits into. And the longer you're exposed to stuff the more chance of being damaged by it.

Senior Officer with the Sex Crimes Squad of the NSW Police (Telephone interview, 6 July 2016)

Sentencing Guidelines for child exploitation materials offences

A number of guidelines exist on sentencing for offences related to online child exploitation materials. The very recent and definitive judicial statement of these, which is also most commonly cited across all jurisdictions, is the NSW case of *R v De Leeuw*.²⁵⁰ In this matter the Court compiled the relevant principles for the sentencing of offences involving online child exploitation materials.²⁵¹

KEY CASE EXAMPLE

*R v De Leeuw*²⁵²

In this matter the Court compiled the relevant principles for the sentencing of offences involving online child exploitation materials:²⁵³

- (a) Unless exceptional circumstances exist, a sentence involving an immediate term of imprisonment is ordinarily warranted;²⁵⁴

²⁵⁰ *R v De Leeuw* [2015] NSWCCA 183 ('De Leeuw').

²⁵¹ *Ibid.*, [72].

²⁵² *Ibid.*

²⁵³ *Ibid.*

- (b) The objective seriousness of the offending is ordinarily determined by reference to the following factors:
- (i) The nature and content of the material, in particular the age of the children and the gravity of the sexual activity depicted;
 - (ii) The number of items or images possessed;
 - (iii) Whether the material is for the purpose of sale or further distribution;
 - (iv) Whether the offender will profit from the offence;
 - (v) In the case of possession or access of child pornography for personal use, the number of children depicted and thereby victimised;
 - (vi) The length of time for which the pornographic material was possessed;²⁵⁵
- (c) General deterrence is the primary sentencing consideration for offending involving child pornography;²⁵⁶
- (d) Less or limited weight is given to an offender's prior good character;²⁵⁷
- (e) Offending involving child pornography occurs on an international level and is becoming increasingly prevalent with the advent of the Internet as a means of allowing people to access and obtain child pornography;²⁵⁸
- (f) Offending involving child pornography is difficult to detect given the anonymity provided by the Internet;²⁵⁹
- (g) The possession of child pornography material creates a market for the continued corruption and exploitation of children;²⁶⁰
- (h) There is a paramount public interest objective in promoting the protection of children as the possession of child pornography is not a victimless crime - children are sexually abused in order to supply the market;²⁶¹
- (i) The fact that an offender does not pay to access a child pornography website or was not involved in the distribution or sale of child pornography does not mitigate the offending.

While *De Leeuw* states that an immediate term of imprisonment is ordinarily warranted, non-custodial sentences are not uncommon.

²⁵⁴ *R v Jongsma* [2004] VSCA 218; 150 A Crim R 386 at 395 [14]; *Hill v Western Australia* [2009] WASCA 4, [28]; *R v Booth* [2009] NSWCCA 89, [48]; *R v Sykes* [2009] QCA 267, [24]; *DPP v Groube* [2010] VSCA 150, [24]; *DPP (Cth) v D'Alessandro* [2010] VSCA 60; 26 VR 477 at 483-4 [21]; *Director of Public Prosecutions (Cth) v Guest* [2014] VSCA 29, [23]-[24]; *DPP v Smith* [2010] VSCA 215, [23], [26]-[29].

²⁵⁵ *R v Jongsma* at 400 [28]; *R v Gent* [2005] NSWCCA 370; 162 A Crim R 29 at 49 [99]; *DPP (Cth) v D'Alessandro* at 483-484 [21]; *Director of Public Prosecutions (Cth) v Guest* [2014] VSCA 29, [25].

²⁵⁶ *Assheton v R* [2002] WASCA 209; 132 A Crim R 237 at 246-247 [35]- [36]; *DPP (Cth) v D'Alessandro* at 483-484 [21]; *Edwards v The Queen* [2013] VSCA 188, [22]; *Director of Public Prosecutions (Cth) v Guest* [2014] VSCA 29, [25]; *Heathcote (A Pseudonym) v R* [2014] VSCA 37, [40] ('Heathcote'); *DPP (Cth) v Zarb* [2014] VSCA 347, [34].

²⁵⁷ *R v Gent* at 44 [65]; *DPP (Cth) v D'Alessandro* at 483-484 [21]; *Moucas v R* [2008] NSWCCA 181, [37].

²⁵⁸ *R v Jones* [1999] WASCA 24; 108 A Crim R 50 at 51 [2]; *Assheton v R* at 246-247 [35]-[36].

²⁵⁹ *Moucas v R* [2008] NSWCCA 181, [31]; *R v Booth* [2009] NSWCCA 89, [29].

²⁶⁰ *R v Coffey* [2003] VSCA 155; 6 VR 543 at 552 [30]; *R v Cook*; *Ex parte Director of Public Prosecutions (Cth)* [2004] QCA 469, [21] ('Cook'); *R v Jongsma* at 395 [14]; *Heathcote* [2014] VSCA 37, [40].

²⁶¹ *R v Jones* at 52 [9]; *DPP (Cth) v D'Alessandro* at 484 [23].

3.2.4. Cumulative/Concurrent Sentencing and the Principle of Totality

To understand the practical penalties imposed by courts on offenders of online child exploitation crimes, it is important to recognise the impact of cumulative and concurrent sentencing, and the various restraints placed upon the Court in determining appropriate sentences.

Offenders in criminal matters may be charged with multiple offences, either arising from a chain of offences in a single criminal act, or a series of separate incidents. This aspect of sentencing is particularly relevant in the area of online child exploitation crimes, where there may be a series of acts where, for example, an online procuring and grooming offence leads to the possession or production of online child exploitation material. In a criminal matter, the most severe sentence imposed for a single charge is referred to as the principal sentence. The court may then order sentences for additional charges to be served either cumulatively, concurrently, partially cumulatively or partially concurrently. This is particularly the case where there is a mix of State and Commonwealth offences. Some of the cases outlined above demonstrate the approach and potential difficulties.²⁶²

Concurrent sentences are those sentences that are to be served at the same time. For example, if an individual is sentenced to three years imprisonment for an offence contrary to s 474.26(1) of the Commonwealth Act, and is also sentenced to one year for an offence contrary to s 474.27(1) of the same legislation, then the total amount of time that the offender will serve will be three years, being the more severe sentence. Cumulative sentences are those that are to be served one after the other. So for the previous example, the offender will be required to serve a four year term of imprisonment. There are various provisions and common law principles that govern the imposition of either concurrent or cumulative sentences.

The *Crimes Act 1914* (Cth) clarifies the operation of this sentencing practice in circumstances where an offender is convicted of both State and Commonwealth charges, providing in section 16B that the sentencing Court must have regard to:

- (a) Any sentence already imposed on the person by the Court or another Court for any other federal offence or for any State or Territory offence, being a sentence that the person has not served; and
- (b) Any sentence that the person is liable to serve because of the revocation of a parole order made, or licence granted, under this Part or under a law of a State or Territory.

²⁶² For example see *R v Tahiraj* [2014] QCA 353, [128].

KEY CASE EXAMPLE

*Burbidge v R*²⁶³

The accused pleaded to two counts under s474.19, Commonwealth Criminal Code and 3 counts under s91H, *Crimes Act 1900* (NSW). In sentencing him to 4 years imprisonment with a 2 year and 3 month non-parole period, the trial judge had taken a cumulative approach to sentencing. Burbidge appealed on the basis that this was manifestly excessive. In dismissing his appeal, Rothman J noted that:

A study of the comparable cases discloses head sentences that vary significantly and range between 18 months' and 5 years' imprisonment...

His Honour then commented on the cumulative sentence imposed at sentencing;

The complaint about fixing sentences for the State offences to operate first and then accumulating the Commonwealth sentences is wholly without merit. It is an appropriate method of overcoming some of the complexities created by the interaction of the State and Commonwealth sentencing regimes, made more complex by the casuistry in the Commonwealth Crimes Act.²⁶⁴

The Principle of Totality

State and Territory jurisdictions each have legislative provisions that guide the sentencing of criminal matters in which concurrent/cumulative sentences may apply.²⁶⁵ These legislative guidelines are accompanied by common law principles that assist Courts in determining the sentence to be imposed in such matters, including the principle of totality.

The principle of totality requires that the final sentence must be "just and appropriate" to the totality of offending behaviour.²⁶⁶ In the matter of in *R v MMK*²⁶⁷ Street CJ summarised the totality principle as:

...descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.²⁶⁸

²⁶³ *Burbidge v R* [2016] NSWCCA 128 ('Burbidge').

²⁶⁴ *Ibid.*, [45].

²⁶⁵ For example, in NSW, Part 4 Div 2 of the *Crimes (Sentencing Procedure) Act 1999* provides a guide for the imposition of cumulative/concurrent sentences of imprisonment.

²⁶⁶ *R H McL v The Queen* (2000) 203 CLR 452, [15] ('R H McL'); *Johnson v The Queen* (2004) 78 ALJR 616, [18] ('Johnson'); *R v Harris* (2007) 171 A Crim R 267, [44] ('Harris').

²⁶⁷ (2006) 164 A Crim R 481.

²⁶⁸ *R v MMK* (2006) 164 A Crim R 481, per Street CJ at [12].

Tahiraj, mentioned above, is a good example, noting again the approach of the trial judge in sentencing.

The total maximum sentence for these three groups would be 40 years imprisonment but this would be disproportionate and unwarranted.²⁶⁹

The case outlined below best describes the sentencing complexities involved.

KEY CASE EXAMPLE

*Adamson v R*²⁷⁰

In *Adamson*, the accused pleaded guilty to Commonwealth charges involving procuring and grooming under ss474.26 and 27, as well as child pornography offences under the *Crimes Act 1958* (Vic). By way of a separate indictment, Adamson pleaded guilty to a number of blackmail charges under the Crimes Act. The offending was discovered by police when the victim went to the police who then took up the role of the victim. Adamson was then arrested when he went to collect what he believed to be \$10,000 which he had demanded from the victim (the basis for the blackmail charges). In total, Adamson was sentenced to 10 years imprisonment with a non-parole period of 7 years.

Due to the number of charges and the combination of State and Commonwealth offences, this was a complex sentencing exercise. The sentencing judge imposed a sentence of four years and six months' imprisonment for the blackmail offences, including the base sentence. The sentences imposed for the online child exploitation offences, including the State pornography offences, were cumulated on the second indictment such as to make a total effective sentence of six years and seven months' imprisonment. The component of the appellant's sentence that related to the online child exploitation offences was therefore two years and one month's imprisonment.²⁷¹

Adamson appealed against the severity of this sentence but this was ultimately dismissed.

Adamson was convicted under both State and Commonwealth provisions. For each charge under s474.26 of the Commonwealth legislation, the offender received 3 years or less. For each offence under s474.27 the defendant was sentenced to 2 years or less.²⁷² For these Commonwealth offences the defendant was sentenced to a total of 3 years and 9 months. It is relevant to reiterate that the statutory maximum penalty for each Commonwealth offence that the accused was convicted of ranges from 7 to 15 years.

²⁶⁹ *Tahiraj* [2014] QCA 353, [147].

²⁷⁰ *Adamson v The Queen* [2015] VSCA 194 ('Adamson').

²⁷¹ *Ibid.*, [69].

²⁷² *Ibid.*, [4].

3.2.5. Other sentencing principles

Scaling of Material

INTERVIEW:

... [J]udges are not required to actually view the images... That responsibility is essentially delegated to those law enforcement [officers] who are classifying the images so that a judge can then assess victim impact.

Representative of International Justice Mission Australia (Telephone Interview, 5 July 2016)

With regard to Australia’s national guidelines, the CETS Scale, the Court of Criminal Appeal in the matter of *R v Porte*, at paragraph 77 said:

It should not be assumed that Category 1 is mild in content. Despite being the lowest classification level, Category 1 material itself is capable of possessing significant gravity.²⁷³

In the matter of *Zarb*,²⁷⁴ the accused pleaded guilty to one charge of accessing child pornography and two of transmitting child pornography contrary to s474.19(1) of the Commonwealth Criminal Code. The images were assessed into categories under the CES scale, that align with the CES scale.

Category		No of images/movies
Level 1	Depictions of children with no sexual activity	310 images
Level 2	Solo masturbation by a child or sex acts between children	15 images
Level 3	Non-penetrative sexual activity between child(ren) and adult(s)	20 images
Level 4	Penetrative sexual activity between child(ren) and adult(s)	57 images 1 movie
Level 5	Sadism, bestiality, humiliation or child abuse	11 images
Level 6	Anime, cartoons, comics and drawings depicting child(ren) engaged in sexual poses or activity	2 images

Table 3.1 Categorisation of images in *DPP v Zarb* [2014] VCC 1517

Zarb ultimately received a Community Corrections Order of 3 years and 3 months, including 300 hours of community work. In imposing this sentence, the judge noted that the number of images was low and that this placed the accused's offending below the median in terms of culpability. This combined with many other personal mitigating factors led the judge to opt for a non-custodial penalty.

²⁷³ *R v Porte* [2015] NSWCCA 174 at [77].

²⁷⁴ *Zarb* [2014] VCC 1517.

General Deterrence versus Good Character

In the matter of *R v Gajjar*²⁷⁵ the defendant pleaded guilty to one count of using a carriage service to communicate with a person believed to be under the age of 16, contrary to s 474.26(1) of the Commonwealth *Criminal Code Act 1995*. He was sentenced to a term of 2 years and 6 months' imprisonment, but was subsequently placed on a recognisance release order that meant he was only required to serve 8 months of that term.

The trial judge noted various aggravating factors relevant to sentencing, including; the significant age difference between Gajjar and the 'girl' he believed to be 14; his willingness to corrupt someone he believed to be sexually inexperienced, and the suggestion that the relationship would be an ongoing one by his offer to present her with an iPod. Finally, there was the fact that he attended at the meeting point, signifying that he was not simply gratifying some theoretical urge.

Gajjar appealed this sentence. The defence argued that the trial judge erred by giving less weight to the defendant's good character in sentencing, due to the fact that grooming offences fall into a class of offending where general deterrence take precedence. The Court of Appeal disagreed.

The appellant's prior good character was, of course, relevant to sentence. Section 16A(2)(m) of the Crimes Act makes that abundantly plain. However, in cases of procuring for sexual purposes contrary to s 474.26(1), it is clearly appropriate, in our view, to give paramount consideration to the principle of general deterrence. It follows from that proposition that it must be open to a sentencing judge to give less weight to prior good character, in such cases, than it might otherwise bear. That is not to say that less weight is to be accorded to good character in any absolute sense. It is rather to recognise that, when greater weight is attached in the balancing process to general deterrence, it necessarily follows, at least in a relative sense that less weight will be accorded to what might otherwise be significant mitigating factors. There is nothing remarkable about this proposition. It is well established that good character will ordinarily be of less weight in relation to certain classes of offences than it is in relation to others.²⁷⁶

Non-Custodial Sentences

In the case of *DPP v MP*²⁷⁷, the defendant pleaded guilty to one count under s474.26. The victim was aged 15 and the offender 25 at the time of the offence. There were hundreds of communications over a period of months and in her victim impact statement, the victim stated that she had become very depressed, suffering from suicidal thoughts as a result of the events.

While the judge noted the seriousness of the offence and need for general deterrence, these concerns, he said, were outweighed by MP's personal circumstances. Chief among these were MP's intellectual disability and post-traumatic stress disorder ('PTSD') which was linked to sexual abuse that he had suffered from his stepfather. Significantly, however, the judge drew no conclusions as to the connection between the offender's own sexual abuse and the offence at hand. MP was given an 18 month corrections order with 100 hours of community service. He was also placed on the Sex Offender's Register for a period of 8 years.

²⁷⁵ *R v Gajjar* [2008] VSCA 268; (2008) 192 A Crim R 76.

²⁷⁶ *Ibid.* per Maxwell P, Nettle JA, Weinberg JA in at [26] – [29].

²⁷⁷ *DPP v M* [2016] VCC 1050 ('M').

Created and Assumed Victim Identities

INTERVIEW

[W]e have several online profiles of children that we have created...Our guys literally go online every day, day and night they'll go online purporting to be children. So for all intents and purposes they will be online in an online persona of a child, and they'll either do proactive work in chat rooms trying to locate people or reactive, from things like these reports that have been made. And then through that work we'll try and identify people... we do tend to use a lot of Commonwealth legislation in our unit and the main reason for that is because we're operating in that covert, online environment, a lot of offences that we detect are 'use carriage services' offences... using a carriage service to transmit indecent communication, using a carriage service for child pornography material.

Senior Officer with the Sex Crimes Squad of the NSW Police (Telephone interview, 6 July 2016)

The matter of *DPP v Allen*²⁷⁸ is a good example of where there was no victim and the communications took place between the accused and a police operative posing as a teenage girl. As a result of this operation Allen pleaded guilty to one count under s474.26 of the *Criminal Code Act 1995*. Important evidence included the sexualised nature of many of the communications and suggestion that the offender and "victim" meet. The judge also concluded that the evidence indicated that Allen had a sexual interest in 13 year old girls.

While the defence sought to mitigate Allen's liability on the basis of there being no victim, the Court rejected this. The judge did, however, note that a search of the Allen's residence found no child pornography material and that he had pleaded guilty at the earliest opportunity. Even so, it was agreed that the objective seriousness of the offence was high and that there was a need, in accordance with previous decisions for both specific and general deterrence. Weighing up all these factors, Allen was sentenced to a term of 2 years' imprisonment. It was ordered, however, that Allen be released after serving 4 months to then be on recognisance for the remaining 20 months.

In her judgment, her Honour noted that section 474.28(9) of the *Criminal Code Act 1995*:

...makes it clear it does not matter that the recipient to whom the sender believes the sender is transmitting a communication is a fictitious person, being represented to the sender as a real person.²⁷⁹

The judge went on to note that in the matter of *R v Gajjar*²⁸⁰ the Court investigated relevant authorities and principles which indicated:

...the legislature viewed conduct of this kind as deplorable. An offender's conduct was to be regarded as no less morally reprehensible merely because the person to whom the communication was made was, unbeknown to him, an undercover police officer.²⁸¹

²⁷⁸ Allen [2016] VCC 837.

²⁷⁹ Ibid.

²⁸⁰ *R v Gajjar* [2008] VSCA 268; (2008) 192 A Crim R 76.

²⁸¹ Ibid. [56].

It appears, therefore, that the relevance of whether a victim is 'real' or created has little impact on the determination of Courts, as general deterrence is a primary consideration of sentencing.

Method of Procurement Relevant to Sentencing of Contact Offenses

*R v Sparrow*²⁸² is also an example of where procuring actually lead to the indecent and sexual assault of the victim, a girl aged 12. In relation to this offending Sparrow pleaded guilty to charges of,²⁸³

- Using a carriage service to procure a person under 16 years of age to engage in sexual activity;
- Indecent treatment of a child under 16 years;
- Sodomy of a person under 18 years; and
- Unlawful carnal knowledge of a child under 16 years.

Sparrow was sentenced to 8 years' imprisonment with a non-parole period of 4 years and six months. He appealed against the severity of this sentence, claiming that "too great an emphasis was placed on the communications between Sparrow and P, in that without regard to them a sentence of no more than three to four years was warranted for counts 2-9."²⁸⁴ These counts related to the charges of indecent treatment of a child young than 16 years of age. The Queensland Court of Appeal dismissed this claim, stating that the communications;

Were the means by which all the offending in counts 2–9 was able to be committed... [and] continued after the conduct in counts 2–9, with the evident purpose of continuing the grooming for further unlawful sexual activity... They were an integral part of the overall offending, and contributed to the nature and seriousness of the total offending.²⁸⁵

3.2.6. Recommendations

INTERVIEW

Now currently, the sentencing is based on 'How many images do they have?', and 'What was the severity of the material?'... [W]e believe that this is not an accurate or appropriate way to sentence... the size of [the] collection doesn't matter; it doesn't mean you're a bigger or smaller threat to the community. So what we are trying to propose is 'How was the individual found by the police?' You know, were they on TOR? Were they utilising encryptions? Were they utilizing methodology to avoid police detection? Or were they on peer-to-peer, which is you know, really quite simple. That's one aspect. How did we find them? The other thing we want to propose is, and this is done in the US, is we want to humanise the actual crime and in many cases there's Australian children in these peoples' collections.

Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016)

²⁸² *Sparrow* [2015] QCA 271.

²⁸³ *Ibid.* [8].

²⁸⁴ *Ibid.* [34].

²⁸⁵ *Ibid.* [33].

Read together with the statistics gathered in Chapter 1, the above review of recent case reports attempts to identify sentencing trends and principles that guide the penalties imposed upon online child exploitation offenders. Case studies illustrate an emphasis placed by Courts on the seriousness and rate of offending. The case reports indicate that judges recognise the community's abhorrence of such crimes, emphasising the role of sentencing as both a general and specific deterrent.

A number of guidelines exist on sentencing for the above offences. These relate to the objective seriousness of the offence. The definitive judicial statement of these, which is also most commonly cited across all jurisdictions, is the NSW case of *De Leeuw*.²⁸⁶

In sentencing, the nature of the material is very important. What is different now are the classification scales used. In 2009, materials were classified according to the English COPINE and Oliver scales. As noted above, cases now rely on CETS and ANVIL, although the categories in these do reflect the previous scales.

Variations in sentencing severity also arise in relation to whether the offence is one of mere possession, or whether there is also dissemination (including possible production). But possession itself is a variable offence depending on the number of images or files, the age of victims, the number of different victims and the extent to which the offender is a member of some form of collaborative network. As *De Leeuw* also notes, a sentence of immediate imprisonment is always warranted for such offences unless there are exceptional circumstances.²⁸⁷

Case reports also indicate that the sentences being imposed upon online child exploitation offenders are negligible compared to the gravity of the crime, with recent sentences failing to reach a penalty close to the statutory maximum. As indicated above, some offenders receive non-custodial sentences for crimes of online child exploitation.

3.3. Connecting online child exploitation materials to harm

What many may consider to be low levels of abuse of boys and girls can have catastrophic consequences for them, leading to a life which is seriously compromised from what might otherwise have been. Both boys and girls are left with a distrust of adults and difficulties with intimacy... This can result in lifelong difficulty in relationships which can cause problems in other aspects of their lives. Although the impact on the lives of abused persons has been reported within the academic literature I have no doubt that it is not well understood by the general community. In my world as a Judge I have been called upon to review many of the sentences imposed upon people convicted of sexual abuse of children, but I readily acknowledge that until I began my work with the Commission, I did not adequately appreciate the devastating and long lasting effect which sexual abuse however inflicted can have on an individual's life.

McClellan JA in His Honour's opening address to the first public hearing of the Royal Commission into Institutional Responses to Child Sexual Abuse, September 2013.

A recurring concern raised in interviews was that sentences in many cases do not reflect the severity of the crimes depicted, and that Courts were failing to recognise the

²⁸⁶ *De Leeuw* [2015] NSWCCA 183.

²⁸⁷ *De Leeuw* [2015] NSWCCA 183, 72.

connection between the possession of online child exploitation materials and the harm faced by the child victims depicted:

I think unfortunately we still often do see courts responding in ways that are really not adequate... they still see a lot of these types of offences as victimless crimes if there isn't an identified [victim] sitting in court... They often sort of say that... 'they're downloading image', 'they're doing it in their own home', you know 'they're not hurting anybody'.²⁸⁸

...[T]o my mind it is all on the same continuum. It's the sexual interest in children and it starts at the bottom end with looking at images and developing fantasy around sex with children, and at the opposite end of the scale, of course, is the worst abuse of a child.²⁸⁹

Arguably, this is reflected in case law, which indicates a tendency for sentences to reflect the lower end of the penalty spectrum. Of the cases examined in this chapter, none have resulted in the maximum penalty sentence.

KEY CASE EXAMPLE

*R v Steven James McKenna*²⁹⁰

McKenna pleaded guilty to offences including:

- Possessing child abuse material: s91H(2) *Crimes Act 1900* (NSW);
- Using a carriage service to groom a person under 16 years: 474.27(1) Commonwealth *Criminal Code*;
- Using a carriage service to procure a person under 16 years for sexual activity: 474.26(1) Commonwealth *Criminal Code*; and
- Using a carriage service to cause child pornography to be transmitted to self: s 474.19(1)(a)(ii) Commonwealth *Criminal Code*.

In relation to the child abuse and child pornography charges the judge first acknowledged the relevance of CETS.²⁹¹ His Honour noted that in accordance with guidance from the NSW Court of Criminal Appeal, he had viewed a representative sample of the material, of which he outlined the content of single images from each category. He then outlined that;

These facts constitute the possession of child abuse material. In terms of objective seriousness for offences of that type, it is slightly below the middle of the range.²⁹²

Following this observation, his Honour noted that one of the two victims of the procurement charges had provided a victim impact statement, from which his Honour determined that ;

It is clear that the criminal offending by Mr McKenna has had a serious impact on that young lady.²⁹³

There was also evidence that the other female victim had attempted to commit suicide as

²⁸⁸ Interview with a representative from an NGO (Telephone interview 8 August 2016).

²⁸⁹ Interview Conducted with a member of the New Zealand Government's Internal Affairs team (Telephone interview, 27 July 2016).

²⁹⁰ *McKenna* [2015] NSWDC 250.

²⁹¹ *Ibid.* [27]-[34].

²⁹² *Ibid.* [45].

²⁹³ *Ibid.*

a consequence of the defendant's actions.

In sentencing McKenna to an effective sentence of 5 years imprisonment with a non-parole period of 3 years and five months, his honour stated that:

Clearly no sentence other than a period of fulltime imprisonment is appropriate... because there were two victims; the two offences of use carriage service to groom and procure should be partially accumulated with each other and the totally concurrent sentences for the other three offences I have just mentioned. This structure gives rise to well-known problems which in New South Wales have been addressed by giving Courts the ability to impose aggregate sentences.²⁹⁴

The sentencing outcome in the matter of *McKenna* reveals a heavy emphasis placed on the impact of offending upon the “two victims” of the crimes, one of whom had provided a victim impact statement to the Court. This would indicate that for crimes of online child exploitation to be recognised as serious offences, identifiable victims who are able to articulate the impact of offending are required.

This issue of connecting harm suffered to the material itself was raised by interview participants in New Zealand where an emphasis is placed on victim impact statements as a means of reinforcing the serious nature of the crimes depicted in online exploitation material.

INTERVIEW:

We will do a victim impact statement around the victim in those images. So we regularly go overseas to overseas law enforcement to find out about that investigation, to find out what happened to the victim, what the impact of that offending was on the victim, and then we'll do a victim impact statement around the victim in that image. And we've had judges in one case, break down in tears... So they're very hard hitting. And for us that's a tool that reinforces the seriousness of the offending. And it's been really successful.

Officer in Charge, Online Child Exploitation Across New Zealand (OCEANZ) (Telephone interview, 11 July 2016).

3.4. Other areas of Reform

3.4.1. Sentencing for administrators of online child exploitation networks

INTERVIEW:

[T]he legislation wasn't really written to address these head administrators... [they] are not only proliferating sexual abuse material of children, but in many cases they are administering networks that demand ongoing abuse of children to maintain membership.

Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016)

²⁹⁴ Ibid.

Currently, there are no Commonwealth provisions dealing with the administration of online child exploitation material networks, where the administrator is based out of Australia. The recent high profile cases of *Graham* and *McCoole*, illustrate how the expansion of online technologies has resulted in the mass possession and distribution of images and videos that comprise online child exploitation material, and also provide examples of how these networks encourage the further abuse and exploitation of children in Australia and overseas.

In the case of *Burbridge*²⁹⁵ above, the sentencing judge noted that the distribution of images was not for commercial purposes, and this acted as a mitigating factor in sentencing. However, as examined below, we can see how administrators of large networks use images themselves as a form of online currency to expand their online communities, encouraging and facilitating extreme abuse of children.

Shannon Grant McCoole

In 2014, Danish investigators contacted Queensland police regarding a number of online child exploitation images found in the possession of a Danish national. These images were taken by the offender Shannon Grant McCoole over a period of 10 months from June 2011 to April 2012. Within some of the images were handwritten notes, suggesting that they were taken for purpose of distribution at a later date, either to another individual, or through an online network, referred to as website “Q”.²⁹⁶ It was also discovered that between June 2013 and June 2014, McCoole had sent numerous posts and private messages through website Q.

Six children were identified in the images taken by McCoole on his own digital camera, as children who were left in the offender’s care, in the context of his employment under Families South Australia and Nanny South Australia. The images also contained one other child who was identified by police. The circumstances surrounding the investigation and arrest of McCoole are outlined in [section 6.2.3](#) of this report.

