

# Classification of child exploitation material for sentencing purposes

Final report

July 2017



Queensland Sentencing  
Advisory Council  
*Inform. Engage. Advise.*

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This report contains subject matter that may be distressing to readers. Anonymised, but explicit material describing sexual offending against children, drawn from sentencing remarks, is included in this report.

If you need help to cope with the feelings you have experienced, support is available. You can contact the Sexual Assault Helpline on 1800 010 120 or visit [www.health.qld.gov.au/sexualassault](http://www.health.qld.gov.au/sexualassault) for a range of support services across Queensland.

### Classification of child exploitation material for sentencing purposes: Final report

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While all reasonable care has been taken in the preparation of this final report, no liability is assumed for any errors or omissions. This final report reflects the law as at 31 May 2017.

The Queensland Sentencing Advisory Council is established by section 198 of the *Penalties and Sentences Act 1992* (Qld). Its functions are detailed in section 199 of the *Penalties and Sentences Act 1992* (Qld).

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12 July 2017

The Hon Yvette D'Ath  
Attorney-General  
Minister for Justice and Minister for Training and Skills  
GPO Box 149  
BRISBANE Qld 4001

Dear Attorney-General

I am pleased to provide the Queensland Sentencing Advisory Council's final report, *Classification of child exploitation material for sentencing purposes*. This report addresses the terms of reference you referred to the council on 22 November 2016.

Yours sincerely

A handwritten signature in black ink, reading 'E. Marchetti'.

Professor Elena Marchetti  
Acting Chairperson  
Queensland Sentencing Advisory Council



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# Abbreviations

ABS	Australian Bureau of Statistics
ACIC	Australian Criminal Intelligence Commission
ACT	Australian Capital Territory
AFP	Australian Federal Police
ANVIL	Australian National Victim Image Library
ANZPAA	Australia New Zealand Policing Advisory Agency
APMC	Australasian Police Ministers' Council
BAQ	Bar Association of Queensland
C4ALL	The classification report produced by Queensland Police Service for the courts. Also called a C4P and C4M report
CAID	Child Abuse Image Database
CCC	Crime and Corruption Commission (Queensland)
CDPP	Office of the Commonwealth Director of Public Prosecutions
CEM	Child exploitation material
CETS	Child Exploitation Tracking System
COPINE	Combating Paedophile Information Networks in Europe (Project)
Criminal Code (Qld)	<i>Criminal Code Act 1899 (Qld)</i> , Schedule 1
Criminal Code (Cth)	<i>Criminal Code Act 1995 (Cth)</i> , Schedule
CPIU	Child Protection Investigation Unit
CSA	<i>Corrective Services Act 2006 (Qld)</i>
Cth	Commonwealth
DJAG	Department of Justice and Attorney-General (Qld)
EEEU	Electronic Evidence Examination Unit
EQ	Education Queensland
Hon	Honourable
ICSE DB	International Child Sexual Exploitation image database
IWF	Internet Watch Foundation
JACET	Joint Anti-Child Exploitation Team
KIRAT	Kent Internet Risk Assessment Tool
LAQ	Legal Aid Queensland
LCCSC	Law, Crime and Community Safety Council
MSO	Most serious offence
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NT	Northern Territory
NTDPP	Office of the Director of Public Prosecutions for the Northern Territory

NZ	New Zealand
OOTD	Out of the Dark project (run by Queensland Family and Child Commission)
PACT	Protect All Children Today
PSA	<i>Penalties and Sentences Act 1992 (Qld)</i>
PTSD	Post-Traumatic Stress Disorder
QCA	Queensland Court of Appeal
QCS	Queensland Corrective Services
QDPP	Office of the Director of Public Prosecutions for Queensland
QFCC	Queensland Family and Child Commission
Qld	Queensland
QLS	Queensland Law Society
QOCCI	Queensland Organised Crime Commission of Inquiry Report (2015)
QP9	Queensland Police Service court brief is referred to as the QP9 (this is an initial summary of the facts alleged, it is not the brief of evidence)
QPRIME	Queensland Police Records and Information Management Exchange
QPS	Queensland Police Service
QSI	Queensland Sentencing Information Service
SA	South Australia
SADPP	Office of the Director of Public Prosecutions for South Australia
SAP	Sentencing Advisory Panel UK—now called the Sentencing Council for England and Wales
SAS	Statistical Analysis System
SASDE	Statewide Access Seized Digital Evidence Database
SPI	Single Person Identifier
TasDPP	Office of the Director of Public Prosecutions for Tasmania
UK	United Kingdom
USA	United States of America
USSC	United States Sentencing Commission
VDPP	Office of the Director of Public Prosecutions for Victoria
WA	Western Australia
WADPP	Office of the Director of Public Prosecutions for Western Australia
YAC	Youth Advocacy Centre Inc.

# Glossary

BlueBear LACE (Law Enforcement Against Child Exploitation)	A purpose built forensic tool used by 49 law enforcement agencies around the world. The program reduces manual review of CEM by extracting files from devices, categorising seized material, image matching against hash value databases and assisting with facial detection.
Contact offence/s	<p>An offence of a sexual nature committed in relation to a child under 16. This includes, but is not limited to, the following offences contained in the Criminal Code (Qld):</p> <ul style="list-style-type: none"> <li>• s210 Indecent treatment of a child under 16 years</li> <li>• s213 Owner permitting abuse of children under 16 years on premises</li> <li>• s215 Carnal knowledge—child under 16 years</li> <li>• s217 Procuring a young person etc. for carnal knowledge—child under 16 years</li> <li>• s218A Using internet to procure children under 16 years</li> <li>• s218B Grooming children under 16 years</li> <li>• s219 Taking child for immoral purposes</li> <li>• s229B Maintaining a sexual relationship with a child.</li> </ul>
CrimTrac	CrimTrac was previously the national information sharing service of Australian police and other law enforcement and security agencies. In mid-2016, CrimTrac merged with the Australian Crime Commission and both agencies now form part of the Australian Criminal Intelligence Commission (ACIC). This agency combines intelligence, research and investigative capabilities to address serious and organised crime. It cooperates at national and international levels. Its role in supporting national cooperation and information sharing continues, and jurisdictional commissioners of police and other enforcement agency executives contribute to the strategic direction of the ACIC via the ACIC Board.
Darknet	The Darknet is the term used to describe the anonymous networks within the deeper parts of the Deep Web. The Deep Web is an umbrella term, which refers to any part of the internet that traditional browsers such as Google, Chrome or Firefox will not search or index. It is usually only accessible using programs such as Tor, I2P or Freenet since data is encrypted and users must be anonymous. <sup>1</sup>
District and Supreme Courts	The District and Supreme Courts of Queensland—including their children's jurisdictions.
Diversion/diverted	<p>The charter of youth justice principles in Schedule 1 of the <i>Youth Justice Act 1992 (Qld)</i> outlines in principle 5:</p> <p>If a child commits an offence, the child should be treated in a way that <b>diverts</b> the child from the courts' criminal justice system, unless the nature of the offence and the child's criminal history indicate that a proceeding for the offence should be started (emphasis added).</p> <p>For the purpose of this report, diversion refers to either a formal caution or a conference.</p>
Europol	Europol is the European Union's law enforcement agency. Europol assists the 28 EU Member States in their fight against serious international crime and terrorism. It also works with many non-EU partner states and international organisations.
Griffeye Analyze	Previously called NetClean Analyze, this software helps investigators analyse large amounts of image and video data and automatically eliminate and prioritise information to classify images and identify victims. The QPS is currently testing Griffeye Analyze to assess its suitability for Queensland.
Hash value/hash value technology/hash set	Hash values for files are unique numeric values or fingerprints which identify the content of a file. If an individual file is altered or changed, hash values will also change. <sup>2</sup> Hash values are also referred to as hash sets.

Hubstream	Hubstream is a software program used by law enforcement agencies. It allows investigators to securely coordinate and refer investigations between all companies, non-government organisations and government agencies in the global network, including Project VIC.
INTERPOL	The world's largest international police organisation, with 190 member countries.
Magistrates Court	Queensland Magistrates Courts—including the children's jurisdiction.
Oliver scale	<p>A classification tool for grading the severity of CEM using the following nine categories:</p> <ol style="list-style-type: none"> <li>1. Depictions of children with no sexual activity.</li> <li>2. Sexual activity between children, or solo masturbation by a child.</li> <li>3. Non-penetrative sexual activity between adults and children.</li> <li>4. Penetrative sexual activity between children and adults.</li> <li>5. Sadism, bestiality or child abuse.</li> <li>6. Anime, cartoons and drawings depicting children engaged in sexual poses or activity.</li> <li>7. Non-illegal/indicative child material (often part of a series containing CEM).</li> <li>8. Adult pornography.</li> <li>9. Ignorable.</li> </ol>
Onion Router (Tor), I2P and Freenet	These are specialist browsers required to access information on the Deep Web. The most commonly known specialist browser is the Onion Router (Tor). Tor was initially developed by the United States Naval Research Laboratory and allows communication and access to information without IP addresses leaving a digital footprint.
Peer-to-peer file sharing	Peer-to-peer (P2P) file sharing is the distribution and sharing of digital files within a P2P network. A P2P network involves an interconnected network of users (peers) who share files amongst each other without an intermediate server. Each peer within the network is both an uploader and downloader of content in relation to other users. The network itself will transcend national and international boundaries. P2P file sharing is usually anonymous, in that a user offering files for sharing (be they music, movies or CEM) will not know who has accessed their content. <sup>3</sup>
Project VIC	Project VIC is a global partnership that uses advanced technology to fight child sexual exploitation and trafficking. Using new forensic and data analytics tools, Project VIC identifies new victims of abuse and locates perpetrators around the globe. More than 2500 law enforcement agencies in 40 countries use the technology developed by Project VIC's partners to rescue child victims, apprehend offenders and secure crime scenes. Project VIC has an international image hash value database, originally coordinated by the Department of Homeland Security (USA) and the International Centre for Missing and Exploited Children. Project VIC complements the ICSE DB and allows various categorisation systems, such as the Griffeye Analyze software, to link to it.
Sexting	Sending of provocative or sexual photos, messages or videos ... generally sent using a mobile phone, but can also include posting this type of material online. <sup>4</sup>
Sofronoff Report	The Queensland Parole System Review Final Report, November 2016, by Walter Sofronoff QC (as His Honour was).
Taskforce Orion	Established in 2015 and provided \$3.2 million, Taskforce Orion aims to address online sharing of CEM. The taskforce employed additional staff to improve forensic capability and victim identification capacity, as well as provide additional intelligence and technical support.

## Executive summary

The Attorney-General and Minister for Justice Yvette D'Ath asked the Queensland Sentencing Advisory Council (the council) to review the classification of child exploitation material (CEM) for sentencing purposes and determine whether any improvements can be made.

The review comprised significant consultation across Queensland's criminal justice system involved with detecting, prosecuting and sentencing CEM offences. In addition, the council consulted with key agencies from Queensland's legal community and victim advocates, as well as community members, content experts and relevant agencies in other Australian and international jurisdictions.

This broad consultation revealed Queensland is well respected for its professionalism in CEM investigation at national and international levels. Consequently, the council was determined to ensure any system used for classification of CEM in Queensland supports and builds on this reputation. Administrative data collected by criminal justice agencies was analysed to gain an appreciation of the Queensland context of CEM offending and offenders. This report provides the outcomes of this analysis.

The report is structured in six chapters, initially introducing the current approach to classifying CEM in Queensland, outlining what is known about CEM offending and CEM offenders, and comparing Queensland's approach to other jurisdictions. The review culminates by proposing a new approach for classifying CEM for sentencing purposes, referred to as the Q-CEM Package. Mechanisms designed to support and evaluate the Q-CEM Package, and Queensland's readiness to continue to meet the many challenges associated with this evolving crime type, are also proposed.

## Key findings

**CEM is not a victimless crime.** These offences harm real children and the repeated circulation of CEM depicting this abuse continues their victimisation. Victims of CEM report lifelong impacts as a result of the abuse and re-victimisation via sharing of the material. It is difficult to permanently or fully remove images from circulation.

**Delays are associated with CEM cases.** The council's research confirmed anecdotal evidence that delays were associated with the criminal justice response to CEM. The delays are most prevalent between charging an offender and proceeding to a committal hearing. During this period, police undertake typically complex forensic processes and classify detected CEM.

**CEM is an international crime with a local footprint.** CEM is a technology-enabled crime and, as such, will continue to evolve and expand in line with the exponential growth and global interconnectivity of technology. Queensland child victims and Queensland offenders require a suitable response from state and Commonwealth criminal justice agencies.

**National and international cooperation is essential.** All Australian state and territory jurisdictions are seeking a platform to support cooperation at national and international levels. A common platform promotes harmonised classification language to respond to the international dimension of these crimes. Common platforms are designed to address time and welfare burdens on criminal justice agencies by sharing data about CEM encountered in other jurisdictions. They enhance victim identification efforts by enabling a stronger focus on new material.

**Data analysis, research and a commitment to practice evaluation are important.** Identifying how this crime type is shifting remains a critical issue for Queensland. Keeping pace will build on the state's reputation for innovation, and reflects the commitment this state has to protecting Queensland children and families.

**Queensland needs a system that balances the requirements of all criminal justice agencies.** Classification for sentencing must balance the demands on law enforcement to identify victims and offenders with the mechanisms required to prosecute and sentence offenders. The Q-CEM Package is specifically designed to address these critical functions of a system responsible for removing children from harm and bringing offenders to account.



**Queensland needs to adopt an enhanced approach to sexting and promoting prevention of CEM offending.** Establishing mechanisms to provide support to families, schools and other organisations that can raise awareness among young people about how to remain safe online is essential. There is also a role to encourage offenders and potential offenders into treatment for their sexual interest in children.

## Recommendations

### Recommendation 1

The council recommends amending section 9(7) of the *Penalties and Sentences Act 1992* (Qld) by:

- (a) replacing the wording ‘image of a child’ in subsection 9(7)(a) with ‘material depicting a child’
- (b) adding a new subsection—role of the offender
- (c) adding a new subsection—offender’s relationship with the child.

### Recommendation 2

The council recommends adding a section to the *Penalties and Sentences Act 1992* (Qld) giving judicial officers discretion to order additional requirements of a parole order (including to submit to medical, psychiatric or psychological assessment) when ordering a parole release date.

### Recommendation 3

The council recommends sentencing judicial officers order that any medical, psychiatric or psychological assessment or treatment reports submitted as part of child exploitation material (CEM) court cases be referred to Queensland Corrective Services to support rehabilitation efforts.

### Recommendation 4

The council:

- acknowledges law enforcement agencies are unlikely to continue using the Oliver scale for classifying images involved in this evolving crime area
- acknowledges the Oliver scale has limitations for law enforcement agencies including resource inefficiencies and diverting resources from victim identification efforts
- recommends, if law enforcement ceases using the Oliver scale as its classification tool for CEM, it should adopt an effective alternative, such as the scheme outlined in recommendation 5 and supported by recommendation 6.

### Recommendation 5

The council recommends the adoption of the Q-CEM Package, incorporating a Classification of CEM Schema (CCS) and a Child Exploitation Material Analysis (CEMA) Report, as the most appropriate approach for presenting timely and adequate information about CEM before Queensland courts for sentencing.

