

Inquiry into law enforcement capabilities in relation to child exploitation

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To: Parliamentary Joint Committee on Law Enforcement (le.committee@aph.gov.au)

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

Thank you for this opportunity to provide comment on the Parliamentary Joint Committee on Law Enforcement's Inquiry into law enforcement capabilities in relation to child exploitation.

As South Australia's Commissioner for Children and Young People, my mandate under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* is to promote and advocate for the rights, interests and wellbeing of all South Australian children and young people. It is also my role to ensure that the State, at all levels of government, satisfies its international obligations under the United Nations Convention on the Rights of the Child (UNCRC).

Child exploitation crosses all boundaries; state and international – and to respond appropriately the Commonwealth Government can look to the international instruments that it has adopted to ensure that laws, policies and practices are – at some level – consistent to international practices. Guidance is available from UN instruments, including Article 19(1) of the UNCRC the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol), as well as General Comment No. 25 on child rights in relation to the digital environment (General Comment).

My recommendations, with, particular reference to paragraphs (a) (b) (c) (e) and (g) of the Terms of Reference provided by the Committee, are to:

Recommendation 1:

Consider the guidance provided by the United Nations Convention on the Rights of the Child, namely Optional Protocol to the Convention on the sale of children, child prostitution and child pornography and the General Comment No. 25 (2021) on children's rights in relation to the digital environment.

Recommendation 2:

Create and set consistent and clear definitions at a Commonwealth level, which align with states and territories and to harmonise these definitions with overseas jurisdictions insofar as possible.

Facilitate a unified approach between service providers at a Federal level, as well as between states and territories which is consistent with how the Federal police work with overseas jurisdictions insofar as possible.

Recommendation 3:

Evolve the language used, and the landscape of understanding around, how exploitation of children and young people occurs, including the factors that lend themselves to a child being vulnerable to exploitation.

Recommendation 4:

Recognise that the digital environment is simply one more "place" that exploitation of children and young people can occur. The same fundamental principles should apply regardless of the location of the exploitation, whether in the digital environment or not. The challenges presented by an environment without borders increases the need for technology providers to be seen as having a positive duty of care to ensure that their

actions are in the best interests of their young users and do not result in the exploitation of a child or young person.

If you have any questions or queries please do not hesitate to contact this office.

Yours sincerely,



Helen Connolly

Commissioner for Children and Young People
Adelaide, South Australia

Recommendation 1: To consider and adopt the guidance provided by the United Nations Convention on the Rights of the Child: namely the Optional Protocol (Optional Protocol) to the Convention on the sale of children, child prostitution and child pornography as well as the General Comment No. 25 (2021) on children's rights in relation to the digital environment.

Child exploitation covers both states and continents so adopting the Optional Protocol can provide a sound framework on what is considered child exploitation and how to respond to this exploitation. It provides clear guidance and definitions, as well as outlining what should be considered in international investigations and what to consider to ensure that the best interests of children, who are victims, are at the fore.

The Optional Protocol defines different forms of child exploitation (however, child exploitation should not be limited to the definitions in this protocol), how to work and cooperate with other States in relation to extradition, investigations and confiscation of evidence, as well as implementing laws policies, practices and programs to prevent offences. It also outlines how to ensure that a child victim's best interests are central to any response.

As the digital environment is another space where child exploitation can occur, General Comment No. 25 should be considered so that children and young people are protected online. However, at the same time this protection needs to be balanced with opportunities for children and young people to participate in the digital environment, and in ways which respect their right to privacy.

General Comment No. 25 includes important provisions on how to balance a child's safety and access to information with privacy. It also details how to respond to different situations that can occur in a digital environment, such as violence against children, protecting children from economic, sexual and other forms of exploitation, protecting children in armed conflict, migrant children and children in other vulnerable situations as well how to respond to children who may enter the child justice system (Articles 55 –122).

Recommendation 2: Create and set one consistent and clear standard for definitions at a Commonwealth level as well as between states, territories.

I commend the Commonwealth and State Governments' progress in working together to address child exploitation through co-operation and working together to provide information and education for children and their families. The bi-annual meetings between Attorney Generals is an appropriate forum where these issues can be discussed.

The Commonwealth and States should ensure that there are consistent and clear legal and policy definitions in relation to child exploitation crimes. As far as possible, any definitions, policies and practices should be consistent with how the Commonwealth Government works with international authorities.

Recommendation 3: To evolve the language used, and the landscape of understanding around, how exploitation of children and young people happens including the factors that lend themselves to a child being vulnerable to exploitation.