The offender ultimately pleaded guilty to 18 State offences and 2 Commonwealth offences, relating to sexual offending against children and the production, dissemination and possession of child exploitation material. Of the Commonwealth offences, one related to the transmission of child pornography using a carriage service and the other offence involved urging or inciting the transmission of child pornography over the internet, with the intention that the offence incited would be committed.²⁹⁷

The sentencing judge, in discussing the Commonwealth charges, outlined that website Q was:

A website that functioned for the sole purpose of facilitating the distribution of child pornography material and encouraging discussion about child abuse amongst its significant number of members.

The network allowed communication between individuals in a secure fashion that enabled them to contact each other and share data without necessarily identifying themselves. It was highly sophisticated, elaborate, organised and controlled. The website was supported by members who were initially required to upload a quantity of pre-seen hardcore child exploitation material upon registration and members were required to continually upload a regular supply of child exploitation material to ‘Q’ website in order to retain membership.

²⁹⁵ *Burbridge* [2016] NSWCCA 128.

²⁹⁶ The name of the network in question has been suppressed.

²⁹⁷ *Criminal Code Act 1995* (Cth) Div 474.19 (iii) and Div 11.4 (for Incitement Provisions).

...The spans of control included you in the position of head administrator of 'Q' website until your arrest in June of 2014. The head administrator was responsible for the administration of the board by enabling others to distribute child exploitation material through it, encouraging the production of child exploitation material and causing child exploitation material to be transmitted to yourself and others.

... Generally speaking, to move up the membership levels, there was a requirement to post and upload and increase the amount of child exploitation material every 30 days.

... Private Zone members were required to post child exploitation material every 14 days to retain membership. The Producers Lounge was for people who produced their own content. In order to gain access, a member was required to prove they had access to at least one child and the ability to produce content with that child. The content was required to contain penetration of the child which was visible in the video or image. The child was required to hold a sign that had the applicant's username, the date and the words 'Q' website."²⁹⁸

McCooles position as head administrator was evidenced by a post published by him on website Q, reminding members of the requirement that they upload to the website child exploitation material at least once a month. At the point that this post was published, the website had about 1,000 members.

The sentencing judge, His Honour Judge Rice, attempted to characterise the nature of these types of crimes:

In part it is a money-making venture, although not for you, but in the main it is - as I have said before - aimed at satisfying the sexual appetites of likeminded people. Its dissemination can be instantaneous via the internet. The creation and dissemination of this material must be shut down. As has been said before, it is a serious social evil."²⁹⁹

Ultimately, in regard to the two counts related to Commonwealth offences, McCooles was sentenced to a minimum of three years for the transmission of child pornography, and a minimum of one year for the offence of incitement, to be served cumulatively.

INTERVIEW:

So that's where we fail at the moment. More and more we are dealing with Australians who have roles in these criminal networks.... And that's pretty serious.

Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016).

Matthew David Graham³⁰⁰

Graham was the administrator of a series of online websites and forums between 2012 and 2014. Through these websites Graham, under the pseudonym 'Lux', connected with other online offenders and was linked to prolific Australian offenders, such as Shannon McCooles. During this time period, Graham administered hundreds of thousands of images, including videos of the torture and rape of a toddler in the Philippines, and in one instance encouraged the rape and murder of a child in Russia. The United States Federal

²⁹⁸ *R v Shannon Grant McCooles* (Unreported, District Court of South Australia, Rice DCJ, 7 August 2015) 5-6.

²⁹⁹ *Ibid*, [9].

³⁰⁰ *The Queen v Graham* [2016] VCC 305 ('Graham').

Bureau of Investigations described Graham's network as "one of the largest and most extreme in the world."³⁰¹

The matter was referred to the AFP and Victoria Police by FBI officers. Graham was arrested in 2014 and ultimately pleaded guilty to 13 Commonwealth charges. He was sentenced to 15 years and 6 months, with a non-parole period of 10 years.

In sentencing the offender, His Honour looked to mitigating factors including,³⁰²

- The guilty plea;
- The offender's contrition or remorse;
- The offender's prospects of rehabilitation;
- The offender's youth (although His Honour determined that due to various considerations, necessarily less weight was to be placed on this factor);
- The increased custodial burden; and
- Medical conditions existing at the time of the offence(s).³⁰³

His Honour also looked to sentencing principles in determining the effective sentence in the matter, including,³⁰⁴

- General deterrence as a paramount consideration;
- The nature and seriousness of the offending; and
- The principle of totality.

State-based provisions related to the administration of online networks

As noted in section 2.5 of this report, there are a variety of State and Territory offences that refer to online child exploitation materials, or equivalent terms. While our research suggests that the online aspects of offending are often prosecuted under Commonwealth law, a few Australian jurisdictions have introduced provisions to deal with individuals found to be administrators of online child exploitation networks.

In Victoria, it is an offence to administer or encourage the use of "child pornography website",³⁰⁵ and it is also an offence to provide information to a person that is likely to assist them in avoiding capture or prosecution for committing one of these offences.³⁰⁶ The legislation provides examples of this latter offence, including circumstances where:³⁰⁷

- 1 A provides information to B about how to use a website to deal with child pornography anonymously or how to encrypt electronic files containing child pornography.
- 2 A provides information to B about how to delete electronic data that records information about B's identity.

³⁰¹ Ibid, [56].

³⁰² Ibid, [29]-[54].

³⁰³ See *R v Verdins* (2007) 16 VR 269 ('Verdins').

³⁰⁴ Graham [2016] VCC 305, [55]-[73].

³⁰⁵ *Crimes Act 1958* (Vic) ss70AAAB and 70AAAC.

³⁰⁶ *Crimes Act 1958* (Vic) s70AAAD(1).

³⁰⁷ *Crimes Act 1958* (Vic) s70AAAD(1).

Victoria's Attorney-General, Martin Pakula, described the introduction of these offences as:

... a clear message to anyone considering committing these child pornography offences that the internet is no longer an anonymous domain for their abhorrent crimes.

This bill will modernise Victorian laws to make the investigation and prosecution of online child pornography offences in this state more effective.³⁰⁸

In 2016, similar provisions were added to Queensland legislation.³⁰⁹ Where a hidden network or anonymising service is used to commit an offence under these new provisions, the maximum penalty will increase from 14 years to 20 years.³¹⁰ This increase in penalties were advocated in response to:

... the Commission's findings that the conduct involved in making new material to be distributed over the internet, especially when it is known that the market is becoming increasingly depraved and voracious, often involves the use of anonymising tools to conceal a person's identity. This makes the detection of offending behaviour, identification of perpetrators and protection of children at risk, more difficult. The amendments will address legislative gaps and limitations identified by the Commission to deter this conduct and protect the community from this abhorrent offending.³¹¹

The relatively recent introduction of State-based legislation surrounding the administration of online child exploitation networks demonstrates this as an emerging issue in Australia. Following the example of Victoria and Queensland, there may be scope for Commonwealth provisions dealing with individuals who administer online child exploitation networks through the use of carriage services to be introduced.

3.4.2. Carly's Law

The sheer volume of internet communications of this nature referred to both at the trial and in the hearing prior to the trial is concerning. It shows it would seem that the internet is indeed a lawless highway populated by sexual predators, con men and thieves. The manner in which the respondent inveigled his way into the home of Ms Ryan by first gaining the trust, albeit temporarily of Ms Ryan's mother was also typical of the behaviour of paedophiles grooming underage children for sex.

- *R v Newman* [2010] SASC 82 per Kelly J at [18].

In 2006, a 14 year old South Australian girl, Carly Ryan, began communicating with an online profile of a man who she believed to be a young, adult musician 'Brandon Kane'. This profile was fictitious, one of a several hundred online profiles run by then 50 year-old Gary Frances Newman. Mr Newman attended Ms Ryan's 15th birthday, under the guise of being Brandon Kane's stepfather 'Shane'. After she rejected his sexual advances, Newman arranged to meet her at a beach, where he subsequently physically assaulted the girl, and strangled her to death.

³⁰⁸ The Hon Martin Pakula MP, *New laws to combat child pornography offences* (Media Release, 4 August 2015) <<http://www.premier.vic.gov.au/new-laws-to-combat-child-pornography-offences/>>.

³⁰⁹ *Criminal Code Act 1899* (QLD) ss 228DA, 228DB and 228DC.

³¹⁰ *Criminal Code Act 1899* (QLD) ss 228DA, 228DB and 228DC.

³¹¹ Explanatory Notes, *Serious and Organised Crime Legislation Amendment Bill 2016* (QLD), 44.

The murder of Carly Ryan prompted Senator Nick Xenophon to introduce the *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010* in an attempt to amend Commonwealth criminal law, and create a federal offence for adults who deceive children about their age while communicating with them online. The original bill failed to pass and a new bill was introduced in 2013 that lapsed in November that year. Regardless, there has been a continued push for criminal reform in South Australia, spearheaded by the Carly Ryan Foundation, and titled “Carly’s Law”. As of the date of writing, an online petition to amend South Australian law has gathered 63,134 signatures. The petition asks that the Commonwealth government “make it illegal for adults to misrepresent their age to minors online for the purpose of grooming with the intent to meet that child.”³¹²

A number of interviewees indicated that this type of deception could instead be considered as an aggravating factor in the sentencing of online child exploitation offenders.

On 2 March 2017, the Federal Minister for Justice, the Hon Michael Keenan MP announced a version of Carly’s law that will:

...make it a crime for an adult to use a carriage service to commit an act in preparation for, or planning to, cause harm to or engage in or procure sexual activity with a minor. Importantly this will include those who misrepresent their age.³¹³

The *Criminal Code Amendment (Protecting Minors Online) Bill 2017* was referred to the Senate Legal and Constitutional Affairs Legislation Committee on 30 March 2017, and the Committee is due to report on 13 June 2017.

Key Recommendation

Substantial further research should be conducted into sentencing outcomes for online child exploitation offences

³¹² Carly Ryan Foundation, *An online predator murdered my 15yr old daughter - introduce Carly’s Law now*, change.org <<https://www.change.org/p/an-online-predator-murdered-my-15yr-old-daughter-introduce-carly-s-law-now>>.

³¹³ The Hon Michael Keenan MP, *New Carly’s Law to protect young Australians online*, (Media Release, 2 March 2017) <<https://www.ministerjustice.gov.au/Mediareleases/Pages/2017/FirstQuarter/New-Carly's-Law-to-protect-young-Australians-online.aspx>>.

4. Chapter IV: Internet Service Providers and Web Hosts

4.1. Overview

The expansion of online technologies has led to increased adoption of the internet globally. Users are accessing, sharing and consuming content, all of which are facilitated by online search engines and social networking services. The rise of the internet age has provided child sex offenders with unprecedented opportunities to engage in online child exploitation and to connect with other offenders. This chapter aims to explore the obligations, policies and measures that ISPs, search engines, and social networking services are implementing to address online child exploitation. The following sections include an analysis and comparison between key providers in each of these areas, in order to ascertain what steps providers are taking to prevent the sexual exploitation of children online.

4.2. Internet Service Providers

An ISP is defined in schedules 5 and 7 of the *Broadcasting Services Act 1992* (Cth) as an entity which supplies, or proposes to supply, an internet carriage service to the public. The rapid development and expansion of computer and internet usage has placed ISPs at the forefront of the burgeoning online child exploitation phenomenon and, in turn, the fight against it. Australia's largest ISPs, Telstra, Optus, iiNet and TPG internet, are subject to a variety of legal obligations aimed at fighting child pornography and child abuse.³¹⁴ ISPs take measures to ensure they comply with the law, including passing on child exploitation obligations to their users. The extent to which each ISP takes its social responsibilities seriously in comparison to its legal obligations in relation to online child exploitation is not uniform and varies between ISPs.

For the purposes of this report we have focused on Australia's largest ISPs, all of which are hosted domestically:³¹⁵

- Telstra;
- Optus;
- iiNet; and
- TPG.

4.2.1. Legislative Provisions

Under section 474.25 of the *Criminal Code Act 1995* (Cth):

A person commits an offence if the person:

- (a) Is an internet service provider or internet content host; and

³¹⁴ *Australian Broadband Providers – Which ISP? (2016) You Compare*
<<http://broadbandguide.com.au/providers>>.

³¹⁵ *Ibid.*

- (b) 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 CP or CA material; and
- (c) Does not refer details of the material to the AFP within a reasonable time after becoming aware of the material.

In addition, section 313 of the *Telecommunications Act 1997* (Cth) requires carriage service providers to:

Do [their] best to prevent telecommunications networks and facilities from being used in, or in relation to, the commission of offences against the laws of the Commonwealth or of the States and Territories,³¹⁶

and

Give officers and authorities of the Commonwealth and of the States and Territories such help as is reasonably necessary for ... enforcing the criminal law; assisting the enforcement of the criminal laws in force in a foreign country.³¹⁷

The combination of these key pieces of legislation has resulted in ISPs updating their terms and conditions to include user obligations which prohibit the use of their applicable services in a manner that is unlawful or in breach of law.³¹⁸ Telstra imposes an obligation on its users to “not use the service or attempt to use a service in any way which causes the user to breach any applicable part of these terms of use or to breach a law (including a foreign law), a code or an instrument which governs the user’s conduct”.³¹⁹ ISP agreements and policies include reporting and monitoring obligations which enable ISPs to comply with their legal obligations under the above laws.³²⁰

4.2.2. Regulation

Internationally, the trend has been to promote the development of a self-regulatory approach for ISPs.³²¹ In Australia the approach taken is a co-regulatory scheme, which means that government, industry and the community all have roles to play in managing internet safety issues. The *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) sets out the legislative framework for online content regulation. Under the Online Content Scheme, set up by schedules 5 and 7 to the *Broadcasting Services Act*, industry groups are required to develop codes about certain matters.³²² These are then

³¹⁶ *Telecommunications Act 1997* (Cth) s 313(1).

³¹⁷ *Telecommunications Act 1997* (Cth) s313(3)(c) and (ca).

³¹⁸ *Compliance Regulations* (2015) iiNet <<https://www.iinet.net.au/about/legal/compliance-regulations.html>>.

³¹⁹ *Terms and Conditions* (28 October 2016) Telstra <<https://www.telstra.com.au/content/dam/tcom/personal/consumer-advice/pdf/consumer/hf-general.pdf>>.

³²⁰ *Ibid.*; iiNet *Our Customer Relationship Agreement Acceptable Use Policy* (17 March 2014) <<https://assets.iinet.net.au/website/about/legal/cra/iinet-group-acceptable-use-policy-v1.pdf>>; Singtel Optus, *iBurst from Optus Acceptable Use Policy Appendix A* (Undated) <<https://www.optus.com.au/content/dam/optus/appendix/Appendix%20AA/AppAA.doc>>; TPG Telecom Limited, *Standard Terms & Conditions* (Undated) <https://www.tpg.com.au/terms_conditions/standard, accessed 20 July 2016>.

³²¹ Directorate General, Justice and Home Affairs, “Background paper”, *International Conference on Combating Child Pornography on the Internet*, Vienna, 29 September — 1 October, viewed 27 July 2016, <<http://www.asem.org/Documents/99ConfVienna/conf.asp>, accessed 27 July 2016>.

³²² ALRC, *The Current Classification Scheme* <<http://www.alrc.gov.au/publications/2-current-classification-scheme/broadcasting-services-act>>.

registered by the regulator, which was initially the Australian Broadcasting Authority, then the ACMA, and is now the OCEC. The regulator can investigate complaints about online material that is either 'prohibited content' or 'potential prohibited content', and can issue a notice requiring certain action to be taken by the content host (for example, removing the content). Financial penalties apply to hosts who fail to comply with a notice. Where the content is sufficiently serious, the regulator must notify law enforcement agencies.

Unfortunately, the Online Content Scheme is somewhat dated, as the industry codes were drafted in 2005 and have not changed, despite the rapid developments in the online sphere since then. The legislation has also remained the same since it was drafted, more than ten years ago. This raises concerns about whether the Online Content Scheme is becoming redundant. Another issue is the emergence of technologies that obscure or anonymise the identity of individuals who engage in the distribution and dissemination of online child exploitation material, such as TOR. The Online Content Scheme was not designed to combat this and may not have the capacity to do so. These technologies are discussed further below.

Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission ('**ACCC**') has authority under the Competition and Consumer Act 2010 (Cth) to enforce fair competition within the telecommunications industry. The ACCC also ensures the protection of consumer's interests.³²³

The Australian Communications & Media Authority

The ACMA is an Australian Government authority that regulates telecommunications within Australia, including the internet and plays a role in the eradication of child sexual abuse from the internet.³²⁴ The ACMA is responsible for the promotion of industry self-regulation and protection of consumer interests as well as investigating complaints regarding illegal or infringing content hosting.³²⁵ In 2015, the Office of the Children's eSafety Commissioner, a statutory office of the ACMA, took over the responsibility of protecting minors online.

Office of the Children's eSafety Commissioner

The OCEC is responsible for the safety of Australian children online, having taken over this responsibility from the ACMA in 2015.³²⁶ The OCEC has a focus on protecting children from cyberbullying, but also has a significant role in dealing with illegal online content, including child exploitation material.³²⁷ The OCEC conducts investigations into online content containing child abuse, and notifies the relevant law enforcement agencies

³²³ *Australian Competition & Consumer Commission* (Undated) Australian Competition & Consumer Commission <http://www.accc.gov.au/>.

³²⁴ *Australian Communications Media Authority Regulatory Responsibility* <<http://www.acma.gov.au/theACMA/regulation-responsibilities-acma>>; Australian Communications Media Authority *Dramatic rise in child sexual abuse material investigations* <<http://www.acma.gov.au/Citizen/Stay-protected/My-online-world/Staying-safe-online/dramatic-rise-in-child-sexual-abuse-material-investigated-australians-play-key-part-in-removal>>.

³²⁵ Australian Communications & Media Authority 2016, <<http://www.acma.gov.au/>>.

³²⁶ The office was created by the *Enhancing Online Safety for Children Act 2015* (Cth).

³²⁷ *Offensive and illegal content complaints* (Undated) Office of the Children's eSafety Commissioner <<https://www.esafety.gov.au/complaints-and-reporting/offensive-and-illegal-content-complaints>>.

for appropriate action.³²⁸ The OCEC will issue a takedown notice for illegal material hosted in Australia, and also works with law enforcement and the global INHOPE³²⁹ network to investigate child sexual abuse.

The OCEC also provides online safety education for Australian children and young people, operates a hotline for complaints of cyberbullying or online exploitation, and administers the Online Content Scheme under schedule 5 and schedule 7 of the *Broadcasting Services Act 1992* (Cth), as outlined above.

When the ACMA still had responsibility for the area of child online exploitation, it developed formal agreements between itself and State police forces such as Queensland and Victoria.³³⁰ These arrangements create a 'national spine' along which the regulator (now the OCEC instead of the ACMA) can make targeted and timely reports where there is evidence that child sexual abuse material has a connection with a particular jurisdiction.

The Telecommunications Industry Ombudsman

The Telecommunications Industry Ombudsman ('**TIO**') is an industry funded scheme, established to provide independent resolution between consumers and providers of telecommunications services.³³¹

Self-Regulatory Bodies

Communications Alliance Ltd.

Communications Alliance is the primary telecommunications industry association in Australia. Through a range of programmes, events and initiatives, Communications Alliance has a role in facilitating industry-based solutions, including leading the industry's involvement in the NBN implementation.³³²

Communications Compliance

Communications Compliance assists Carriage Service Providers with guidance on how to comply with the Telecommunications Consumer Protections ('**TCP**') Code.³³³

³²⁸ Australian Communications and Media Authority, 'ACMA fighting online child abuse' (Media Release, 95/2011, 15 September).

³²⁹ INHOPE (Undated) International Association of Internet Hotlines <<http://www.inhope.org/gns/home.aspx>>.

³³⁰ Australian Communications Media Authority, 'New national network for reporting online child sexual abuse content' (Media release, 42/2014, 29 July 2014).

³³¹ *Telecommunications Industry Ombudsman* (Undated) Telecommunications Industry Ombudsman <<http://www.tio.com.au/>>.

³³² *Communications Alliance Ltd* (Undated) Communications Alliance Ltd <<http://www.commsalliance.com.au/>>.

³³³ *Welcome to Communications Compliance* (Undated) Communications Compliance Ltd <<http://commcom.com.au/>>.

4.2.3. Policies and User Obligations

The following table compares the terms, conditions and policies of each of the Telcos:

Telecommunications Company	Telstra	Optus	iiNET	TPG
User obligations – Comply with laws	✓	✓	✓	✓
User obligations – Explicitly addressing child exploitation material	x	x	✓	x
Report cases of apparent child exploitation material to law enforcement	x	x	✓	x
Cooperate with law enforcement on these matters	x	x	x	x
Reporting function for users	x	x	x	x
Child exploitation policy / statement	x	x	✓	x

Table 4.1 Comparison of the terms, conditions and policies of four Telcos, as of the time of writing.

User Obligations

Pursuant to Section 474.25 of the *Criminal Code Act 1995* (Cth), ISPs have an obligation to refer child pornography or child abuse materials which can be accessed or used on their service to the AFP once they have become aware of such materials. Knowledge of the material is crucial – if ISPs are not aware of the content they are hosting, clause 91 of Schedule 5 to the *Broadcasting Services Act* protects them from liability.³³⁴ Since ISPs do not have control over how their services are used or what material is accessed via their services, ISPs have introduced general obligations which flow down to their users. Optus for example, includes the following obligation in its standard terms and conditions:

Users must comply with:

- All laws,
- All directions by a regulator,
- All notices issued by authorisation of or under law (for example, under the Copyright Act 1968 (Cth)), and
- Reasonable directions by Optus.

Users must not use, or attempt to use, the service:

- To break any law or to infringe another person's rights (including damaging any property or injuring or killing any person or infringing someone's copyright),

³³⁴ *Broadcasting Services Act 1992* (Cth) sch 5 cl 91.

- To transmit, publish or communicate material which is defamatory, offensive, abusive, indecent, menacing or unwanted.
- To distribute or make available indecent, obscene, offensive, pornographic, illegal or confidential material.³³⁵

These obligations are similar across the ISP standard consumer terms and conditions. Breach of these terms and conditions gives the ISPs the ability to suspend their customer's services and/or terminate their contract to provide the services. The obligations are general in nature and do not specifically call out child exploitation materials, with the exception of iiNet, which specifically prohibits use of its services to make inappropriate contact with children or minors.³³⁶

It is worth noting that most user terms and conditions are included in the lengthy Standard Form Agreements that govern the contract between a consumer and their ISP of choice. Most users will never read these agreements, so the inclusion of extra terms and conditions will not be effective unless certain key provisions are brought to the user's attention. This could be done by summarising the most important obligations into several brief points, and requiring a user to click a check box to confirm their acceptance of each obligation.

4.2.4. Reporting and Co-operation with Law Enforcement

Under Section 474.25 of the *Criminal Code Act 1995* (Cth) and pursuant to industry codes of practice, the content of which is prescribed by the *Broadcasting Services Act 1992* (Cth), ISPs must address take-down procedures relating to prohibited Australian-hosted content, content assessment, compliance with online provider rules, and complaints handling. Section 313 of the *Telecommunications Act 1997* also requires ISPs to give authorities as much help as is reasonably necessary for the purposes of enforcing criminal law. Under the terms and conditions on which help is to be given,³³⁷ the ISP does not profit from or bear the cost of giving such help. This means that ISPs can pass on the costs for their assistance to the law enforcement body requesting their help.

In the context of online child exploitation, ISPs have opted to include general reporting, termination and suspension rights in their standard consumer terms and fair use policies. Telstra, for example, includes the following take down obligation in its standard consumer terms and conditions:

We can cancel, suspend or restrict your service by telling you with as much warning as we reasonably can if: (a) the law requires us to do so.³³⁸

These rights are broad and act as catch-all provisions. Where an ISP is legally required to report a matter and/or provide additional assistance to law enforcement, they have the right to do so under their standard consumer terms and conditions. Although these rights do not specifically relate to online child exploitation, they adequately protect ISPs against breaches under legislation and regulators, so long as they are aware of the infringing material and report it within a reasonable time.

³³⁵ *Terms and Conditions* (2016) Singtel Optus Pty Limited, <<https://www.optus.com.au/about/legal/standard-forms-agreement/personal/internet>>.

³³⁶ iiNet, *Our Customer Relationship Agreement Acceptable Use Policy*, above n 320.

³³⁷ *Telecommunications Act 1997* (Cth) s 314(2).

³³⁸ Telstra, *Terms and Conditions*, above n 319.

ISPs such as Telstra and Optus also include terms in their agreements which allow them to monitor their users' use of their services to ensure compliance with the terms and conditions. These terms are presented in the form of general acknowledgements and are framed as necessary in order to investigate a breach or suspected breach of the agreement. The language used by ISPs is highly discretionary and at times vague, for example TPG states:

We may monitor the use of your service, however we do not promise to do so.³³⁹

These terms indicate that ISPs have the ability to cooperate with law enforcement on online child exploitation and child exploitation in a more proactive capacity than just complying with legal requests.

To date, a limited number of government agencies have relied on section 313 of the *Telecommunications Act 1997* to assist in their investigations or work disrupting illegal activity online. The most frequent user of the provision is the AFP, which relies on section 313 in the implementation of its Access Limitation Scheme. As reported on June 2015, 21 of the 32 requests made under section 313 were by the AFP, the remainder of the requests were ASIC regarding financial fraud and one request by the Attorney-General's portfolio on the basis of counter terrorism grounds. The Scheme has already blocked 570 sites (covering multiple domains) which contain extreme child sexual abuse and exploitation material. The sites are selected on the basis of their inclusion on INTERPOL's 'worst of' child abuse list. Once blocked, the domain redirects visitors to a block page and a link to the INTERPOL website.³⁴⁰ The AFP has noted that it only uses section 313 where other mechanisms to prevent the activity have been or are unlikely to be successful.³⁴¹ This is because the section 313 powers are a blunt and broad tool, which can block legitimate sites as well as the target sites.

Under the *Telecommunications Act 1997*, the ACMA has the power to determine industry standards where existing codes are deficient, or where the Minister has directed the ACMA to do so.³⁴² The ACMA can also request a body or association to develop an industry code that deals with one or more specified matters relating to telecommunications activities and provide the ACMA with a copy of the code.³⁴³ However, it must be noted that the *Telecommunications Act* is designed to deal with carriage of information, not content issues. If this would limit the effectiveness of a new code, then an alternative would be to develop a code to replace or update the existing Online Content Scheme under the *Broadcasting Services Act*. The development of new industry codes may be the most effective route for the strengthening of ISP regulations, so that they will be required to take a more active role in combating online child exploitation.

In practice, it appears from interviews conducted with law enforcement that Telcos remain reluctant to assist in the investigation of online child exploitation.

³³⁹ TPG, *Standard Terms & Conditions*, above n 320.

³⁴⁰ Standing Committee on Infrastructure and Communications, Parliament of the Commonwealth of Australia *Balancing Freedom and Protection – Inquiry into the use of subsection 313(3) of the Telecommunications Act 1997 by government agencies to disrupt the operation of illegal online services* (2015) 1 and 2.

³⁴¹ *Ibid.* 2.

³⁴² *Telecommunications Act 1997* (Cth) s 123-125AA.

³⁴³ *Telecommunications Act 1997* (Cth) s 118.

INTERVIEW:

Lawfully, I mean lawfully we're not on fishing expeditions here... These are legitimate investigative lines of enquiry and their level of compliance for mobile data is about 20 or 30 per cent, which is disgraceful... I got really angry at one recently... we asked this Telco four times urgently who this person is, they say 'can't help can't help can't help'. I rang the Safety commission and within 40 minutes I had the information. That person was a registered sex offender who was sexually abusing a four-month-old baby. So why was it that the Safety Commissioner can lean on them and they'll tell me, yet I can't get the information?

Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016).

Australian law attempts to shift a portion of responsibility to ISPs to ensure that the services they provide to consumers do not serve as a medium for online child exploitation. ISPs have not adopted explicit terms and conditions or policies against online child exploitation; instead they flow general obligations down to their users. Industry regulators have also attempted to push obligations onto ISPs in a bid to increase ISPs' responsibilities to cooperate with law enforcement and prevent online child exploitation. From a contractual standpoint, ISPs have done little more than include discretionary rights in their consumer terms and conditions, including but not limited to reporting, monitoring, suspension and termination rights. There has been some voluntary action on behalf of ISPs to tackle child exploitation material, namely a filtering scheme implemented in 2011 by Telstra, Optus and other large Telcos.³⁴⁴ The voluntary scheme required Telcos to filter out sites that had been black-listed by INTERPOL, and was part of an effort to avoid a broader Federal Government filtering scheme. ISPs are generally reluctant to take an active role in filtering and blocking sites, out of concerns that it will diminish user experience by blocking non-illegal sites.