### Recommendation 6

The council recommends formalisation of an approved field triage process and a Timeframe Report for the prosecuting agency with carriage of the matter as a priority to support implementation of the Q-CEM Package.

### Recommendation 7

The council recommends formalisation of the Q-CEM Package, incorporating the CCS and the CEMA Report, supported by approved field triage, into the Queensland Police Service (QPS) policy/procedural framework as a matter of urgency.

## Recommendation 8

The council recommends:

- consideration be given to introducing thresholds by adding a provision to the *Evidence Act 1977* (Qld) regarding a CEM certificate. The certificate would be evidence of the fact an authorised officer conducted classification of seized CEM in accordance with the threshold method
- a threshold method set by a regulation (most likely the *Evidence Regulation 2007*) to deliver time savings in the classification of CEM for Queensland courts
- an independent body evaluate the use of a threshold process if implemented at six-month and two-year evaluation points.

## Recommendation 9

The council recommends the Queensland Government elevate the issue of coordination and cooperation in both classification approaches and data sharing to the national level via the Law, Crime and Community Safety Council.

## Recommendation 10

The council recommends the Queensland Government consider removing any legislative impediments to the sharing of CEM between law enforcement agencies, which include criminal intelligence organisations.

## Recommendation 11

The council recommends the establishment of an eSafeQ Commissioner position to meet the challenges associated with online offending and protect Queensland children and families in the virtual environment.

## Recommendation 12

The council recommends an integrated, staged and independent evaluation framework be adopted to monitor and assess the implementation and effectiveness of the Q-CEM Package to deliver the intended outcomes for Queensland.

## Recommendation 13

The council recommends law enforcement agencies undertaking classification for Queensland courts immediately commence documenting baseline information and establish data collection mechanisms.

## Recommendation 14

The council recommends the evaluation of Taskforce Orion provide definitive guidance about current and projected resource and maintenance requirements associated with the trialled technology and welfare management, and any practice improvements or learnings derived from the trial.

## Recommendation 15

The council:

- acknowledges the suite of recommendations have resource implications for QPS as the agency with primary responsibility for classification in Queensland
- recommends QPS be allocated additional resources for a three-year period to support the implementation and evaluation of the Q-CEM Package.

## Recommendation 16

The council proposes an independent review be undertaken of current arrangements in which state-based forensic and investigative resources specific to this offending type are divided between the Crime and Corruption Commission (CCC) and QPS.

# Chapter 1: Introduction

Advancements in technology and global connectivity have delivered significant benefits to Queenslanders, including offenders. Accessing, distributing and producing child exploitation material (CEM) is now internationally recognised as a technology-enabled criminal activity, extending this offending beyond conventional state and national boundaries, facilitating a thriving global market in abusive material, and providing a platform for unparalleled networking between like-minded individuals. This crime is growing exponentially and is responsive to ongoing improvements in the capacity and reach of technology.

Queensland has established its reputation as a jurisdiction serious about addressing the exploitation of children.<sup>5</sup> The state has also, through the expertise of its law enforcement agencies, demonstrated a dedicated commitment to keeping pace with offenders. While the globalisation of technology has undoubtedly enabled this crime to extend in reach and type, CEM has a very real local dimension, involving Queensland offenders, affecting Queensland families and harming Queensland children. In addition, Queensland agencies detect these offenders in our local communities and pursue them using our courts. As a result, it is critical that Queensland as a jurisdiction is well positioned to face the global and expanding nature of this crime. This report constitutes the council's response to a request from the Attorney-General for a review of the system used to classify CEM for sentencing in Queensland.

## Background and terms of reference

In 2015, the Queensland Government initiated the Commissions of Inquiry Order (No.1) 2015 into the extent, and nature of organised crime in Queensland. The Queensland Organised Crime Commission of Inquiry (QOCCI) commenced in May 2015 and the terms of reference identified selected crimes for attention—illicit drugs, child sex crimes, financial crimes, money laundering and corruption. The QOCCI made 14 recommendations about online child sexual offending and child exploitation in its final report (2015). It recommended a referral to the Queensland Sentencing Advisory Council of a review of the current Oliver scale classification system, other classification systems and the merits of using random sampling for the purposes of sentencing CEM offences.

On 22 November 2016, and following the council's establishment, the Honourable Yvette D'Ath, Attorney-General and Minister for Justice and Minister for Training and Skills formally referred the review of the classification of CEM for sentencing to the council to provide advice on:

- the effectiveness and ongoing suitability of Queensland's current CEM classification system, referred to as the 'Oliver scale'
- the potential for alternative classification systems used by other jurisdictions to be introduced in Queensland
- whether material classified by other jurisdictions should be relied on for sentencing purposes in Queensland
- the merits of using random sampling of seized CEM for sentencing
- a process for balancing the needs of a sentencing court to have an agreed objective method for assessing an offender's criminal behaviour with the need for police to focus on victim identification and rescue
- the suitability of electronic databases to reduce the time police spend in classifying CEM, and if so, which systems are preferred
- what, if any, additional factors were needed to improve Queensland's existing sentencing guidelines outlined in section 9(7)(a) of the *Penalties and Sentences Act (1992)* (Qld) (PSA) for CEM offenders
- any other matters the council considers relevant.

The Attorney-General also requested the council give strong consideration to reducing time delays, prioritising victim identification, protecting officer wellbeing and reflecting community concern about

this issue as underlying imperatives for the review. The full terms of reference are provided at Appendix I. The council was asked to report its findings and recommendations to the Attorney-General by 31 May 2017.

## Oliver scale

The terms of reference specifically referred to the role of the Oliver scale in sentencing for CEM offences. This section defines the Oliver scale, outlining how it came to play such a critical role in sentencing.

The Oliver scale was adapted from the Combating Paedophile Information Networks in Europe (COPINE) scale, which comprised 10 categories of material.<sup>6</sup> The creators of COPINE argued the legal definition of child pornography did not capture all the material that an adult with a sexual interest in children may seek. As a result, the COPINE scale included categories which may not be considered illegal, but in the context of CEM offending indicates an inappropriate interest.

In 2002, the then United Kingdom's (UK) Sentencing Advisory Panel (SAP) developed an objective classification system to measure the seriousness of seized material, condensing the 10 categories of COPINE down to five. In the case of *R v Oliver*, the Court of Appeal of England and Wales adopted that scale,<sup>7</sup> which became known as the 'Oliver scale', and has since been accepted in other Commonwealth jurisdictions. Queensland courts first used the Oliver scale in approximately 2007,<sup>8</sup> and it has assumed a critical role as a mechanism for grading the severity of images.<sup>9</sup> It forms the basis of all classification systems used in Australian courts in sentencing for both state-based and Commonwealth CEM offences, albeit with some modifications.<sup>10</sup>

In 2016, the Queensland Court of Appeal confirmed the acceptance of the Oliver scale as a classification tool in Queensland courts for informing sentencing decisions.<sup>11</sup> The five original categories identified in the Oliver scale reflect the perceived nature of activity depicted in an image, in levels of increasing seriousness.<sup>12</sup> The Oliver scale was modified by Australian case law and legislative amendments to incorporate a sixth category<sup>13</sup> of anime, cartoon or virtual image.<sup>14</sup> The Oliver scale has since become a nine-point scale,<sup>15</sup> with an extra three categories covering material that is legal, but nevertheless connected to the case. Table I sets out the modified Oliver scale applied in Queensland.

**Table I: Oliver scale applied in Queensland**

Category	Category representation	Guide
1	CEM—No sexual activity	Depictions of children with no sexual activity—nudity, surreptitious images showing underwear, nakedness, sexually suggestive posing, explicit emphasis on genital areas, solo urination
2	CEM—Child non-penetration	Non-penetrative sexual activity between children or solo masturbation by a child
3	CEM—Adult non-penetration	Non-penetrative sexual activity between child(ren) and adult(s). Mutual masturbation and other non-penetrative sexual activity
4	CEM—Child/adult penetration	Penetrative sexual activity between child(ren) or between child(ren) and adult(s)—including but not limited to: intercourse, cunnilingus and fellatio
5	CEM—Sadism/bestiality/child abuse	Sadism, bestiality or humiliation (urination, defecation, vomit, bondage, etc.) or child abuse
6	CEM—Animated or virtual	Anime, cartoons, comics and drawings depicting children engaged in sexual poses or activity
7	Non-illegal/indicative	Non-illegal child material (believed to form part of a series containing CEM)
8	Adult pornography	All pornographic material not CEM-related
9	Ignorable	Banners and other non-objectionable graphics useful for establishing proportionality. System files and unrelated images—holiday snaps, landscape, family photos, etc.

# The council's approach to the reference

## Scope

Given the range of considerations set by the Attorney-General, the council established the scope of the review as a priority. Some issues were ruled out of scope because they were not intrinsic to the core issues contained in the reference, or they were outside the council's role. This review does not include consideration of:

- individual cases and sentences
- appeals against sentences for CEM offenders
- activities relating to the identification or the investigation of CEM offenders
- risk assessments of CEM offenders for treatment purposes
- offender treatment or the risk of reoffending
- costing any associated technical solutions to support classification.

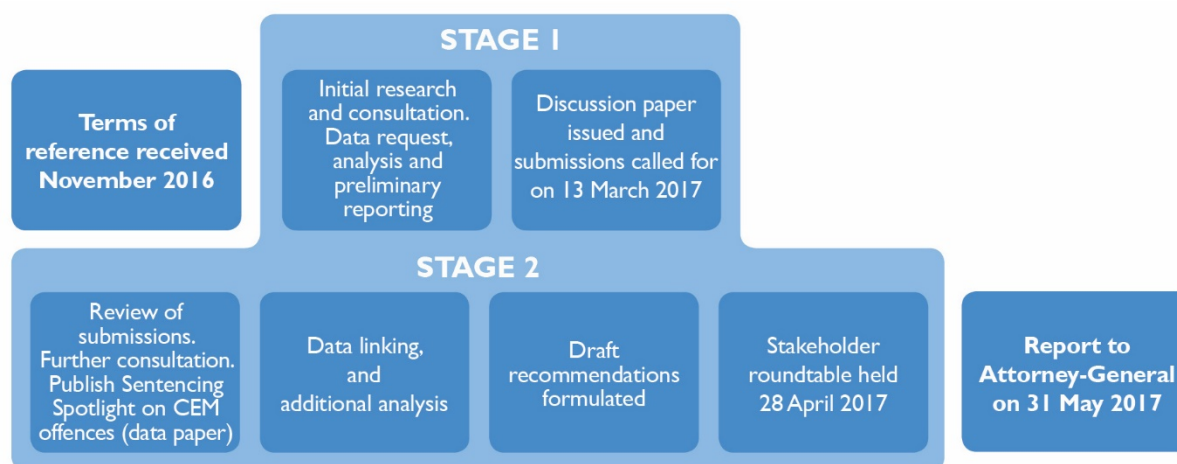
The principal focus of this review is to determine how best to present the vast amount of digital material associated with CEM to a court to support sentencing.

Research by the council found the overwhelming majority of CEM offences were perpetrated by men. Although female offenders were identified, given the strongly gendered nature of this offending, the council has at times referred to offenders and perpetrators in male gendered terms in this report.

## Methodology

The council has adopted the Australian Law Reform Commission's<sup>16</sup> approach to law reform projects, which has become well accepted in legal policy circles. Due to the short timeframes involved, the process was somewhat truncated (see Figure 1), but was deliberately chosen to ensure maximum transparency in the process and more than one opportunity for key agencies to debate the issues involved.

**Figure 1: Methodology**



### Stage 1

Initial consultation comprised documenting the current approach taken in Queensland, other Australian jurisdictions, the UK and New Zealand, and in some instances, Canada and the United States.

Letters enclosing the terms of reference for initial comment were sent to:

- heads of each of the Queensland court jurisdictions
- Queensland Law Society (QLS)

- Bar Association of Queensland (BAQ)
- Legal Aid Queensland (LAQ)
- Queensland Police Union of Employees
- Bravehearts
- Protect All Children Today (PACT)
- Commissioner, Queensland Police Service (QPS)
- Director of Public Prosecutions (Queensland) (QDPP) and counterparts in all other Australian jurisdictions
- Crown Prosecution Service, England and Wales
- Australian Criminal Intelligence Commission (ACIC)
- Australian Federal Police (AFP)
- Office of the Children's eSafety Commissioner, Australian Government
- Her Majesty's Chief Inspector of Constabulary, UK
- Sentencing Council for England and Wales
- Justice Policy and Strategy, NSW Department of Justice
- Queensland Crime and Corruption Commission (CCC).

Data was requested from QPS, Queensland courts and Queensland Corrective Service (QCS). This request focused on offenders charged (QPS), finalised by Queensland courts (Queensland courts) and under corrective services supervision (QCS) in relation to CEM offending. QPS and Queensland court data requested related to the period 1 July 2005 to 30 June 2016. Two sets of data were requested from the QCS. The first request was for a specific cohort of offenders finalised by Queensland courts in 2011–12, while the second request focused on five years of point in time data about those under supervision for CEM offences. Further information about data requests, data limitations and analyses undertaken is contained in Appendix 2. Analyses of CEM offenders in Queensland during the 10 year period from 2006–07 to 2015–16 was undertaken to understand how offenders were dealt with by the criminal justice system, which provided a better understanding of offender characteristics and co-offending patterns.

Using this initial research, the council released a consultation paper on 13 March 2017 to provide more information to stakeholders and members of the public on the use of classification for sentencing CEM offences, and posed a set of 10 questions. The paper called for submissions from the public and stakeholders and provided for a four-week consultation period. The council received 11 written submissions. The council appreciates the time and effort taken to respond to such a complex issue, and expresses its appreciation of the courage shown by those community members directly affected by child exploitation who chose to share their stories.

Questionnaires were later sent to the offices of each Director of Public Prosecutions in Australia, as well as to the Director of Public Prosecutions, Crown Prosecution Service in the UK (with further assistance from the Norfolk Constabulary) and the New Zealand Department of Internal Affairs (through New Zealand Crown Law). Every office responded except for the NSW Director of Public Prosecutions, which confirmed it would not be providing a response.

Consultation with other Australian and international law enforcement agencies was assisted by QPS. These agencies were later approached directly via their nominated representative/s. South Australia (SA) Police and Victoria Police both provided a formal written response in addition to participating in direct consultation.

A series of initial meetings were held with:

- QPS
- CCC
- QDPP



- QCS
- ACIC
- Office of the Children's eSafety Commissioner, Australian Government.

A meeting was also held with representatives of victims of crime groups to discuss the consultation paper and invite submissions. These included Victim Assist Queensland, Court Network, the Department of Communities, Child Safety and Disability Services, Department of Justice and the Attorney-General (DJAG) and Youth Justice (DJAG).

Copies of the terms of reference and consultation paper were also sent to the Departments of Justice and Attorney-General in each Australian jurisdiction, inviting any advice about any relevant reform or review in their jurisdiction.<sup>17</sup> The Australia New Zealand Policing Advisory Agency (ANZPAA) was also forwarded information about the review and provided an opportunity to make comment.

A questionnaire for legal agencies was sent to the LAQ, BAQ, the Aboriginal and Torres Strait Islander Legal Service (Qld), QLS and the Law Council of Australia. Responses were received from some but not all of these agencies.

A set of questions was also provided to the Heads of Jurisdiction for their comment. The Chief Justice of the Supreme Court of Queensland and the Chief Judge of the District Court of Queensland provided responses.

