



VICTORIA POLICE

**Parliament of Australia – Parliamentary Joint
Committee on Law Enforcement:
Inquiry into law enforcement capabilities in
relation to child exploitation**

**Responses to questions taken on notice at hearing 9 December 2021 –
Detective Superintendent Mary-Jane Welsh,
Cybercrime Division, Crime Command, Victoria Police**

Question 1 - Access to Commonwealth legislative powers and working across jurisdictional borders – *Point the Committee in the right direction on that legislation and what kind of changes would be required in a practical sense?*

The following are examples of where issues with access to Commonwealth powers for law enforcement agencies working across jurisdictional borders can impact the investigation of potential child exploitation:

Controlled Operations

Despite Victoria Police being a law enforcement agency for purposes of the *Crimes Act 1914* (Cth) (**Crimes Act**), applications for an authority to conduct a controlled operation under section 15GI of the Crimes Act can only be made to an authorising officer who is a select officer of the AFP, ACC and ACLEI (as defined in section 15GF of the Crimes Act). This means that Victoria Police cannot access Commonwealth controlled operations without the necessity of engaging with the AFP.

In regard to equivalent Victorian legislation (*Crimes [Controlled Operations] Act 2004*), controlled operations can be pursued under section 3 of this Act for the purpose of obtaining evidence that may lead to the prosecution of a person for a Victorian offence. Accordingly, there is no State provision to allow a controlled operation for Commonwealth offences.

Account Takeover Warrants

The account takeover warrants power under section 3ZZUJ of the Crimes Act allows the AFP or the ACC to take control of one or more online accounts. An emergency authorisation for taking control of an online account may be given by an appropriate authorising officer. The term 'authorising officer' is currently defined in section 3ZZUM of the Crimes Act and this definition specifies select officers of the AFP and the ACC as 'authorising officers'. No officer within Victoria Police has the power to issue an emergency authorisation under section 3ZZUX of the Crimes Act, or apply to a Magistrate for the issue of an account takeover warrant under section 3ZZUN of the Crimes Act. Victoria Police is unable to assume control of suspects' online accounts. It is similarly so in relation to access to any cloud-based services post warrant.

Consequences of existing legislation on operational police response and child safety

With improved technology, collaboration, and processes enabling often rapid sharing of information across jurisdictions, Victoria Police can be in the possession of intelligence and evidence which indicates children are in immediate harm and/or imminent harm. Quite often despite this knowledge, critical information about the location/identity of the child and offender may be unknown. This can be due to obfuscation techniques used by offenders and various other barriers presented by online offending. Therefore, further investigation is required, supported by legislation which permits certain

investigative activities necessary to identify offenders and victims in an otherwise anonymous online environment. The existing *Crimes (Controlled Operations) Act 2004* presents difficulties for police investigating crimes committed online. For example, it is often extremely hard to specify whether the operation is a local or cross-border controlled operation. This is because, at the outset of the operation the investigators may be unable to state whether any part of the investigation may take place outside Victoria.

Police need to engage swiftly. State based legislation operates in situations where there is a reasonable belief that the offender is in Victoria. However, the location of the offender and their identity is frequently unknown at this stage of the investigation. Use of Commonwealth law which is more able to support online investigations in these circumstances requires collaboration with AFP. Although strong and effective partnerships are maintained between Victoria Police and the federal authorising agencies, the sheer number of investigations that are referred, or otherwise require a Commonwealth controlled operation authority, makes the authorising agency's involvement in each investigation impractical. These issues are further compounded by operational priorities and limited resources to participate in State investigations where requested and impact on timely intervention by police which can place victims at risk of unnecessary exposure to offenders.

Questions 2 & 4 – Obtaining information from tech companies - *Experience in delaying with tech companies, example of longer wait times or inappropriate responses; dealing with the Googles and Apples of the world, versus Facebook and social media companies?*

The responsiveness of social media companies varies, and justifications required from law enforcement to release the information also vary between companies. Google have been the most forthcoming in providing relevant information to Victoria Police, when requested. The response time is the shortest, two to three days.

Facebook / Instagram requires an overview of the investigation and a justification as to the relevance of the data. Unlike Google, Facebook / Instagram will reject any request where a clear justification as to the relevance of the information requested has not been provided. The justification and description required for releasing subscriber/IP details for child exploitation matters is much lower than other offence types. The wait time for Facebook replies is approximately one week for informal requests for information. Formal mutual assistance requests (where information is required to be included on a brief of evidence in support of criminal charges) involve a law enforcement agency requesting information from overseas organisations such as Facebook to assist in an investigation. This is currently a convoluted process that may take anything from six months to two years to receive a response.