The current state of legislation and policy against online child exploitation puts an onus on ISPs to ensure their users do not use or access their services in a manner that contravenes such laws and policies and to "do their best" to prevent their networks or facilities being used for the commission of offences. However, current law and policy does not go far enough to make ISPs responsible in their own right, nor does it encourage ISPs to actively monitor and prevent online child exploitation. Unfortunately the wording of the legislation (e.g. referring to ISPs doing their "best") is so vague as to be ineffective in setting out the obligations of ISPs. Self-regulatory bodies have made it clear that they do not want to extend the obligation of ISPs beyond that of providing the services, on the basis that it is not their duty to monitor the internet.³⁴⁵ ISPs are openly committed to continuing their compliance with industry legislation and codes, but it is apparent that ISPs are not adequately or proactively protecting children against online child exploitation specifically.

³⁴⁴ Renai LeMay, 'Most ISPs will filter Interpol list this year: IIA' (27 June 2011)

<<https://delimiter.com.au/2011/06/27/most-isps-will-filter-interpol-list-this-year-ia/>>.

³⁴⁵ 'Senate Standing Committees on Environment and Communications Inquiry into Harm being done to Australian children through access to pornography on the internet' (Undated) Communications Alliance Ltd 2016

<http://www.commsalliance.com.au/__data/assets/pdf_file/0006/52269/160310_Comms-Alliance_Submission_Senate-Inquiry-Children-Online-Access-to-Pornography_Final.pdf accessed 22 July 2016>.

4.2.5. The Darknet

The reliance on the cooperation of ISPs concerning internet law is further complicated by the rise in disruptive technologies like the Darknet. The use of Darknets such as TOR denies all identifying information to ISPs, or any third parties. This makes the law harder to enforce as it is almost impossible to determine the identity and location of the end-user which render data-retention measures meaningless.³⁴⁶

It is not possible to outlaw the use of Darknets such as TOR completely, not only due to the practical inefficiency of such a measure, but also because it could go beyond the power of the Commonwealth government under the Constitution of Australia. The Darknet is not used only as a cryptomarket for child exploitation material. It is also used as a forum for the free exchange of political and social ideas.³⁴⁷ As such a law prohibiting the use of Darknets may violate the test in *Lange v Australian Broadcasting Corporation*,³⁴⁸ whereby any law that effectively burdens the freedom of communication about political matters in its terms, operation of effect is unconstitutional.³⁴⁹

INTERVIEW

How difficult is it? Look, if they are using TOR and they are set up and don't make mistakes it's impossible. We're reliant on some fairly innovative law enforcement techniques and them making errors. So yeah, if they're using proxies or anonymising services using encryptions and using the so-called Darknet or TOR, it would be very tough... the hidden web is very, very challenging, but you know that doesn't mean we give up. We keep trying.

Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016)

As such, it is necessary to adapt law enforcement methods to the developing use of these technologies. However, it is possible to investigate online child exploitation on the Darknet, because while TOR and similar technologies protect browsing, they do not protect content on the computer of the end-user.³⁵⁰

4.3. Social-Networking Sites

The growing popularity of social networking sites presents new challenges when attempting to combat online child exploitation. These sites provide new opportunities for potential child sex offenders to upload, share and access sexually explicit material which may result in the exploitation of a child. Despite the prevalence of online social media sites, certain legislative gaps prevent law enforcement agencies and regulators in Australia from taking action against content service operators. Such operators do not have the requisite "Australian connection"³⁵¹ under legislation as the content on these

³⁴⁶ Felix Ralph, 'Anonymity and the Law: "The Darknet Rises"' (2013) 32(1) *Communications Law Bulletin* 14, 14.

³⁴⁷ *Ibid.*

³⁴⁸ (1997) 145 ALR 96.

³⁴⁹ *Ibid.*, 96-97.

³⁵⁰ Ralph, above n 346.

³⁵¹ *Broadcasting Services Act 1992* (Cth), Schedule 7.

sites is hosted offshore, therefore the relevant operators are not subject to the local online content regime. The absence of a regulatory framework heightens the need for social-networking service operators to adopt non-legislative measures to address online child exploitation.³⁵²

For the purposes of this report we have focused on the following social-networking websites:

- *Facebook, Inc.* – <https://www.facebook.com>: an online social networking service where users can create profiles, upload content and chat online. Facebook is headquartered in California, United States. Facebook uses local data centres located in the United States and Europe.³⁵³
- *Snapchat, Inc.* – <https://www.snapchat.com>: a mobile application that enables users to send photos, videos, drawings and online messages via the service. Snapchat is hosted on Google’s platform.³⁵⁴ Google operates data centres in the United States and Europe.³⁵⁵ Snapchat is based in California, United States.
- *Instagram, LLC.* – <https://www.instagram.com>: an online social networking service founded in California, United States. Instagram allows users to upload and share photos and videos, as well as chat online.³⁵⁶ Instagram uses Facebook’s data centres.³⁵⁷ Facebook acquired Instagram in 2012.³⁵⁸
- *Twitter, Inc.* – <https://twitter.com>: Twitter is an online social networking service through which users can share short messages of no more than 140 characters (referred to as “tweets”) to users in the network.³⁵⁹ Users can comment and post images, videos and links. Twitter is based in California, United States. Twitter does not publicly share information regarding its data centre locations³⁶⁰ although data is not hosted in Australia.

4.3.1. Legislative Provisions

Whilst the law in Australia places certain obligations on ISPs and internet content hosts,³⁶¹ social networking services do not meet the definition of “internet content hosts” under schedule 5 of the *Broadcasting Services Act 1992* (Cth) which refers to “a person

³⁵² Choo, above n 36, 2.

³⁵³ *The Facebook Data Center FAQ* (16 September 2016) Data Center Knowledge <<http://www.datacenterknowledge.com/the-facebook-data-center-faq/>>.

³⁵⁴ Kyle Russell, *Unlike Many Startups And Big Tech Companies, Snapchat Is Powered By Google, Not Amazon* (10 January 2014) Business Insider <<http://www.businessinsider.com.au/snapchat-is-built-on-googles-cloud-2014-1?r=US&IR=T>>.

³⁵⁵ *Google Data Centers* (Undated) Google Inc <<https://www.google.com.au/about/datacenters/gallery/#/locations>>.

³⁵⁶ *Instagram FAQ* (2016) Instagram LLC <<https://www.instagram.com/about/faq/>>

³⁵⁷ Branson, R., Canahuati, P., & Shortway, N. 2014 ‘Migrating from AWS to FB’ weblog, Instagram, Sydney, viewed 25 July 2016., <<http://instagram-engineering.tumblr.com/post/89992572022/migrating-aws-fb>>.

³⁵⁸ Eric Jackson, *Why Instagram Might Be The Best Internet Acquisition Ever*, (12 November 2013) Forbes <<http://www.forbes.com/sites/ericjackson/2013/11/12/why-instagram-might-be-the-best-internet-acquisition-ever/#314b8255c29b>>

³⁵⁹ *New user FAQs* (2016) Twitter Inc <<https://support.twitter.com/articles/13920>>.

³⁶⁰ Yevgeniy Sverdlik, *Custom Servers Process Tweets in Twitter Data Centers*, (13 July 2015) Data Center Knowledge <<http://www.datacenterknowledge.com/archives/2015/07/13/custom-servers-process-tweets-in-twitter-data-centers/>>.

³⁶¹ *Criminal Code Act 1995* (Cth) s.474.

who hosts internet content in Australia, or who proposes to host internet content in Australia.”³⁶² Schedule 7 of the *Broadcasting Services Act 1992* (Cth) refers to content service providers and hosting service providers, however such providers are not regulated unless they have an “Australian connection”:

- (1) For the purposes of this Schedule, a content service has an **Australian connection** if, and only if:
 - (a) Any of the content provided by the content service is hosted in Australia; or
 - (b) In the case of a live content service—the live content service is provided from Australia.
- (2) Note: A link is an example of content. If a link provided by a content service is hosted in Australia, the content service will have an Australian connection (see paragraph (a)).

Australian law enforcement agencies have limited power to issue take down notices to social-networking sites given that content is generally not hosted locally.

4.3.2. Policies and User Obligations

The following table compares the terms, conditions, and policies of each social networking service:

Social Media Sites	Facebook	Snapchat	Instagram	Twitter
User obligations – comply with laws	✓	✓	✓	✓
User obligation – Explicitly addressing child exploitation material	x	x	✓	✓
Report cases of apparent child exploitation material to law enforcement	✓	x	✓	✓
Apply a takedown policy	✓	✓	✓	✓
Cooperate with law enforcement and other authorities	✓	✓	✓	✓
Reporting function for users	✓	✓	✓	✓
Child exploitation policy / statement	✓	x	✓	✓

Table 4.2 Comparison of the terms, conditions and policies of four social networking services.

³⁶² *Broadcasting Services Act 1992* (Cth) Sch 5.

Takedown policy

Facebook, one of the world's most popular social-networking services,³⁶³ removes any content that threatens or promotes sexual violence or sexual exploitation of minors.³⁶⁴ Instagram also has a takedown policy in place which explicitly states that Instagram "may remove images that show nude or partially-nude children."³⁶⁵ Whilst this content may not be pornographic in nature, Instagram cites that "it could be used by others in unanticipated ways" which is an important recognition given that the online environment provides child sex offenders with unprecedented opportunities to access material and imagery which could be sexually exploited. Snapchat also has the ability to take down content which violates its terms and conditions, however there is no specific mention of sexually suggestive content relating to children.³⁶⁶ Contrastingly, Twitter has a much more robust policy in place which states that the service provider will remove images or content "promoting child exploitation."³⁶⁷ The policies of Facebook and Twitter are not discretionary. Both service providers will take down content of this nature whereas Snapchat and Instagram "may" take down such content.

User obligations

The Facebook Terms and Conditions state that users must not post content that is "pornographic; incites violence; or contains nudity or graphic or gratuitous violence",³⁶⁸ but the terms do not make specific mention of children. Instagram has similar terms which state that users "may not post violent, nude, partially nude, discriminatory, unlawful, infringing, hateful, pornographic or sexually suggestive photos or other content via the Service."³⁶⁹ The social-networking operator also has a Community Guidelines section which states that Instagram has "zero tolerance when it comes to sharing sexual content involving minors or threatening to post intimate images of others."³⁷⁰ The guidelines also attempt to educate users by articulating the following:

...sharing nude or sexually explicit images of minors—on the web, on mobile phones, by mail or any other way—is illegal in most countries and could have serious legal and life-changing consequences for both the creator of the images and anyone who requests them.³⁷¹

Snapchat has general terms regarding posting pornographic content.³⁷² The Community Guidelines also indicate that users cannot snap "nudity or sexually suggestive content involving minors (people under the age of 18)".³⁷³ Twitter have general terms regarding using pornographic media in profile or header images,³⁷⁴ in addition to a Child

³⁶³ *Top 15 Most Popular Social Networking Site* (November 2016) eBIZMBA Guide <<http://www.ebizmba.com/articles/social-networking-websites>>.

³⁶⁴ *Community Standards - Sexual Violence and Exploitation* (2016) Facebook <<https://www.facebook.com/communitystandards#>>.

³⁶⁵ *Community Guidelines* (2016) Instagram <<https://help.instagram.com/477434105621119/>>.

³⁶⁶ *Community Guidelines* (2016) Snapchat <<https://support.snapchat.com/en-US/a/guidelines>>.

³⁶⁷ *Child sexual exploitation policy* (2016) Twitter <<https://support.twitter.com/articles/37370>>.

³⁶⁸ *Terms of Service* (2016) Facebook <<https://www.facebook.com/terms>>.

³⁶⁹ *Terms of Use* (2016) Instagram <<https://help.instagram.com/478745558852511>>.

³⁷⁰ *Community Guidelines* (2016) Instagram <<https://help.instagram.com/477434105621119/>>.

³⁷¹ *Ibid.*

³⁷² *Terms of Service* (2016) Snapchat <<https://www.snapchat.com/terms>>.

³⁷³ *Community Guidelines* (Undated) Snapchat <<https://support.snapchat.com/en-US/a/guidelines>>.

³⁷⁴ *Twitter Terms of Service* (30 September 2016) Twitter <<https://twitter.com/tos?lang=en>>.

Exploitation Policy which stipulates that Twitter does not tolerate child sexual exploitation.³⁷⁵

Online reporting tools for users

All of the social-networking sites contain a mechanism for users to report content that violates the operators terms and conditions. Facebook users can access this on both the website and also select this on an individual post. Instagram has an in-built reporting function as well, and requests that users report images that sexually exploit children. Instagram personnel will then review the report and remove any such content.³⁷⁶ Twitter has a specific form for users to report a “Child Exploitation Issue”.³⁷⁷ Similarly, Snapchat has a similar tool for users to report “a safety or abuse concern”³⁷⁸ which is more general in nature.

4.3.3. Reporting and cooperation with law enforcement

With the exception of Snapchat, all of the social-networking sites have a policy to report potential cases of child exploitation online. Facebook has a dedicated page which provides information to law enforcement authorities³⁷⁹ who may be seeking information from Facebook regarding a child exploitation matter. Additionally, Facebook’s policies state that the provider will report:

...all apparent instances of child exploitation appearing on our site from anywhere in the world to the United States National Centre for Missing & Exploited Children (NCMEC), including content drawn to our attention by government requests.³⁸⁰

Instagram adopts a similar approach through its policy, which states that it will “report all apparent child pornography to the National Centre for Missing and Exploited Children.”³⁸¹ The policy also directs users not to share or comment on the image. Twitter has a Child Exploitation Policy³⁸² which contains a similar statement under which any images or content promoting child exploitation will be removed and reported to NCMEC.³⁸³ Snapchat’s online policies, terms and conditions make no mention of a positive obligation to report any apparent child exploitation material to law enforcement or any other authority. Snapchat’s cooperation with law enforcement appears to be limited to legally compelled actions in response to governmental requests for user account information.³⁸⁴ Facebook³⁸⁵, Twitter³⁸⁶ and Instagram³⁸⁷ also work with law enforcement to assist in

³⁷⁵ *Child sexual exploitation policy* (2016) Twitter <<https://support.twitter.com/articles/37370>>.
³⁷⁶ *Community Guidelines* (2016) Instagram <<https://help.instagram.com/477434105621119/>>.
³⁷⁷ *Report a Violation – Report A Child Sexual Exploitation Issue* (2016) Twitter <<https://support.twitter.com/forms/cse>>.
³⁷⁸ *Snapchat Support* (Undated) Snapchat, <<https://support.snapchat.com/en-US/i-need-help>>.
³⁷⁹ *Information for law enforcement authorities* (2016) Facebook <<https://www.facebook.com/safety/groups/law/guidelines/>>.
³⁸⁰ *Information for law enforcement authorities* (2016) Facebook <<https://www.facebook.com/safety/groups/law/guidelines/>>.
³⁸¹ *Privacy & Safety Center – Report Something* (2016) Instagram <<https://help.instagram.com/423234141135444>>.
³⁸² *Child sexual exploitation policy* (2016) Twitter <<https://support.twitter.com/articles/37370>>.
³⁸³ *Child sexual exploitation policy* (2016) Twitter <<https://support.twitter.com/articles/37370>>.
³⁸⁴ *Transparency Report* (30 June 2016) Snapchat <<https://www.snapchat.com/transparency>>.
³⁸⁵ *Facebook and Law Enforcement* (2016) Facebook <<https://www.facebook.com/safety/groups/law>>.
³⁸⁶ *Child sexual exploitation policy* (Undated) Twitter <<https://support.twitter.com/articles/37370>>.

resolving inquiries, but their level of cooperation varies depending on whether the “matter [involves] imminent harm to a child or risk of death or serious physical injury to any person”³⁸⁸ or if the information “will help them respond to emergencies, including those that involve the immediate risk of harm, suicide prevention and the recovery of missing children.”³⁸⁹ Twitter is the only social-networking site to explicitly state that it will cooperate with law enforcement agencies that are “seeking information regarding Twitter accounts promoting or distributing child sexual exploitation.”³⁹⁰

The majority of social-networking sites are working to prevent online child exploitation through the development of policy which directly addresses this. Snapchat, as an emerging social-networking site, is not as proactive in its approach. It is recommended that Snapchat adopt similar policies to Facebook, Twitter and Instagram which obligate users not to upload or share child exploitative content, as well as partner with law enforcement so that child exploitation matters are referred to, and appropriately handled by the relevant authorities. Whilst Snapchat has a law enforcement guide in place, the social-network service needs to do more to combat child exploitation online, especially given the nature of the services being provided. Snapchat published a “Parents Guide to Snapchat”³⁹¹ which provides guidance on how to block and delete users who harass or send unwanted snaps. It also describes the reporting function and recommends that “if snapchat isn’t for you (or your kid)”³⁹² it can be deleted. However, Snapchat could use this space to explicitly mention child exploitation material and provide guidance to users detailing the appropriate steps to take when this material is discovered.

4.4. Search Engines

Search engines are a powerful tool that can be abused to locate publicly available child exploitation material on the internet. As major search engine providers are located and/or hosted outside of Australia, they are not subject to the Australian content regime regarding hosting of such materials. Despite the legislative limitations, these search engines have recognised their responsibilities in relation to material that exploits a child. Google³⁹³, Yahoo³⁹⁴ and YouTube³⁹⁵ have placed concrete obligations on users not to distribute child exploitation material and have clear take-down policies where such material is reported to the providers.

For the purposes of this report we have focused on the following search engines:

³⁸⁷ *Information for Law Enforcement* (2016) Instagram <<https://help.instagram.com/477434105621119/>>.
³⁸⁸ *Information for Law Enforcement* (2016) Instagram <<https://help.instagram.com/477434105621119/>>.
³⁸⁹ *Facebook and Law Enforcement* (2016) Facebook <<https://www.facebook.com/safety/groups/law/>>.
³⁹⁰ *Child Sexual Exploitation Policy* (2016) Twitter <<https://support.twitter.com/articles/37370>>.
³⁹¹ *A Parents’ Guide to Snapchat* (2013) Snapchat <http://www.connectsafely.org/wp-content/uploads/snapchat_guide.pdf>.
³⁹² *A Parents’ Guide to Snapchat* (2013) Snapchat <http://www.connectsafely.org/wp-content/uploads/snapchat_guide.pdf>.
³⁹³ Google, Inc.
³⁹⁴ Yahoo, Inc.
³⁹⁵ YouTube, LLC.

- *Google* - <https://www.google.com>: the most-used search engine on the World Wide Web³⁹⁶.
- *YouTube* - <https://www.youtube.com>: a global video-sharing website headquartered in California, United States. YouTube operates as one of Google's subsidiaries³⁹⁷. Most of the content on YouTube has been uploaded by individuals. YouTube is one of the most popular "search engines" for video content.
- *Yahoo!* – <https://www.yahoo.com>: the third largest search engine in the US by the query volume at 12.8 per cent.³⁹⁸

4.4.1. Legislative Provisions

Similarly to social networking services, search engine providers are not bound by any specific local laws as the services are hosted outside of Australia. As a result, Google, YouTube and Yahoo do not meet the definition of "internet content hosts" under schedule 5 of the *Broadcasting Services Act 1992* (Cth) and thus fall outside the ambit of Australian legislation and the reach of Australian law enforcement and regulators. This significantly limits the ability of such agencies to take action against search engine providers that host child exploitation material.

³⁹⁶ *The Top 500 Sites on the Web - Sites by Category - Search Engines* (2016) Alexa
<http://www.alexa.com/topsites/category/Computers/Internet/Searching/Search_Engines>.

³⁹⁷ *Google buys YouTube for \$1.65 billion* (10 October 2006) NBCNEWS
<http://www.nbcnews.com/id/15196982/ns/business-us_business/t/google-buys-youtube-billion/#.UbECrBG9KSM>.

³⁹⁸ *ComScore Releases February 2015 U.S. Desktop Search Engine Rankings* (17 March 2015)
ComScore Inc <<http://www.comscore.com/Insights/Market-Rankings/comScore-Releases-February-2015-US-Desktop-Search-Engine-Rankings>>.

4.4.2. Policies and User Obligations

The following table compares the terms, conditions and policies of each of the search engine providers:

Search Engines	Google	Yahoo!	YouTube
User obligations – comply with laws	✓	✓	✓
User obligations –Explicitly addressing child exploitation material	✓	✓	✓
Report cases of apparent child exploitation material to law enforcement	x	x	x
Apply a take-down policy	✓	✓	✓
Cooperate with law enforcement on these matters	x	x	✓
Reporting functions for users	✓	x	✓
Child exploitation policy	x	x	✓

Table 4.3 Comparison of the terms, conditions and policies of three search engine services.

User Obligations

These search engines expressly prohibit the distribution, uploading or sharing of content that exploits or abuses children on their platforms, namely, Google’s Community Guidelines³⁹⁹, the YouTube Child Endangerment Policy⁴⁰⁰ and Yahoo’s Community Guidelines.⁴⁰¹

For Google and Yahoo, where image content is available, this also includes a prohibition on cartoon images which depict child sexual abuse imagery.

YouTube has a dedicated policy relating to child exploitation. YouTube’s Child Endangerment Policy⁴⁰² provides that YouTube has zero tolerance for sexual content involving minors. Uploading, commenting, or engaging in any type of activity that sexualizes minors will immediately result in account suspension.

³⁹⁹ *User Content and Conduct Policy* (Undated) Google <<https://www.google.com/intl/en-US/+policy/content.html>>.

⁴⁰⁰ *Child Endangerment Policy* (2016) YouTube <<https://support.google.com/youtube/answer/2801999?hl=en>>.

⁴⁰¹ *Yahoo Community Guidelines* (Undated) Yahoo <<https://policies.yahoo.com/us/en/yahoo/guidelines/>>.

⁴⁰² *Child Endangerment Policy* (2016) YouTube <<https://support.google.com/youtube/answer/2801999?hl=en>>.

Takedown Policy

Google's Removal Policies⁴⁰³ and Yahoo's Community Guidelines⁴⁰⁴ provide for takedown of child sexual abuse images. YouTube relies on its community members to "flag" content that they find inappropriate. YouTube's staff review "flagged" videos 24 hours a day, seven days a week. Videos that violate its Community Guidelines (including sexual content involving minors) are removed from YouTube.⁴⁰⁵

Online reporting tools for users

Given the volume and speed at which content becomes available on the internet, user reporting is an important tool which enables search engines to be notified of any child exploitation material that is being distributed via their services. Google directs its users to report links or websites displaying content which is sexually or physically abusive towards children. Google directs its users to contact local organisations⁴⁰⁶ (for Australia, Office of the eSafety Commissioner) or report such content to local law enforcement agencies. YouTube does not provide explicit guidance to users, but YouTube's Flagging Content Policy allows users to flag content for review and removal if necessary.⁴⁰⁷

4.4.3. Reporting and cooperation with law enforcement

Only YouTube, being a dedicated online video content provider, explicitly confirms in its Child Endangerment Policy⁴⁰⁸ that it will "report it to the NCMEC (The National Centre for Missing & Exploited Children), who in turn works with global law enforcement agencies", as well as assisting law enforcement with investigations into reported content that could potentially endanger a child. Google and Yahoo do not provide any commitments to work with law enforcement. This may be attributed to the fact that such search engines use index content and thus cannot be held responsible for any child exploitation material.

Other initiatives

Google has altered its algorithm to limit search results for suspected child exploitation material queries, and implemented Microsoft's digital fingerprint technology to tag illegal images. The search engine is developing a similar system to detect and delete film footage showing illegal activities.⁴⁰⁹

⁴⁰³ *Removal Policies* (2016) Google

<<https://support.google.com/websearch/answer/2744324?hl=en>>.

⁴⁰⁴ *Yahoo Community Guidelines* (Undated) Yahoo

<<https://policies.yahoo.com/us/en/yahoo/guidelines/>>.

⁴⁰⁵ *Flagging Inappropriate Content* (2016) YouTube

<https://support.google.com/youtube/answer/2802027?hl=en&ref_topic=2803138>.

⁴⁰⁶ *Report child abuse on sites & image* (Undated) Google

<<https://support.google.com/websearch/answer/148666?hl=en>>.

⁴⁰⁷ *Flagging Inappropriate Content* (2016) YouTube

<https://support.google.com/youtube/answer/2802027?hl=en&ref_topic=2803138>.

⁴⁰⁸ *Child Endangerment* (2016) YouTube

<<https://support.google.com/youtube/answer/2801999?hl=en>>.

⁴⁰⁹ Liat Clark, *Extent of Google's renewed battle against online child abuse revealed* (18 November 2013) Wired <<http://www.wired.co.uk/article/eric-schmidt-child-abuse>>.

As a major tool for internet users to access images and videos on the internet, search engines have taken some measures to limit distribution and access to child exploitation materials. All search engines have clear policies prohibiting the distribution and sharing of such materials, including a right to take-down any content that violates their policies. The search engines also have tools in place which allow users to report content which may breach the provider's guidelines and terms.

However, the search engines do not take a proactive approach in relation to reporting and cooperating with law enforcement. Search engines need to strengthen their policies in this area and take an active role in preventing the distribution and access to child exploitation material online. Whilst the research indicates that some providers are implementing policies and tools to combat this issue, the extent to which such policies are enforced is unclear. It is recommended that search engines publish information on their cooperation with law enforcement and/or other actions taken to address child exploitation matters. This will assist in determining whether such policies are effective.

4.5. Recommendations

To ensure that the regulation of online content remains effective and relevant in the context of new technologies, schedules 5 and 7 of the *Broadcasting Services Act* that created the Online Content Scheme should be reviewed and updated. This may include a review of measures available to regulators in relation to search engine providers and online social-networking sites. This will necessarily include a review and update of industry codes that were drafted in 2005. It should be noted that there is scope under the *Broadcasting Services Act* for industry codes to be developed on ISPs reporting online child exploitation material that is hosted on their networks to Australian law enforcement.

There is also a need to address the clear distinction between the measures that search engines and social networking services are taking when compared to ISPs. The search engines and social media services are more proactive in their approach generally and appear to be cooperating with law enforcement on child exploitation matters, while ISPs are assuming minimal responsibilities and have not developed adequate initiatives to target this issue.

Based on the research, ISPs are subject to the most stringent legal obligations locally, yet are less focused on collaborating with government, law enforcement and the community to tackle child exploitation matters and take positive steps to prevent online child exploitation offences. Search engines and social networking services are more explicitly dealing with this issue; however, some operators need to establish more robust policies to educate users and implement tools to prevent child exploitation online. In the absence of a tighter legislative regime in Australia, it is recommended that an updated industry code be developed, that sets out minimum standards applicable to the provision of services. Enforcement mechanisms for non-compliance will be a necessary part of this code, in order to ensure that it operates effectively. This would improve the steps that providers are taking to prevent the sexual exploitation of children online.

Key Recommendations

To facilitate effective online content regulation in Australia the *Broadcasting Services Act 1992* (Cth) should be updated to reflect the emergence of new technologies and further ensure that instances of online child exploitation material hosted in Australia and overseas are effectively identified and investigated.

To enhance cooperation between ISPs and law enforcement, internet industry codes should be reviewed and amended. In particular, an industry code, guideline or standard should be developed by the ACMA to assist telecommunications providers to 'do [their] best' under the provisions of the *Telecommunications Act 1997* (Cth).

5. Chapter V: Online Child Exploitation and Trafficking

5.1. Overview

This chapter examines Australia's response to human trafficking and slavery in the specific context of online child exploitation, as well as the nexus between online child exploitation and trafficking. A comprehensive review of the effectiveness of our legal response necessarily requires a review of the interface between these crimes, including:

1. Emerging trends in this industry, including the relationship between online child exploitation and child trafficking and enslavement; and
2. An analysis of relevant legislative provisions

5.2. Law of Trafficking and Slavery

5.2.1. International legal framework

Australia is a signatory to:

- The Trafficking Protocol;
- The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery ('**Supplementary Slavery Convention**'); and
- The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography ('**Optional Protocol**').

The Trafficking Protocol requires signatory states to criminalise trafficking, which is defined to involve the "recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".

The Supplementary Slavery Convention requires signatory states to take all practicable and necessary legislative measures to bring to an end to slavery, including debt bondage, serfdom, child marriage, servile marriage and child servitude.