QPS also provided a written submission in response to the terms of reference.

## **Stage 2**

At the close of the initial consultation phase, the council considered the written submissions and undertook a number of additional meetings with key agencies. A final roundtable was held with key agencies from the law and justice sector to enable the council to test some of its draft recommendations. The roundtable was attended by representatives from:

- QPS
- AFP
- CCC
- LAQ
- QDPP
- Office of the Commonwealth Director of Public Prosecutions (CDPP)
- QLS
- Strategic Policy Branch, DJAG
- ACIC
- Office of the Chief Magistrate.

Representatives of the council attended the Youth, Technology and Virtual Communities Conference held at Bond University on 2–4 May 2017, an annual gathering of international and domestic experts on the prevention and prosecution of online child sex offences hosted by QPS. This event gave the council an opportunity to learn firsthand what approaches are being applied to tackle child exploitation, and to ensure recommendations were informed by best practice.

To support the initial data presented in the consultation paper, a more detailed analysis of sentencing outcomes of CEM offenders over the 10-year period (1 July 2006 to 30 June 2016) was undertaken. A *Sentencing Spotlight on child exploitation material offences* was published on 9 May 2017 containing this analysis.<sup>18</sup> Additional information included plea data, trends in CEM offending over time in Queensland, and a comparison of offender characteristics and sentencing outcomes for each CEM offence type.

For the final report, additional analysis of the sentencing data over the 10-year period was conducted to examine factors of interest, including court duration and offences withdrawn or

dismissed. Data linkage was also undertaken (see Appendix 2) to explore reoffending over the period.

The council was also interested in exploring the interaction of offenders with both police and corrections, and the formal use of classification in sentencing. For two cohorts of offenders—those sentenced in 2011–12 and 2015–16—sentencing remarks were obtained (where available) and thematically coded. Specific attention was given to identifying whether formal reference was made to classification, or the quantity or nature of the CEM involved. The council acknowledges limitations exist when using sentencing remarks for analytical purposes. For example, sentencing remarks may not refer to all matters raised by the Crown and the defence during the sentencing hearing. Despite limitations, sentencing remarks provide useful details about the material involved in a case. Additional QPS charge data was also incorporated for these two cohorts to explore the duration between the police charge and court finalisation.

The 2015–16 cohort was selected to enable 10 years of prior offending (based on court data) to be examined. In addition, as this group was the most recent to be finalised by Queensland courts, it provided an ability to examine the application of current legislation and case law (up to 30 June 2016) to these cases.

For those finalised in 2011–12, details of their interactions with QCS and any treatment programs were also obtained. This cohort was selected to facilitate an examination of prior offending (based on court data) over a six-year period, interactions with QCS, including any supervision or treatment undertaken, and any future offending (based on court data) over a five-year period. More information regarding methodology and data analysis is at Appendix 2.

### **Literature analysis**

A literature review documented research and academic analysis of CEM offending and considered:

- psychological characteristics of CEM offenders
- demographic characteristics of CEM offenders
- recent statistics about CEM offending, such as the number of sites hosting CEM, those countries most likely to be hosting or producing CEM, and the most frequently encountered content
- occupational health and safety issues for CEM investigators.

### **Sentencing remarks analysis**

The council reviewed Queensland case law, in particular Court of Appeal judgments, as well as key judgments in other Australian and international jurisdictions to understand how relevant sentencing principles and factors have been interpreted and applied in CEM matters. The council was particularly interested in understanding how courts applied the Oliver scale, viewed the role of the offender, and considered any aggravating and mitigating factors when sentencing for CEM offences.

As noted previously, the council acknowledges that, while sentencing remarks provide the best source of data regarding the reasons for a judge's sentence, real limitations exist when using these for analytical purposes. Many remarks do not contain a comprehensive list of the factors taken into account by judicial officers when sentencing. However, the council recognises the value in reviewing sentencing remarks to understand the role that classification plays in assessing the seriousness of offending as part of the sentencing process.

## **Report structure**

The remainder of this report outlines the council's response to the terms of reference as follows.

**Chapter 2: Queensland context.** This chapter details the prevalence of CEM offending, examines the social science research on CEM offenders, and sets out the demographic characteristics of CEM offenders in Queensland identified in the council's research. The chapter also outlines the approach taken in Queensland to investigate, prosecute and sentence offenders, and the use of the Oliver scale for these purposes.

**Chapter 3: Sentencing CEM offenders in Queensland.** This chapter outlines the current legislative framework for dealing with CEM offending, outlines how CEM offenders are sentenced, and summarises sentencing outcomes for CEM offences in Queensland over the last 10 years.

**Chapter 4: Classification of CEM.** This chapter provides a description of how CEM is classified in other Australian jurisdictions. It provides an analysis of the shortcomings of the Oliver scale, and a description of several key international approaches to classification. Random sampling is explored as an alternative to classifying full collections of CEM.

**Chapter 5: Replacement system of classification—Q-CEM Package.** This chapter presents a proposed new approach to assessing offence seriousness for sentencing purposes. The proposed ‘Q-CEM Package’ aims to find a balance between the police priority of investigating offenders and identifying victims and the court’s priority of understanding the seriousness of the offending to assist with sentencing.

**Chapter 6: Building Queensland’s position.** To sustain and extend Queensland’s leading role in tackling CEM offending, this chapter outlines a range of additional recommendations to enhance the approach taken to prosecute offences and provide additional mechanisms to enhance Queensland’s capacity in this area.

## Chapter 2: Queensland context

This chapter provides an introduction to the nature and prevalence of online child abuse and CEM offending. It reviews the current legal framework for this offending, describes the demographic characteristics of CEM offenders, and outlines how Queensland's criminal justice agencies investigate and prosecute these offences.

### An international crime

Online child abuse and the CEM market are international crimes that are fast evolving alongside advances in technology.<sup>19</sup> The growth of the internet has increased the range, volume and accessibility of sexual abuse imagery of children, and has provided an environment for the proliferation of CEM and the creation of an expanding market for its consumption. It has also made access to children much easier, with children increasing their use of computers, tablets and smart phones. The internet has made vast quantities of high-quality images instantly available, at any time and in (seeming) anonymity.<sup>20</sup> It provides offenders with another platform to sexually offend against a child. Examples include live streaming or broadcasts of child sexual abuse,<sup>21</sup> grooming a child for the purpose of contact offending, or using the internet to interact with a child to observe the child engaging in sexual conduct that has been requested by the offender. This conduct may then be recorded and uploaded to the internet, or used to extort further sexual conduct from the child. The internet assumes a critical role in the documented increase in CEM, with much of this proscribed material accessed, downloaded and shared online.<sup>22</sup> Research reinforces that making CEM involves the exploitation of a child, even if no contact offending takes place, because the images are used for sexual gratification, can be distributed widely, do not deteriorate and the child cannot legally consent.<sup>23</sup>

The CEM market is international, transcending borders and physical location.<sup>24</sup> Offences arising from this enterprise include making, distributing or possessing material. While it is difficult to quantify the true nature of this type of offending, CEM is recognised as a crime of heightened global concern.<sup>25</sup> Images depicting the abuse of children are transmitted to offenders across the world, each of whom may continue to redistribute the same images.<sup>26</sup> At state, national and international levels, public awareness of, and concern about, CEM is growing. This worldwide market demands new methods of investigation and control. It requires law enforcement agencies to stay abreast of shifts in technology and offending behaviour, and for legal policy makers to ensure legislation and policy is flexible and responsive.

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*As technology advances and access to new technology spreads, so do the ways in which that technology may be used for illicit purposes. The result is a complex and constantly changing environment for criminal behaviour and law enforcement action to take place within an increasingly expanding world of legitimate online activity.<sup>27</sup>*

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While the international dimension of this offending is increasingly acknowledged, CEM activity can involve Queensland offenders and Queensland child victims. A common scenario encountered by QPS is a Queensland offender downloading an image from a server in another country, with the sexual abuse perpetrated on the child in the image having taken place in a different country altogether. Improvements in the capacity and transportability of electronic devices and the reach and quality of internet connections have clearly facilitated the growth of the CEM market. This has led to the establishment of dedicated investigative units.

### Internet use

The following consumer information about internet use and uptake in Australia and Queensland provides contextual information confirming that CEM offending is likely to continue to grow. Australians consistently demonstrate a strong propensity for internet use.<sup>28</sup> The Australian Bureau of Statistics (ABS) confirmed Australia registered approximately 13.5 million internet subscribers as

at December 2016.<sup>29</sup> Table 2 provides more detailed information about the increase in uptake of the internet by households over a 10-year period from 2004–05 to 2014–15.<sup>30</sup>

**Table 2: Australian internet uptake over 10 years**

	Australia	Queensland
Households with access to the internet in 2004–2005	56% (n = 4.4 million)	56% (n = 0.9 million)
Households with access to the internet in 2014–2015	86% (n = 7.7 million)	86% (n = 1.5 million)

Source: ABS 8146.0 'Household use of technology' 2004–05; 2014–15.

In 2014–15, the ABS also found each of the 1.5 million Queensland households that had internet access had multiple devices.<sup>31</sup>

As at 2014–15, 85 per cent of Australians aged 15 and over accessed the internet for personal reasons in a typical week, with the highest proportion of internet users associated with the 15 to 17 year age group (99%).<sup>32</sup> In 2016, 80 per cent of Australian young people aged 8 to 13 years and teenagers aged 14 to 17 years used more than one device to access the internet. Australians aged 8 to 13 years spent on average 19 hours online outside of school time, and 14- to 17-year-olds spent on average 33 hours per week online outside school time.<sup>33</sup>

## Child exploitation material offences

There are a range of offences under both Queensland and Commonwealth legislation relating to the access, possession, distribution and making of CEM.

In Queensland, CEM is any material likely to cause offence to a reasonable adult that describes or depicts a person, or a representation of a person, who is, or apparently is, a child under 16 years:

- in a sexual context, including engaging in a sexual activity
- in an offensive or demeaning context
- being subjected to abuse, cruelty or torture.<sup>34</sup>

The Commonwealth legislation uses similar definitions relating to CEM and child pornography material.<sup>35</sup>

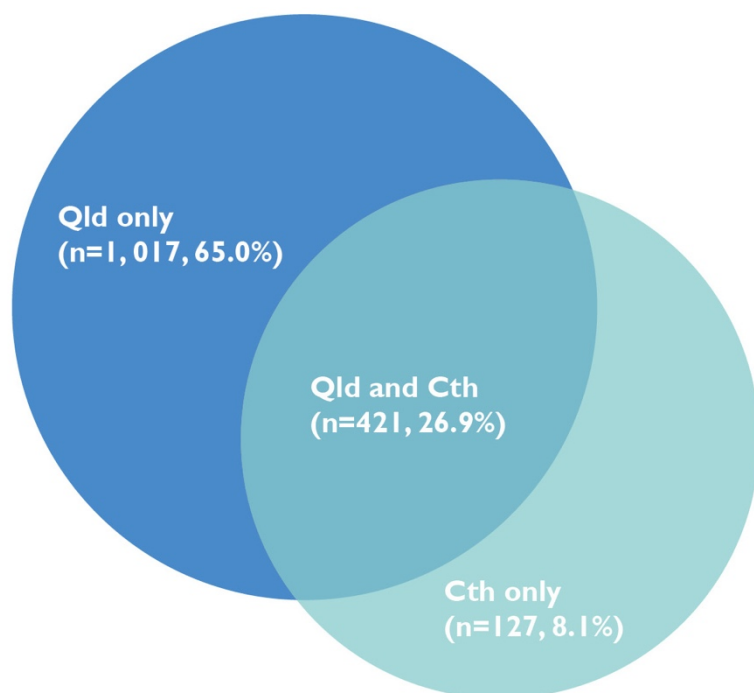
CEM offending covers a broad range of behaviour, from young people sexting<sup>36</sup> images to their peers through to making and distributing CEM via online networks (Appendix 3 details the relevant Queensland and Commonwealth definitions, offence provisions and maximum penalties). There has also been significant legislative change over time (Appendix 4 provides a detailed summary of the legislative changes that have occurred in relation to these offences in Queensland), with new offences being established for more specific CEM-related behaviour (e.g. encouraging the use of a CEM website).<sup>37</sup>

Online child sexual offences are dealt with in state, territory and Commonwealth criminal legislative frameworks. While all Australian jurisdictions have legislation prohibiting CEM, each has its own definitions (child exploitation material, child abuse material or child pornography). Not only are different definitions used, but some also separate material based on the nature of the activity depicted. In addition, different age thresholds operate in different jurisdictions. For example, the Commonwealth targets material depicting children aged under 18 years, while Queensland's threshold is under 16 years. Despite these differences across Australia, which complicate direct comparison and research,<sup>38</sup> all jurisdictions agree such activity should be criminalised.

It is not uncommon for offenders to be charged under both Queensland and Commonwealth legislation, and Queensland courts can deal with both types of offences simultaneously.<sup>39</sup> Figure 2 demonstrates approximately 27 per cent of CEM offenders are charged under both Queensland and Commonwealth legislation. The principles applicable to sentencing for CEM offences that have been

consistently identified by Australian appeal courts apply equally to state and Commonwealth offences.<sup>40</sup>

**Figure 2: Court finalisations by jurisdictional source of offence, 2006–07 to 2015–16**



Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted January 2017

The key distinction between the Queensland and Commonwealth legislative frameworks arises from the Commonwealth's responsibility for internet, telecommunications, postal services and border protection versus the states' constitutional authority over criminal matters. As a result, Commonwealth offences relate to the use of a carriage service (such as the internet) to access child pornography or child abuse material.<sup>41</sup> There is an aggravated offence when a person commits one or more of the child pornography or child abuse offences on three or more separate occasions and the commission of the offence involves two or more people (Criminal Code (Cth) s474.24A). Comparable provisions exist where postal services<sup>42</sup> are used and where an offender commits such offences overseas.<sup>43</sup>

## Child exploitation material offenders

This section examines the social science research on CEM offenders, and introduces the results from the council's analysis of administrative data on CEM offenders in Queensland. Understanding offenders and the drivers for their offending ensures the criminal justice system appropriately punishes offenders, and that treatment and supervision are targeted and responsive in order to reduce the risk of reoffending. These insights can also inform approaches to prevention.

While treatment is beyond the scope of this review, rehabilitation is a core sentencing principle in Queensland and Australia, and it is the view of the council that treatment is an essential part of the criminal justice process. Understanding this offending cohort, and considering how it may be shifting alongside advances in technology, is critical to ensuring Queensland's criminal justice system is well positioned to address CEM offending in the future.

### Types of CEM offenders

The internet has enabled an exponential growth in the proliferation of CEM, but researchers and clinicians do not know whether the internet has fuelled this demand or simply satisfies a market that



already existed.<sup>44</sup> Similarly, it is entirely probable the number of CEM offenders is underestimated due to the clandestine nature of the activity and the availability of technological means for avoiding detection and apprehension. Further, it is difficult to determine the incidence of child sexual abuse; as with all sex crimes, these are significantly under-reported.<sup>45</sup>

Social science research to date has identified three distinct categories of online child sexual exploitation offenders: contact-only offenders, online-only offenders, and dual offenders who engage in both contact and online offences.<sup>46</sup> It is important to note that not all CEM offenders are paedophiles and not all CEM offenders engage in other sex offending. While there is overlap in these categories, each is separate and neither is a predicate to the other.<sup>47</sup>

Paedophilia is a term often misused and misunderstood. In clinical literature, paedophilia is a diagnosis of a persistent sexual interest in prepubescent children, and hebephilia is a sexual interest in pubescent children.<sup>48</sup> Researchers have attempted to classify CEM offenders into subtypes based on their behaviour and use of CEM.<sup>49</sup> CEM offenders are heterogeneous, and offenders can have broad-ranging motivations, histories and characteristics.