Other companies such as Microsoft and Snapchat are less inclined to provide responses to law enforcement.

Question 3 – Obtaining information from Commonwealth agencies - *Delays from Commonwealth agencies – specific examples?*

Wait time for Commonwealth agency requests by Victoria Police officers can vary dramatically. By way of comparison, AFP have on most occasions receive responses within the same day. Some examples of delays experienced by Victoria Police are provided below. Delays in receiving information can mean that children may be accessible to offenders whereby contact offending may be occurring. By understanding if the offenders have access to children consideration can allow resourcing to be prioritised to those investigations whereby children are being harmed. By having all available information especially in relation to access to children, this allows for an informed risk assessment and the prioritisation of investigative options.

Centrelink

- Male offender engaged in online communication with a covert operative purporting to be a 14-year-old female. Intelligence suggested he had targeted other children online. Centrelink check requested on the 9 June 2021 to identify if offender had access to children within his home. Medicare

checks received on the 16 June 2021 (7-day delay) which suggested no direct access to children. This allowed prioritisation of other high risk investigations as there was no direct risk to children.

- Male offender believed to be an administrator of a group chat where pre-pubescent male child abuse material was exchanged amongst the group. The group was believed to have over 450 members. Investigations identified a further group was being managed by the offender. Medicare check submitted on 14 July 2020 in order to establish if offender had access to children within his home. Check serviced on the 27 January 2021 (6-month delay). This was a 6-month period. Operational decisions were made to proceed executing the warrant prior to the return of the checks. No direct access to children was identified.

Medicare

- Report received from the National Centre for Missing and Exploited Children (NCMEC) regarding male offender grooming and targeting pre-pubescent girls. Information was received that the offender also was raping his sister. Medicare checks submitted on the 14 December 2020 and reply received 21 December 2020 (1-week delay) requested to identify if offender had child age sister. No child age sister was identified.
- Investigation into a male offender who was communicating with a covert operative. The offender stated he was committing rapes on a 9-year-old female and nominated her first name. He further identified that the child was his cousin's daughter. Medicare checks were required to identify the victim. First check was submitted on the 12 April 2021 with result received on 14 April 2021 (2-day delay). The second check was also submitted on the 12 April 2021 and was returned on the 4 May 2021 (3-week delay). Investigative decision was made on the 16 April 2021 to proceed with a search warrant and arrest due to a risk to children. Results identified that offender had not had access to the child and the conversation was fantasy.
- Male offender engaged with a covert operative who was purporting to be a female 14-year-old child. Chat was highly sexualised with offences were committed against the covert operative. Medicare check submitted on the 26 July 2021 to identify if the offender had access to children within his home. Result received on the 27 September 2021 (9 weeks) which confirmed no recorded children at the address. Operational decision to proceed with the search warrant and arrest prior to the return of the check.

Question 5 – Consistency of definitions for CAM / offences that are applicable nationally – *Is the lack of definitions a problem within Australia?*

The main issue faced by Victoria Police investigating these matters is the lack of standardisation nationally regarding the definition of a child - in Victoria, Tasmania, the Northern Territory and the Australian Capital Territory it is a person under the age of 18, in South Australia it is a person under 17, and in Western Australia, Queensland and New South Wales it is a person under 16. Under Commonwealth legislation, a child is a person under the age of 18. This causes challenges particularly with cross border offending where the activity may be illegal in one state but not another.

Question 6 – Inconsistent definitions and impact on prosecutions – *Have you come across any situations where the language, description or definition within legislation has been such that a prosecution may fail because of differences in the language or definitions in the legislation?*

Whilst we have not identified any specific examples of failed prosecutions, the following are examples of where lack of consistency in language, description or definition has resulted in different responses to potential child exploitation:

- On occasion Victoria Police investigators have referred websites containing what they deem to be child abuse material to the Office of the eSafety Commissioner to review and if appropriate, issue takedown notices. However, the investigator's assessment sometimes does not match that of the Office of the eSafety Commissioner, which utilises an 'InHope' maturation and content tool. This

tool bases its assessment of age on physical development. Further, if images are posted in a non-sexualised manner, they do not meet the Office of the eSafety Commissioner's definition of what constitutes child abuse material. In comparison, under state legislation nudity is illegal if a reasonable person would regard it to be offensive.

- Victoria Police investigators have, in the past, received referrals from other states regarding people's online activity in searching for child abuse material, but whilst other states have offences for attempting to access child abuse material sites (South Australia for example), Victoria does not.