The Optional Protocol requires (in addition to the online child exploitation elements discussed elsewhere in this paper) signatory states to criminalise the sale of children, including offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child and engagement of the child in forced labour.

Australia has enacted various pieces of legislation within its Commonwealth, State and Territory legal frameworks which address its international obligations under the above protocols and convention. However, as with the implementation of all international laws, the domestic law can vary in theory or practice from its parent international law.

Through its National Action Plan to Combat Human Trafficking and Slavery 2015-2019 ('National Action Plan'),⁴¹⁰ Australia has demonstrated its commitment to attempting to ensure that Australia's response to human trafficking and slavery is comprehensive, effective, timely, coordinated and consistent with our international obligations.⁴¹¹ Australian legislation has already been amended to reflect emerging trends in these industries,⁴¹² but given the seriousness of the subject matter and the potential harm to its victims and its community, the importance of continuous improvement cannot be understated.

5.2.2. Domestic laws on trafficking and slavery

Further to Australia's obligations under the Trafficking Protocol and Supplementary Slavery Convention, trafficking, slavery and slavery-like practices are criminalised under Divisions 270 and 271 of the *Criminal Code*. There are also separate Commonwealth, State and Territory legal frameworks which are concurrently relevant to trafficking and slavery, for example, under the Commonwealth the *Crimes Act 1914* and the *Migration Act 1968*, and in State and Territory Crimes Acts and Criminal Codes.

Division 270 contains the following slavery, servitude and slavery-like offences:

- Slavery (the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised);⁴¹³
- Forced labour (the condition of a person where, because of coercion, threat or deception a reasonable person in the position victim would not consider themselves to be free to cease providing the services or leave)⁴¹⁴ and servitude (where in addition to forced labour the victim is significantly deprived of personal freedoms in other aspects of their life);⁴¹⁵
- Deceptive recruitment (where the recruiter causes the victim to be deceived about their freedom to cease providing services or leave, among other things);⁴¹⁶ and
- Forced marriage.⁴¹⁷

These offences apply generally to adults and children, although there are aggravated offences where the victim is a minor. The provisions apply extraterritorially, for example in circumstances where the conduct occurred outside Australia but the offender is Australian. These offences have no transportation requirement (unlike trafficking offences which require the movement of the victim across or within Australian borders).

⁴¹⁰ Succeeding the Action Plan to Eradicate Trafficking in Persons (2004)

⁴¹¹ National Action Plan to Combat Human Trafficking and Slavery 2015-19' (Report, National Action Plan)

<<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>> Principle 1, 18.

⁴¹² *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth)

⁴¹³ *Criminal Code Act 1995* (Cth) Div 270.1

⁴¹⁴ *Criminal Code Act 1995* (Cth) Div 270.6

⁴¹⁵ *Criminal Code Act 1995* (Cth) Div 270.4

⁴¹⁶ *Criminal Code Act 1995* (Cth) Div 270.7

⁴¹⁷ *Criminal Code Act 1995* (Cth) Div 270.7B

Trafficking

Australia's trafficking offences are criminalised under Division 271 of the *Criminal Code*. There is also State and Territory legislation,⁴¹⁸ although as trafficking in Australia tends to involve foreign nationals, these are not often utilised in practice.

Trafficking is defined by the *Criminal Code* as the organisation or facilitation of a victim's entry or exit in or out of Australia or domestically within Australia, or receipt of that victim, in certain circumstances including where:

- Coercion threat or deception is used resulting in the victim's compliance,⁴¹⁹
- Where there is intention or recklessness as to exploitation following the victim's move,⁴²⁰ and
- The offender deceives the victim as to nature of their stay, for example as regards whether they will be required to provide sexual services (or the nature of those services or the extent to which they are free to cease providing those services), the confiscation of travel or identity documents, or their ability to leave.⁴²¹

Most of the provisions apply generally, including to child victims. However, there are also specific provisions prohibiting the international and domestic trafficking of children (under the age of 18). Notably, the child trafficking provisions do not require that there be a means such as coercion or deception of the trafficked child, but rather focuses on the intention of the trafficker for the child to be used to provide sexual services or otherwise be exploited (or recklessness as to whether the child would be so used).⁴²²

5.3. Developments in Online Child Exploitation

Trafficking of children for sexual exploitation existed prior to the Internet.⁴²³ However, the United Nations Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography noted that a recurrent pattern over the last 25 years is the rise of the Internet and new technologies to commit the offences of sale and sexual exploitation of children, including the online streaming of child abuse.⁴²⁴ Trafficking in children for sexual exploitation has been linked to the demand for child exploitation material on the internet and with the availability of low cost advertising online.⁴²⁵

⁴¹⁸ In relation to trafficking: *Crimes Act 1900* (ACT) s79 and 80, *Crimes Act 1900* (NSW) s80B, *Criminal Code Act 1983* (NT) s202B-D, *Criminal Law Consolidation Act 1935* (SA) s66 and 67, *Crimes Act 1958* (Vic) s60AB and 60AD, *Criminal Code Act Compilation Act 1913* (WA) s331B – D.

⁴¹⁹ *Criminal Code Act 1995* (Cth) Div 271.2(1), (1A), 271.5(1), (1A).

⁴²⁰ *Criminal Code Act 1995* (Cth) Div 271.2(1C),(2) 271.5(2)

⁴²¹ *Criminal Code Act 1995* (Cth) Div 271.2(2A) and (2B), 271.5(2A) and (2B).

⁴²² *Criminal Code Act 1995* (Cth) Div 271.4 and 7.

⁴²³ Experts now agree that child sexual abuse has always occurred and still exists in all socio-economic groups. (The National Resource Center on Child Sexual Abuse, 1994).

⁴²⁴ United Nations Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, '25 Years of Fighting the Sale and Sexual Exploitation of Children: Addressing New Challenges' (Report, Undated)

<<http://www.ohchr.org/Documents/Issues/Children/SR/25YearsMandate.pdf>>

⁴²⁵ Bellamy, Carol (UNICEF Executive Director speaking at Asia-Pacific Symposium on Trafficking in Persons as reported in UNICEF: Child sex trafficking must end (2000) M2 Presswire

There are relatively few identified instances of child trafficking in Australia and the overall number of trafficked children and adults in Australia is not known. Five children were referred to the Support for Trafficked People Program in the 2014-15 financial year and only two cases have ever been successfully prosecuted.⁴²⁶ However, this is not to say that the issue is small, only that the incidence of child trafficking is difficult to quantify given the complexity of the transactions which can constitute trafficking of children and the clandestine nature of the crimes. Very often such crimes are hidden in plain sight in the form of false identification, sham inter-country adoptions and illegal immigrations.

Similarly, online child exploitation crimes are also difficult to measure, given criminals' adaptation to use of new and secure technologies, such as using streaming services, the anonymity of the "dark web" which complicates the collection of data,⁴²⁷ or untraceable payment systems such as Bitcoin.

We are not aware of any research which has sought to explore the relationship between child trafficking and online child exploitation. However, case examples in Australia and overseas demonstrate a strong nexus between the production of online child exploitation materials and child trafficking and enslavement. Such cases include where:

- The victims have been trafficked for the purpose of direct physical sexual abuse (for example, prostitution) and that abuse is photographed or filmed and distributed;⁴²⁸ or
- The victims have been trafficked for the sole purpose of being exploited to create child abuse materials.⁴²⁹

Traffickers can engage in online child exploitation activity as a tool to facilitate trafficking, for example grooming to identify or prepare victims for trafficking for sexual exploitation, or exposing children to indecent communications, adult pornography or child exploitation material in order to desensitise them to sexual conduct or to create a fear of disclosure for control purposes.⁴³⁰ There may also be a connection between child sex tourism facilitated by the internet and online child exploitation.⁴³¹

⁴²⁶ Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government's Response 1 July 2014–30 June 2015* (2015) 1, 34.

⁴²⁷ See for example, AIC report (1997) <http://www.aic.gov.au/media_library/conferences/children/grant.pdf>.

⁴²⁸ P 11 http://www.ecpat.org/wp-content/uploads/legacy/global_monitoring_report-philippines.pdf ; R v KAK

⁴²⁹ See for example, 429 DPP (Cth) v McIntosh (a pseudonym) [2016] VCC 622 and the case of Australian Peter Truong and Mark Truong in connection with their surrogate son (<http://www.abc.net.au/news/2014-03-10/boy-with-henna-tattoo-network-exposed/5310812>)

⁴³⁰ http://www.genderit.org/sites/default/upload/case_studies_phil3_1.pdf . Klain, Davies & Hicks 2001 *Child Pornography: The Criminal-Justice-System Response*. American Bar Association Center on Children and the Law for the National Center for Missing & Exploited Children page 7; Re general comments re use of grooming to de-sensitise and use of internet to locate children for criminal purposes - http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi379.pdf

⁴³¹ Marks, Kathy. 'In the Clubs of the Filipino Sex Trade, a Former Ruc Officer is Back in Business'. 28; Sellier, H. (2001), "The world citizens' movement to protect innocence in danger", In C.A. Arnaldo (ed.) *Child abuse on the Internet: Ending the silence*, Berghahn Books and UNESCO, Paris, pp.173—75.

5.4. Case Reports

Where the offence of child trafficking has been proven, each case has involved a family member as the offender. In Australia, there have been two cases involving the prosecution of child trafficking.

5.4.1. Australian Cases

KEY CASE EXAMPLE

*DPP (Cth) v McIntosh (a pseudonym)*⁴³²

In May 2016, a Victorian man who pleaded guilty to 37 charges including the trafficking and sexual assault of his twin surrogate daughters, was sentenced to 22 years imprisonment, with a 15 and a half year non-parole period. The offender entered into a surrogacy arrangement as sperm donor and facilitated the entry of the babies into Australia for the purposes of sexual exploitation. The man recorded the sexual abuse of the twin girls, who were seven months old at the time. He then distributed this exploitation material online.

The offender was found to have viewed child exploitation material for around 20 years, and accessed and shared child exploitation material over the internet for more than 5 years, prior to his trafficking offences. He was also found to have created exploitation materials, including of his nieces. The judge addressed the development of offending behaviours at [32]:

In my view, your case reflects another of the dangers and evils of child pornography offences through use of the internet. That is the progression from accessing or even sharing material solely to view it, to discussion of it on chat sites with other users of such material, to then yourself engaging in contact sexual offending with children, and to producing child pornography material yourself and then sharing it with others through the internet.⁴³³

In this case, the offender entered into a surrogacy arrangement with the intention of sexually abusing the babies. The police uncovered evidence of online conversations from before the birth of the girls, which demonstrated that his intention in bringing the children to Australia was for him to sexually exploit them, and for him to share images of that abuse online.⁴³⁴ Her Honour stated at [62]:

...after finding pleasure but unfortunately also sexual gratification through your interaction with your nieces, you deliberately entered into an arrangement whereby your own biological children would be born and brought to Australia for you to act out your sexual preferences with them, and ultimately share images of that with others of your perverted sexual tastes.⁴³⁵

Her Honour later refers to psychological evidence which stated that like for many others, the offender's paedophilic tendencies were latent until strengthened through the behavioural reinforcement of viewing of online child exploitation material, which led to a preoccupation with his deviant interests. This in turn led to the escalation of his behaviours from material offending to contact offending and hence to the trafficking

⁴³² [2016] VCC 622

⁴³³ *Ibid.* [32].

⁴³⁴ *Ibid.*, [62].

⁴³⁵ *Ibid.*

offences.⁴³⁶

This case demonstrates the nexus between online child exploitation offences and trafficking offences, due to the potential for online offending behaviour to escalate to trafficking for the purposes of child sexual exploitation.

KAK

The case of *R v KAK* (October 2013)⁴³⁷ involved the trafficking of a child by her mother. The mother arranged for her daughter, aged 11, to be brought to Australia for the purpose of being sexually exploited. Though not prosecuted as separate offences, the complainant was subject to being photographed and videotaped engaging in sexual activity (although there is no reference to any online component of that conduct).

Peter Truong and Mark Newton

While this matter was settled in the United States, it involved an Australian man and his partner. It illustrates the connection between child trafficking and online child exploitation.

In 2013, a Queensland man, Peter Truong, and American partner Mark Newtown were found guilty in the United States for trafficking their son, a boy purchased from Russia for US\$8,000.00 and taken around the world for the purpose of being molested by others for commercial gain. Investigations revealed that Truong and Newtown had a high level of involvement in an online paedophile network through which members traded millions of images and produced new child exploitation materials for distribution. The men were found to have produced images of their own son as well as many other boys, facilitated through their child modelling business.

5.4.2. Live-distant-child abuse

Trafficking occurs throughout the Asia Pacific region. As other forms of slavery and trafficking are being combatted in countries like the Philippines, there has been an increase in trafficking activity for the sole or primary purpose of online child exploitation. This industry is driven by the financial income from Australian offenders who encourage the production of online sexual exploitation materials.

ECPAT reports that children in the Philippines are lured to sex tourism “hot spots”, such as Angeles City, Metro Manila and Cebu City on the promise of legitimate jobs in the city. Thereafter they are physically and/or emotionally coerced into working in the sex industry including, increasingly, online exploitation dens, where they are made to perform on webcams to foreign online sex tourists. In 2013, it was estimated that tens of thousands of boys and girls are in the webcam sex tourism trade alone, with that number predicted to increase.⁴³⁸ Unlike saved videos and pictures, streamed videos used in the webcam online child exploitation industry are far more difficult for law enforcement to identify and investigate. There are indications that live-distant-child abuse occurs outside of

⁴³⁶ *Ibid.*, [131].

⁴³⁷ *R v KAK* [2013] QCA 310

⁴³⁸ Terre Des Hommes, ‘Webcam Child Sex Tourism’, (2013)

<<http://www.terredeshommes.org/wp-content/uploads/2013/11/Webcam-child-sex-tourism-terre-des-hommes-NL-nov-2013.pdf>> 35.

commercial transactions, and may involve multiple perpetrators using video conferencing programs to stream the simultaneous abuse of children in a variety of locations.

Patrick Goggins

In July 2014, Patrick Goggins was sentenced by the Victorian County Court of over 20 sex offences involving persistent sexual abuse of Filipino children, in particular causing children to engage in sexual intercourse in his presence, acts which were streamed over webcam. Goggins paid more than \$15,000 to view Live-Distant-Abuse, which was streamed to his location in Melbourne.⁴³⁹

Brett Le Gassick

In August 2014 Brett Le Gassick was sentenced to over 20 sex offences, including making transfers of \$3,676.90 as payment for online live sex shows performed by children in the Philippines and causing children to engage in sexual intercourse outside of Australia.⁴⁴⁰ Le Gassick was refused entry to the Philippines and the Court heard that Le Gassick had plans to meet with girls for sex, which is just one of many examples of online child exploitation materials offenders progressing into contact crimes.

Both Goggins and Le Gassick were successfully prosecuted under Australian child sex laws, which have since 2010 been applicable to extraterritorial conduct. Though not directly responsible for the transport and detention of their victims, their custom supports the trafficking of children in the Philippines.

5.4.3. Extraterritoriality of trafficking and slavery offences

Australia’s trafficking and slavery offences operate extraterritorially.⁴⁴¹ As such, it is arguable that Australian offenders such as Goggins and McIntosh could be prosecuted as second parties or co-conspirators to the enslavement of children overseas. Both of those cases did result in successful prosecutions under child exploitation provisions. However, prosecution under trafficking and slavery provisions would increase the maximum penalties available, and better reflect the harm that is suffered by the overseas victims of child exploitation offences.

5.5. Recommendations

There is a significant need for further research on the link between the trafficking and enslavement of children and online child exploitation. This would expand our understanding of the developments in offending behaviour and the harm caused by online child exploitation both in Australia and globally.

Key Recommendation

Substantial further research should be conducted into the relationship between human trafficking and online child exploitation in order to facilitate the development of a coordinated Australian response to these emerging crimes.

⁴³⁹ *R v Goggins* [2014] VCC 1086.
⁴⁴⁰ *DPP v Le Gassick* [2014] VCC 1288.
⁴⁴¹ *Criminal Code 1995* (Cth), 271.10-271.11.

6. Chapter VI: Combatting Online Child Exploitation

6.1. Overview of International Affiliations and Key Bodies

INTERVIEW:

[W]ell one case we came across was a forum site where we were able to pick out some information about where the person in the images was located, due to some information in the photograph. And also, because of references on the forum site, we came across references to the age of the girl; she was fourteen in this case. So we put that information together into an intel report which we sent through in that case to our colleagues in the U.K., the Internet Watch Foundation, who sent it through to their police, and as a result of that, that girl was taken into protection.

A Commonwealth public servant (Telephone interview, 17 August 2016)

Online child exploitation is very much an international crime. Producers of child exploitation materials, individuals who access those materials, victims, servers and locations where child exploitation materials are stored and distributed are often spread across many nations. This is further compounded by the potential for victims of child exploitation to be trafficked between borders for the purpose of further abuse, or production of abuse materials. As such, the successful investigation and prosecution of offenders requires strong avenues for international co-operation, and these can be realised through either structured affiliations and programmes, or case-by-case assistance.

There are currently a variety of international affiliations between law enforcement agencies, private organisations and government and non-government organisations specifically dedicated to online child exploitation crimes. A number of these are discussed below.

6.1.1. Virtual Global Taskforce

The Virtual Global Taskforce ('VGT') is an alliance of 13 law enforcement agencies seeking to build partnerships with private organisations, and non-government organisations, to help protect children from online child exploitation.

VGT was created in 2003 and since then has:

- Prompted investigations;
- Identified hundreds of offenders (worldwide);
- Assisted in the rescue of hundreds of children; and
- Conducted a number of law enforcement operations into online and offline offending (resulting in over 1,000 suspects being investigated).

The VGT members include law enforcement agencies of Australia, Canada, Colombia, Europol, INTERPOL, Italy, Netherlands, New Zealand, Republic of Korea, United Arab Emirates, United Kingdom, United States and Switzerland. The AFP through its Child Protection Operations is Australia's law enforcement member.

The VGT also partners with a number of organisations in the private sector which support the VGT in a range of capacities from financial to academic research, industry education, technological support and victim support all of which are required for a successful programme. These private sector partners include: Blackberry, Child Rescue Coalition, ECPAT, ICDC Arabia, ICMEC, INHOPE, International Justice Mission, Kik, Kinsa, Magnet Forensics, Microsoft digital crimes unit, NCMEC, NetClean, PayPal, Telstra, The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism ('the Code'), WebIQ, World Vision and Ziuz.⁴⁴²

There is a shared understanding between members that the protection of children from online crimes is often achieved by global – and not merely national – methods.

The success of VGT is evidenced in its international investigation operations that result in arrests and the safeguarding of children globally.

KEY OPERATION: OPERATION RESCUE

In 2011, Operation Rescue involved the co-operation of the AFP, the New Zealand Police, United States Immigration and Customs Enforcement, the National Child Exploitation Coordination Centre (as part of the Royal Canadian Mounted Police), the Italian Postal and Communications Police Service, the Child Exploitation and Online Protection Centre in the United Kingdom and Europol.⁴⁴³

Together the Operation uncovered a global paedophile network consisting of thousands of online members, which was destroyed, resulting in over 200 children being safeguarded and 184 offenders arrested worldwide.⁴⁴⁴

In 2012 a joint investigation named Operation Endeavour was established by the United Kingdom's National Crime Agency, the AFP and United States Immigration and Customs Enforcement. The operation resulted in 29 international arrests and 15 children in the Philippines aged between 6-15 identified and safeguarded from further sexual abuse.⁴⁴⁵

More recently, Operation Atlas, conducted from 29 June to 23 October 2015, involved the participation of the AFP, Colombian National Police, Dutch National Police, Cybercrime Coordination Unit of Switzerland, U.S. Immigration and Customs Enforcement's, Homeland Security Investigations, Korean National Police Agency, New Zealand Police, Royal Canadian Mounted Police, the United Arab Emirates Ministry of the Interior and the United Kingdom's National Crime Agency.⁴⁴⁶

Investigations from leads found during Operation Atlas are ongoing, however the operation has so far resulted in 303 arrests globally, and the identification of 106 victims.⁴⁴⁷

⁴⁴² Virtual Global Taskforce, *Industry Partners* <<http://virtualglobaltaskforce.com/who-we-are/industry-partners/>>

⁴⁴³ Virtual Global Taskforce, *What we do*, <<http://virtualglobaltaskforce.com/what-we-do/>>

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ Virtual Global Taskforce, *News* <<http://virtualglobaltaskforce.com/2015/vgt-announces-over-300-arrests-from-operation-atlas-2->>.

⁴⁴⁷ Ibid.

6.1.2. The Violent Crimes Against Children International Taskforce

In 1995, the FBI in the United States created the Innocent Images National Initiative to address illicit online service activities involving the sharing of child exploitation material. In 2012, this initiative joined with the FBI Crimes Against Children programme to form the Violent Crimes Against Children programme ('**VCAC**').⁴⁴⁸

In October 2004, the FBI initiated the Violent Crimes Against Children International Taskforce ('**VCACITF**') (formerly known as the Innocent Images International Task Force).

VCACITF consists of online child sexual exploitation investigators from around the world. There are 69 active members from 40 countries, including Australia.⁴⁴⁹ Newly invited task force officers complete a five week training process in the United States where they work with FBI agents from VCAC. There is an annual VCACITF coordination meeting where task force members come together in a central location to share best practices and coordinate transnational investigations between members.⁴⁵⁰

VCACITF enables the real-time transfer of information to help combat global online child exploitation. An example of the success of sharing information with officers working globally is a VCACITF international operation managed by New Zealand law enforcement. The operation launched in July 2014 resulted in the identification and arrest of 48 people worldwide, with 31 children rescued from abusive situations. The operation also led to more than 100 investigative leads as of December 2015.⁴⁵¹ As well as investigators from OCEANZ (a NZ Police unit focused on child exploitation), Customs NZ and the NZ Department of Internal Affairs, the investigation involved police and law enforcement agencies from the United States, Australia, Spain, Poland, Greece, France, Canada, Romania, and the United Kingdom.⁴⁵²

6.1.3. International Association of Internet Hotlines

KEY ASSOCIATION: INHOPE

INHOPE is an invaluable tool for information sharing between government agencies, NGOs and law enforcement. INHOPE members are supported by national governments, ISPs and law enforcement, and many operate national hotlines to assist in the detection and location of exploited victims and online child exploitation materials.

⁴⁴⁸ Federal Bureau of Investigation, *Violent Crimes Against Children/Online Predators*, <www.fbi.gov/investigate/violent-crime/cac>.
⁴⁴⁹ Federal Bureau of Investigations, *Violent Crimes Against Children Taskforce*, <<https://www.fbi.gov/investigate/violent-crime/cac/international-task-force>>.
⁴⁵⁰ *Ibid.*
⁴⁵¹ "Kiwis arrested in child abuse sting", *New Zealand Herald* (Online, 22 December 2015) <http://m.nzherald.co.nz/crime/news/article.cfm?c_id=30&objectid=11564876>.
⁴⁵² *Ibid.*

The International Association of Internet Hotlines ('**INHOPE**') is an association of 51 Internet hotline providers in 45 countries worldwide. The aim of INHOPE is to eradicate illegal content on the Internet.⁴⁵³

The associated INHOPE Foundation is a charity that helps develop new hotlines worldwide, particularly in emerging countries where there is little or no funding.⁴⁵⁴

INHOPE hotlines offer the general public a way to anonymously report Internet material, including child sexual exploitation material, they suspect may be illegal. Reports are quickly investigated in accordance with national law and, if considered potentially illegal, the content is traced to a hosting country. Information about the report will be passed onto relevant law enforcement agencies in the hosting country. Normally, information will also be passed onto the relevant ISPs hosting the content so that the material can be removed from the Internet.⁴⁵⁵

INHOPE members around the world have the support of their National Government, the ISP industry and national and international law enforcement agencies.⁴⁵⁶ As well as operating National hotlines, INHOPE members cooperate with international members in exchanging information about legal content and provide training opportunities.⁴⁵⁷

All INHOPE members are required to adhere to the INHOPE Code of Practice that sets out, among other things, requirements for member websites and information to be provided about the hotline and procedures on that website, cooperation with other member hotlines, the need for a published statement detailing the cooperation agreements with local law enforcement, and evidence of internal and complaints procedures.⁴⁵⁸

The CyberReport Hotline is the INHOPE member in Australia. The CyberReport Hotline is run by the Office of the Children's eSafety Commissioner, an independent statutory body of the Australian Government. The CyberReport Hotline undertakes to complete investigations of complaints within two working days and has legal 'take-down' powers for prohibited material hosted in or made available in Australia.⁴⁵⁹

On 26 July 2016, the Children's E-Safety Commissioner's office released figures that show there had been 7,400 investigations into online child sexual exploitation material in the preceding year. 92 per cent of those investigations depicted children who were primary school age or younger. During this period, the office worked with INHOPE's members around the world to remove thousands of URLs hosting child sexual exploitation material and referred information to law enforcement agencies in Australia and overseas.⁴⁶⁰

⁴⁵³ International Association of Internet Hotlines (INHOPE), *At a glance*

<<http://www.inhope.org/gns/who-we-are/at-a-glance.aspx>

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ INHOPE, *Code of Practice* (2016)

<http://www.inhope.org/Libraries/Best_Practice_Papers/2016_Code_of_Practice_-_readopted_May_2016_AGM.sflb.ashx>.

⁴⁵⁷ INHOPE, above n 453.

⁴⁵⁸ INHOPE, above n 456.

⁴⁵⁹ INHOPE, *Our Members: Australia* <<http://inhope.org/gns/our-members/australia.aspx>>.

⁴⁶⁰ Office of the eSafety Commissioner, "Child sex abuse images mainly primary schoolers" (Media Release, 26 July 2016) <<https://www.esafety.gov.au/about-the-office/newsroom/media-releases/child-sex-abuse-images-mainly-primary-schoolers>>.

In 2014, INHOPE assessed 83,644 URLs as containing child sexual exploitation material worldwide. This was a 71 per cent increase from 2013.⁴⁶¹ Globally, 95 per cent of cases reported to INHOPE members were reported to law enforcement agencies with 1 day and in 91 per cent of cases, there was removal of child exploitation material from public access within 3 days.⁴⁶²

6.1.4. INTERPOL's International Child Sexual Exploitation Database

In 2001, INTERPOL initiated the Child Abuse Image Database, which used sophisticated image and video comparison software to compare new images with previously available material. This enables connections to be made between victims, abusers and places.

This ultimately led to the establishment of the ICSE in 2009. The database was backed by the G8 and funded by the European Commission.

The ICSE database uses sophisticated image and video comparison software to make connections between victims, abusers and places. Participant countries are able to access the ICSE database directly and in real time, providing immediate information for investigations.⁴⁶³

The ICSE database is continuously growing as more countries are participating in the programme. By the end of 2015, INTERPOL had identified over 8,000 victims from nearly 50 countries, as well as numerous unidentified victims using the ICSE database.⁴⁶⁴ INTERPOL report that on average 7 child victims were identified every day in 2015 using the ICSE database and since its launch more than 3,800 offenders have been arrested from investigations using it.⁴⁶⁵

The constant changes in offending patterns, and the nature of material that is being produced or distributed, requires ongoing versions which can bridge any gaps, and continue aiding in investigations. In February 2016, the third version of the database was released, which expanded the database's features. A fourth version is currently being developed.⁴⁶⁶

In 2010, police in Australia uncovered a large number of exploitation images of underage boys. The police officers entered the images into INTERPOL's database but were unable to identify the victims or location. Further evidence led them to suspect the images were produced by an organized criminal group in Bangladesh which had been sexually abusing young boys and selling the images online since 2004.

Police in Bangladesh continued the investigation; arresting three men in 2014, one whom they believed was the head of the criminal network.

⁴⁶¹ International Association of Internet Hotlines (INHOPE), *Statistics 2014* <<http://www.inhope.org/tns/resources/statistics-and-infographics/statistics-and-infographics-2014.aspx>>.

⁴⁶² Ibid.

⁴⁶³ INTERPOL, *Victim Identification* <<http://www.interpol.int/Crime-areas/Crimes-against-children/Victim-identification>>.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid.

During the arrests, police recovered a large number of child exploitation images and videos, estimating that the total number of victims (aged from 10 to 16) to be as high as several hundred. The information also enabled police to rescue a 12 year old boy.⁴⁶⁷

6.1.5. WePROTECT Global Alliance

The Global Alliance Against Child Sexual Exploitation was launched in 2012 as a joint initiative between the European Union and the United States. Participation in the Global Alliance is open to any country willing to join. Australia is a member of the Global Alliance.