The key issues clinicians are seeking to understand include whether:

- any relationship exists between the use of online CEM, online grooming and contact offences
- offenders progress from accessing or possessing CEM to committing contact offences<sup>50</sup>
- online-only offenders require different types of treatment to contact sex offenders.

A 2017 study on the offending trajectories of 152 Australians convicted of online child sexual exploitation offences found that although the majority appeared to be online-only offenders, in a minority of cases there was a connection between exploitative material, grooming and contact offending.<sup>51</sup> Other studies have found CEM offenders, regardless of whether they meet the clinical definition of paedophilia, are more likely to be sexually aroused by children than contact offenders or the general population.<sup>52</sup>

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*With the ubiquity of electronic devices and the use of digital media in many aspects of modern life, offending takes place without regard for jurisdictional distinctions. Those offenders who offend both online and offline now have the means to transition from one to the other in a way that seamlessly melds the two aspects of their offending. The distinction between online and offline offending is an artefact of the constitutional framework and artificially compartmentalises offending without regard for the overall nature of offending. This is particularly so given that the online–offline distinction under Commonwealth law does not equate to whether offending involves the use of digital media or not.<sup>53</sup>*

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## Motivations for collecting CEM

The United States Sentencing Commission (USSC) noted in its report to the US Congress that ‘the spectrum of child pornography offenders is not static; and child pornography offenders may move across a spectrum of behaviours’.<sup>54</sup> This means caution is needed about making assumptions that an offender will have specific characteristics.<sup>55</sup>

Researchers have identified two broad, core motivations for collecting CEM—sexual and non-sexual.<sup>56</sup> Sexual interest in children and corresponding sexual gratification are significant motivators for many CEM offenders. These motivations can include paedophilic interests, deviant sexual interests such as sexual violence or bestiality, or other risky, illegal sexual behaviour separate to CEM.

Researchers express different perspectives about whether potential desensitisation resulting from habitual use of adult pornography pushes an offender to access new or more extreme images such as CEM. Researchers against this notion of progression point to the selective preference displayed by some offenders about the age, gender and sexual content of the material they collect as evidence that escalation is not necessarily inevitable. However, consensus generally exists among clinical

researchers that deviant sexual beliefs and antisocial behaviour and attitudes are the two primary risk factors for other sex offending.<sup>57</sup>

Non-sexual motivations for collecting CEM include obsessive collecting behaviour,<sup>58</sup> stress avoidance or dissatisfaction with life, and an associated desire to connect with an online community.<sup>59</sup> Many offenders may be motivated by a combination of sexual and non-sexual reasons.

Making connections to an online community should not be regarded as less serious than other motivations. There are compelling case examples of online paedophile networks encouraging, or even mandating, production of new material to obtain and maintain membership.

The recent high profile SA case of Shannon McCoole demonstrates this point.<sup>60</sup> McCoole was the head administrator of a Tor (the Onion Router) based<sup>61</sup> network. This network comprised several membership classes that were only accessible following regular sharing of new material, often with specific requirements such as involving penetration and use of a specified object to prove recent production and authenticity.

## Queensland offenders

### Cautioning and conferencing

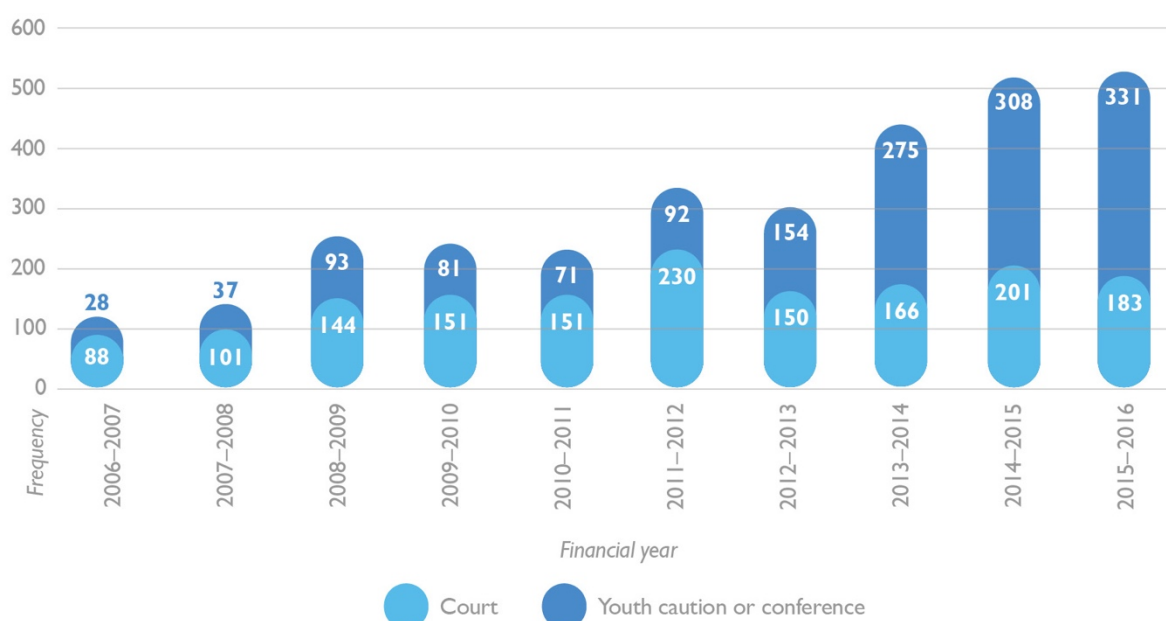
A large number of young offenders (1470, or 48% of the total number of offenders) were diverted by QPS from the court system over the 10-year period. The vast majority were formally cautioned (92.9%), and the remaining 7.1 per cent (n=105) attended a youth justice conference.

Figure 3 illustrates the total number of offenders dealt with for CEM-related offences over the 10-year period, separated according to whether they were diverted by QPS or sentenced in Queensland courts.

The vast majority of offenders either dealt with via QPS diversion or otherwise sentenced in court for CEM offences were male (n=2347, 77.3%), however, the gender breakdown was significantly different for young people diverted. Of the 1470 young people cautioned or conferenced by QPS, 45.2 per cent were female (n=664). Comparatively, only 1.5 per cent of offenders who had matters involving CEM in court were female (n=24), and of the 28 young offenders sentenced in court, only 10.7 per cent (n=3) were female.

Offenders who are cautioned or conferenced are beyond the scope of this review as any CEM they possessed, distributed or produced is not classified. However, the council heard from multiple agencies that young people are increasingly using technology to make, share and possess images that are, in fact, defined as CEM. This report returns to discuss this issue further in Chapter 6.

**Figure 3: All offenders dealt with for CEM offences in Queensland, 2006–07 to 2015–16**



Source: QPS QPRIME Database; Queensland Treasury – Courts Database, extracted January 2017

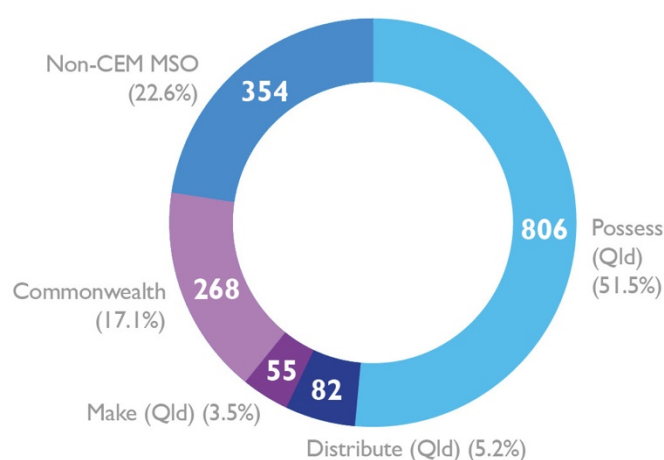
## Characteristics of sentenced offenders

Over the 10-year period, analysis of the 1565 offenders sentenced for CEM offences revealed the following:

### Nature of offending

- Offenders were responsible for 4312 specific offences.
- 1038 offenders (66.3%) were dealt with for CEM offences alone, with the remainder being dealt with for CEM in conjunction with other non-CEM offending.
- 400 offenders (25.6%) were dealt with for both CEM and contact offending at the same time.
- Over half (51.5%) of all CEM offenders had a Queensland possession offence as their most serious offence (MSO). Only 137 (8.7%) had a Queensland making or distribution CEM offence as their MSO (see Figure 4).

**Figure 4: CEM offenders sentenced in Queensland courts, by MSO, 2006–07 to 2015–16**

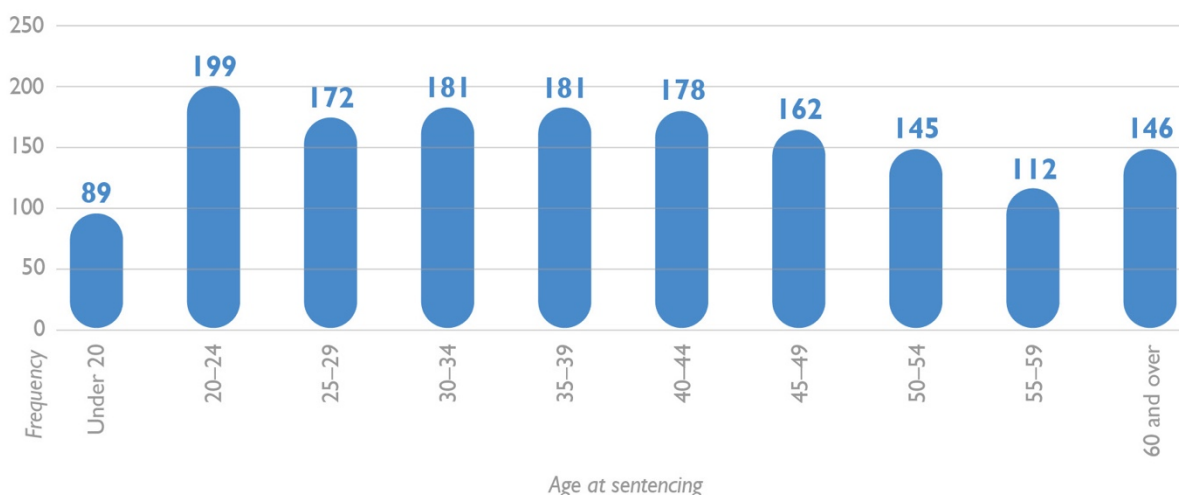


Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted January 2017

## Age at sentencing

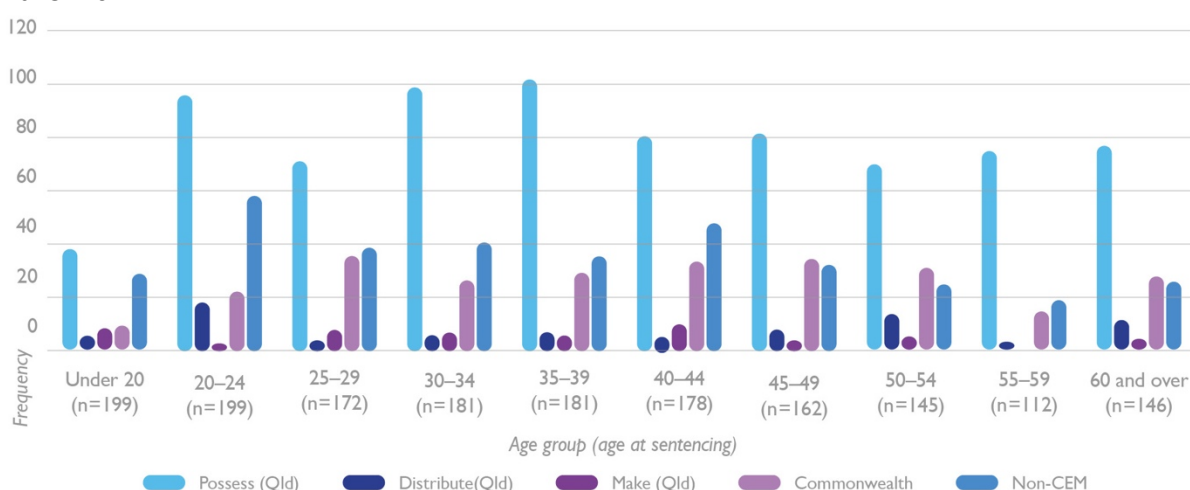
- Almost all of the offenders were adults (98.2%), with only 28 being young offenders.
- The age of offenders ranged from 13 to 88 years, with an average age of 39.9 years.
- Offenders were not restricted to any particular age group, and were relatively evenly split between age groups (see Figure 5).
- Offenders aged 20–24 years old were more likely than other age groups to have a distribution offence, or a non-CEM offence as their MSO.
- The offence of making CEM remained low across all age groups (see Figure 6).

**Figure 5: Number of offenders sentenced, by age at sentence, 2006–07 to 2015–16**



Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted January 2017

**Figure 6: Number of CEM offenders sentenced, by MSO type and age group, 2006–07 to 2015–16**



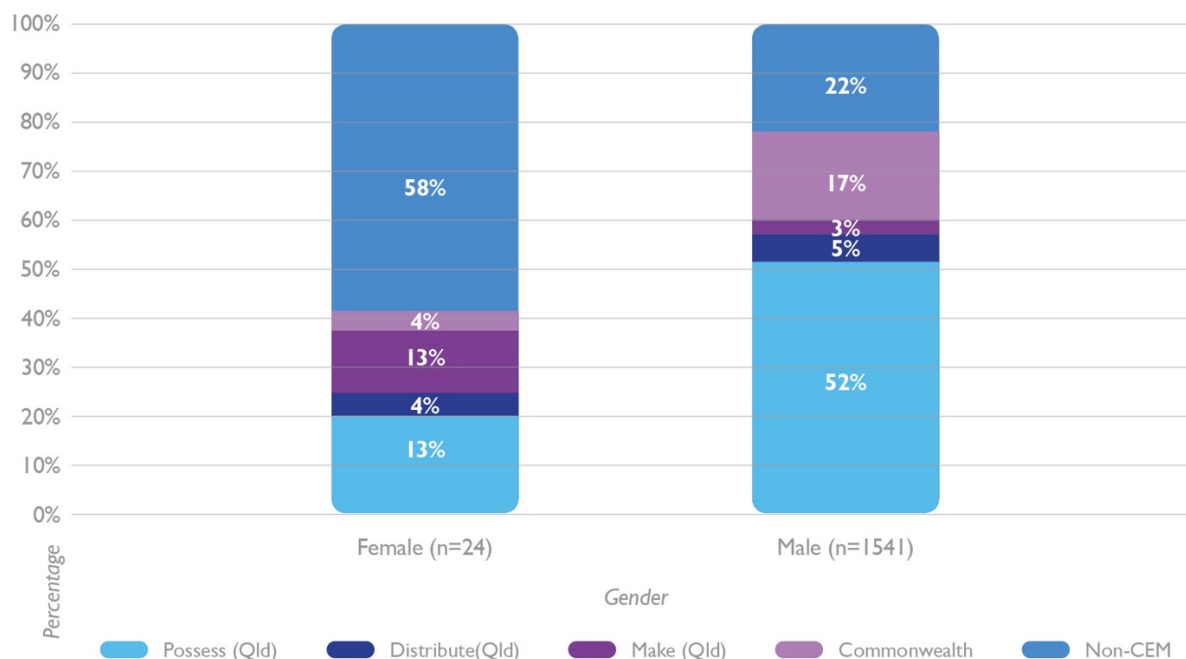
Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted January 2017

## Gender

- Offenders were overwhelmingly male, with only 1.5 per cent female (n=24), and of the 28 young offenders sentenced in court, only 10.7 per cent (n=3) were female.