Research has shown that children and young people are intrinsically more vulnerable than adults due to their physical and mental development. Children and young people who are being exploited – whether they have any perceived involvement in their own exploitation or not –

should not be treated as perpetrators regardless of circumstances. This theme ties in with guidance set out in international human rights law, unpacked at Recommendation 1.

Taking this idea further, it is important to remove risk of potential bias, discrimination and any blind spots that could result in a failure to protect, even to proactively penalise, children and young people already in vulnerable situations.

The best way to evolve understanding is via unified definitions, awareness raising and harmonised training between Commonwealth and State authorities, including investigative arms, prosecution bodies and courts as well as other service providers.

This also requires an understanding that children and young people who make what may appear to be active choices that led to their own exploitation, are not viewed as having exercised agency or provided valid consent.

“Due to social and political constraints of victimhood, if children are considered less vulnerable and/or innocent (McAlinden, 2014) than their peers due to their behaviour or circumstances, they are deemed to be less deserving of help or blamed for the harm or abuse they suffer (Brown, 2015).”

The understanding of a child’s developmental growth and behaviour is not well understood and those working in this area should be trained so they are equipped to work with children and young people being exploited. Specialist knowledge and training must underpin the system responses at all stages.

One example includes investigators in Canada being trained in the complex nature of enduring child sexual abuse trauma, so they do not misinterpret the effects of trauma with a lack of credibility from a potential victim (*Canadian Centre for Child Protection (CCCCP) 2017 Survivors’ Survey*).

Using Communication Partners in the court system to support vulnerable parties, in the UK and Australia, is another example where intermediaries who are experts in child trauma and sexual exploitation can support vulnerable children and change outcomes and minds in the justice system. Research has revealed that this extra support has resulted in an increase in successful prosecutions, reduced further harm for these parties, and more efficient court proceedings, with judges, prosecutors and defence lawyers all welcoming the changes made in the system.

It is also critical to prevent the misapplication of existing laws, so they are not weaponised against the very people they were designed to protect. For example, children creating explicit images of themselves to share with another and trauma related problematic sexual behaviour between children can at times result in children being caught up in a legal system with unpredictable and varied outcomes, when often education and treatment would result in better outcomes.

Aside from the harm such risk can cause at an individual level, this can result in undermined public confidence in legal enforcement leading to crimes going unreported. For example, young people who have created explicit material of themselves which they intended for private use, may avoid reporting criminal public on-sharing of the material to avoid incurring punishment.

Recommendation 4: To recognise that the digital environment is simply one more “place” that exploitation of children and young people can occur. The same fundamental principles should apply regardless of the location of the exploitation, whether in the digital environment or not. The challenges presented by an environment without borders increases the need for technology providers to be seen as having a positive duty of care to ensure that their actions are in the best interests of their young users and do not result in the exploitation of a child or young person.

There are unique challenges, and increased and novel opportunities, for exploitation arising from the rapid evolution of technologies in the digital environment. These opportunities are coupled with high engagement by children and young people with the digital environment. Human rights should attach to the subject, not the location where the subject happens to be. Laws protecting children from exploitation need to be effective, irrespective of where the violations occur.

Among the key practical challenges for law enforcement is that these crimes have no borders, yet legal powers of investigation and enforcement are jurisdictionally confined and mutual assistance between governments is logistically lacking for a range of reasons. Promoting as much cooperation between intelligence-sharing with overseas jurisdictions is as important as reducing law-lag as recommended in UN guidance. It is up to State Governments to find ways to make law enforcement cohesive as these crimes take place without borders, and perpetrators use jurisdictional limitations to evade prosecution.

The fact that technology providers and Internet Service Providers create and facilitate these unique environments means that the law should recognise (1) they owe a positive duty of care / duty to act in the best interests of their users and (2) owe a special duty of care to their most vulnerable users (children and young people).

Examples of ways technology providers could demonstrate commitment to this duty could include:

1. Working alongside law enforcement to upskill investigators on new developments that:
 - a. could present additional or new risks for child exploitation (for example, the emergence of new encryption technology on their platform or the use of new peer-to-peer apps); and
 - b. could present scalable and automated opportunities to identify child exploitation (for example, Apple’s “neuralMatch” that scans images before they are uploaded to iCloud, or Google, Microsoft, Facebook and Twitter’s use of technology that creates a digital fingerprint for known abuse imagery and then scans user-generated content for these digital fingerprints).

It is important to carefully balance the right to privacy, where possible, with these technologies when designing protocols. For example, to consider what happens when a young person may share an explicit image of themselves with their partner using a parent’s phone.