WePROTECT was created by the United Kingdom government and launched in 2014 to combat online child exploitation.

At the WePROTECT summit in November 2015, the United Kingdom, United States and European Union formalised a merger between WePROTECT and the Global Alliance Against Child Sexual Abuse Online. The newly formed 'WePROTECT Global Alliance' seeks to eradicate child sexual abuse and exploitation.

At its first meeting in March 2016, the WePROTECT Global Alliance Board agreed upon a vision to:⁴⁶⁸

- 1) Identify and safeguard more victims;
- 2) Apprehend more perpetrators; and
- 3) End online child sexual exploitation.

70 countries were already members of WePROTECT or the Global Alliance against Sexual Abuse Online, along with major international organisations, 20 of the biggest names in the global technology industry, and 17 leading civil society organisations. All of these organisations and participants have been asked to join WePROTECT Global Alliance.⁴⁶⁹

These participants include:

- Child Helpline International
- Apple
- DELL
- Google
- International Justice Mission
- Facebook
- Internet Watch foundation

⁴⁶⁷ INTERPOL 'Child Abuse Ring Identified through International Collaboration via INTERPOL', (Media Release, 18 June 2014) <<http://www.interpol.int/News-and-media/News/2014/N2014-114>>.

⁴⁶⁸ The WePROTECT Global Alliance, *Our Strategy to End the Sexual Exploitation of Children Online*, (July 2016) <<https://static1.squarespace.com/static/5630f48de4b00a75476ecf0a/t/578408b5f7e0ab851b789e14/1468270775764/WePROTECT+Global+Alliance+Strategy.pdf>> 2.

⁴⁶⁹ Ibid.

- INTERPOL
- Microsoft
- UNICEF
- Twitter
- Yahoo
- Internet Watch Foundation

On 12 July 2016, the new Global Partnership Fund to End Violence Against Children was launched. The Fund will deliver a global programme of capacity and capability building, with an initial donation of £40m from the United Kingdom government supporting its work to end online child sexual exploitation. The Fund will be hosted by UNICEF and the WePROTECT Global Alliance Board will be responsible for advising how to prioritise its activities for maximum impact.⁴⁷⁰

6.1.6. DNA Database Agreement with United Kingdom

On 6 November 2014, Australia and the United Kingdom signed a bilateral agreement to access each country's DNA and biological databases. The agreement is considered to be historic and ground-breaking as it enables each party to share data directly, without the involvement of INTERPOL. If successful, the partnership could pave the way for similar agreements with other countries including in particular the United States and Canadian police forces.

The then Australian Minister for Justice, Michael Keenan, said the agreement shows the "interconnected nature of the world today has created a fast-paced and borderless criminal threat environment."⁴⁷¹

He noted that the agreement will "enable more systematic database to database exchange... allowing Australia to further contribute to international criminal investigations and to fight transnational crime."⁴⁷²

The agreement enables British police officers to search for DNA profiles of offenders in Australia, and vice versa. At the time of signing, the Australian DNA database stored the biological information of 750,000 people.⁴⁷³

6.1.7. The United States' National Centre for Missing and Exploited Children

NCMEC provides services, resources and technical assistance to child victims of abduction and sexual exploitation, their families and the professionals who serve them.

NCMEC operates the CyberTipline as a member of INHOPE. More than 7.5 million reports of suspected child sexual exploitation have been made to the CyberTipline

⁴⁷⁰ WePROTECT Global Alliance, *Strategy* <<http://www.weprotect.org/strategylaunch>>.

⁴⁷¹ Michael Keenan, 'Interpol's International Child Sexual Exploitation Database' (Speech delivered at INTERPOL General Assembly, Monaco, 4 November 2014).

⁴⁷² Joshua Robertson, 'Australia and British Police to Share their DNA Databases', *The Guardian* (Online) 6 November 2014 <<http://www.theguardian.com/australia-news/2014/nov/06/australian-and-british-police-to-share-their-dna-databases>>.

⁴⁷³ *Ibid.*

between 1998 and April 2015.⁴⁷⁴ More than half of these, 4.4 million, were received in 2015 alone.⁴⁷⁵

NCMEC also operates the Child Victim Identification Program, has a Sex Offender Tracking Team and Child Sex Trafficking Team to help law enforcement and the private sector reduce the proliferation of child pornography and prevent child victimisation.

The Child Victim Identification Program was launched in 2002 after NCMEC analysts repeatedly saw images of the same child victims in their reviews and began tracking which victims had been previously identified by law enforcement. Up until April 2015, the NCMEC has analysed more than 139 million images and videos depicting apparent child exploitation sexual material through the Program.⁴⁷⁶

NCMEC uses, among other investigation techniques, PhotoDNA technology.

NCMEC is a major source of referrals to the AFP's Child Protection Operations ('CPO') where some form of Australian content, mainly victim, is identified. As discussed later, this then leads to investigation by the CPO itself or referral to State/Territory police.

In the late 1990s, the NCMEC reported numerous requests for assistance from individuals and organisations around the world. With the volume of requests for assistance from abroad exceeding NCMEC's capacity to respond, the Board of Directors authorised the creation of a new organisation that would devote itself to doing globally what NCMEC was committed to doing in the United States.⁴⁷⁷

6.1.8. The International Centre for Missing and Exploited Children

KEY ASSOCIATION: ICMEC

"The proliferation of child pornography on the Internet has created an enormous challenge for law enforcement personnel who seek to identify and rescue victims, and to investigate and prosecute offenders. The number of images seized by law enforcement around the world, both still and video, is staggering. Individual offenders possess massive collections of up to terabytes or even petabytes of data. When tens of thousands of images of child abuse material are seized by law enforcement, many of the photos or videos are destined to be left on hard drives and in police station evidence lockers."⁴⁷⁸

By combining investigation techniques with new forms of forensic technology, law enforcement around the world can overcome issues surrounding the identification and protection of child victims, as well as the investigation and prosecution of offenders.

The ICMEC was established in 1998 as a sister organisation to NCMEC, and officially launched in April 1999.

⁴⁷⁴ National Centre for Missing and Exploitation Children, *CyberTipline*, <<http://www.missingkids.com/CyberTipline>>.

⁴⁷⁵ National Centre for Missing and Exploitation Children, *Homepage* <<http://www.ncmec.org>>.

⁴⁷⁶ National Centre for Missing and Exploitation Children, *Child Victim Identification Program* <<http://www.missingkids.com/CVIP>>.

⁴⁷⁷ International Centre for Missing and Exploited Children, *Our History*

<<http://www.icmec.org/history>>.

⁴⁷⁸ *Ibid.*

ICMEC works with, among others, NCMEC, INTERPOL, the Organization of American States and the Hague Conference on Private International Law.

ICMEC established the Global Missing Children's Network ('**GMCN**') bringing together partners in 24 countries on 4 continents to help recover missing and abducted children. Australia is a partner of the GMCN.

ICMEC also established a Global Training Academy where law enforcement from around the world can train to investigate child abduction, sexual abuse and child exploitation, including online.

ICMEC reports

ICMEC recognised the need to gain a better understanding of the global legislative landscape as it related to child pornography. ICMEC issued an initial report in 2006 that identified key areas of risk in child pornography and offered a legislative review of laws combating this crime globally.

The study of national legislation sought to find out which countries:

- Generally outlaw child pornography;
- Define what 'child pornography' is;
- Criminalise computer-facilitated offenses;
- Criminalise the known possession of child pornography, regardless of the intent to distribute;
- Require ISPs to report suspected child pornography to law enforcement or to some other mandated agency; and
- Require ISPs to develop and implement data retention and preservation provisions. This last point was added in the 8th edition of the report published in 2016⁴⁷⁹

The 2006 and subsequent reports provide a 'menu of concepts' that countries could consider when drafting anti-child pornography legislation. The 11 fundamental concepts are:⁴⁸⁰

1. Defining 'child' for the purposes of child pornography as anyone under the age of 18, regardless of the age of sexual consent in that country;
2. Defining 'child pornography,' and ensuring that the definition includes computer and Internet-specific terminology;
3. Creating offences specific to child pornography in the national penal code, including criminalising the knowing possession of child pornography, regardless of one's intent to distribute, and including provisions specific to knowingly downloading or knowingly viewing images on the Internet;
4. Ensuring criminal penalties for parents or legal guardians who acquiesce to their child's participation in child pornography;

⁴⁷⁹ International Centre for Missing and Exploited Children, 'Child Pornography: Child pornography, Model Legislation & Global Review' (8th Edition, 2016) <<http://www.icmec.org/wp-content/uploads/2016/02/Child-Pornography-Model-Law-8th-Ed-Final-linked.pdf>> v.

⁴⁸⁰ Ibid. 1.

5. Penalising those who make known to others where to find child pornography;
6. Incorporating grooming provisions;
7. Punishing attempt crimes;
8. Establishing mandatory reporting requirements for healthcare and social service professionals, teachers, law enforcement officers, photo developers, information technology professionals, ISPs, credit card companies and banks;
9. Creating data retention and/or preservation policies/provisions;
10. Addressing the criminal liability of children involved in pornography; and
11. Enhancing penalties for repeat offenders, organised crime participants, and other aggravating factors to be considered upon sentencing.

Since the first ICMEC report, 127 countries have refined or implemented new anti-child exploitation material legislation in line with the 'menu of concepts'.⁴⁸¹ However, ICMEC notes that:

35 countries still do not have legislation that deals specifically with child pornography. Of the 79 countries that do have some legislation in place, 60 of them do not define child pornography specifically; 26 do not deal with computer-based offenses; 50 do not criminalize possession without regard to intent to distribute; and 79 have data retention legislation in place to ensure access by law enforcement to user data needed to investigate and prosecute online criminal activity.⁴⁸²

At the time of the 2016 report, only 11 countries met all criteria recommended by ICMEC. Australia is one of those 11 countries.⁴⁸³

Under the organisational structure of ICMEC, Australia is also a member of the Asia-Pacific Financial Coalition Against Child Pornography ('**APAC-FCACP**'), which was launched in 2009. Its mission is "to broaden the fight against the online sale and dissemination of child sexual exploitation materials."

Members include banks, credit card companies, online third-party payment systems, technology companies, social networking platforms, industry associations, and law enforcement agencies.

Since its launch, there have been a number of country roundtables, including Sydney in May 2014.⁴⁸⁴

The APAC-FCAP has also published 3 significant reports; APAC-FCACP Legal Framework and Obstacles,⁴⁸⁵ Best Practices: File Hosting and File Sharing Companies,⁴⁸⁶ and Industry Considerations for Protecting Children.⁴⁸⁷

⁴⁸¹ Ibid.

⁴⁸² International Centre for Missing and Exploited Children, *Child Pornography: Model Legislation & Global Review* <<http://www.icmec.org/child-pornography-model-legislation>>.

⁴⁸³ International Centre for Missing and Exploited Children, above n 477, 9.

⁴⁸⁴ See International Centre for Missing and Exploited Children, *Asia-Pacific Financial Coalition Against Child Pornography* <<http://www.icmec.org/apac-fcacp>>.

⁴⁸⁵ Allen & Overy, 'Coalition of Stakeholders Against Commercial Sexual Exploitation of Children on the Internet' (International Centre for Missing and Exploited Children, 2012) <http://www.icmec.org/wp-content/uploads/2016/06/AO-Asia-Pacific-Report_-HK-Section-Updated-July2015_new-ICMEC-cover_Final.pdf>.

ICMEC forensic technology

In April 2014, Friend MTS, a leading global provider of platform, channel and content protection services, donated forensic technology to ICMEC to assist in finding and removing the most egregious videos of child sexual exploitation from the Internet. ICMEC has made the technology, F1 Video Fingerprinting ('F1'), available to law enforcement and software providers globally. F1 generates unique video fingerprints of child-pornography video clips. These 'video fingerprints' are used by law enforcement to efficiently and reliably identify copies or partial copies of illegal material, saving law enforcement valuable time and enabling online services to filter and block its distribution.⁴⁸⁸

ICMEC serves as the Administrative Coordinator and International Outreach Coordinator for Project VIC.⁴⁸⁹

In the vast amount of material that is not reviewed, there are victims of abuse who are not identified, rescued and supported. Out of that dilemma comes Project VIC's philosophy: Victims First – No Child Left Behind.⁴⁹⁰

By accessing the NCMEC and ICSE databases and using technologies such as PhotoDNA and F1, Project VIC has compiled all existing online child exploitation images into a single repository and built a library of over 5 million unique images of child pornography, including stills and video. Project VIC give each image, whether still or video, a unique identifier known as a "hash value." Through processing and categorization of the images, there are now more than 2 million quality-controlled hash values available to law enforcement.⁴⁹¹

Using the hash value allows investigators to quickly 'pre-categorise' images identified during new investigations. By identifying the known images and known victims, which could be 85 per cent of the seized images, law enforcement is able to concentrate their victim identification efforts on the remaining 15 per cent of unknown images.⁴⁹²

In 2015 Project VIC launched a new initiative, Project VIC-International, to promote and grow the information sharing of Project VIC data and innovations. Countries who have adopted the Project VIC model of information sharing, and victim centric approach to investigations include the United Kingdom, Canada, New Zealand and Australia.⁴⁹³

6.1.9. End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes

ECPAT was established in 1990 as a campaign to end child prostitution in Asian Tourism. By 1996 it became apparent that the sexual exploitation of children was also

⁴⁸⁶ International Centre for Missing and Exploited Children, 'Confronting New Challenges in the Fight against Child Pornography' (Asia Pacific Financial Coalition against Child Pornography, 2013) <<http://www.icmec.org/wp-content/uploads/2015/10/APAC-FCACP-File-Hosting-and-File-Sharing-Best-Practices.pdf>>.

⁴⁸⁷ Ibid.

⁴⁸⁸ Project Vic, *F1 Video Fingerprinting* <<http://www.projectvic.org/f1-video-fingerprinting>>.

⁴⁸⁹ International Centre for Missing and Exploited Children, *Project Vic* <<http://www.icmec.org/project-vic>>.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² Project Vic, *Homepage* <<http://www.projectvic.org>>.

⁴⁹³ International Centre for Missing and Exploited Children, above n 448.

growing in other areas of the world. ECPAT ceased being a regional programme and became a global non-governmental organisation and network.⁴⁹⁴

ECPAT coordinates research, advocacy and action to end the commercial sexual exploitation of children internationally. Among other things, it produces country reports on child sexual exploitation. The 2nd edition report on Australia was issued in 2012.⁴⁹⁵

There are 90 member organisations in 82 countries working to end sexual exploitation of children with ECPAT. The not-for profit organisation Child Wise is the Australian member of ECPAT.

ECPAT has special consultative status with the Economic and Social Council of the United Nations and holds a general assembly every three years.

Within the ECPAT network, different groups have different roles depending on the country they operate in. For example, the Western European groups, Australia and New Zealand operate on the understanding that their role in ECPAT is helping to build capacities of groups in developing countries. Education in those countries is based more around the importation of child pornography (including online) and being 'sending countries' in the child sex tourism industry.⁴⁹⁶

World Congresses

In collaboration with the Swedish government and UNICEF, ECPAT International coordinated the First World Congress against Commercial Sexual Exploitation of Children ('CSEC') in 1996. Representatives from 122 governments, including representatives from Australia, participated in the Congress.⁴⁹⁷ Attending governments approved an Agenda for Action. The Agenda for Action provides a framework for the implementation of articles related to the sexual exploitation of children in the Convention on the Rights of the Child.⁴⁹⁸

In 2001 a Second World Congress against CSEC was held in Yokohama with double the number of participants including representatives from 134 governments and many young people.⁴⁹⁹ The Third World Congress was held in Rio de Janeiro in 2008 bringing together representatives from 137 governments, representatives from civil society, UN agencies, the private sector, and children and young people.⁵⁰⁰

Code of Conduct for the Protection of Children From Sexual Exploitation in Travel and Tourism

ECPAT International has created the Code, an industry-driven responsible tourism initiative with a mission to provide awareness, tools and support to the tourism industry in order to prevent the sexual exploitation of children.⁵⁰¹

⁴⁹⁴ ECPAT International, *History* <http://resources.ecpat.net/EI/Ecpat_history.asp>.

⁴⁹⁵ ECPAT International, *Global monitoring status of action against commercial sexual exploitation of children*, (Australia, 2ed, 2012).

⁴⁹⁶ ECPAT International, *ECPAT Network* <http://resources.ecpat.net/EI/Ecpat_network.asp>.

⁴⁹⁷ *Ibid.*

⁴⁹⁸ Declaration and Agenda for Action 1st World Congress against Commercial Sexual Exploitation of Children Stockholm, Sweden, 27 - 31 August.

⁴⁹⁹ ECPAT, above n 494.

⁵⁰⁰ *Ibid.*

⁵⁰¹ ECPAT International, *About, The Code* <<http://www.thecode.org/about>>.

When a tourism company joins the Code they commit to taking the following six essential steps to help protect children:

- 1) Establish a policy and procedures against sexual exploitation of children;
- 2) Train employees in children's rights, the prevention of sexual exploitation and how to report suspected cases;
- 3) Include a clause in contracts throughout the value chain stating a common repudiation and zero tolerance policy of sexual exploitation of children;
- 4) Provide information to travellers on children's rights, the prevention of sexual exploitation of children and how to report suspected cases;
- 5) Support, collaborate and engage stakeholders in the prevention of sexual exploitation of children; and
- 6) Report annually on their implementation of Code related activities.⁵⁰²

There are a number of Australian tourism members of the Code including Accor Hotels, Adventure Travel Trade Association and Carlson hotels.⁵⁰³

The Code is a partner of VGT.⁵⁰⁴

Interagency Working Group Terminology Guidelines

ECPAT has also coordinated the Interagency Working Group, which released the "Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse", called the "Luxembourg Guidelines" as they were released in that country in June 2016.⁵⁰⁵ The Interagency Working Group is composed of 18 leading bodies in the prevention of child sexual abuse, including INTERPOL, Europol, International Centre for Missing and Exploited Children, Office of the United Nations High Commissioner for Human Rights as well as the Special Representative to the UN Secretary General on Violence against Children, the UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography.⁵⁰⁶

The Luxembourg Guidelines were created to address the lack of consensus at the international level on the terminology to be used in relation to the sexual exploitation and sexual abuse of children.⁵⁰⁷ The Luxembourg guidelines provide detailed definitions of each term in which the meaning is explained linguistically, and the use of the term is analysed. The inconsistency across jurisdictions has caused flawed responses to child sexual exploitation, and ineffective methods of measuring the impact of these offences.⁵⁰⁸

⁵⁰² Ibid.

⁵⁰³ ECPAT International, *Members*, The Code <<http://www.thecode.org/who-have-signed/members>>.

⁵⁰⁴ Virtual Global Taskforce, *Industry Partners* <<http://virtualglobaltaskforce.com/who-we-are/industry-partners>>.

⁵⁰⁵ Interagency Working Group, 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse' (ECPAT, June 2016) <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---jpec/documents/instructionalmaterial/wcms_490167.pdf>.

⁵⁰⁶ Ibid., vi.

⁵⁰⁷ Ibid., 1.

⁵⁰⁸ Ibid.

The Guidelines state that greater consistency and conceptual clarity of the terminology is needed to ensure stronger advocacy, policy and laws.⁵⁰⁹

6.1.10. The Financial Coalition against Child Pornography

Since 2006, ICMEC, NCMEC and a collection of 34 banks, credit card companies, electronic payment networks, third party payment companies and Internet service providers have worked collaboratively as part of the Financial Coalition against Child Pornography ('**FCACP**').

Within the FCACP, the Prevention Working Group identifies best practices to eliminate the commercial exchange of child exploitation materials. The focus of the FCACP is to curb the money flow to child sexual exploitation material commercial ventures. Among other things, the FCACP:

- Tracks the origins of funds found to be used in illegal activities to close the accounts identified;
- Monitors Internet merchants by approving products being sold online. Investigating links to merchants' websites to ensure no 'off-the-book products' or services are being processed through a merchant's account; and
- Cross references records from pornography websites with credit card information to identify credit card usage on illegal sites.⁵¹⁰

FCACP has published a number of 'best practice' papers for the industry and launched a workshop 'keeping child pornography merchants out of the payments system'. The workshop was designed to help online companies from being infiltrated by commercial organisations that sell child exploitation material online.⁵¹¹

The APAC-FCACP was established in 2009.

Since 2013, the APAC-FCACP has focused on initiatives directed to individual countries. There have been three country specific roundtables in New Zealand, Australia and Hong Kong.

In May 2014, a roundtable was held in Sydney. Participants included:

- Child Wise
- Uniting Church in Australia
- ACMA (the functions of the ACMA relating to online child exploitation are now coordinated by the Office of the Children's eSafety Commissioner)
- InHope
- University of Tasmania Law School
- AFP

⁵⁰⁹ Ibid.

⁵¹⁰ UNODC, 'Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children' (UN May 2015) 52.

⁵¹¹ International Centre for Missing and Exploited Children, *The Financial coalition Against Child Pornography* <www.icmec.org/fcacp>.

- Queensland Police Taskforce Argos ('Argos')
- Mastercard
- PayPal
- Visa
- Facebook
- Microsoft
- Safer Childhoods Foundation of Indonesia
- Google
- Thai Institute of Justice

APAC-FCACP's Technology Challenges Working Group seeks to identify the ever-increasing tools that the exploiters of children employ on the Internet. To this end, the Working Group published two resources on confronting challenges in the fight against child exploitation material:

- Best Practices to Help File Hosting and File Sharing Companies Fight the Distribution of Child Sexual Exploitation Content; and
- Considerations for Protecting Children & Your Company's Reputation When Engaging with Digital Businesses.⁵¹²

6.1.11. The Technology Coalition

The Technology Coalition was established in 2006 by ICMEC, NCMEC and a number of Internet service providers. The Technology Coalition aims to eradicate online child sexual exploitation. The group's strategy is to sponsor the development of technology solutions that disrupt the ability to use the Internet to exploit children or distribute child exploitation materials.⁵¹³

The Technology Coalition is funded by member companies and does not accept funding from Government agencies or NCMEC.

There are currently 9 members working with the Technology Coalition:

- Dropbox
- Facebook
- GoDaddy
- Google Inc.
- LinkedIn
- Microsoft Corporation
- PayPal

⁵¹² International Centre for Missing and Exploited Children , *APAC The Financial Coalition Against Child Pornography* <<http://www.icmec.org/apac-fcacp>>.

⁵¹³ Technology Coalition, *Homepage* < <http://www.technologycoalition.org/>

- Snapchat
- Twitter
- Yahoo! Inc.

The Technology Coalition seeks and creates platforms for collaboration with the private and public sectors for the creation of standards, the sharing of best practices and similar initiatives that advance the fight against online sexual exploitation of children.

For example, one of the Technology Coalition's ongoing projects is PhotoDNA.⁵¹⁴ PhotoDNA was developed in 2009 by Microsoft in cooperation with Dartmouth College. Numerous companies, both inside and outside the Technology Coalition, have deployed PhotoDNA, as part of NCMEC's PhotoDNA Initiative.⁵¹⁵

The computer technology assists in finding images of child exploitation. The technology helps calculate the distinct characteristics of a digital image to match it to other copies of that same image. While it was previously possible to identify illegal images if they were exact matches of known sexual exploitation photos, perpetrators could keep photos from being detected by changing them slightly. For example, adjusting the size of the photo or making a small mark on it. By using "hash" matching technology, PhotoDNA can identify known illegal photos even if someone has altered them.⁵¹⁶

The technology allows companies to compare millions of photos against a 'hash set' of child sexual exploitation images. The 'hash set' is created by NCMEC from the catalogue of child exploitation images it holds. Previous technologies required time, money and technical expertise to get up and running and keep it up-to-date. PhotoDNA is available on the Cloud for free, taking away the expertise and running cost issues for smaller companies and other organisations that want to give users the freedom to upload content while ensuring the integrity of their platforms.⁵¹⁷

An example of an online organisation using PhotoDNA is Kik, a chat network that is popular among teens and young adults around the world. Microsoft reports that:

Kik uses it to detect exploitative profile photos as they're being uploaded, so the company can immediately remove them, report them to law enforcement and remove the user's account... The company does manually review some images, but with more than 200 million users globally, automation is a must. PhotoDNA allows Kik to identify known illegal images among a much greater number of photos, while in many cases letting human moderators avoid the disturbing task of identifying them. Another crucial advantage for Kik is that it doesn't cause any delay for users sharing content.⁵¹⁸

6.2. Domestic Agencies and Organisations

This section identifies and analyses the role of key Australia-based agencies and organisations specifically involved in countering the online exploitation of children. The

⁵¹⁴ Technology Coalition, *Coalition Projections* <http://www.technologycoalition.org/coalition-projects>.

⁵¹⁵ Microsoft, *Features Microsoft's PhotoDNA: Protecting children and businesses in the cloud* <<https://news.microsoft.com/features/microsofts-photodna-protecting-children-and-businesses-in-the-cloud/#sm.000wzbnvby3kfs811081fux25nyul>>.

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

⁵¹⁸ Ibid.

section is divided into 3 parts: government based bodies, specialist law enforcement units, and principal NGOs working in the area.

6.2.1. Specialist Government Agencies, Organisations and Resources

These include:

- Office of the Children's eSafety Commissioner
- National Children's Commissioner
- Australian Human Rights Commission
- ThinkUKnow
- Australian Criminal Intelligence Commission
- Austrac

Office of the Children's eSafety Commissioner

The OCEC is an independent statutory office created by the *Enhancing Online Safety for Children Act 2015* (Cth).⁵¹⁹ The Commissioner has a wide range of functions and powers to enhance online safety for Australian children.⁵²⁰

OCEC's primary functions are to provide online safety education for children and their parents, a complaints service for cyberbullying and the investigation of complaints from the public and law enforcement agencies about offensive and illegal content online through its CyberReport team.⁵²¹

The CyberReport team assesses whether online content reported is offensive and illegal by reference to the National Classification Scheme, which also applies to films, publications and computer games. Offensive and illegal content includes:

- Child sexual abuse material
- Material that advocates the doing of a terrorist act
- Detailed instruction or promotion in crime or violence
- Instruction in paedophilic activity
- Gratuitous, exploitative and offensive depictions of violence or sexual violence.⁵²²

The CyberReport Hotline is the complaints mechanism for reporting offensive or illegal online content in Australia. Reports can be made anonymously through the

⁵¹⁹ *Enhancing Online Safety for Children Act 2015* (Cth) s 14

⁵²⁰ *Enhancing Online Safety for Children Act 2015* (Cth) s 15

⁵²¹ Office of the Children's eSafety Commissioner, *Role of the Office*

<<https://www.esafety.gov.au/about-the-office/role-of-the-office>>.

⁵²² Office of the Children's eSafety Commissioner, *What we can Investigate*

<<https://www.esafety.gov.au/complaints-and-reporting/offensive-and-illegal-content-complaints/what-we-can-investigate>>.

Hotline. OCEC, through the CyberReport Hotline, is a member of INHOPE (see international affiliations section for more detail on INHOPE).⁵²³

Investigations into online child exploitation material are prioritised by the CyberReport team, which works with law enforcement agencies nationally and within the INHOPE global network to remove the material irrespective of where it is hosted. Investigations can involve content hosted across a range of platforms, including web sites, file hosts and peer-to-peer networks.⁵²⁴ Reports of child sexual exploitation material and other illegal content are usually investigated within two working days. The CyberReport team has legal take-down powers for prohibited content hosted in, or made available from, Australia.⁵²⁵

On 26 July 2016, OCEC released figures that show there had been 7,400 investigations into online child sexual exploitation material in the preceding year. 92 per cent of those investigations depicted children who were primary school age or younger. During this period, OCEC and the CyberReport team worked with INHOPE's members around the world to remove thousands of URLs hosting child sexual exploitation material and referred information to law enforcement agencies in Australia and overseas.⁵²⁶

Prior to the creation of OCEC, reports of online child exploitation material could be made through a hotline run by the ACMA. The ACMA worked with police forces throughout Australia and INHOPE.⁵²⁷ OCEC has also taken on responsibility of cybersmart programmes that were formerly run by the ACMA.

Australian Human Rights Commission

As Australia ratified the CRC in December 1990, Australia has a duty to ensure that all children in Australia enjoy the rights set out in the treaty. The Australian Human Rights Commission has undertaken a number of major projects to draw community attention to the serious human rights challenges facing vulnerable groups of children.⁵²⁸

In 2013, Australia's first National Children's Commissioner was appointed to assist in protecting the rights of children within Australia.⁵²⁹

The National Children's Commissioner's key duties include:

- Advocating nationally for the rights and interests of children and young people which includes all children and young people up to eighteen years of age
- Promoting children's participation in decisions that impact on them

⁵²³ International Association of Internet Hotlines, *Australia: CyberReport* <<http://www.inhope.org/gns/our-members/australia.aspx>>.