- Female offenders were most likely to have a non-CEM offence as their MSO (58.3%), with CEM offences being secondary, while male offenders were most likely to have a CEM possession offence as their MSO (52.0%) (see Figure 7).
- Of the 24 females sentenced for non-CEM offences as their MSO, 25 per cent (n=6) were charged with a male co-offender.

**Figure 7: CEM offence types as MSO, by gender, 2006–07 to 2015–16**

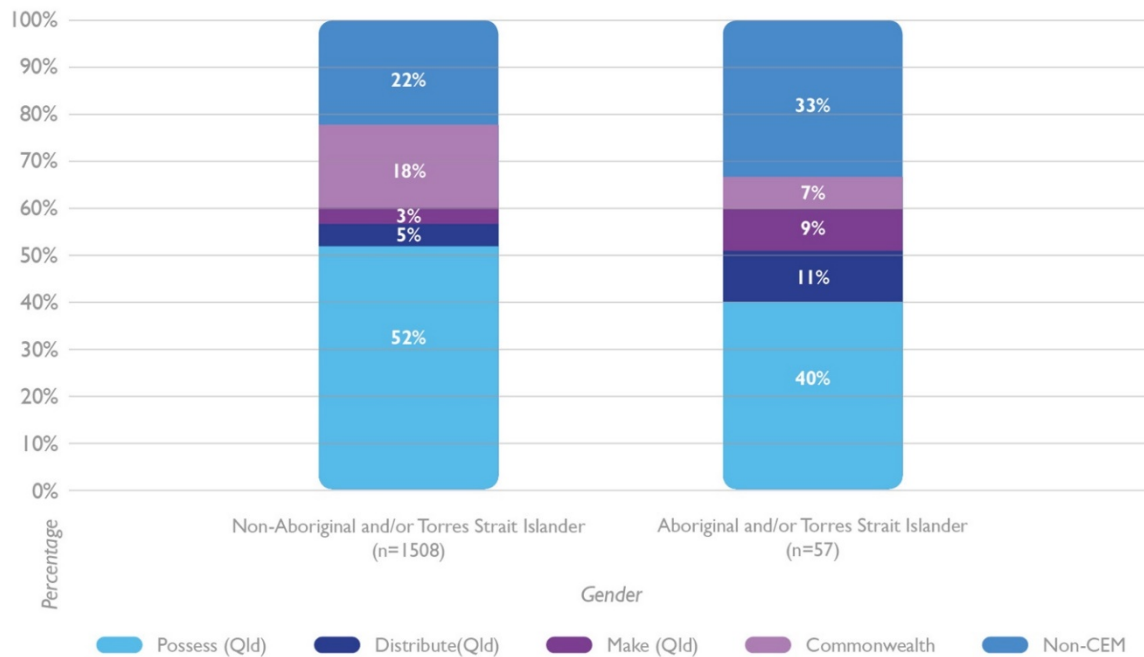


Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted January 2017

### Aboriginal and Torres Strait Islanders

- Only 57 (3.6%) offenders identified as being Aboriginal and/or Torres Strait Islander, with the majority being non-Indigenous (1508; 96.4%).
- 40.4 per cent of Aboriginal and Torres Strait Islander offenders had a CEM offence as their MSO, while 33.3 per cent had a non-CEM MSO. This compares to 51.9 percent of non-Aboriginal or Torres Strait Islander offenders having CEM possession as their MSO, and 22.2 per cent with a non-CEM MSO (see Figure 8).

**Figure 8: CEM offence types as MSO, by Indigenous status, 2006–07 to 2015–16**

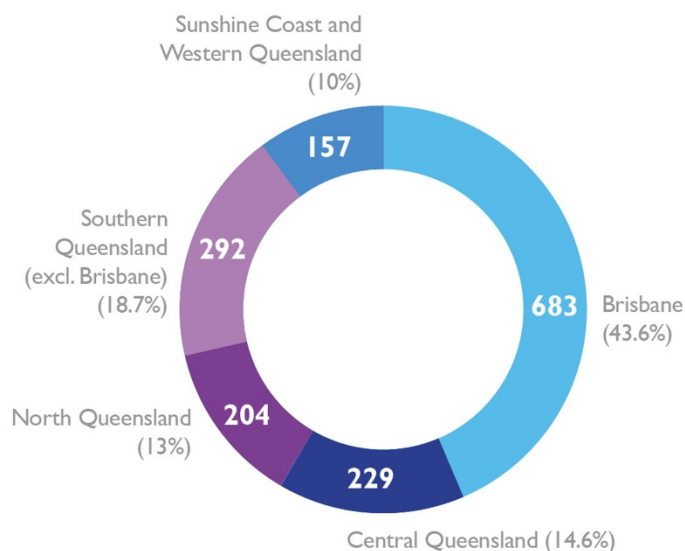


Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted January 2017

### Location

- While most offenders were sentenced in Brisbane courts (43.6%), matters were dispersed across the state (see Figure 9).

**Figure 9: Finalised CEM offenders, by sentencing court location, 2006–07 to 2015–16**



Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted January 2017

More information about CEM offenders in Queensland, including case studies, is available in the council's *Sentencing Spotlight on child exploitation material offences* available via [www.sentencingcouncil.qld.gov.au](http://www.sentencingcouncil.qld.gov.au)



## Queensland's criminal justice response

This section provides an overview of Queensland's criminal justice processes currently in place to respond to CEM offending, including the sentencing process, the classification of material, and the principles used by the courts to determine sentences for these matters. While investigation and forensic processes are not within the scope of this review, the council felt it was important to set out current processes for investigation and prosecution to contextualise matters that arose in consultation and to provide background to the council's recommendations.

### Investigation

There are three organisations responsible for investigating criminal matters that involve operations or individuals based in Queensland—QPS, CCC and AFP.

#### Queensland Police Service

QPS is one of the primary agencies providing first response services for child protection matters. QPS investigations concerning child sexual offences are led by the Child Safety and Sexual Crime Group, one of four specialised groups within the State Crime Command. It has responsibility for developing and providing a specialist statewide response to the investigation and management of all types of offending against children. It includes Taskforce Argos, the Child Protection Offender Registry, Sexual Crimes Unit and the Child Trauma Taskforce.<sup>62</sup> Officers in these units are responsible for identifying victims and offenders, obtaining and executing search warrants, seizing evidence, charging and interviewing defendants, and leading the classification of any seized CEM.

The Child Protection Investigation Unit (CPIU) has a statewide structure to provide a specialist policing response to children. CPIUs are centrally supported by the QPS Child Safety Director, Child Abuse and Sexual Crime Group in State Crime Command in Brisbane. The Child Safety Director is also responsible for working collaboratively with government and non-government agencies to ensure child protection matters receive a statewide, coordinated response.

Taskforce Argos is the specialist unit responsible for the investigation of organised paedophilia, child exploitation and computer-facilitated child exploitation. Established in 1997, it contains the Victim Identification Unit, which is responsible for coordinating and providing assistance in the identification of victims of online child abuse. The QOCCI noted in its final report that Taskforce Argos is a world leader in policing online child sex offending.<sup>63</sup>

QPS works closely with law enforcement agencies in Australia and abroad, sharing key information to capture offenders and save children. The QOCCI consulted extensively with Taskforce Argos and noted it operated differently from other policing units.<sup>64</sup> In 2015–16 the taskforce's Victim Identification Coordinator was appointed Chair of the INTERPOL Specialist Group on Crimes against Children, coordinating global efforts to combat child exploitation.<sup>65</sup> On 1 March 2017, the Queensland Government announced the appointment of two highly regarded and internationally recognised investigators to the Victim Identification Unit. Both investigators have significant experience in digital forensic analysis and working with international child exploitation databases.<sup>66</sup>

In 2016, QPS established Taskforce Orion<sup>67</sup> to complement Taskforce Argos, and enhance internal policing capacity. This increase in resources has been acknowledged as critical to addressing this offending type, as well as the increasing sophistication of motivated offenders. As noted by the QOCCI report:

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*... the online child exploitation material market is not new, but is evolving with the advancement of technology. The child exploitation material market is borderless and ... participants are historically early adopters of new forms of technology that increases efficiency and anonymity. Those factors contribute to an ever-expanding market where offenders are difficult to detect, locate and prosecute.*<sup>68</sup>

**QOCCI**

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QPS is also responsible for the management of reportable offenders in Queensland. Reportable offenders are people who commit serious offences against children and are required to comply with reporting obligations under the *Child Protection (Offender Reporting) Act 2004*. As at 30 June 2016, Queensland's register contained the details of 3157 offenders. The council's data analysis revealed that of the 157 offenders sentenced in 2011–12 for CEM offending that resulted in some form of supervision by QCS, 87.9 per cent were confirmed to be on the register.

### **Crime and Corruption Commission**

QPS works closely with the CCC on investigations concerning criminal paedophilia. The Cerberus Unit within the CCC is a specialist unit comprising experienced police officers, forensic computing experts and an intelligence analyst.<sup>69</sup> The CCC advised the council its investigations primarily focus on the online CEM market using peer-to-peer networking to share files. The CCC works closely with QPS CPIUs, particularly when carrying out investigations into suspects located in regional Queensland.

The *Crime and Corruption Act 2001* (Qld) contains extraordinary powers enabling the CCC to:

- generate a 'notice to produce', which compels the recipient to provide 'a stated document or thing' unless they have a reasonable excuse<sup>70</sup>
- issue its own attendance notices compelling a person to attend secret<sup>71</sup> hearings to give evidence or produce a stated document or thing.<sup>72</sup>

The CCC is not bound by the rules of evidence when conducting hearings.<sup>73</sup> Unlike a person who is compelled to attend a court, a person compelled by the CCC to appear at an investigative hearing must answer questions asked of them and produce the thing as required, even if their answers or production of the thing may incriminate them.<sup>74</sup>

Following the QOCCI report's recommendation 4.14 to increase resourcing for QPS and the CCC, the CCC received \$485,000 over 2015–16 and 2016–17 to tackle child exploitation by recruiting additional forensic computing specialists to work on these investigations.

### **Special warrant powers to compel passwords**

As a result of the QOCCI report,<sup>75</sup> QPS and the CCC have powerful new options to apply for extraordinary court orders to demand passwords and other access information<sup>76</sup> (see Appendix 4) which came into effect on 9 December 2016.<sup>77</sup>

The amendments give magistrates or judges who issue a search warrant the power to order a 'specified person' at the place to do various things as stated in the warrant in relation to a storage device. A 'specified person' is widely defined, and includes:

- a suspect or others associated with the storage device owner (or their employee), possessor (or their employee), user (past or present), or a system administrator (past or present) for the computer network of which the storage device forms/formed a part
- someone with a working knowledge of the storage device or the network on which the device forms/formed a part, or of measures applied to protect information stored on a device.<sup>78</sup>

The activities that can be ordered by warrant include any of the following:

- access to the device
- access information (information necessary to access and read information stored electronically)<sup>79</sup>
- any other information or assistance necessary to enable use of and access to stored information accessible only by using the access information ('stored' includes accessible through the device)<sup>80</sup>
- access for an investigator to use the information, examine the stored information, make a copy of it if it may be evidence of an offence, and convert it, if it may be relevant evidence, into an understandable form.<sup>81</sup>

The warrant can include a second order that the specified person do these activities after the storage device is seized and removed.<sup>82</sup> In circumstances where investigators require still more

information or assistance, they can apply at any time after the warrant has been issued and the device/s seized for another order in the terms outlined above.<sup>83</sup>

A person cannot avoid complying with these orders on the grounds that providing the information or assistance could incriminate them or make them liable to a penalty.<sup>84</sup> It is an offence to contravene these orders, punishable by a maximum of five years imprisonment under section 205A of the Criminal Code (Qld).

It is anticipated these new powers will improve an investigator's ability to access information at the triage stage and reduce delays associated with the forensic analysis of seized material. Assessing the impact of this significant change should be considered an area of interest for the future.

### **Australian Federal Police/Joint Anti-Child Exploitation Team**

QPS works collaboratively with police in other jurisdictions to address serious criminal activity. The Joint Anti-Child Exploitation Team (JACET) is a joint taskforce between the AFP and various state and territory police forces to increase dissemination of information received from international agencies directly to partner agencies regarding online child sex offenders.<sup>85</sup> The Queensland JACET is located within Taskforce Argos.

The AFP also works closely with the CDPP and has recently acquired Project VIC. The AFP intends to coordinate CEM hash set<sup>86</sup> sharing at the national and international levels.<sup>87</sup>

### **Overview of QPS CEM investigation**

As QPS is the primary police agency that investigates CEM offending in Queensland, the council engaged extensively with the Child Abuse and Sexual Crime Group, and in particular Taskforce Argos senior investigators. The council also engaged with the CCC and the AFP.

The council acknowledges CEM investigations are often extremely complex for a range of reasons, including:

- the full extent of offending is often unknown prior to search, seizure and arrest
- the need to manage CEM in a way that protects internal QPS systems from toxic material, which has specific implications for storage, transportation and other management of CEM
- the complexity of forensic analysis required, particularly regarding encryption, and ability to reach and use the Darknet
- the existence of skill disparities and inconsistent practices across the state.

Unlike the majority of other offences, CEM investigations are often instigated following seizure and arrest of the offender. While some of the offences committed by a CEM offender may be known at the start of an investigation (e.g. the offender may have already distributed CEM to an undercover investigator, which has brought him to the attention of authorities), in some cases the bulk of offending may only become apparent once investigations or forensic analyses have commenced.

QPS has advised that, given the risk of continued contact offending (to children in the home or at a place of employment), the risk the offender may abscond or the risk the offender may destroy evidence, officers arrest CEM offenders before forensic analyses are complete. This decision has significant implications for the prosecution process, as mandatory timeframes associated with court processes start from the date of the first appearance in court.

While the delay caused by forensic analysis (prior to classification) is outside the scope of this review, it has become clear it is a significant contributor to the overall delays which triggered the need for this review. Unfortunately, QPS provided advice about this issue in the late stages of the review and cannot provide any reliable data to assist in assessing its contribution, making it difficult to comment on this issue at this stage.

CPIU and Taskforce Argos officers are responsible for the QPS-led investigation of suspects and offenders, obtaining and executing warrants, undertaking classification of CEM and providing statements for court. The council understands when a warrant is issued, CPIU and Taskforce Argos officers may undertake a triage process to assess the scope of the offending, inform and prioritise the forensic process and, importantly, identify the risks posed by an offender, particularly in relation

to any immediate harm to a child. This process helps QPS determine workload according to priority and need. QPS has acknowledged this process is inconsistent across the state and is working towards achieving greater standardisation of investigative practice through training.

