

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/---ipecc/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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