⁵²⁴ International Association of Internet Hotlines, *Australia* <<http://www.inhope.org/gns/our-members/australia.aspx>>.

⁵²⁵ Ibid.

⁵²⁶ Office of the Children's eSafety Commissioner, 'Child sex abuse images mainly primary schoolers' (Media Release, 26 July 2016) <<https://www.esafety.gov.au/about-the-office/newsroom/media-releases/child-sex-abuse-images-mainly-primary-schoolers>>.

⁵²⁷ Australian Communications and Media Authority, 'New national network for reporting online child sexual abuse content' (Media Release 42/2014, 29 July 2016) <<http://acma.gov.au/theACMA/acma-and-australian-police-cement-national-network-for-reporting-online-child-sexual-abuse-content>>.

⁵²⁸ Australian Human Rights Commission, *About Children's Rights* <<https://www.humanrights.gov.au/our-work/childrens-rights/about-childrens-rights>>.

⁵²⁹ Ibid.

- Providing national leadership and coordination on child rights issues
- Promoting awareness of and respect for the rights of children and young people in Australia
- Undertaking research about children's rights
- Reviewing laws, policies and programmes to ensure they protect and uphold the rights of children and young people.⁵³⁰

A key strategic theme of the Commission is to address violence, harassment and bullying. In 2014 the National Children's Commissioner conducted consultations and research on self-harm and suicide among children. Online bullying and exposure to harmful material was found to be an important risk factor in relation to intentional self-harm. Further, in 2015 the Commissioner investigated the impact of family violence on children, finding that children are increasingly exposed to harmful online images and information in the context of family breakdown and violence. The Children's Commissioner regularly consults with children and young people about their rights, including the right to be free from harm and abuse. The Commissioner is a member of the Federal Government's On-line Safety Working Group, chaired by the Office of the Children's E-Safety Commissioner, and the network of Australian Children's Commissioners and Guardians, a number of whom have a role in overseeing state based child protection systems. To date there do not appear to have been any specific projects by the Human Rights Commission focused on online child exploitation, however in 2016, the Commission made a submission and recommendations to the Senate Standing Environment and Communications References Committee Inquiry on Harm being done to Australian children through access to pornography on the Internet.

Australian Criminal Intelligence Commission

The Australian Criminal Intelligence Commission ('**ACIC**') is an almost 1000-strong national agency, with a presence in every State and Territory of Australia.⁵³¹ The ACIC has investigative, research and information delivery functions to support operational law enforcement throughout Australia.⁵³²

One of ACIC's information sharing services is Child Protection. ACIC state that law enforcement throughout Australia use ACIC child protection solutions to help identify and manage offenders against children, helping to protect children at risk.⁵³³ In particular, ACIC operates and maintains the National Child Offender System ('**NCOS**') and CETS.

NCOS is used by Australian law enforcement to record and share child offender information. Identified child sex offenders (and other defined categories of serious offenders against children) are required to keep police informed of their location within Australia and to provide other personal details for a period of time after they are released into the community.⁵³⁴

⁵³⁰ Ibid.

⁵³¹ Australian Criminal Intelligence Commission, *Structure* <<https://www.acic.gov.au/about-us/organisational-structure>>.

⁵³² Australian Criminal Intelligence Commission, *About Us* <<https://www.acic.gov.au/about-us>>.

⁵³³ Australian Criminal Intelligence Commission, *Child Protection* <<https://www.acic.gov.au/our-services/child-protection>>.

⁵³⁴ Australian Criminal Intelligence Commission, *National Child Offender System* <<https://www.acic.gov.au/our-services/child-protection/national-child-offender-system>>.

NCOS consists of:

- The Australian National Child Offender Register ('**ANCOR**') which enables authorised police officers to register, case manage and share information about registered persons; and
- The Managed Person System ('**MPS**'), which holds information on offenders who are charged but not convicted, or after an offender's reporting obligations have been completed.⁵³⁵

CETS is a joint project between ACIC and the AFP. It is intended to automate the process of linking seized child exploitation material with previously identified child exploitation images. This enables law enforcement to save time sorting through already identified images and enables there to be a focus on identifying new images and therefore new child victims.⁵³⁶

ACIC also operate the Australian Cybercrime Online Reporting Network ('**ACORN**') which is a national policing initiative of the Commonwealth, State and Territory governments. ACORN is a national online system that allows the public to securely report instances of online crime.⁵³⁷ It also provides advice to help people recognise and avoid common types of online crime. ACORN does not accept reports about online child sexual exploitation images and notes that this material should be referred to the Office of the Children's eSafety Commissioner.⁵³⁸

Austrac

This federal agency is Australia's financial intelligence agency with regulatory responsibility for anti-money laundering and counter-terrorism financing. Through the provision of information from a range of industry sources it is able to investigate suspicious movements of money. While it focuses mainly on terrorist financing, serious & organised crime, money laundering and tax evasion, it has also investigated suspicious transactions relating to online child exploitation.

6.2.2. Federal Police Units

Australian Federal Police

The AFP conducts the Child Protection Operations ('**CPO**') team. The CPO team co-ordinates and investigates multijurisdictional and international online child exploitation offences, within the online and travel and tourism environments.⁵³⁹ The AFP has JACET agreements with various State police agencies. The JACETs enable AFP CPO officers to work closely with State child exploitation teams throughout Australia. More information on the various JACETs is set out below.

⁵³⁵ Ibid.

⁵³⁶ Australian Criminal Intelligence Commission, *Child Exploitation Tracking System* <<https://www.acic.gov.au/our-services/child-protection/child-exploitation-tracking-system>>.

⁵³⁷ Australian Criminal Intelligence Commission, *About ACORN*, ACORN <<https://www.acorn.gov.au/about-acorn>>.

⁵³⁸ Australian Criminal Intelligence Commission, *Online Child Sex Abuse Material*, ACORN <<https://www.acorn.gov.au/learn-about-cybercrime/online-child-sexual-abuse-material>>.

⁵³⁹ Australian Federal Police, *Online Child Sex Exploitation* <<https://www.afp.gov.au/what-we-do/services/child-protection/online-child-sex-exploitation>>.

The AFP maintains the ThinkUKnow program licence in Australia.⁵⁴⁰ The ThinkUKnow program is described in [section 7.2.2](#) of this report. The AFP is also Australia's representative on the VGT.

Investigation and enforcement

The types of offences investigated by the CPO team include accessing, sending or uploading child exploitation material on electronic devices. Grooming and procuring of children over the Internet are investigated by the AFP.⁵⁴¹

The CPO team investigate and coordinate matters in conjunction with:

- State and Territory police (for more information on State and Territory police units, see below);
- Government organisations;
- Non-government organisations (including Internet Service Providers and Internet Content Hosts);
- The Virtual Global Taskforce; (for more information on VGT, see [section 6.1.1](#) of the report);
- INTERPOL;
- Other international law enforcement agencies, and
- Members of the public.⁵⁴²

The AFP report for the period 1 July 2014 to 30 June 2015 notes that during that period the CPO and AFP responded to the threat of child sex exploitation online and in travel and tourism, resulting in 56 offenders being arrested/summonsed for in excess of 145 child sex offence charges.⁵⁴³

In November 2014, the AFP commenced Operation Aqueous, following a referral from Europol that identified two Australian victims of child sexual exploitation. The subsequent investigation resulted in the removal of four children from harm. The offender, known by the pseudonym "McIntosh"⁵⁴⁴ was sentenced to 22-years imprisonment for a combination of online and contact offences, in what has been described as "one of the worst examples of child sexual abuse and trafficking the AFP has seen".⁵⁴⁵ During this investigation more than 20,000 images and over 200 videos depicting child sexual exploitation were uncovered and referred to the AFP Victim Identification Team.⁵⁴⁶

⁵⁴⁰ ThinkUKnow, *Corporate Report 2014-15*, (2014)

<http://www.thinkuknow.org.au/site/sites/thinkuknow.org.au.site/files/reports/TUK_2014-15_CorporateReport.pdf>.

⁵⁴¹ Ibid.

⁵⁴² Ibid.

⁵⁴³ Australian Federal Police, *Annual Report 2014-15*, (2014) <https://www.afp.gov.au/afp-annual-report-2014-15#chapter_4-4> ch 4.

⁵⁴⁴ For a further examination of this matter see [section 5.4.1](#) of this report.

⁵⁴⁵ Australian Federal Police, *Annual Report 2015-16*, (2016) 47

<<https://www.afp.gov.au/sites/default/files/PDF/Reports/afp-annual-report-2015-2016.pdf>>.

⁵⁴⁶ Ibid.

6.2.3. Queensland

Task Force Argos

The Child Safety & Sexual Crime Group ('**CSSCG**') is a specialist group of the Queensland Police Service ('**QPS**'). Task Force Argos is a specialist police unit within the CSSCG. Argos specialises in disrupting child exploitation networks online.

Argos assists in the investigation and arrest of suspected offenders, the training of enforcement officers and provides education about the risks of electronic devices and the use of the Internet by children.⁵⁴⁷

Paul Griffiths, Argos' Child Victim Identification Co-ordinator, is also the chair of the INTERPOL Specialist Group on Crimes against Children.⁵⁴⁸

Education

Argos officers regularly present to schools and communities groups on the dangers associated with online activity.

Argos has created an e-Brochure, "Who's Chatting To Your Kids?", for parents and caregivers providing basic information on the Internet, smart devices and social media to help guide, assist and supervise children and young persons.⁵⁴⁹

In September 2013, Police Minister Jack Dempsey launched a new education campaign called 'Your Selfie? Keep It To Yourself'.⁵⁵⁰ The campaign, developed by Argos, is aimed at raising community awareness on the implications and dangers of sexting by children and young people.

The QPS is a policing partner of ThinkUKnow.

Training

Argos officers regularly train enforcement officers throughout Australia and New Zealand.⁵⁵¹ Argos also provides online training to law enforcement in countries such as Taiwan.⁵⁵² Training includes topics such as best practice methodologies for investment of child exploitation offences online and victim identification techniques.⁵⁵³

⁵⁴⁷ Queensland Police Service, *Annual Report 2015-16*, (2016) 32
<<https://www.police.qld.gov.au/corporatedocs/reportsPublications/annualReport/Documents/2015-16/QPS%20Annual%20Report%202015-16.pdf>>.

⁵⁴⁸ Ibid.

⁵⁴⁹ Queensland Police Service, *Who's Chatting To Your Kids?* (25 August 2008)
<<https://www.police.qld.gov.au/programs/cscsp/personalSafety/children/childProtection/Documents/whoschattingebook.pdf>>.

⁵⁵⁰ Jack Dempsey, 'Police Urge Teens to Keep Selfies Private' (Media Release, 3 September 2013)
<<http://statements.qld.gov.au/Statement/2013/9/3/police-urge-teens-to-keep-selfies-private>>.

⁵⁵¹ Neil Roberts, 'Taskforce Argos leading the way with anti-child exploitation software' (Media Release, 2 March 2010) <<http://statements.qld.gov.au/Statement/Id/68700>>.

⁵⁵² Queensland Police Service, above n 547.

⁵⁵³ Ibid.

An example of international training includes:

- In April 2014, an Argos' victim identification co-ordinator provided training to 100 South African police and prosecutors⁵⁵⁴;
- In September 2014, an Argos victim identification officer delivered training to 50 USA Homeland Security Special Agents⁵⁵⁵; and
- Immediately following the Youth, Technology and Virtual Communities Conference ('YTVCC') in 2015, Argos hosted a practitioner's seminar for National and International undercover officers examining covert techniques for online investigations.⁵⁵⁶

The 2015 YTVCC attracted approximately 445 delegates including representatives from Australian law enforcement agencies and from 16 countries.⁵⁵⁷ In May 2017, Argos will host the fifth YTVCC in Queensland. The conference includes expert speakers from across the world specialised in criminal investigation, prosecution, online crime and sex offender psychology.⁵⁵⁸ The theme for the 2017 YTVCC is 'Prevent, Protect, Prosecute.' The goal of the conference is to provide attendees with the latest developments, strategies and challenges faced globally in the effort to fight crimes against children.⁵⁵⁹

Investigation and enforcement

Argos works both proactively and reactively. As well as investigating cases of online child exploitation and working to identify and arrest an offender, Argos also actively seeks to identify and rescue the victims.

Between 1 July 2015 and 30 June 2016, officers of Argos helped:

- Rescue 84 children nationally and internationally;
- Finalise one international operation;
- Referred 441 targets to partner law enforcement agencies nationally and internationally; and
- Charged 147 offenders on 1,108 charges.⁵⁶⁰

⁵⁵⁴ Queensland Police Service, *Annual Report 2013-14* (2014) <<https://www.police.qld.gov.au/corporatedocs/reportsPublications/annualReport/Documents/Performance.pdf>>.

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid.

⁵⁵⁷ Queensland Police Service, above n 547, 33.

⁵⁵⁸ Youth Technologies and Virtual Communities Conference, *Home* (2016) <<http://ytvc.com.au>>.

⁵⁵⁹ Ibid.

⁵⁶⁰ Queensland Police Service, above n 547.

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[A] lot of law enforcement agencies work on a very simple process where a case comes in, execute search warrant, arrest offender, walk away... We don't do that. We certainly target the offenders but what we look for is contact offending. So we work on the basis that if you are masturbating to child exploitation it's not a quantum leap to think that you have committed, or will commit contact offences against of children. So we look very carefully at collections of child exploitation material. We take over their accounts; we infiltrate the networks they are in. So we don't just walk in and walk away. So that's one aspect of what we do. We also proactively target peer-to-peer, TOR, Freenet, Clearnet. That is one side of the house and then we also have that reactive capacity where... on a couple of fronts where mum and dad might contact us and say that "this has just happened to our child." Or, there's also the breadth of international referrals that come into the country. So that is probably the most significant area in terms of growth. Since Microsoft developed and implemented PhotoDNA, companies like Facebook for example and Kik are now running PhotoDNA across the material that's distributed across their social media platforms. And in many cases that is child exploitation material, and those agencies then refer that to [the relevant referral agencies. If information is relevant to Australia it will be referred here].... That then obviously requires a review and a response. So, on top of what we do proactively we are seeing that come in as well.

Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016)

An example of Argos' work (and cooperation with international law enforcement agencies) includes the secret administration of a Dark web paedophile network for around 6 months in 2014. By the time Argos officers ceased administrating the website, 85 children victims had been rescued and hundreds of people across the globe arrested.⁵⁶¹

Evidence was provided to Argos following the arrest of a man who owned a company that distributed child exploitation films in Canada, which led to the investigation and arrest of a number of people in Australia. One of the Australians arrested was a member of a bulletin board website on the Dark web. Membership of the website was closely controlled. Inactive accounts raised suspicion and could be suddenly terminated. Members were required to upload new material frequently. More than 45,000 people complied with these rules. Following his arrest, officers of Argos assumed the offender's membership and investigated those using the website.⁵⁶²

Danish authorities provided information that the administrator of the website was located somewhere in Australia, probably in Adelaide. Argos officers used their membership of the website to search for clues into the administrator's identity. The investigation led to the identification and arrest of Shannon McCooles, a 32 year old childcare worker for Families SA in Adelaide.⁵⁶³ McCooles was sentenced in August 2015 to 35 year's imprisonment with a 28 year non-parole period for 18 State and two Federal offences he committed between 2011 and 2014. The charges included persistent sexual exploitation of children, sexual intercourse with children, aggravated indecent assault, and the

⁵⁶¹ Michael Safi, 'The Takeover: how police ended up running a paedophile site' *The Guardian*, 13 July 2016 (online) < <https://www.theguardian.com/society/2016/jul/13/shining-a-light-on-the-dark-web-how-the-police-ended-up-running-a-paedophile-site>>.

⁵⁶² Ibid

⁵⁶³ Ibid.

production and dissemination of images of child abuse.⁵⁶⁴ McCoolle's arrest was suppressed allowing Argos officers to secretly take control of the bulletin board website as the administrator.⁵⁶⁵

Another offender arrested was Richard Huckle from the United Kingdom. Huckle abused children in Malaysia and was arrested at Gatwick airport in December 2014 after returning home for Christmas. Upon arrest, over 20,000 indecent images of children were found on hardware owned by Huckle, including approximately 1,000 images of children that he had abused.⁵⁶⁶ Huckle has refused to provide access to various encrypted files found on his personal laptop and suspected to contain images and videos, including images of additional victims. Huckle has been referred to as one of the United Kingdom's worst paedophiles.⁵⁶⁷

Task Force Orion

On 30 October 2015 the Queensland Organised Crime Commission of Inquiry report was released. Among other things, the report recommended that the QPS and the Queensland Crime and Corruption Commission ('QCCC') be properly resourced, including with technical staff and analysts, to undertake a 'blitz' and tackle to a greater degree known Queensland-based offenders sharing child exploitation material on peer-to-peer platforms.⁵⁶⁸ The State Government allocated \$3.2M in extra funding to the QPS by the as a first stage to improve frontline investigations into child exploitation.⁵⁶⁹

On 10 November 2015 Taskforce Orion, a new QPS taskforce was established. On 1 January 2016, Taskforce Orion commenced operations, to span an 18 month period. In conjunction with regional CPIU officers, Argos officers and the Crime and Corruption Commission, Orion will target Queenslanders who share child exploitation material through peer-to-peer networks, and those who attempt to share material anonymously through the Darknet.⁵⁷⁰ Taskforce Orion also provides a specialised training course to detectives across Queensland.⁵⁷¹

Between 1 January 2016 and 30 June 2016, 60 offenders have been charged in Queensland for 238 offences relating to online child exploitation material.

⁵⁶⁴ *R v Shannon Grant McCoolle* (Unreported, District Court of South Australia, Rice DCJ, 7 August 2015).

⁵⁶⁵ *Ibid.*

⁵⁶⁶ *Ibid.*

⁵⁶⁷ *Ibid.*

⁵⁶⁸ Queensland Organised Crime Commission of Inquiry, *Report of the Queensland Organised Crime Commission of Inquiry*, (30 October 2015).

⁵⁶⁹ *Ibid.*

⁵⁷⁰ Queensland Police Service, above n 547, 31.

⁵⁷¹ Amy Mitchell-Whittington, 'Taskforce Orion training to crack down on child exploitation offenders', *Brisbane Times*, (online), 31 May 2016, <<http://www.brisbanetimes.com.au/queensland/taskforce-orion-training-to-crack-down-on-child-exploitation-offenders-20160531-gp7v3r.html>>.

JACET

On 6 April 2016 a JACET was announced between the AFP and the QPS. The JACET will combine the resources of AFP's Child Protection Federal agents and Argos.⁵⁷² The objective of the JACET is to accelerate dissemination of information regarding child sex offenders received from international agencies to National, State and Territory agencies. It is modelled on similar, existing agreements found in other Australian jurisdictions.⁵⁷³

Queensland Crime and Corruption Commission

The QCCC investigates both crime and corruption, has oversight of both the police and the public sector, and protects witnesses. The QCCC can investigate major crimes including offences relating to child exploitation material.⁵⁷⁴

The QCCC has the power to call witnesses to coercive hearings and compel them to answer questions and/or produce documents. Hearings may be held as part of its own investigations or at the request of other law enforcement agencies, if certain legislative requirements are met. The right to silence does not apply at a QCCC hearing nor does the privilege against self-incrimination.⁵⁷⁵

The QCCC works closely with the Argos, regional child protection investigation units, Offices of the Commonwealth and Queensland Director of Public Prosecutions, and interstate and foreign law enforcement agencies.⁵⁷⁶ The QCCC has also disseminated seven evidence packages to interstate jurisdictions concerning the use by an individual of a peer-to-peer platform to access, possess and distribute child exploitation images.⁵⁷⁷

Following recommendations from the Queensland Organised Crime Commission of Inquiry, the QCC received \$485,000 over 2015-16 and 2016-17 to facilitate the recruitment of forensic computing specialists.⁵⁷⁸

The QCCC annual report for 2015 – 2016 reveals that:

- 17 people have been charged with 252 offences including the possession, access and production of child exploitation material;
- 15 Queensland children were identified as being in a harmful;
- The QCCC exercised its coercive hearing powers to obtain passwords on two occasions for encrypted devices and to facilitate the identification of children appearing in child exploitation images.

⁵⁷² Bill Byrne, 'Commonwealth-State partnership to tackle child predators in Queensland' (Media Statement, 6 April 2016) <<http://statements.qld.gov.au/Statement/2016/4/6/commonwealthstate-partnership-to-tackle-child-predators-in-queensland>>.

⁵⁷³ Ibid; Queensland Police Service above n 547.

⁵⁷⁴ Queensland Crime and Corruption Commission, *What the CCC Investigates* (11 September 2015) <<http://www.ccc.qld.gov.au/crime/what-the-ccc-investigates>>.

⁵⁷⁵ Queensland Crime and Corruption Commission, *Special Powers* (5 May 2015) <<http://www.ccc.qld.gov.au/about-the-ccc/powers>>.

⁵⁷⁶ Queensland Crime and Corruption Commission, *Annual Report 2014-2015* (1 September 2015) 15 <<http://www.ccc.qld.gov.au/research-and-publications/publications/ccc/corporate/ccc-annual-report-2014-15>>.

⁵⁷⁷ Ibid.

⁵⁷⁸ Queensland Crime and Corruption Commission, *Annual Report 2015-2016* (1 September 2016) 32 <<http://www.ccc.qld.gov.au/research-and-publications/publications/ccc/corporate/ccc-annual-report-2015-16>>.

6.2.4. New South Wales

The Child Exploitation Internet Unit ('**CEIU**') sits within the NSW Police Force's State Crime Command Sex Crimes Squad. The CEIU works closely with the Joint Investigation Response Squad, a specialist Police squad who are responsible for the investigation of serious crime against children and young people.⁵⁷⁹

CEIU investigates the sexual exploitation of children facilitated through the Internet and related telecommunications devices by:

- Conducting both proactive and reactive investigations to identify persons utilising the Internet to groom and procure children for sexual exploitation;
- Conducting investigations into the production, dissemination and possession of images of child sexual exploitation facilitated by the Internet and telecommunication systems;
- Coordinating the NSW Police response to matters relating to child sexual exploitation referred from external law enforcement agencies;
- Providing assistance, specialist advice and technical support to State Crime Command and Local Area Commands relating to the investigation of child sexual exploitation facilitated by the Internet or telecommunication systems;
- Assisting with community awareness and education on the safe use of the Internet;
- Maintaining professional networks with other State, National and International Law Enforcement bodies and external agencies involved in the investigation of computer facilitated sexual exploitation of children; and
- Operating a Help Desk service.⁵⁸⁰

On 6 May 2015, the AFP and NSW Police Service announced a JACET. The JACET enables AFP CPO officers to work closely with CEIU officers to ensure greater communication, the rapid sharing of intelligence and to eliminate duplication of efforts.⁵⁸¹

The NSW Police Service is a policing partner of ThinkUKnow.⁵⁸²

⁵⁷⁹ NSW Police Force, *Child Exploitation Internet Unit*

<http://www.police.nsw.gov.au/about_us/structure/operations_command/state_crime_command>.

⁵⁸⁰ Ibid.

⁵⁸¹ Michael Keenan and Troy Grant, *New South Wales joins Commonwealth-State efforts to tackle child exploitation* (Media Statement, 6 May 2015)

<<https://www.ministerjustice.gov.au/MediaReleases/Pages/2015/SecondQuarter/6-May-2015-New-South-Wales-joins-Commonwealth-State-efforts-to-tackle-child-exploitation.aspx>>.

⁵⁸² ThinkUKnow, above n 514.

6.2.5. Victoria

The Victorian Police Task Force Astraea was established in February 2012 in response to increasing online exploitation of children.⁵⁸³ Attached to the Victoria Police Sexual Crimes Squad, the task force specialises in identifying and investigating sex offenders targeting children online.⁵⁸⁴ Its objectives are to:

- Strengthen police capabilities to manage intelligence on sexual offenders and child abuse offenders; and
- Expand Victoria's former Internet Child Exploitation Team to undertake proactive investigations.⁵⁸⁵

By 2014-15, initiatives within Task Force Astraea and the Victoria Police E-Crime Squad had strengthened their capabilities to counter the increase in online child exploitation such that in 5 years, the detection of online child exploitation offences had doubled.⁵⁸⁶

On 3 October 2014, a joint media release announced a new JACET between the AFP's CPO and Taskforce Astraea.⁵⁸⁷ The JACET's objective is to improve the sharing of information from international and federal law enforcement agencies regarding online sexual offenders, with State and Federal officers co-located.⁵⁸⁸

In 2015, Taskforce Astraea became the JACET. Successful completion of the FBI's VCACITF training programme is a prerequisite for inclusion in the JACET.⁵⁸⁹

Investigation and enforcement

An anonymous report to the FBI led to the identification of an online child exploitation network administrator in Melbourne. The investigation combined the efforts of Victorian police, FBI and INTERPOL, leading to the arrest of the administrator, known as "Lux"⁵⁹⁰ who was charged with State and Commonwealth offences. His arrest led to information resulting in a number of arrests in both the United States and Canada.⁵⁹¹

This matter resulted in the introduction of a state-based offence of failing to provide a password to an encrypted device, and led to the introduction of offences for administrators of online child exploitation networks.⁵⁹²

⁵⁸³ Victoria Police, *Annual Report* (2011 – 2012)

<http://www.police.vic.gov.au/annualreport/vpar_2011-12.doc> 46.

⁵⁸⁴ *Ibid.*

⁵⁸⁵ *Ibid.*

⁵⁸⁶ *Ibid.*, 24.

⁵⁸⁷ Minister for Justice and Victorian Attorney General, 'New Commonwealth-State partnership to tackle child exploitation' (Joint Media Release, 3 October 2014)

<<https://www.ministerjustice.gov.au/Mediareleases/Pages/2014/FourthQuarter/3October2014-NewCommonwealthStatepartnershiptotacklechildexploitation.aspx>>.

⁵⁸⁸ Victoria Police, *Annual Report 2014 – 2015*, (2015) 48

<http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=112492>.

⁵⁸⁹ Victoria Police, *Annual Report, Additional Information* (2014 – 2015); for more information on VCACITF see [section 6.1.2](#) of this report.

⁵⁹⁰ For further information on this case see [section 3.4.1](#) of this report.

⁵⁹¹ Victoria Police, *Annual Report 2015-16*, (2016) 43

<http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=120742>.

⁵⁹² See [section 2.5.2](#) of this report.

6.2.6. Tasmania

The Tasmania Police do not have a dedicated unit dealing with online child exploitation materials. Its website refers to agencies such as the Office of the Children's eSafety Commissioner in relation to online child exploitation offences. Data from the Tasmanian Police Annual Report indicates that in 2015-16, offences involving a minor in child exploitation constituted 1% of serious crimes reported in this period.⁵⁹³

The Tasmania Police is a policing partner of ThinkUKnow.⁵⁹⁴

6.2.7. South Australia

The South Australia Police Special Crimes Investigation Branch has a team of child protection officers.⁵⁹⁵

In January 2015 a new JACET was established between the South Australia Police and AFP. Under the JACET, officers of the AFP CPO work alongside South Australia Police child protection officers.⁵⁹⁶

The objectives of the JACET are to improve the sharing of information from international and federal law enforcement agencies regarding online sexual offenders, with State and Federal officers co-located.⁵⁹⁷

According to the South Australia Police's 2014-15 Annual Report:

- Between January and June 2015, JACET undertook 63 investigations resulting in 31 search warrants executed, 15 arrests, 3 reports and 1 child saved from further sexual abuse; and
- As at 30 June 2015, the JACET had received 29 online child exploitation referrals from a central AFP assessment centre.⁵⁹⁸

The South Australia Police is a policing partner of ThinkUKnow.⁵⁹⁹

6.2.8. Western Australia

Police Sex Crime Division

The Western Australia Police Sex Crime Division is part of the Specialist Crime Portfolio.⁶⁰⁰ The division consists of 6 different areas, including the Online Child

⁵⁹³ Department of Police, Fire and Emergency Management, *Annual Report 2015-16* (2016) 21 <<http://www.police.tas.gov.au.s3.amazonaws.com/wp-content/uploads/2016/10/DPFEM-Annual-Report-2015-16.pdf>>.

⁵⁹⁴ ThinkUKnow, above n 540.