The council was advised QPS has recently initiated a trial of the Kent Internet Risk Assessment Tool (KIRAT), which allows police to target known offenders and suspects by pooling information about them and their activities.<sup>88</sup> The KIRAT and recommendations pertaining to triage are detailed in Chapter 5 of this report.

Seized electronic devices are physically transported to the Electronic Evidence Examination Unit (EEEU) based in Brisbane for forensic imaging and uploading to the Statewide Access Seized Digital Evidence (SASDE) database. This stand-alone database provides investigators with access to decrypted contents of the seized electronic evidence using a forensic image. The timeframes for EEEU analysis vary significantly from case to case, depending on any encryption or password protection on devices, volume and type of data, and existing workloads including backlogs.

Once material is uploaded to SASDE, officers can commence in-depth analysis to identify additional incriminating details, including locating CEM files possessed and accessed, timeframes of offending, frequency and method of CEM distribution and frequency of access to material, as well as the task of classifying the material seized. A flowchart of the forensic process for CEM cases is at Appendix 5.

Any decrypted material is matched against the Queensland hash set library to identify and eliminate previously categorised material from the seizure, thereby decreasing the volume of images to be manually reviewed.<sup>89</sup>

At the time of the QPS submission, the Queensland hash set library held 765,933 hash values of known material graded under the Oliver scale (categories 1 to 6). CPIU or Taskforce Argos officers examine the material with a focus on classifying new or unknown material. Officers categorise material for court purposes into the nine-point Oliver scale (six illegal categories and three non-illegal categories).<sup>90</sup> This is considered in more detail in Chapter 1.

When all the seized material has been categorised against the Oliver scale, a classification report is produced. This is called a C4P, C4M or C4ALL report (hereafter referred to as a C4ALL report), which sets out the total number of images or videos in each category. This report is later provided to the state or Commonwealth prosecuting authority. Importantly, the C4ALL report is not an admissible witness statement, but is used by sentencing judges to inform their decision.<sup>91</sup>

## Prosecution

CEM offences fall under both state and Commonwealth legislation. Depending on the stage of the court process and region, the Police Prosecution Corps, the QDPP or the CDPP lead the prosecution of each matter, based on the evidence gathered and presented by investigators.<sup>92</sup> Generally this process comprises the committal hearing, followed by indictment and sentencing, which usually occurs in the District Court. According to the council's data analysis, almost all offenders (97.5%) sentenced over the 10-year period pleaded guilty to CEM offences.

### Office of the Director of Public Prosecutions (Queensland)

The QDPP is responsible for prosecuting people charged with criminal offences, assisting victims and confiscating proceeds of crime. The QDPP does not have specialised prosecution teams, rather prosecutors are either based in Brisbane or assigned to regional offices and allocated matters based on workload and availability. Although there may be prosecutors who regularly prosecute CEM matters, the council understands there is no specialised branch within the QDPP for these crimes. In its report, the QOCCI noted that restructuring its operations to facilitate a dedicated team of prosecutors for CEM matters was impractical. The QOCCI proposed instead that QDPP staff undertake joint training with Taskforce Argos.<sup>93</sup> QPS advised this joint training is yet to occur.

### Office of the Commonwealth Director of Public Prosecutions

The CDPP prosecutes alleged offences against Commonwealth law<sup>94</sup> and works with QPS, CCC and AFP to prosecute CEM offences. Primarily, CDPP staff who regularly prosecute these matters are located within the Human Exploitation and Border Protection Group.<sup>95</sup> In its submission, the CDPP

advised the council that QPS provides a standard classification report, but noted 'other agencies will vary in the way and manner in which the information is presented/provided'.<sup>96</sup>

The CDPP *Annual Report 2015–16* documented that the agency received 245 new victim/witness referrals from the Witness Assistance Service—222 (90%) related to online child sex exploitation, and 107 (44%) were children.<sup>97</sup> All new child referrals involved sexual offences, the vast majority (95%) of which occurred online.

## Prosecution process

The vast majority of CEM offences (both state and Commonwealth) are sentenced in the District Court (91% for this review's 10-year data). A charged person (defendant) must proceed through the Magistrates Court before the charge progresses to a higher court. The council's analysis of court data over the last 10 years found CEM offences dealt with in the higher courts were generally progressed through Queensland courts via two pathways: committal hearing and indictment (74%) or ex-officio indictment (15%).<sup>98</sup>

### Committal hearing and indictment

The most common way to transfer charges to a higher court is via a committal hearing. At a committal hearing, the prosecution presents admissible evidence collected by the investigating officers against the defendant, with the aim of establishing that a sufficient case exists for the matter to go to trial in a higher court.<sup>99</sup>

There are three types of committal hearing

1. full hand up committal hearing (the prosecution hands up either a full or partial brief of evidence<sup>100</sup> to the magistrate in a short process in court)<sup>101</sup>
2. committal hearing with cross-examination (certain prosecution witnesses give oral evidence or are cross-examined by the defence counsel on predetermined issues in court before a magistrate)<sup>102</sup>
3. registry committal (via written communication between the court registry and the parties, with no hearing or appearance in court and no consideration by a magistrate of whether the case is sufficient to go to trial. A defendant wishing to plead guilty at that stage must provide a signed statement to that effect).<sup>103</sup>

In the first two types of committal hearings, once the prosecution has presented its case the magistrate is required to discharge the defendant if there is insufficient evidence, or otherwise invite the defendant to enter a plea and commit the defendant to a higher court for trial or sentence. A defendant can plead guilty and then be committed for sentence, plead not guilty, or enter no plea. In the two latter situations, the defendant will be committed for trial (for CEM offences only 2% of defendants pleaded not guilty or did not enter a plea at committal).<sup>104</sup>

The Criminal Code (Qld) requires the prosecution to give an accused person specified material at least 14 days before the committal hearing, although this can be altered by the court or by court practice direction.<sup>105</sup> Such material includes:

- copies of witness statements (or a written notice if there is no statement in the prosecution's possession)
- any report of any test or forensic procedure relevant to the proceeding in the prosecution's possession
- a written notice describing any test or forensic procedure (including one not yet completed)
- a written notice describing any original evidence on which the prosecution intends to rely
- a copy of anything else on which the prosecution intends to rely at the committal hearing.

The Queensland Magistrates Courts have developed practice directions and a case conferencing procedure designed to streamline the committal process and set out timeframes for prosecution disclosure of evidence.<sup>106</sup> CEM is sensitive evidence and as such has statutory limitations on its disclosure.<sup>107</sup>



Depending on how the defendant decides to proceed, the prosecution will be required to produce a 'partial brief' of evidence containing the 'substantial evidence' in the matter for a committal for sentence, or a 'full brief' of evidence containing witness statements and exhibits which the prosecution proposes to rely on in the proceeding, as well as all matters that would tend to help the case of the accused person.<sup>108</sup>

Tension often arises at the committal stage in proceedings between disclosure requirements and the capacity of investigating agencies to have completed the analysis of material detected in a CEM offence matter. While the prosecution can technically establish its case by proving only one image, an accused person has a right to know the full extent of the allegations against him, requiring the full collection of images to be classified and provided to the prosecution.

In south-east Queensland, the QDPP prosecutes state matters through committal. After the committal hearing, the QDPP or CDPP examines the police evidence and prepares an indictment. The indictment outlines the charge/s and is presented in the higher court.<sup>109</sup> Legislation requires the QDPP and CDPP to present an indictment within six months of the committal hearing.<sup>110</sup> QDPP guidelines<sup>111</sup> specify that indictments should be presented as soon as reasonably practicable, but not later than four months from a committal for trial, and that charges must adequately and appropriately reflect the criminality that can reasonably be proven.

If a defendant has not pleaded guilty, the prosecution must prepare its case for trial, which means having all of the material it needs to present its case to a jury. Even if a defendant has pleaded guilty, the prosecution must have the evidence necessary to put before a judge to enable a judge to assess the apparent age of the child and the nature of the activity shown in the images for sentencing purposes.

### **Ex-officio indictments**

The ex-officio indictment<sup>112</sup> process allows defendants to request their charges bypass the committal process in the Magistrates Court and proceed directly for sentence in a higher court. It is intended to fast-track uncontested matters<sup>113</sup> and is primarily reserved for straightforward cases where the forensic evidence is easily accessed and processed by police. Both the QDPP and CDPP can use ex-officio indictments.<sup>114</sup>

Ex-officio indictments require prosecution agreement. Due to existing committal processes (such as a registry committal for sentence),<sup>115</sup> QDPP agreement to ex-officio indictments for the sentence will only be granted if a defendant demonstrates exceptional circumstances.<sup>116</sup>

Further, the QDPP may decline to proceed by way of the ex-officio process where, for example, the defence disputes significant facts, police material is outstanding<sup>117</sup> or a full brief of evidence has already been prepared. The QDPP guidelines state an investigating officer should notify the QDPP as soon as possible if difficulties arise and 'where there is insufficient reason for the delay, the matter will be referred back for a committal hearing'.<sup>118</sup>

The ex-officio process requires the defence to accept all of the material allegations set out in the initial police brief—the QP9<sup>119</sup> form. Separately from the QP9, the ex-officio brief is not a full brief of evidence.<sup>120</sup> QPS is required to deliver a partial brief of evidence to the QDPP.<sup>121</sup>

## **Sentence**

This section provides an overview of the sentencing process, and in Chapter 3 legislation and case law specific to CEM offences will be discussed in much greater detail. The sentencing process in Queensland for any offender who has pleaded guilty or is found guilty involves consideration of legislation and appeal court decisions. Sentencing courts are required to hand down appropriate sentences within the framework established by Parliament through legislation, and in accordance with case law. At the sentencing hearing, the prosecution and defence both make sentencing submissions (which are verbal and can also be supplemented by written submissions), which provide the court with a summary of the facts of the case, impact of the crime on identified victims, the background of the offender and appropriate penalties.



A psychological, psychiatric, medical or statutory report is often obtained to provide the sentencing court with more information about an offender and their circumstances, such as mental or medical health details. Such a report is usually obtained and produced voluntarily by the defence (see Chapter 3).

A sentencing court may receive any information or submission it considers appropriate to enable it to impose the proper sentence.<sup>122</sup> Section 132C of the *Evidence Act 1977* (Qld) states a sentencing judicial officer:

- may act on an allegation of fact that is admitted or not challenged
- may act on an allegation that is not admitted or challenged if satisfied on the balance of probabilities that the allegation is true. The degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true.

In many cases, an agreed schedule of facts will be handed up to the judge or magistrate. Although the sentencing judge or magistrate has discretion to decide on the facts, a schedule of facts agreed between the parties is usually accepted by the court and relied on for sentencing.

At the end of a sentencing hearing, judicial officers set out the sentence and the reasons for the decision, particularly if a sentence of imprisonment or suspended imprisonment is imposed.<sup>123</sup> Chapter 3 provides more detail about the penalty options and how the judge or magistrate reaches their determination.

## Summary

This chapter draws on both social science research and court data to describe CEM offenders and their offending in detail. The social science research suggests it is difficult to draw conclusions about the risks posed by these offenders, or whether their offending is likely to escalate. This evidence will grow as research continues.

Queensland data revealed 1470 young people were diverted from court by QPS and 1565 offenders were sentenced by Queensland courts for CEM offences over the period 2006 to 2016.

Focusing on those offenders sentenced by Queensland courts reveals a cohort of predominantly male offenders with an average age of 39.9 years who plead guilty to CEM offending and are sentenced in the District Court. This analysis also revealed just under one third of offenders sentenced in Queensland courts were also charged with associated Commonwealth CEM offences.

This chapter outlined and described the role of both state and federal police and prosecution agencies.

Queensland has already established a strong reputation internationally for its efforts in relation to CEM. The remaining chapters provide suggestions on how Queensland sustains and extends this reputation.

## Chapter 3: Sentencing child exploitation material offenders

This chapter examines legislation and case law for sentencing CEM offences in Queensland and other jurisdictions in Australia and overseas. It also explores the way in which information about CEM offending is put to sentencing judicial officers and how the judiciary might be given more discretion to set specific orders about rehabilitation with parole.

### Legislation

The *Penalties and Sentences Act (1992) (Qld) (PSA)* is the key piece of legislation that guides sentencing for offences in Queensland. Four of the purposes of the PSA are particularly relevant to this review:

- providing a sufficient range of sentences for appropriate punishment and rehabilitation of offenders, and ensuring that protection of the community is the paramount consideration where appropriate (section 3(b))
- promoting consistency of approach in the sentencing of offenders (section 3(d))
- providing fair procedures for imposing sentences (section 3(e)(i))
- providing sentencing principles that are to be applied by courts (section 3(f)).

Consistency in sentencing in this context refers to the application of a consistent approach (i.e. using the same purposes and principles) for sentencing similar offences, rather than the application of the same sentence.<sup>124</sup>

Section 9 of the PSA establishes an offender is sentenced for either one or a combination of the following purposes:

- punishment
- rehabilitation
- deterrence
- denunciation
- community protection.

The PSA states imprisonment must generally only be imposed as a last resort and a sentence allowing an offender to stay in the community is preferable.<sup>125</sup> However, these two principles do not apply to CEM offences. Instead, section 9(7) of the PSA requires a court sentencing a CEM offender to have regard primarily to:

- the nature of any image of a child that the offence involved, including the apparent age of the child and the activity shown
- the need to deter similar behaviour by other offenders to protect children
- the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community
- the offender's antecedents,<sup>126</sup> age and character
- any remorse or lack of remorse of the offender
- any medical, psychiatric, prison or other relevant report relating to the offender
- anything else about the safety of children under 16 the sentencing court considers relevant.

The *Serious and Organised Crime Legislation Amendment Act 2016 (Qld)* introduced additional reform to Queensland's CEM offences (see Appendix 4) that commenced on 9 December 2016.

Amendments to the PSA introduced a new circumstance of aggravation applicable to specific offences, including CEM (Criminal Code (Qld) sections 228A–DC) and contact offences.<sup>127</sup> The circumstance of aggravation applies if an offender is part of a criminal organisation, which could include networked online child exploitation forums, and the offender knows the offence is

committed at the direction of, or for the benefit of a criminal organisation, or in association with another participant of a criminal organisation.

A court must impose an additional seven-year term of actual prison with no parole, cumulative on the 'base component' sentence, for these aggravated offences. In addition, a control order of up to five years to commence when an offender is released from custody is also required. A court can only reduce an offender's penalty, or decide not to impose a control order, if the offender cooperates with law enforcement.

Three new CEM offences were also inserted into the Criminal Code (Qld) in 2016:<sup>128</sup>

- administering a CEM website (section 228DA)
- encouraging use of a CEM website (section 228DB)
- distributing information about avoiding detection (section 228DC).

An additional circumstance of aggravation was added in 2016 to all CEM sections 228A–DC. This circumstance of aggravation increases the maximum penalty for each of the offences if an offender uses an anonymising service or hidden network to commit a CEM offence.