⁵⁹⁵ Michael Keenan and Tony Piccolo, 'New Commonwealth-State partnership to tackle child predators' (Joint Media Statement, 22 April 2015) <<https://www.ministerjustice.gov.au/Mediareleases/Pages/2015/SecondQuarter/22-April-2015-New-Commonwealth-State-partnership-to-tackle-child-predators.aspx>>.

⁵⁹⁶ Ibid.

⁵⁹⁷ Ibid.

⁵⁹⁸ South Australia Police, *Annual Report* (2014 – 2015)

<https://www.police.sa.gov.au/__data/.../sapol_annual_report_20142015.pdf>. 18

⁵⁹⁹ ThinkUKnow, above n 540.

Exploitation Squad ('OCES'). The OCES investigates child sexual exploitation involving electronic communication and offences relating to child exploitation material.⁶⁰¹

The Western Australia Police play a role in education about Internet safety⁶⁰² and are a policing partner of ThinkUKnow.⁶⁰³

A memorandum of understanding establishing a JACET between the AFP's CPO and Western Australia Police's Sex Crime Division was announced on 19 December 2014.⁶⁰⁴

Recent arrests from the JACET include:

- July 2016, further charges laid against a man (initial charges laid in April 2016) for offences including 214 counts of indecently recording a child, 94 counts of indecently dealing with a child, two counts of sexual penetration of a child and possessing child exploitation material. Analysis of items seized from the accused resulted in over 26,000 videos and images of child exploitation material and obscene material being identified,⁶⁰⁵
- July 2016, man arrested with charges laid of possession and distribution of child exploitation material;⁶⁰⁶ and
- June 2016, man charged with possession of child exploitation material.⁶⁰⁷

Corruption and Crime Commission

The Western Australia Corruption and Crime Commission ('WACCC') was established on 1 January 2004 as a permanent investigative commission with the same powers as a Royal Commission. The WACCC has wide ranging powers to assist WA police to combat and reduce the incidence of organised crime and minimise and manage misconduct in the public sector.⁶⁰⁸

The WACCC has a number of investigative powers not ordinarily available to the police and as a result can be a useful vehicle for investigations.⁶⁰⁹

⁶⁰⁰ Western Australia Police, *Sex Crime* <<https://www.police.wa.gov.au/Crime/Sex-crime>>.

⁶⁰¹ Western Australia Police, *Internet Child Safety*, <<https://www.police.wa.gov.au/Your-Safety/Child-abuse/Internet-child-safety>>.

⁶⁰² Western Australia Police, *Internet Safety Tips* <<https://www.police.wa.gov.au/About-Us/Young-people/Internet-safety-tips>>.

⁶⁰³ ThinkUKnow, above n 540.

⁶⁰⁴ Michael Keenan and Liza Harvey, 'WA extends Commonwealth-State partnership to tackle child exploitation' (Joint Media Statement, 19 December 2014)

<<https://www.ministerjustice.gov.au/Mediareleases/Pages/2014/FourthQuarter/19December2014-WAExtendsCommonwealthStatePartnershipToTackleChildExploitation.aspx>>.

⁶⁰⁵ Western Australia Police, 'JACET further charges' (Media Release, 3 August 2016)

<<https://www.police.wa.gov.au/Media-Centre/Media-Releases/779-JACET-further-charges>>.

⁶⁰⁶ Western Australia Police, 'JACET Arrest' (Media Release, 8 August 2016)

<<https://www.police.wa.gov.au/Media-Centre/Media-Releases/794-JACET-Arrest>>

⁶⁰⁷ Western Australia Police, 'JACET Arrest- Maylands Man' (Media Release, 21 July 2016)

<<https://www.police.wa.gov.au/Media-Centre/Media-Releases/633-JACET-Arrest>>.

⁶⁰⁸ Corruption and Crime Commission, *About the CCC – Who we are* (2015)

<<https://www.ccc.wa.gov.au/about-us>>.

⁶⁰⁹ Corruption and Crime Commission, *About the CCC – Who we are* (2015)

<<https://www.ccc.wa.gov.au/about-us>>.

For example, in 2012 the WACCC undertook an investigation into a teacher who was accused of indecent conduct with students. The investigation revealed significant electronic child exploitation material stored on the teacher's computer.⁶¹⁰

AFP Western Australian JACET

The Western Australian JACET assisted Western Australian Police in Operation Ripstop, an investigation of a paedophile ring. The Operation led to eight members of the ring being charged with over 500 offences including child pornography offences.⁶¹¹ One of the members charged was the father of the victim who received a sentence of 22 years and 6 months. These arrests led to a number of subsequent arrests.⁶¹²

6.2.9. Australian Capital Territory

The Australian Capital Territory Police do not have a dedicated unit dealing with online child exploitation materials. Their website provides information on how children can ensure they are safe online.⁶¹³

The ACT Police run the Constable Kenny Koala education programme. The Constable Kenny Koala programme presents in schools and is designed to educate children between the ages of 3 -12 years on a range of safety issues, including online safety.⁶¹⁴

The ACT Police is a policing partner of ThinkUKnow.⁶¹⁵

6.2.10. Northern Territory

The Northern Territory Police Force entered into a JACET with the AFP in November 2014. The team consists of specialised Northern Territory Police Force investigators and coordinates a multi-agency response to the investigation of online child exploitation.⁶¹⁶ The Online Child Exploitation Investigation Unit undertakes investigations into online offences such as the possession and distribution of child exploitation materials. Members from this unit have undertaken training in online investigation methodologies.⁶¹⁷

The Northern Territory also has a Child Abuse Taskforce, in partnership with the Department of Children and Families and the AFP. The taskforce investigates matters

⁶¹⁰ Corruption and Crime Commission, *Report on the investigation of alleged public sector misconduct in relation to contact with students and the accessing of child pornography by a department of education employee* (2 November 2012) <<https://www.ccc.wa.gov.au/sites/default/files/Teacher%27s%20Contact%20with%20Students%20and%20Accessing%20Child%20Pornography.pdf>>.

⁶¹¹ Australian Federal Police, above n 545, 57.

⁶¹² Ibid.

⁶¹³ Australian Federal Police ACT Policing, *Online Safety* <<https://www.police.act.gov.au/safety-and-security/online-safety>>

⁶¹⁴ Constable Kenny, *About Kenny- Overview* <<http://www.constablekenny.org.au/about/>>.

⁶¹⁵ ThinkUKnow, above n 540.

⁶¹⁶ Northern Territory Police, Fire and Emergency Services, *Annual Report 2014-2015* <http://www.pfes.nt.gov.au/~media/Files/Forms_Licences_Permits_Publications/Triservice/Annual_reports/2014_15%20NTPFES%20AR-web.ashx>.

⁶¹⁷ Northern Territory Police, Fire and Emergency Services, *Annual Report 2015-2016* (2016) 43 <http://www.pfes.nt.gov.au/~media/Files/Forms_Licences_Permits_Publications/Triservice/Annual_reports/NTPFES%20Annual%20Report%202015-16.ashx>.

relating to complex child abuse and child sexual assault.⁶¹⁸ The Northern Territory Police is a policing partner of ThinkUKnow.⁶¹⁹

In the 2015-16 financial year, there were 21 recorded child pornography offences in the Northern Territory.⁶²⁰

6.2.11. COAG Working Group

On 21 October 2016, Minister for Justice, the Hon Michael Keenan MP, announced an agreement to form a new joint working group including members from senior Australian police and justice officials, to assist in combatting child sex offenders in Australia.⁶²¹ This working group, formed through COAG's Law, Crime and Community Safety Council, will be due to report in the first half of 2017 on issues including:⁶²²

- Commitment from State and Territories that post-sentence, court-ordered schemes may be applied to Commonwealth child sex offenders; and
- Options for restricting overseas travel of convicted child sex offenders

6.3. Key Non-Government Organisations

6.3.1. Bravehearts

Founded by Hetty Johnston in 1997, Bravehearts' mission is to prevent child sexual assault, with a focus on educating, empowering and protecting Australian children from sexual assault.⁶²³ It delivers school-based education programmes around prevention as well as support for survivors, research and comment on legislative reform.⁶²⁴

Bravehearts operates in Queensland, New South Wales, Victoria and Tasmania.⁶²⁵

Bravehearts has partnered with Queensland's Task Force Argos to launch "Join the Dots", an online reporting tool which children can use to anonymously provide information about online predators.⁶²⁶ Join the Dots is available through the Bravehearts website, with information sent to Bravehearts shared with relevant law enforcement officers.⁶²⁷

⁶¹⁸ Ibid 41.

⁶¹⁹ ThinkUKnow, above n 540.

⁶²⁰ Northern Territory Police, Fire and Emergency Services, above n 617, 165; it should be noted that while NT legislation no longer refers to the phrase "child pornography" the annual report uses this phrase to outline offences that fall under "sexual assault and related offences".

⁶²¹ The Hon Michael Keenan MP, *Agreement to pursue national measures concerning child sex offenders*, (Media Release, 21 October 2016)

<<https://www.ministerjustice.gov.au/Mediareleases/Pages/2016/FourthQuarter/agreement-to-pursue-national-measures-concerning-child-sex-offenders.aspx>>.

⁶²² Ibid.

⁶²³ Bravehearts, *Our History* <<https://www.bravehearts.org.au/pages/about-us.php>>.

⁶²⁴ Bravehearts, *Our Mission and Vision* <<https://www.bravehearts.org.au/pages/about-us.php>>

⁶²⁵ Ibid.

⁶²⁶ Bravehearts, *Join the Dots* <<https://bravehearts.org.au/report-sexual-assault/join-the-dots/>>.

⁶²⁷ Ibid.

6.3.2. Child Wise

Child Wise began in 1991 and seeks to prevent child sexual abuse and exploitation. They hold education and training sessions to the public on issues related to child sexual abuse and exploitation, including the global expansion of child exploitation images.⁶²⁸ The 2014-2015 annual report notes that throughout the year, Child Wise delivered 100 education programmes across Australia and 96 training sessions to organisations. 6,186 people also accessed Child Wise’s online publications and fact sheets during this same period.⁶²⁹

Child Wise also advocates for new laws and improvements to the systems that protect children.⁶³⁰

Child Wise is the Australian representative of ECPAT International, a global network of organisations and individuals working together to eliminate child sexual abuse and exploitation.⁶³¹ Child Wise is the official representative of the Code for Australia.⁶³² More information on the Code can be found in section 6.1.9 of this report.

6.3.3. International Justice Mission

The International Justice Mission (‘IJM’) is a Not-for Profit Organisation, primarily made up of lawyers, investigators, social workers and community activities focused on “protecting the poor from violence in nearly 20 communities throughout Africa, Latin America, South and Southeast Asia”.⁶³³ IJM Australia is the Australian branch of the IJM, and is one of 6 partner offices. The other offices are based in the United States (head office), Canada, Germany, Netherlands and the UK. Field offices are also located throughout Latin America, Southeast Asia, India and Africa.⁶³⁴

IJM Australia partners with IJM globally to deliver justice programmes overseas as well as local programmes.⁶³⁵

IJM Australia’s primary focus, based on their annual report of 2013-2014, is supporting an office in Cebu, Philippines, where IJM is partnering with local authorities to rescue and assist children who are the victims of sex-trafficking and to reduce the commercial sexual exploitation of minors in the city.⁶³⁶

Internationally, particularly in relation to the Philippines, IJM is working with law enforcement to uncover instances of children being forced to engage in sexual acts for

⁶²⁸ Child Wise, *About Child Wise* <<http://www.childwise.org.au/page/7/about-child-wise>>.
⁶²⁹ Child Wise *Annual Report 2014-2015* <https://childwise.blob.core.windows.net/assets/uploads/files/Annual_Report_2015.pdf>
⁶³⁰ Ibid.
⁶³¹ Child Wise, above 585.
⁶³² Child Wise, *The Code* <<http://www.childwise.org.au/page/31/child-protection-training-for-hotel-child-care-services>>.
⁶³³ International Justice Mission, *Our Story* <<https://www.ijm.org.au/get-to-know-us/our-story/>>
⁶³⁴ International Justice Mission, *Where We Work* <<https://www.ijm.org.au/our-solution/where-we-work/>>.
⁶³⁵ International Justice Mission, above n 633.
⁶³⁶ International Justice Mission Australia, *Year In Review: Highlights From July 2013 To December 2014* <https://www.ijm.org.au/wp-content/uploads/2015/11/IJM_2014_AU_YearInReview-WEB.pdf>.

the purpose of online child exploitation material.⁶³⁷ The IJM website indicates the organisation's focus in these instances is on rescuing the children, providing legal assistance to prosecute the individuals involved and rehabilitating the children rescued.⁶³⁸

IJM describe their approach as a 4 step process:

1. **Rescue** – “we identify children and adults who are victims of violence, like rape, forced labour, or sex trafficking. We then support local law enforcement in rescue operations and ensure that victims are treated with dignity during the operation”;
2. **Restore** – “we create individual treatment plans to meet survivors' specific needs. We partner with local aftercare homes in cases where long term shelter is required, ensure the survivor's medical needs are addressed, provide trauma counselling and support access to school and/or vocational training”;
3. **Restrain** – “we provide training and hands-on mentoring for police, judges, prosecutors and other professionals to equip the justice system to gather the property evidence for use in court”; and
4. **Represent** – “We help the survivor prepare to share the truth in court, and ensure that public prosecutors have the resources they need for a fair trial that brings the perpetrator to justice. In justice systems where cases tend to move very slowly through the system, we work to avoid delays in the case and keep it moving forward as quickly as possible”.⁶³⁹

6.3.4. Carly Ryan Foundation

The Carly Ryan Foundation ('CRF') was created by Carly Ryan's mother, Sonya Ryan, to promote Internet safety. Carly began an online relationship with someone she believed to be an 18 year old boy but who was actually a 50 year old predator who murdered Carly when they met in person. Carly was 15 years old at the time of her death.⁶⁴⁰

The CRF provide detailed online safety seminars and workshops for schools and organisations surrounding the use of the Internet, risks of use and safety tips.⁶⁴¹

In February 2016, the CRF, in collaboration with ThinkUKnow, launched a 'Family Online Safety Contract'.⁶⁴² The contract is a tool for parents and caregivers to discuss issues of

⁶³⁷ International Justice Mission, 'IJM Helps Rescue Young Girls From Online Sex-Abuse Shows' (Media Release, 16 October 2015) <<https://www.ijm.org.au/ijm-helps-rescue-young-girls-from-online-sex-abuse-shows/>>; International Justice Mission, 'Filipino Children as Young as 2 Rescued From Cybersex Trafficking' (Media Release, 20 August 2015) <<https://www.ijm.org.au/filipino-children-as-young-as-2-rescued-from-cybersex-trafficking/>>.

⁶³⁸ Ibid.

⁶³⁹ International Justice Mission, *How We Work* <<https://www.ijm.org.au/how-we-work/>>.

⁶⁴⁰ Carly Ryan Foundation, *Carly's Story* http://www.carlyryanfoundation.com/page/view_by_id/4; further information on this particular matter and the proposed Carly's Law can be found in section 3.4.2 of this report.

⁶⁴¹ Carly Ryan Foundation, *Online Safety Seminars*

<http://www.carlyryanfoundation.com/what_we_do/online_safety_seminars>.

⁶⁴² Carly Ryan Foundation, *Family Online Safety Contract* (9 February 2016)

<http://www.carlyryanfoundation.com/files/116_tuk_fosc_2016_family_online_safety_contract_final.pdf>.

online safety with their children and young persons and provide an agreement around reporting the things children see, say and do online.⁶⁴³

6.3.5. Our Watch

Our Watch was originally established in July 2013 as the Foundation to Prevent Violence against Women and their Children by a partnership of the Victorian and Commonwealth Government.⁶⁴⁴ The organisation has since developed into a national organisation with all State and Territories becoming members (with the exception of New South Wales and Western Australia).⁶⁴⁵

Our Watch's focus is on driving cultural change in relation to violence against women and their children. In partnership with ANROWS and VicHealth, Our Watch has developed *Change the story: A shared framework for the primary prevention of violence*, an initiative focussed on steps to eliminate violence against women in Australia. The organisation also works with education providers, through Respectful Relationships education, as well as national sporting codes, workplaces and social marketing initiatives such as "The Line". The Line supports young people to promote equality, respectful and healthy relationships between men and women, and to reject aggressive or negative attitudes and behaviours.⁶⁴⁶

Our Watch does not have a specific research focus on online child exploitation. However the organisation's mandate is to combat violence against young women, including online violence. In March 2016 Our Watch undertook a joint survey of 600 Australian girls aged 15-19 with Plan International Australia into online sexual harassment and bullying.⁶⁴⁷ Survey results, published as "Don't Send Me that Pic" include:

- 7 out of 10 survey participants believe online harassment and bullying is commonplace;
- Participants do not want to share sexual photos of themselves online; and
- Despite this, 81 per cent of participants believing it is unacceptable for boyfriends to ask girlfriends for explicit photos, 51 per cent believe the pressure to do so exists.⁶⁴⁸

⁶⁴³ Ibid.

⁶⁴⁴ Our Watch, *Our Watch Annual Report 2013-2014* (November 2014) <<http://www.ourwatch.org.au/getmedia/1b371baf-737e-4571-9e80-7e9550355ca2/OurWatch-AnnualReport2013-2014-accessible.docx.aspx?ext=.docx>>.

⁶⁴⁵ Ibid.

⁶⁴⁶ Our Watch, *Our Watch Annual Report 2014 – 2015* (November 2015)

<<http://www.ourwatch.org.au/getmedia/34aada54-0177-4d23-ab46-5981a38b2f1a/OurWatchAnnual-Report-2014-2015-accessible.pdf.aspx>>.

⁶⁴⁷ Hannah Grant, *Australian girls aged 15-19 report endemic online abuse and harassment – new survey* (2 March 2016) Our Watch <<http://www.ourwatch.org.au/News-media/Latest-news/%E2%80%8BAustralian-girls-aged-15-19-report-endemic-online>>.

⁶⁴⁸ Plan International and Our Watch, *Don't Send Me That Pic* (March 2016) <<https://www.plan.org.au/learn/who-we-are/blog/2016/03/02/dont-send-me-that-pic>>

6.3.6. Alannah & Madeline Foundation

The Alannah & Madeline Foundation was launched in 1997, in the wake of the Port Arthur massacre, with the mission to keep children safe from violence.⁶⁴⁹

The Alannah & Madeline Foundation commissioned the report *Young People and Technology: a review of the current literature (2nd edition)* in 2009 which researched the way young people use technology as well as the potential for technology to be a source of exploitation and cyber-bullying for young people.

The report reviewed the current legislation in this area and compiled available statistics concerning online exploitation and cyber-bullying of young people.⁶⁵⁰ It refers to the Alannah & Madeline Foundation Cybersafety Framework for Schools Initiative, designed to address cultural change concerning online exploitation, cyber-attacks and unacceptable or unethical use of technology.⁶⁵¹

A more recent initiative of the Alannah & Madeline Foundation is eSmart. eSmart is a prevention and risk management framework with the goal to better integrate cyber safety practices and promote the safe use of online technology.⁶⁵² eSmart currently run three programmes, eSmart Schools and eSmart Libraries provide a prevention and risk management framework to schools and libraries across the country.⁶⁵³ The eSmart Digital Licence assists in the delivery of the eSmart Schools and eSmart Libraries programmes but can also be used by parents and caregivers at home to help teach children and young persons about online safety.⁶⁵⁴ The eSmart Digital Licence involves a series of 'online challenges' including quizzes, videos and games to teach school age children how to play, learn and socialise online in a smart, safe and responsible way.⁶⁵⁵

6.3.7. Kids Helpline

Kids Helpline is an online and phone counselling service available to children (under 25 years old).⁶⁵⁶ Kids Helpline includes information on their website about online child exploitation (sexting, sexual abuse and posting sexual content on social media).⁶⁵⁷ The website directs children to the Australian OCEC to make complaints related to cyberbullying, or "offensive and illegal content complaints".

6.3.8. National Association for Prevention of Child Abuse and Neglect

National Association for Prevention of Child Abuse and Neglect ('NAPCAN') focuses on raising public awareness in relation to the instances and impact of child abuse and

⁶⁴⁹ Alannah & Madeline Foundation, *About Us* <<https://www.amf.org.au/who-we-are/about-us/>>.

⁶⁵⁰ Alannah and Madeline Foundation, *Young People and Technology: a review of the current literature (2nd edition)* (2009) <https://www.ncab.org.au/media/1371/2ndedition_youngpeopleandtechnology_litreview_june202009.pdf>.

⁶⁵¹ Ibid.

⁶⁵² Alannah & Madeline Foundation, *eSmart* <<https://www.amf.org.au/what-we-do/esmart/>>

⁶⁵³ eSmart, *Who We Are* (2016) <<https://www.esmart.org.au/who-we-are/>>.

⁶⁵⁴ Ibid.

⁶⁵⁵ Ibid.

⁶⁵⁶ Kids Helpline, *We Are Kid's Helpline* <<https://kidshelpline.com.au/parents/why-khl/>>.

⁶⁵⁷ Kids Helpline, *Tips and Info- Staying Safe Online* <<https://kidshelpline.com.au/teens/tips/staying-safe-online/>>.

neglect. It achieves this through the development and promotion of prevention strategies and programs, research and advocacy. In terms of child exploitation, the organisation appears to focus on abuse, including the sexual abuse of children, although it does not appear to target online child exploitation specifically.

6.3.9. Australian Childhood Foundation

The Australian Childhood Foundation ('ACF') focuses on the protection of and trauma recovery for children who have suffered neglect and abuse, including child sexual abuse and exploitation, as well as the development of resources, advocacy work and community education.⁶⁵⁸

6.4. Recommendations

Interviewees were in general agreement that there was a high level of cooperation between Australian law enforcement and government agencies targeting online child exploitation offenders. This cooperation enables a more sophisticated and effective law enforcement response. However, there continues to be lack of clear policy direction, which can be seen in the discrepancies regarding terminology and statutory maximum penalties between State, Territory and Commonwealth jurisdictions.⁶⁵⁹ It is also evident in the inconsistent pre-emptive prevention mechanisms across jurisdictions. Interviewees referred to the annual Youth, Technology and Virtual Communities Conference, and the subsequent practitioner's meeting for undercover officers, both of which are hosted by Argos, as an opportunity for coordination. However, there remains a need for a body which ensures a coordinated policy response to online child exploitation across Australia.

As such, we recommend that a peak government body be created to provide a forum for the coordination of a national legislative and law enforcement response to online child exploitation.

One model that may be considered for this purpose is the National Roundtable on Human Trafficking and Slavery, which is the primary consultative mechanism on human trafficking and slavery.⁶⁶⁰ Such a body on online child exploitation should be chaired by the Attorney-General's Department and comprise representatives of government departments, law enforcement agencies and key stakeholders.

A peak national body on online child exploitation should draw on the expertise of existing bodies, maintain strong connections to key stakeholders and provide official channels for the exchange of information. Once created, this body should also lobby the Council of Australian Governments to revise the language in relevant State, Territory and Commonwealth legislation to reflect the Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse.

Further research is needed to ensure that such a body takes the appropriate form to counter the evolving challenges presented by the online environment.

⁶⁵⁸ Australian Childhood Foundation, *Resources*, <<http://www.childhood.org.au/for-professionals/resources>>.

⁶⁵⁹ See Chapter 3 for further information.

⁶⁶⁰ Attorney-General's Department, 'National Action Plan to Combat Human Trafficking and Slavery 2015-2019' (2014), 2.

Key Recommendation

To ensure an effective legal and community response to online child exploitation in Australia, the Australian government should create a peak national body comprising representatives of government departments, law enforcement agencies and key stakeholders at State, Territory and Commonwealth levels. This body would draw on the expertise of existing bodies and provide official channels for the exchange of information.

7. Chapter VII: Education and Outreach

7.1. Overview

There are a wide range of programmes operating in Australia focused on educating young people to interact safely in online environments. These education initiatives have been developed and implemented by both government bodies and non-government organisations and represent an important component in the prevention of online child exploitation.

However, the multitude of prevention programmes has led to a confusing duplication of efforts from government bodies and non-government organisations, often relying on prevention models with little evidence basis.

This chapter will discuss a sample of the government and non-government prevention programmes operating in Australia, as well as the prevention education models embedded in Australian State and Territory education curricula. This chapter will conclude with an analysis of viable models for initiatives to prevent online child exploitation which will remain relevant for a generation of digitally native young people.

7.2. Key Initiatives

7.2.1. Office of the Children’s eSafety Commissioner

Chapter 6 outlines the wide range of functions and powers of the OCEC to enhance online safety for Australian children.⁶⁶¹ Amongst the primary functions of the OCEC is the education of children and their parents or guardians about online safety, as well as supporting the implementation of measures to improve online safety for children.⁶⁶²

The educational initiatives of the OCEC fall broadly within three categories:

1. The Voluntary Certification Scheme;
2. Resources and programmes for schools; and
3. Online resources and materials for young people and parents.

Voluntary Certification Scheme

The OCEC is responsible for certifying providers of online safety programs to schools. Individuals and organisations are evaluated for certification according to four criteria set out in the Voluntary Guidelines;

- The capacity to deliver online safety programs;
- Appropriate program content;
- Ability to evaluate and review performance; and

⁶⁶¹ *Enhancing Online Safety for Children Act 2015* (Cth) s 15.

⁶⁶² *Ibid.*

- Experience in presenting online safety programs.⁶⁶³

The guidelines were created to help ensure that programmes are appropriate and likely to be effective.⁶⁶⁴ The guidelines establish a standard of service and content for providers of education about online safety. The guidelines also allow a degree of flexibility, which is necessary in order for providers to stay relevant in an evolving online landscape.

Resources and Programmes for Schools

The OCEC provides a variety of classroom resources and lesson plans for primary and secondary students, as well as programmes such as pre-service teacher programmes.⁶⁶⁵ The focus is largely on preventing bullying in online environments, and educating young people on the sending and receiving of sexually explicit material.

The online lesson plans developed by the OCEC on 'sexting' contain exercises and discussion topics on the potential for exploitation by sexual predators.⁶⁶⁶ The lessons discuss the possibility of self-generated images being collected and reproduced on child exploitation websites.⁶⁶⁷ The lesson plans also contain information about potential criminal liability arising from the sharing of explicit images amongst young people, although this is done using the language of 'child pornography'.

Online resources for young people and parents

The resources and information provided online by the OCEC for young people include media rich activities such as games and quizzes. These activities focus on the development of healthy interactions between young people online and digital citizenship.⁶⁶⁸

Resources for parents include 'iParent', a means to educate parents and guardians about the digital environments in which their children are interacting.⁶⁶⁹ iParent contains information and videos on online grooming and procuring.⁶⁷⁰ Parents are provided with information on minimising their children's vulnerability and educating their children about risk factors.⁶⁷¹ The emphasis is placed on harm prevention, while acknowledging the inevitability and importance of young people interacting in online environments.

⁶⁶³ Office of the Children's eSafety Commissioner (Cth), *Guidelines for the voluntary certification of providers who deliver online safety programs in Australian schools* (2015).

⁶⁶⁴ *Ibid.*, p 2.

⁶⁶⁵ Office of the Children's eSafety Commissioner, *Education Resources*, <<https://www.esafety.gov.au/education-resources>>.

⁶⁶⁶ Office of the Children's eSafety Commissioner, *Standalone Lesson Plans for Secondary Classes*, Standalone Lesson Plans for Secondary Schools <<https://www.esafety.gov.au/education-resources/classroom-resources/stand-alone-lesson-plans-for-secondary-schools>>.

⁶⁶⁷ Office of the Children's eSafety Commissioner, *Middle and Upper Secondary- Sexting* <<https://www.esafety.gov.au/-/media/cesc/documents/lesson-plan-doc-middle-upper-secondary-sexting.docx>>, 4.

⁶⁶⁸ Office of the Children's eSafety Commissioner, *Buddie* <<https://www.esafety.gov.au/education-resources/classroom-resources/budde>>.

⁶⁶⁹ Office of the Children's eSafety Commissioner, *iParent* <<https://www.esafety.gov.au/education-resources/iparent>>.

⁶⁷⁰ Office of the Children's eSafety Commissioner, *Unwanted Contact Online* <<https://www.esafety.gov.au/education-resources/iparent/online-risks/unwanted-contact>>.

⁶⁷¹ Office of the Children's eSafety Commissioner, *Behaviours and Unwanted Contact* <<https://www.esafety.gov.au/education-resources/iparent/online-risks/unwanted-contact/behaviours-and-unwanted-contact>>.

7.2.2. ThinkUKnow Australia

ThinkUKnow was established by the AFP in 2009. The program was developed in the United Kingdom in 2006 by the Child Exploitation and Online Protection ('CEOP') Centre.⁶⁷²

Educational Presentations

ThinkUKnow provides free online safety education through face-to-face and online presentations to young people, teachers, parents and carers. ThinkUKnow delivers online safety education in all Australian States and Territories. The educational program provided by ThinkUKnow is based on Federal, State and Territory police investigations and experience, as well as feedback from young people.⁶⁷³ In this respect, ThinkUKnow differs from the OCEC, as ThinkUKnow develops and delivers programs to schools and parents. The OCEC, in contrast, relies on the information provided through its website, and outsources the delivery of face-to-face programs. The material in these programs was redeveloped in 2015 and 2016 based on feedback from stakeholders and presenters.⁶⁷⁴

ThinkUKnow educational programmes are delivered by volunteers. In 2015 to 2016, ThinkUKnow improved training for volunteers by developing training manuals and providing face-to-face training across Australia.⁶⁷⁵

The ThinkUKnow website has two sections, one aimed at young people and another aimed at parents, guardians and educators. The approach taken by the ThinkUKnow website regarding prevention and education is similar to that of the OCEC. However as ThinkUKnow is affiliated with the AFP, there is a stronger focus on the dimensions of young people's interactions online that are relevant to law enforcement.

Online Materials and resources for young people

This section of the website contains information about online grooming.⁶⁷⁶ The information warns young people about the techniques employed by offenders and reassures children that there are no repercussions for reporting predatory behaviour to the police.

The material on ThinkUKnow educates young people about decision making online in terms of "managing your reputation" and "managing your privacy".⁶⁷⁷ The material provided on privacy management is focused on the prevention of identity theft, as well as protecting information about home addresses. Unlike the OCEC, ThinkUKnow does not provide material for young people that openly deals with the issue of online child exploitation materials-based offences.

⁶⁷² ThinkUKnow, *ThinkUKnow Corporate Report 2015-2016*, <https://www.thinkuknow.org.au/site/sites/thinkuknow.org.au.site/files/ThinkUKnow%20Corporate%20Report%202015-16_0.pdf> 1.

⁶⁷³ ThinkUKnow, above n 672.

⁶⁷⁴ *Ibid.*, 7.

⁶⁷⁵ *Ibid.*, 13.

⁶⁷⁶ Australian Federal Police, *Online Grooming*, ThinkUKnow Australia, <<https://www.thinkuknow.org.au/youth/online-grooming>>.

⁶⁷⁷ Australian Federal Police, *Privacy Management*, ThinkUKnow Australia <<https://www.thinkuknow.org.au/youth/privacy-management>>; Australian Federal Police *Reputation Management*, ThinkUKnow Australia <<https://www.thinkuknow.org.au/youth/reputation-management>>.

Online Materials and resources for parents, guardians and educators

ThinkUKnow provides information for parents and educators about online environments and how to educate young people about interacting safely online. Similar to the material provided for young people, the section for parents and guardians contains information about online grooming offences.⁶⁷⁸ This information includes a description of online grooming, the challenges parents may face in identifying grooming, and tips to pass on to young people to minimise their risk of grooming while online.

Online child exploitation material is mentioned in the context of online grooming,⁶⁷⁹ although there are no specific prevention or education resources on this subject available to parents and guardians.

7.2.3. Bravehearts

Bravehearts⁶⁸⁰ aims to prevent child sexual assault in Australia and has led two initiatives to prevent online child exploitation; Join the Dots and CyberEcho.

Join the Dots

The previous chapter outlines the operation of Join the Dots as an online reporting tool which was created in partnership with Argos. Join the Dots provides a safe space for young people to anonymously report 'creepers'; people engaging in predatory or inappropriate behaviour online.⁶⁸¹ These reports are then forwarded to the police.

CyberEcho

CyberEcho is an online training program created by Bravehearts to raise awareness about online safety issues for children aged 9 to 12. CyberEcho was developed in association with Google.⁶⁸² CyberEcho is accredited by the OCEC and has been piloted in 6 schools, although it is not yet generally available.⁶⁸³ The training program was designed for all communities, but with special consideration given to remote and indigenous communities.⁶⁸⁴ The program focuses on digital citizenship skills⁶⁸⁵ and features material on online grooming.⁶⁸⁶

⁶⁷⁸ Australian Federal Police, *Online Grooming*, ThinkUKnow Australia
<<https://www.thinkuknow.org.au/site/online-grooming/>>.

⁶⁷⁹ Australian Federal Police, *Cyber Safety and Security Guide for You and Your Family*, ThinkUKnow Australia
<https://www.thinkuknow.org.au/site/sites/thinkuknow.org.au.site/files/Factsheets/TUK_Parents_Booklet.pdf>.

⁶⁸⁰ For more information on Bravehearts please see [section 6.3.1](#) of this report.

⁶⁸¹ Bravehearts, *Join the Dots* <<https://bravehearts.org.au/report-sexual-assault/join-the-dots/>>.

⁶⁸² Bravehearts, *What We Do* <<https://bravehearts.org.au/what-we-do/>>.

⁶⁸³ Bravehearts, *Keeping Safe Online* <<https://bravehearts.org.au/services/keeping-safe-online/>>.

⁶⁸⁴ Telephone interview with a senior representative of Bravehearts, 12 July 2016.

⁶⁸⁵ *Ibid.*

⁶⁸⁶ Bravehearts, *Keeping Safe Online* <<https://bravehearts.org.au/services/keeping-safe-online/>>.

7.2.4. Carly Ryan Foundation

The Carly Ryan Foundation promotes education and prevention of internet crime. The Carly Ryan Foundation provides seminars for schools, and has collaborated in the development of the Online Family Safety Contract and the Thread App.

Family Online Safety Contract

The Family Online Safety Contract was developed in collaboration with ThinkUKnow Australia. It is presented as a 'contract' that both parents and children sign. In doing so the children agree to follow certain rules with regard to their behaviour online, such as; "Never agree to meet someone in person that I have only met online, and I will tell my parents if someone asks to meet me."⁶⁸⁷

Thread App

The Thread App is a mobile application for iOS and Android. It was developed in collaboration with Kojo, with funding from Google and the Government of South Australia's Office for Youth.⁶⁸⁸ The app is designed to provide a connection between the user's location, trusted contacts such as parents and the emergency services.⁶⁸⁹ App users 'check in' at pre-set deadlines to inform trusted contacts of their location, and if the deadline is missed then their last location is sent to nominated contacts. The app contains a personal safety alarm that sends the user's location to their nominated contacts, and dials 000. The app also has links to Crime Stoppers, Kids Helpline, Lifeline and ThinkUKnow Australia.⁶⁹⁰ The app is designed to promote communication between young people and trusted adults without requiring the enforcement of strict rules.⁶⁹¹

7.2.5. Alannah and Madeline Foundation

The Alannah and Madeline Foundation, discussed in Chapter 6, has led several initiatives to prevent harm online to children. Online initiatives include the commission of the *Young People and Technology: a review of the current literature (2nd edition)* report in 2009. The major educational initiative of the Alannah and Madeline Foundation is eSmart Schools and Libraries. The foundation has also developed the eSmart Digital Licence, an online interactive educational tool to teach children how to interact safely online.⁶⁹² The Digital Licence program costs \$30 per child for parents.⁶⁹³

⁶⁸⁷ Carly Ryan Foundation and ThinkUKnow Australia, *Family Online Safety Contract* <http://www.carlyryanfoundation.com/files/116_tuk_fosc_2016_family_online_safety_contract_final.pdf>.

⁶⁸⁸ The Carly Ryan Foundation, *The Thread App* <<http://www.thethreadapp.com/>>.

⁶⁸⁹ *Ibid.*

⁶⁹⁰ Justin Wilkey, 'Carly Ryan Foundation launches new child safety app', *ABC News* (online) 29 January 2015 <<http://www.abc.net.au/news/2015-01-28/carly-ryan-foundation-launches-new-child-safety-app/6052484>>.

⁶⁹¹ *Ibid.*

⁶⁹² Alannah and Madeline Foundation, *eSmart Digital Licence- Prevention* <<https://www.amf.org.au/what-we-do/esmart-digital-licence/>>.

⁶⁹³ Alannah and Madeline Foundation, *Buy It Now*, eSmart Digital Licence <<https://www.digitalllicence.com.au/buy-it-now/>>.

eSmart Schools and Libraries

eSmart employs a ‘cultural change’ approach to online safety.⁶⁹⁴ It is described as a “prevention and risk management framework for Australian schools and libraries”.⁶⁹⁵ eSmart Libraries is currently used in over 50% of libraries across Australia and eSmart Schools is used in 2200 Australian schools.⁶⁹⁶ In 2013 the eSmart Schools system was described as best-practice in the promotion of online safety through cultural change.⁶⁹⁷ Rather than involving a discrete online program, both eSmart Schools and Libraries involve a range of online and offline resources, including a framework of policies and procedures and an eSmart curriculum. By addressing policy and procedural gaps, and implementing evidence-based approaches to online safety, eSmart asserts that schools create a culture of online safety.⁶⁹⁸

7.2.6. Australian Childhood Foundation

The Australian Childhood Foundation (‘ACF’) promotes the creation of stable and secure relationships for children, and encourages the education and empowerment of communities with regard to the safeguarding of children. They provide a range of informative online resources for organisations and parents.⁶⁹⁹

7.3. Australian Schools Curricula

7.3.1. Australian National Curriculum

The Australian National Curriculum will address online child exploitation education through two learning areas; Digital Technologies, and Health and Physical Education, the latter of which deals will involve respectful relationships training. These subjects were endorsed by the Education Council in September 2015, but have yet to be implemented in any State.⁷⁰⁰

Digital Technologies

The Digital Technologies outcomes within the new curriculum requires students to use computational thinking and information systems to define, design and implement digital solutions.⁷⁰¹

⁶⁹⁴ Alannah and Madeline Foundation, *eSmart- Prevention* <<https://www.amf.org.au/what-we-do/esmart/>>.

⁶⁹⁵ Ibid.

⁶⁹⁶ Ibid.

⁶⁹⁷ Alannah and Madeline Foundation, *Chairman’s Brief 2013-2014* <https://www.amf.org.au/media/1246/amf_chairmansbrief_2014.pdf> 16.

⁶⁹⁸ Alannah and Madeline Foundation, *eSmart Schools Framework* <<https://www.esmart.org.au/esmart-schools/esmart-schools-framework/>>

⁶⁹⁹ Australian Childhood Foundation, *Resources*, <<http://www.childhood.org.au/professionals/resources>>.

⁷⁰⁰ The Honorable Christopher Pyne MP Minister for Education and Training, ‘A New National Curriculum from 2016’ (Media Release, 18 September 2015) <<https://ministers.education.gov.au/pyne/new-national-curriculum-2016>>.

⁷⁰¹ Australian Curriculum, Assessment and Reporting Authority (ACARA), *Technologies Learning Area Introduction*, Australian Curriculum <<http://www.australiancurriculum.edu.au/technologies/introduction>>.

Online safety and digital citizenship is included within the digital technologies learning area from Year 3, with syllabus points that teach students to “Plan, create and communicate ideas and information independently and with others, applying agreed ethical and social protocols”.⁷⁰² Social protocols are defined within the curriculum as “Generally accepted ‘rules’ or behaviours for when people interact in online environments, for example, using language that is not rude or offensive to particular cultures, and not divulging personal details about people without their permission.”⁷⁰³ This skill is developed progressively from Year 3 to Year 10.

This learning area also involves developing children’s ‘ethical understanding’ an overall outcome of the curriculum.⁷⁰⁴ Ethical understanding encourages the development of students’ personal values such as empathy and respect for others.⁷⁰⁵

Health and Physical Education

This learning outcome includes relationships as a focus area throughout the Foundation to Year 10 curriculum. Respectful relationships are included in the description of each band.⁷⁰⁶ From Year 9 onwards children are to be taught how empathy and ethical decision-making contributes to respectful relationships.⁷⁰⁷

Respectful relationship education was developed in the years prior to 2009 when the Flood and Carmody publications on national standards and best practice were released. Since 2009, Respectful relationships education has existed as best practice in sexual violence prevention education.⁷⁰⁸ The programme was created as part of a framework, designed to drive social change to prevent sexual and gender-based violence.

The inclusion of respectful relationship education in the National Curriculum represents a move towards systemic and embedded outcomes for sexual violence prevention in Australia.⁷⁰⁹

Both of these learning areas provide children and young people with skills needed to minimise their risk of exposure to harm on the internet. It is also hoped that this focus on

⁷⁰² Australian Curriculum, Assessment and Reporting Authority (ACARA) *Digital Technologies*, Australian Curriculum, <<http://www.australiancurriculum.edu.au/technologies/digital-technologies/curriculum/f-10?layout=1#cdcode=ACTDIP022&level=5-6>>.

⁷⁰³ Ibid.

⁷⁰⁴ Ibid.

⁷⁰⁵ Australian Curriculum, Assessment and Reporting Authority (ACARA), *Ethical Understanding*, Australian Curriculum <<http://www.australiancurriculum.edu.au/generalcapabilities/ethical-understanding/introduction/introduction>>.

⁷⁰⁶ Australian Curriculum, Assessment and Reporting Authority (ACARA), *Health and Physical Education*, Australian Curriculum <<http://www.australiancurriculum.edu.au/health-and-physical-education/curriculum/f-10?layout=1>>.

⁷⁰⁷ Ibid.

⁷⁰⁸ Moira Carmody et al, ‘Framing Best Practice: National standards for the primary prevention of sexual assault through education’ (Report, National Association of Services Against Sexual Violence, 2009).

⁷⁰⁸ Michael Flood et al, ‘Respectful Relationships Education Violence prevention and respectful relationships education in Victorian secondary schools’ (Report, Department of Education and Early Childhood Development, November 2009)

⁷⁰⁹ Cara Gleeson et al, ‘Respectful Relationships Education in Schools: Evidence Paper’ (Report, Our Watch, December 2015) 33.

developing empathetic and ethical decision making skills from a critical early age⁷¹⁰ will help to change the culture of gender-based violence and violence within unequal power relationships.⁷¹¹

The inclusion of these learning areas in the National Curriculum represents a positive opportunity to minimise the risk of harm to children and also make positive cultural changes. However, these changes are being implemented differently in each State and Territory.

The lack of clarity, as well as differences in interpretation between States and Territories makes it difficult to point with certainty to the standard that can be expected of schools in relation to online safety education.

7.3.2. State Curricula

The Australian National Curriculum is being implemented differently, and at different rates across States and Territories. At the time of this report respectful relationship education had only been implemented into the curricula of Victoria and the Australian Capital Territory.⁷¹² In certain States and Territories there are also different online safety education policies between public, independent and Catholic school systems.⁷¹³

The degree to which online child exploitation prevention education is integrated within curricula varies widely between States. The Victorian Curriculum provides the most comprehensive protections against online child exploitation, with both online safety and respectful relationship education firmly embedded in the educational syllabus.⁷¹⁴ In the other regions there are different standards of implementation regarding education on both digital technology and respectful relationships.

As in the national curriculum, online child exploitation prevention education in the States and Territories can be broadly divided into two learning areas; digital technologies and health and physical education. The development of educational models in these two learning areas has largely developed independently and as such, both areas will be discussed separately below.

⁷¹⁰ Gail Winkworth, 'Principles of child centred practice: timely, developmentally appropriate, participatory and collaborative' (Report, ACT Department of Disability, Housing and Community Services, Institute of Child Protection Studies, June 2006) 11.

⁷¹¹ Michael Flood et al, 'Respectful Relationships Education Violence prevention and respectful relationships education in Victorian secondary schools' (Report, Department of Education and Early Childhood Development, November 2009)

<<http://www.education.vic.gov.au/Documents/school/teachers/health/respectfulrel.pdf>> 8.

⁷¹² Victorian Curriculum and Assessment Authority, *Health and Physical Education- Rationale and Aims* <<http://www.education.vic.gov.au/Documents/school/teachers/health/respectfulrel.pdf>>;

Australian Capital Territory Education Directorate, *Safe and Supportive Schools Policy*, Policy Identifier: SASS201603, 4.

<http://www.education.act.gov.au/__data/assets/pdf_file/0007/848437/Safe-and-Supportive-Schools-Policy.pdf>

⁷¹³ Office of the Children's eSafety Commissioner, *National and State Education Department Policies* <<https://www.esafety.gov.au/education-resources/school-policies/national-and-state-education-department-policies>>.

⁷¹⁴ In 2016 schools in Victoria can choose to use either the Victorian Curriculum or the AusVELs. All schools will be expected to use the Victorian Curriculum from 2017. See Victorian Curriculum and Assessment Authority, *Welcome to AusVELs* <<http://ausvels.vcaa.vic.edu.au/>>.

Digital Technologies

The resources provided by the Office of the eSafety Commissioner are widely relied on across Australia for information regarding online safety and digital citizenship.⁷¹⁵ However, there are also individual State-based policies in place within schools.

Throughout Australia, online safety education generally focuses on the prevention of 'cyberbullying', rather than online child exploitation,⁷¹⁶ although there are online child exploitation prevention measures embedded in the various State and Territory curricula.

Notably, the Victorian Curriculum Digital Technologies learning area requires that children from Foundation to Level 2 are taught to; "Independently and with others create and organise ideas and information using information systems, and share these with known people in safe online environments."⁷¹⁷ This emphasis on safe and positive engagement with online environments is continued throughout the digital technologies curriculum.⁷¹⁸ Information on the Victorian Curriculum content and outcomes is easily accessible to parents and young people on the Victorian Curriculum and Assessment Authority website.⁷¹⁹

However, online child exploitation prevention measures are not so clearly embedded in the curricula of other States and Territories. For example, the current digital technologies education model in New South Wales is comparatively convoluted and does not contain comparable prevention initiatives.

Digital technologies education is incorporated with the Science syllabus for students between Kindergarten and Year 6.⁷²⁰ Between Years 7 and 8, students must complete a mandatory Technology subject.⁷²¹ From Year 9 onwards digital technology is not a compulsory subject. Digital technology is incorporated in the science syllabus, although the outcomes only require Year 7-10 students to "develop a willingness to use evidence and reason to engage with and respond to scientific and technological ideas as informed, reflective citizens".⁷²²

Health and Physical Education

Online child exploitation prevention education is also addressed within the Health and Physical Education learning areas of various State and Territory curricula. This learning

⁷¹⁵ Melissa Davey, 'Experts criticise 'paternalistic' response to schoolgirls sharing explicit images', *The Guardian* (online) 24 August 2016 <<https://www.theguardian.com/australia-news/2016/aug/24/experts-criticise-paternalistic-response-to-schoolgirls-sharing-explicit-images>>.

⁷¹⁶ Office of the Children's eSafety Commissioner, *National and State Education Department Policies* <<https://www.esafety.gov.au/education-resources/school-policies/national-and-state-education-department-policies>>.

⁷¹⁷ Victorian Curriculum and Assessment Authority, *Digital Technologies- Curriculum* <<http://victoriancurriculum.vcaa.vic.edu.au/technologies/digital-technologies/curriculum/f-10/>>

⁷¹⁸ *Ibid.*

⁷¹⁹ *Ibid.*

⁷²⁰ Board of Studies Teaching and Educational Standards NSW, *Science K-10 (Incorporating Science and Technology K-6)* <<http://syllabus.bostes.nsw.edu.au/science/science-k10/>>.

⁷²¹ Board of Studies Teaching and Educational Standards NSW, *Technology and Applied Studies (TAS)* <<http://syllabus.bostes.nsw.edu.au/tas/>>.

⁷²² Board of Studies Teaching and Educational Standards NSW, *Years 7-10 Life Skills Outcomes* <<http://syllabus.bostes.nsw.edu.au/science/science-k10/years-710-life-skills-outcomes/>>.

area is also known as Personal Development, Health and Physical Education ('PDHPE') in New South Wales or Health and Wellbeing in Tasmania.⁷²³

These learning areas do not deal explicitly with the topic of online child exploitation prevention. However, in most States and Territories these learning areas contain content addressing topics such as respectful relationships and responding to unsafe situations. This content is particularly relevant to the prevention of online grooming and procuring.

Respectful relationship education has been implemented in the curricula of Victoria, Queensland and the ACT, as well as the syllabus of New South Wales.⁷²⁴ New South Wales, the ACT and Western Australia have also specifically nominated child sexual abuse prevention, personal safety and protective behaviours as teaching topics.⁷²⁵

7.4. Recommendations

There is an abundance of government and non-government online safety education initiatives. Several of these online education tools are stated to be evidence-based, such as ThinkUKnow and the eSafe programmes developed by the Alannah and Madeline Foundation. However, from our research it is not clear what the academic evidentiary basis is for these two programmes. While ThinkUKnow is based on the experiences and investigations of law enforcement officers, there remains a significant gap in academic scholarship in this area. In this way, it would be possible to develop greater clarity and consistency in the delivery of educational programmes to prevent online child exploitation. We recommend that further research be conducted in this area.

The online environment in which young people explore and develop new relationships is constantly changing. Assumptions about the internet and the way young people interact with digital technology must be set aside in favour of more nuanced understanding. Australian initiatives targeting online child exploitation prevention have been criticised as part of a model of "crime prevention" in which perpetrators of abuse or violence are strangely absent".⁷²⁶ Online criminal or deviant behaviour does not exist in a vacuum, and online activity should be considered an extension of offline behaviours, attitudes and systemic beliefs.

A review of current programmes in Australia highlights a tendency to problematize only the online dimension of these behaviours.⁷²⁷ There remains a significant gap in online child exploitation educational programmes, as there is no scope for the integration of

⁷²³ Board of Studies Teaching and Educational Standards NSW, *Personal Development, Health and Physical Education (PDHPE)* <<http://syllabus.bostes.nsw.edu.au/pdhpe/>>.

⁷²⁴ Victorian Curriculum and Assessment Authority, *Learning in Health and Physical Education* <<http://victoriancurriculum.vcaa.vic.edu.au/health-and-physical-education/introduction/learning-in-health-and-physical-education>>; Queensland Curriculum and Assessment Authority, *Years 7-10 Health and Physical Education* <https://www.qcaa.qld.edu.au/downloads/p_10/ac_hpe_yr7-10.pdf> 3; Australian Capital Territory Education Directorate, *Every Chance to Learn- Curriculum Framework for ACT Schools* <http://www.education.act.gov.au/__data/assets/pdf_file/0005/515750/ECTL_Framework.pdf> 136; Board of Studies Teaching and Educational Standards NSW, *Personal Development, Health and Physical Education (PDHPE)* <<http://syllabus.bostes.nsw.edu.au/pdhpe/>>.

⁷²⁵ Kerryann Walsh et al, 'Child Sexual Abuse Prevention Education: A Review of school policy and curriculum provision in Australia' (2013) 39(5) *Oxford Review of Education* 649, 660.

⁷²⁶ Kath Albury and Kate Crawford, 'Sexting, consent and young people's ethics: Beyond Megan's Story' (2012) 26(3) *Continuum* 463, 465.

⁷²⁷ *Ibid.*

primary prevention. It should be noted that research has been conducted into primary prevention of child sexual abuse, including the Australian Institute of Family Studies final report on *Conceptualising the Prevention of Child Sexual Abuse*.⁷²⁸ Research has also been undertaken by the Institute of Child Protection Studies, based out of the Australian Catholic University and funded by the Royal *Commission into Institutional Responses to Child Sexual Abuse*.

This protective approach to early intervention must be supplemented with primary prevention to address the cultural causes of online child exploitation.⁷²⁹ Protective early intervention can provide protection to some victims.⁷³⁰ However, this does not prevent the offence, and can do little to prevent the production and distribution of online child exploitation materials. This area requires high-level academic research to identify gaps and provide direction and clarity in the development of primary prevention programmes.

Anti-Slavery Australia recommends that online child exploitation prevention initiatives are integrated more fully with evidence-based respectful relationships, and child abuse prevention education programmes, and that substantial further research is needed in this area.

Key Recommendation

In developing an effective national response to online child exploitation in Australia, COAG should implement a nationwide child exploitation primary prevention education programme, supported through training and technology development, with consistent and proven results. This should be integrated with existing nationwide education programmes.

⁷²⁸ Antonia Quadara, Vicky Nagy, Daryl Higgins and Natalie Siegel, 'Conceptualising the Prevention of Child Sexual Abuse' (Research Report No 33, Australian Institute of Family Studies, June 2015).

⁷²⁹ Our Watch, Australia's National Research Organisation for Women's Safety and VicHealth 'Change the story: A shared framework for the primary prevention of violence against women and their children in Australia', (Our Watch, 2015) 15.

⁷³⁰ Kerryann Walsh, Karen Zwi, Susan Woolfenden, Aron Shlonsky, 'School-based education programmes for the prevention of child sexual abuse' (2014) 4 *Cochrane Database of Systematic Reviews* 1.

8. Resources

8.1. For children and young people

Office of the Children's eSafety Commissioner

- eSafety Issues: <https://www.esafety.gov.au/esafety-information/esafety-issues>
- Resources for primary and secondary students: <https://www.esafety.gov.au/education-resources/classroom-resources>

ThinkUKnow

- For young people aged 11-17: <https://www.thinkuknow.org.au/youth/>
- Videos and short films: <https://www.youtube.com/ThinkUKnowAUS>

Bravehearts

- Toll free child sexual assault support line **1800 272 831**. Support Line is open during the hours of **8:30am to 4:30pm Monday to Friday AEST** (Please note hours vary on public holidays).
- For further information: <https://bravehearts.org.au/services/do-you-need-support/>
- *Join the Dots*- Anonymous 'creeper' reporting tool: <https://bravehearts.org.au/report-sexual-assault/join-the-dots/>

Alannah and Madeline Foundation

- *National Centre against Bullying*- Bullying for kids: <https://www.ncab.org.au/bullying-advice/bullying-for-kids/>

Our Watch

- Information for teens and young adults: <http://www.ourwatch.org.au/Preventing-Violence/Teens-Young-Adults>
- *The Line*- sexting and online abuse: <http://www.theline.org.au/Sexting-and-online-abuse>

8.2. For Parents and Guardians

Office of the Children's eSafety Commissioner

- iParent: <https://www.esafety.gov.au/education-resources/iparent>
- Report offensive or illegal content: <https://www.esafety.gov.au/complaints-and-reporting/offensive-and-illegal-content-complaints/report-offensive-or-illegal-content>
- Report Cyberbullying: <https://www.esafety.gov.au/complaints-and-reporting/cyberbullying-complaints/i-want-to-report-cyberbullying>

- Quick guide to popular social media sites and apps:
<https://www.esafety.gov.au/esafety-information/games-apps-and-social-networking>

ThinkUKnow

- For parents, carers and teachers: <https://www.thinkuknow.org.au/site/>
- Report online child exploitation material: <https://www.thinkuknow.org.au/site/online-child-sexual-exploitation>

Bravehearts

- Online safety information: <https://bravehearts.org.au/services/keeping-safe-online/>

Carly Ryan Foundation

- Thread app: <http://www.thethreadapp.com/>

Alannah and Madeline Foundation

- eSmart Digital License: <https://www.esmart.org.au/esmart-digital-licence/>
- *National Centre against Bullying*- Bullying for parents:
<https://www.ncab.org.au/bullying-advice/bullying-for-parents/>

Our Watch

- Information for parents and caregivers: [http://www.ourwatch.org.au/Preventing-Violence/Parents-Caregivers-\(1\)](http://www.ourwatch.org.au/Preventing-Violence/Parents-Caregivers-(1))

Online sexual exploitation of children and young people is emerging as a significant issue in Australia and around the world. The low cost and ready availability of sophisticated technologies coupled with widespread internet access has put children and young people at an increased risk of abuse through online grooming and procurement tactics. The use of new technologies to produce, disseminate and store child exploitation materials has also resulted in offenders having unprecedented access to tens of thousands of images of child abuse. These images depict the increasingly depraved, violent torture and sexual abuse of younger and younger children. Australian offenders are among the most prolific, and the impact of local offending can be seen both here and overseas, particularly in the commission of online, overseas abuse of children and infants.

Anti-Slavery Australia, based within the UTS Faculty of Law, has conducted research on trends in online child exploitation offences and the legal and policy context in Australia. Through interviews, a review of prosecution statistics and a close examination of policy, case reports and legislation, the research quantifies and evaluates the Australian legal landscape of online child exploitation crimes.

Behind the Screen: Online Child Exploitation in Australia identifies gaps in the identification and prosecution of offenders in Australia and makes recommendations for further areas of research.



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