Sentencing offenders convicted of Commonwealth offences will also be influenced by the Commonwealth *Crimes Act 1914*, which provides a list of considerations to be taken into account by a court when determining the sentence for a Commonwealth offence (including child pornography and CEM offences). The nature and circumstances of the offence are included in this list of considerations. Commonwealth legislation restricts sentencing to prison as a last resort, although case law establishes that imposing a sentence other than prison for CEM-related offenders is the exception.<sup>129</sup> The current maximum penalties for CEM-related offences vary between offences, and between state and Commonwealth legislation. For example, the maximum penalty for possession of CEM (a Queensland offence) is 14 years, and the maximum penalty for using a carriage service to access CEM (a Commonwealth offence) is 15 years.<sup>130</sup> Appendix 3 provides a comprehensive list of relevant penalties.

The appropriate penalty in any case will depend on the particular circumstances of the case before the court, and the sentences imposed may range from non-custodial orders (such as good behaviour bonds, fines, community service or probation orders) to all forms of imprisonment. Of the 1565 offenders sentenced by a court in Queensland over the 10-year period examined, 78.1 per cent received a custodial penalty. For those receiving custodial penalties, the most likely custodial sentence imposed was a suspended sentence, either fully (36.7%) or partially (35.7%), and the median duration for all custodial sentences imposed was just under 15 months. The factors applicable to sentencing for CEM offences have been consistently identified by Australian appeal courts and apply equally to state and Commonwealth offences.<sup>131</sup> The following section provides more detail about the factors.

## Case law

Sentencing factors established by appeal courts throughout Australia influence sentencing practice across all courts, all jurisdictions and all offence categories to varying degrees.

The Queensland Court of Appeal has made it clear that 'quality' (in the sense of the seriousness of the categorisation of the images)<sup>132</sup> and 'quantity' should be assessed together. Both the number of images and the image content are relevant to the sentence,<sup>133</sup> including where there are Commonwealth access offences being considered alongside a Queensland possession offence.<sup>134</sup> This is consistent with the approach nationally.<sup>135</sup>

The significance of the volume of material involved, while relevant, should not be overstated.<sup>136</sup> The number of images as such may not be the critical issue—in a case of possession of CEM, the significance of quantity lies more in the number of different children who are depicted and thereby victimised.<sup>137</sup> If material was obtained in a way that did not involve production but was kept for personal viewing only, the number of images or files may cease to be relevant as an aggravating

circumstance. The quality of the images (in terms of the cruelty or degradation depicted) may be considered more important in determining the seriousness of the offending behaviour.<sup>138</sup>

In 2012, the NSW Court of Criminal Appeal (NSWCCA) reviewed case law in *Minehan v R*, and set out the following matters which ‘may be relevant to an assessment of the objective seriousness’ of CEM offences<sup>139</sup> (Queensland cases applying similar factors have been added in endnotes).

1. Whether actual children were used in the creation of the material. <sup>140</sup>
2. The nature and content of the material, including the age of the children and the gravity of the sexual activity portrayed.
3. The extent of any cruelty or physical harm occasioned to the children that may be discernible from the material. <sup>141</sup>
4. The number of images or items of material—in a case of possession, the significance lying more in the number of different children depicted.
5. In a case of possession, the offender’s purpose, whether for his own use or for sale or dissemination. In this regard, care is needed to avoid any infringement of the principle in <i>The Queen v De Simoni</i> (1981) CLR 383 [where an indictment does not refer to particular circumstances of aggravation, a judge in imposing sentence may have regard to those circumstances only if they would not render the accused liable to a greater punishment pursuant to the Criminal Code].
6. In a case of dissemination/transmission, the number of persons to whom the material was disseminated/transmitted. <sup>142</sup>
7. Whether any payment or other material benefit (including the exchange of child pornographic material) was made, provided or received for the acquisition or dissemination/transmission. <sup>143</sup>
8. The proximity of the offender’s activities to those responsible for bringing the material into existence [note recommendation 1(b) in this chapter].
9. The degree of planning, organisation or sophistication employed by the offender in acquiring, storing, disseminating or transmitting the material. <sup>144</sup>
10. Whether the offender acted alone or in a collaborative network of like-minded persons. <sup>145</sup>
11. Any risk of the material being seen or acquired by vulnerable persons, particularly children.
12. Any risk of the material being seen or acquired by persons susceptible to act in the manner described or depicted.
13. Any other matter in [the relevant sentencing legislation] bearing upon the objective seriousness of the offence.
Three further considerations were also identified as important: the importance of (1) general deterrence and (2) denunciation; and (3) the fact that an offender’s previous good character is of less significance. <sup>146</sup>

In *Minehan v R*, the NSWCCA acknowledged there may be other relevant sentencing factors highlighted in future cases.<sup>147</sup> In 2015, the NSWCCA set out another list in *R v De Leeuw*, which added the following.<sup>148</sup>

1. Unless exceptional circumstances exist, a sentence involving an immediate term of imprisonment is ordinarily warranted [however, the Queensland Court of Appeal has commented that actual imprisonment for possessing CEM is not inevitable]. <sup>149</sup>
2. The length of time for which the material was possessed is a further factor relevant to the objective seriousness of the offending.
3. 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.
4. Offending involving child pornography is difficult to detect given the anonymity provided by the internet.
5. The possession of child pornography material creates a market for the continued corruption and exploitation of children.
6. 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.
7. 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.

Being intermediate appellate court judgments, these factors are applicable in Queensland. In February 2017, several of these factors<sup>150</sup> were put to the Court of Appeal and reproduced in its judgment in *R v Howe*, being described as ‘helpful general submissions’.<sup>151</sup>

Sentencing for contact sexual offending has developed separately to CEM offending, as the relevant PSA provisions (see Appendix 4) and case law demonstrate. There are Queensland Court of Appeal decisions about the issue of actual imprisonment for both CEM and contact offenders. The court has noted prison for CEM offenders is not inevitable.<sup>152</sup> In contrast, the court noted contact offending against children should ordinarily result in prison unless exceptional circumstances exist (see *R v Quick* and *R v Pham*),<sup>153</sup> a principle which Parliament has since legislated in Queensland.

The seriousness attached to contact offending against children by the court influenced the subsequent legislative amendment in 2010 (section 9(4) of the PSA) mandating actual imprisonment for these offenders.<sup>154</sup> In introducing the relevant legislation, the then Attorney-General acknowledged that it enacted existing common law sentencing principles into statute.<sup>155</sup> The QLS raised concerns about the significant tightening of judicial discretion as a result of this provision, and cautioned that it is unacceptably close to mandatory sentencing.<sup>156</sup>

In *R v Jones* the court also commented on the value of judicial discretion in sentencing. The court acknowledged community confidence is linked to the ability of a wide variety of judges to impose consistent sentences based on relevant discretionary factors, having regard to legislation, comparable sentences and appeal cases.<sup>157</sup>

In *R v Richardson; ex parte A-G (Qld)* in 2007, the court rejected an argument based partly on *R v Quick* that a wholly suspended sentence for CEM offenders was manifestly inadequate.<sup>158</sup> The court stated possession of CEM (Criminal Code (Qld) section 228D), while undoubtedly serious, did not equate with the gravity of the offence of indecent treatment of a child. At the time, the maximum penalty for possession of CEM was five years imprisonment, while the maximum penalty for indecent treatment was 14 years. The penalties are now the same.<sup>159</sup> In addition, the sentencing principle of prison as a last resort (section 9(2)(a) of the PSA) still applied for CEM offending in 2007.<sup>160</sup>

The QLS raised concerns in response to increased penalties for CEM offences introduced in 2013, arguing possessing CEM fell into a different category from other CEM offences (distribution and production). It distinguished between an offender directly abusing a child from those who view material only. It called for research to be undertaken to assess whether increased penalties reduced offending.<sup>161</sup>

DJAG countered this suggestion by arguing that downloading and viewing CEM inevitably results in a child at some time being abused to produce additional material to satisfy demand. DJAG further suggested such offences are not victimless and cause significant harm to children. The market for this material needed to be targeted.<sup>162</sup>

Differences in the type of offending behaviour have resulted in minor differences in legislated sentencing factors between CEM and contact offenders. Ten sentencing factors are stipulated for contact offenders (section 9(6) of the PSA), while seven factors are stipulated for CEM offenders (section 9(7) of the PSA). Some of these sentencing factors are comparable across both offending types.<sup>163</sup> However, three differences reflect distinctions in the offending behaviour:

1. the effect of the offence on the child (for contact offenders only)
2. the nature of the offence—including physical harm or the threat of it to the child or another (for contact offenders only; although factors for CEM offenders include the nature of the activity in the image and section 9(2)(c) of the PSA requires, for all sentences, regard to the nature and seriousness of the offence and the effect on any child who may have been directly exposed to or witnessed it)
3. the need to protect the child or other children from the risk of the offender reoffending (for contact offenders only).<sup>164</sup>

Based on the 10-year sentencing outcomes in Queensland courts, the council found that, of the 400 offenders charged with both CEM and contact offending, 88.0 per cent received a custodial penalty, compared to 74.8 per cent of those charged with CEM offences only or those charged with CEM



and non-contact offences. Research has also acknowledged that CEM is a difficult offending area to examine and quantify, and real complications exist in drawing conclusions about the risk of these offenders becoming contact offenders. For example, recent Australian Institute of Criminology research revealed the majority of CEM offenders in their study cohort were predominantly involved in online CEM offences, 'although in a minority of cases there was a connection between exploitative material, grooming and contact offending'.<sup>165</sup> In the council's analysis of the cohort of 229 individual offenders sentenced in 2011–12, 45 involved both CEM and contact; four offenders had prior contact offending; and five offenders had subsequent contact offending.

## Enhancing section 9(7) of the PSA

The council acknowledges the PSA already provides a 'catch-all' provision covering 'anything else about the safety of children under 16 the sentencing court considers relevant' (section 9(7)(g)). His Honour Judge Robertson noted in his submission there is also a 'catch-all' provision in section 9(2)(r) of the PSA covering 'any other relevant circumstance', which is also relevant when sentencing offenders for CEM offences. His Honour notes these provisions must also be understood in the context of the jurisprudence.<sup>166</sup> Further, the Queensland Court of Appeal has noted that:

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*Community confidence in the sentencing process depends, in no small part, on a wide variety of judges imposing sentences which are consistent, and which are formulated by reference to relevant discretionary factors and by having regard to the relevant legislation, comparable sentences, and the guidance of appellate court decisions.*<sup>167</sup>  
**Queensland Court of Appeal**

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The council nevertheless proposes three amendments to section 9(7) of the PSA to embed factors that have already arisen through case law for sentencing CEM offences, and which judicial officers are most likely already routinely applying when appropriate. These are discussed individually below.

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### **Recommendation 1**

**The council recommends amending section 9(7) of the Penalties and Sentences Act 1992 (Qld) by:**

- (a) replacing the wording 'image of a child' in subsection 9(7)(a) with 'material depicting a child'**
  - (b) adding a new subsection—role of the offender**
  - (c) adding a new subsection—offender's relationship with the child.**
- 

## Replacing 'image of a child' with 'material depicting a child'

The definition of CEM encompasses a wider range of material than images alone. In section 207A of the Criminal Code (Qld), material is defined to include 'anything that contains data from which text, images or sound can be generated'. This has not been changed since it was inserted into the Code in 2005.

The definition of CEM in section 207A has had one major amendment, replacing the word 'someone' with the phrase 'a person, or a representation of a person', through the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld). The policy objective was to ensure animated or virtual images of children are caught by the definition,<sup>168</sup> as possessing such material 'may lead to a toleration of actual child exploitation and it is appropriate to shield the community from offensive fictional material which describes the sexual or other abuse of children'.<sup>169</sup> In answer to legal stakeholder submissions pointing out that no [actual] child was harmed or exploited in such circumstances, the Queensland Legal Affairs and Community Safety Committee considered that 'in



circumstances where virtual images (or similar) form part of a prosecution, this is a matter which can properly be considered by the judge at sentencing'.<sup>170</sup>

The offence provisions in the Criminal Code use the word 'material' rather than 'image'. 'Image' is not defined in the PSA, the Code or the *Acts Interpretation Act 1954* (Qld), although the word does fall into definitions of other, wider terms in the Code, such as computer generated image (CGI), picture, record, information, material, visual record and sensitive evidence.

The *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) inserted a definition of the word 'information' into section 207A of the Code, which is also relevant to CEM offences.<sup>171</sup> 'Information' is used in a context ancillary to the definition of CEM itself, in the (new) definitions of 'anonymising service' and 'hidden network' (relating to the new circumstance of aggravation) and, relevantly, in two offence provisions in Chapter 22 of the Criminal Code (see Appendix 4).<sup>172</sup>

This recommendation would expressly equate the application of section 9(7)(a) of the PSA to cartoons, pseudo-images and written text where a real child is not depicted. It would not detract from the fact case law confirms the use of actual children in the creation of the material is a relevant sentencing factor.<sup>173</sup> It would remain for the sentencing court to determine, in its discretion, the weight to be placed on this factor in sentencing.

The words 'the activity shown' at the end of the sentence in section 9(7)(a) would also need to be omitted and replaced with the words 'the activity depicted'.

Applying section 9(7)(a) uniformly to the definition of CEM would not curb judicial discretion, and would ensure the provision has a broad application to accommodate future technological advancements such as live streaming, virtual reality and artificial intelligence or other mechanisms (such as child abuse dolls) that may be used for CEM offending.

### Adding the 'role of the offender'

While the overall importance of the nature of the image, apparent age of the child and activity depicted should not be minimised, the council believes additional factors might prove useful in assessing the collection in isolation and avoiding any risk of offenders being investigated, prosecuted and sentenced on a basis which may place too much emphasis on volume or depravity of images and too little on the offending behaviour. The comment in the *Oliver* judgment is relevant: '... that the two primary factors determinative of the seriousness of a particular offence are the nature of the indecent material *and the extent of the offender's involvement with it* (emphasis added)'.<sup>174</sup> Issues covered by such a further subsection could include:

- search terms and platforms used
- access patterns—duration and frequency
- the manner in which the offender came to the attention of the police
- the offender's manipulation, cultivation and interest in the material (e.g. how the material is saved and stored and whether it is edited, copied or moved between devices)
- evidence of sharing, making material available or trading
- the offender's focus and preferences (e.g. ages of children, activity depicted and type of material)
- the offender's connection with the origin of the material (e.g. whether it was downloaded in one large body of data, or individual items obtained from a producer as part of an organised group).

Ensuring sentencing courts are armed with this information by adding this legislative factor would also assist sentencing courts in assessing an offender's risk to the community.<sup>175</sup>

Adding this factor to the existing sentencing guidance would respond to the BAQ's suggested additional factor to cover how the material seized was examined, where it was located and how the authorities found it, so as to support more consistency in sentencing.<sup>176</sup> It would also address the QLS's suggestion that the proximity of the offender's activities to those responsible for bringing the material into existence is another relevant sentencing factor.<sup>177</sup>

The council also notes the USSC's work in 2012, which identified 'the extent to which an offender has organised, maintained, and protected his collection over time, including through the use of

sophisticated technology' as a primary factor that should be considered in sentencing CEM offenders.<sup>178</sup>

### Adding the 'offender's relationship with the child'

Adding a sentencing factor to section 9(7) of the PSA to include any relationship between an offender and a depicted child would ensure sentencing encompasses issues such as breach of trust. This would likely be applied where an offender knows a real child through any pre-existing relationship or engages in grooming behaviour.

Any relationship between a child and an offender has not to date been explicitly identified in the relevant case law as a specific factor for consideration by a court in determining objective seriousness. Relational proximity, or the existence of a relationship at all, is more likely to arise in the context of charges in which an offender involved a child in making CEM or making CEM without the direct involvement of a child, or otherwise where contact offending has been charged in addition to CEM offending.

During the 10 years from 1 July 2006 to 30 June 2015, of the 1565 defendants finalised in relation to CEM offending in Queensland courts, a total of 400 (25.6%) involved both CEM and contact offences in the same matter.

Where CEM and contact offending are charged together, a contact offence is likely to take precedence over that of making CEM in terms of seriousness.<sup>179</sup>

In any case, where contact offending is charged, section 9(6) of the PSA would apply and take precedence. While section 9(6) does not have an express subsection regarding relational proximity, it has a stronger emphasis on risk, probably because of the direct link between victim and identified complainant inherent in contact offending.

For the reasons above, any addition to section 9(7) may also be required for section 9(6). This issue is exacerbated as offenders sentenced under section 9(6) must go to prison unless there are exceptional circumstances, whereas prison is not mandatory for CEM offenders sentenced under section 9(7).<sup>180</sup>

A court will consider any relationship between a CEM offender and an identified child when it arises on the particular facts of an individual case, whether this factor is listed in section 9(7) or not. The case law guidance on CEM which has been developed has occurred principally in the context of the possession and distribution offences.

In *R v MBM*, White JA stated that (at least in 2011) there were 'few comparable cases relating to making child exploitation material'.<sup>181</sup> In that case, the offending occurred in the family home where the offender lived with his parents and brother. He made CEM by filming his visiting niece. White JA noted 'such conduct is a step closer to the actual exploitation of children which gives rise to this industry and must be denounced. The applicant ... while not in a position of trust, betrayed the protection the child could expect in the home of her extended family'.<sup>182</sup>

The council also notes the *UK Sexual Offences Definitive Guideline* includes 'child depicted known to the offender' as one of 16 mandated aggravating factors.<sup>183</sup> In the *Oliver* decision, the court included the following circumstances in a discussion of more serious examples of CEM offending: 'the offender was actively involved in the production of images at Levels 4 or 5, especially where that involvement included a breach of trust'.<sup>184</sup> The court also listed 'specific factors which are capable of aggravating the seriousness of a particular offence', one of which was where:

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*... the offender was responsible for the original production of the images, particularly if the child or children involved were members of the offender's own family, or were drawn from particularly vulnerable groups, such as those who have left or have been taken from their home or normal environment, whether for the purposes of exploitation or otherwise, or if the offender has abused a position of trust, as in the case of a teacher, friend of the family, social worker, or youth group leader.*<sup>185</sup>

**R v Oliver**

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## Role of classification in sentencing

As part of this review, the council has found CEM classification results alone do not provide enough detail for sentencing. Detailed schedules of agreed facts, created and disclosed in a timely manner, are an important tool in bridging this gap. The court will sentence on the level of criminal culpability particularised and will not assume criminality. The council has also found there is widespread, but not universal, support for the view that judges and magistrates should view a sample of CEM. On the other hand, the council noted the strong view that a detailed schedule of agreed facts can offset the need to otherwise view a sample.

These issues are further outlined below.

### CEM classification reports—helpful, but not enough

The classification results of seized material are provided to prosecutors and the accused via the C4ALL report. This report details the number of images classified against each Oliver scale category, but does not provide any specific information about the actual activity within the image.

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*Once the material is categorised, [Electronic Evidence Examination Unit] generate a C4ALL report which outlines the total amount of images/videos tallied into each of the nine categories. This report is then provided to the relevant prosecuting authority, whether state or Commonwealth. C4ALL reports are not evidence but are often used by the courts as a sentencing tool.*

**QPS**

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Based on analysis of 367 Queensland higher court sentencing remarks for two cohorts of CEM offenders (2011–12 and 2015–16), the council found reference was made in some way by sentencing judges to classification (whether it be the Oliver scale, C4ALL reports or ‘classification’) in 67.3 per cent of cases.<sup>186</sup> While it is acknowledged that the full submissions made to the judicial officer are not included in the sentencing remarks, these references were most likely where the MSO was a possession offence, and least likely in cases involving a making offence or non-CEM MSO.

Classification levels provide ‘only marginal assistance’ to courts involved in imposing or reviewing CEM sentences.<sup>187</sup> Even if they help achieve some consistency of approach in sentencing, they do not address all relevant issues.<sup>188</sup>

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*Unless other detailed and helpful material is included in the brief of evidence, such as detailed computer analysis, the C4All report assumes a remarkably large significance in the prosecution of these offences. It becomes the only real yardstick by which the objective criminality can be assessed... The classification approach is used during sentencing, and the C4P, C4M or C4All reports are routinely tendered during the sentencing hearing.*

**QDPP**

*[The C4ALL report] provides a very useful tool by which defendants can provide instructions whether to accept allegations as to the nature of material identified by police, without requiring defence lawyers to view the material. The evidence, when set out in that format, sets out a clear breakdown of the material. Absent the evidence being set out in that format, the task of taking instructions from a defendant would require a defence lawyer to view the images ... [C4ALL reports] usually form the basis of taking instructions from a defendant where the only issue is whether the images meet the definition for CEM.*

**LAQ**

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However, the BAQ stated ‘the defence’s case is not necessarily based around the category of images and therefore [the C4All] report is not relied upon’.<sup>189</sup> The reports ‘form a large part of the tools for a sentencing judge’, and to some degree they satisfy the requirement for a judge to have ‘regard to the nature of the image and quantity of the images. Further detail, however, is required to comply with section 9(7)(a) of PSA and this is usually provided through the prosecution submissions’.<sup>190</sup> The

council has concluded C4ALL reports containing classification results on their own do not satisfy the requirements of section 9(7)(a) of the PSA. In *Director of Public Prosecutions (Cth) v Garside*, the Victorian Court of Appeal stated:<sup>191</sup>

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*An assessment of the objective gravity of offending by reference to the categorisation of images and videos may lead to salient subjective features of the offending being given insufficient attention. There will be varying degrees of seriousness of the images within each particular category. The increasing risk that the international child pornography industry poses, that the possession of child pornography material creates a market for the continued corruption and exploitation of children and that those who possess such material, whether for profit or not, are more than mere passive recipients of material but are active participants in the market, must remain at the forefront of the sentencing task in order that general deterrence, in particular, is given its necessary weight. It is necessary to ensure that the absence of material in higher levels of classification, does not unconsciously result in a minimisation of the objective gravity of possession of lower level categories of material.*

**Victorian Court of Appeal**

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In *R v Hickey*, the Queensland Court of Appeal commented ‘the CEM was moving images, rather than still images. Apart from the categorisation of the videos and the identification of the dates of the contents of each of the hard drives containing CEM, there was no further material put before the sentencing judge as to the length or nature of the videos.’<sup>192</sup>

### Timing of disclosure of CEM classification reports

There is tension between law enforcement agencies and legal agencies concerning the timely provision of evidence for court proceedings and disclosure to defence.<sup>193</sup> Both the QDPP and CDPP raised concerns with the council over the timeliness of C4ALL reports and the need for more information about the offender, including his role in relation to his collection.<sup>194</sup> Both agencies had experienced inconsistencies between law enforcement agencies on the timing of the delivery of that report prior to committal. The CDPP advised that the AFP generally provides the ‘relevant forensic report and associated classification with the full brief, obtained prior to committal’.<sup>195</sup> However, in relation to QPS briefs:

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*... the results of classification or forensic examination are not provided until after the committal proceedings and in most instances shortly before presentation of the indictment. Currently, when the information is sought post committal it is not forthcoming before indictments are to be presented.*

**CDPP**

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The CDPP also advised there were instances when the classification had not been conducted or reports were not provided prior to sentence hearings.<sup>196</sup> Full discussions of the classification process and associated problems are provided in Chapter 4. The QDPP advised in its first submission in March 2017, the office ‘typically’ receives C4ALL reports ‘as part of the prosecution brief, usually but not always prepared prior to committal’,<sup>197</sup> and that it ‘has attempted to reduce delays by notifying investigators that we do not necessarily require classification of the whole of the seized material. It is unclear what gains in terms of the time of resolution have been achieved by this means’.<sup>198</sup>

However, the QDPP advised in April 2017 that ‘in recent times there have been some instances of police officers refusing to conduct classifications of any images until a matter is listed for sentence. ... The difficulty, if not impossibility, of getting a matter committed let alone listed for sentence in the absence of evidence of the nature of the CEM is obvious’.<sup>199</sup> The QDPP also noted the matter has been raised with QPS management and reported confidence that the issue would be actively addressed.<sup>200</sup>

## Lack of detail provided by the Crown causes sentencing assumptions

Court judgments demonstrate that when it comes to sentencing an offender regarding a wide-ranging subject matter like CEM, a lack of specificity requires a court to punish on the basis that the offending is towards the lower end of the appropriate sentencing range:

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*The QDPP does not require investigators to view all seized material (whether by automated process/program or by individual assessment). The QDPP cannot require the investigators to view any particular proportion of the seized material. However, investigators must understand that there is a risk that a court may sentence only on the basis of the material viewed and classified, and hence the investigators must themselves determine what they consider to be an appropriate amount of material in the individual circumstances of the matter.*<sup>201</sup>

### QDPP

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*Thompson v R*<sup>202</sup> is a case in point. This matter was an Oliver-era English Court of Appeal decision which the New Zealand Department of Internal Affairs uses as a guide in framing representative charges (which are not used in Queensland). The case involved 11 of 12 possession of CEM counts related to specific images. The last count related to 3735 other images and ‘there was no information whether by way of schedule, admission or otherwise, as to the number of photographs which fell into each of the levels identified ... in *Oliver*’.<sup>203</sup> The judge had information about only 11 images set out in the specific counts ‘as to the approximate quantity of the images at the different levels’.<sup>204</sup>

The sentencing judge did not question ‘the deficiency in the information provided’ and ‘allowed himself to be placed in a very difficult position’ by not requiring the ‘approximate number of images at each level contained in the count relating to the 3735 images, so that he could properly proceed to sentence in accordance with the guidelines set out in *Oliver*’.<sup>205</sup>

The court found that, as a result, ‘there was no basis on which he could find on the information before him that there were any at [Oliver] level 4 [emphasis added]’. The court accepted the force of the submission that, because the prosecution ‘failed to identify the levels of the 3735 other images, and no request was made by the judge prior to sentence for those to be identified, it would not be right to make an assumption against the offender as to the number of images at the different levels’ [emphasis added].<sup>206</sup> In the absence of specific counts agreed to be representative of the comprehensive count (a practice not used in Australia):

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*... there must be available to the court an approximate breakdown of the number of images at each of the levels. This may best be achieved by the prosecution providing the defence with a schedule setting out the information and ensuring that the defence have an opportunity, well in advance of the sentencing hearing, of viewing the images and checking the accuracy of the schedule.*<sup>207</sup>

### Thompson v R

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The ‘unfortunate lack of information before the court’ was one of five reasons why the offender’s original sentence was held to be excessive.<sup>208</sup>

In *Kenworthy v The Queen [No 2]*,<sup>209</sup> the Western Australia (WA) Court of Appeal resented an appellant on material provided by agreement between the parties, which the court criticised as being deficient in specificity (see below regarding judges viewing sample images). The court resented the appellant on the material provided by the parties, undertaken ‘on the assumption, favourable to the appellant, that the images are towards the lower end of the range of seriousness of photographic images falling within those categories [emphasis added]’.

## Judges viewing materials

The *Oliver* judgment stated ‘as to the nature of the material, it will usually be desirable for sentencers to view for themselves the images involved, unless there is an agreed description of what those



images depict'.<sup>210</sup> This reference to viewing samples is distinct from the discussion later in this report regarding sampling for the different purposes of investigation and disclosure. Appendix 6 contains a summary of the position in various Australian and international jurisdictions.

The WA Court of Appeal's decision in *Smit v State of Western Australia* is often cited in CEM decisions. McLure P noted that *Oliver* did not suggest that the classification list should be a substitute for the sentencing judge viewing the CEM:

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*The relative perversion and debauchery of the pornographic material is a relevant sentencing factor. Viewing a representative sample (as identified or agreed by the parties) of the material will ordinarily be necessary for the proper performance of the sentencing judge's duties [In Smit, the sentencing judge viewed all 43 images charged—a relatively small number]. Judges involved in the administration of the criminal law are frequently exposed to material that is deeply offensive in a myriad of different ways whilst being required to retain their objectivity and sense of proportion. Moreover, this court is assisted by findings as to the nature of the pornographic material such as those made by the sentencing judge in this case which went well beyond the limited description in the DPP's list. The classification levels can only be of marginal assistance to courts involved in imposing or reviewing sentences for offences involving child pornography.*<sup>211</sup>  
**WA Court of Appeal**

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*Smit* was considered by the NSWCCA in *R v Porte*.<sup>212</sup> In the judgment, Johnson JA wrote a common feature of CEM sentences is 'classification of *at least some* of the material in accordance with a scale used to assess the objective seriousness of the images [emphasis added]'.<sup>213</sup> It is appropriate for sample images to be made available to the sentencing court, and courts of appeal, 'to allow an impression to be formed of the material and its degree of depravity'.<sup>214</sup>

In *Fitzgerald v R*, the NSWCCA stated it was not necessary for a sentencing judge to view a representative sample to 'get a general perception' of the material, to 'view all or even most of the images and videos ... the extent of the cruelty and harm to the hundreds of individual child victims involved, is self-evident from the categorisation of the images and videos ... the nature of the harm is readily discernible from the [Oliver nine-point scale] classification. No further evidence of the depiction of actual cruelty or harm was necessary'.<sup>215</sup>

The NSW judgments of *Porte* and *Fitzgerald* were delivered in 2015, after the implementation of the NSW random sampling legislation, which was described in *Porte* as 'a process which provides further assistance to a sentencing court'.<sup>216</sup>

A NSW District Court judge (in possession of classification results) rejected the tender of a representative sample which the Crown had offered on the basis the judge 'may wish' to view it: 'If material is tendered it is incumbent on the judge to view it. The judge doesn't get a choice'.<sup>217</sup> There was:

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*... a real risk that doing so will engender feelings of disgust and an emotional reaction to offending which is inappropriate on the part of a sentencing judge. I know that the offender had 3 videos in which children were subject to sadism, humiliation or bestiality. I know that he had 11 videos showing penetrative sexual activity between children or between children and adults ... part of the harm caused to the children depicted in the videos and images arises from the viewing of such material, and that is the case even in the course of judicial proceedings.*<sup>218</sup>  
**NSW District Court Judge**

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In its 2016 judgment in *Kenworthy v The Queen [No 2]*, the WA Court of Appeal expanded on *Smit*. It did not refer to *Porte* or *Fitzgerald*, and set a position distant from that of NSW.



The WA Court of Appeal stated:<sup>219</sup>

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*Depending on the circumstances, the ordinary approach of the sentencing judge viewing a representative sample of the pornographic material may not be necessary where the parties provide a sufficiently detailed agreed description of the nature and egregious features of the pornographic material which is the subject of the charge. Such a written description will need to descend to particulars well beyond the [Oliver nine-point scale] classification of the material. The nature of the material within each [Oliver nine-point scale] category may range from written text and cartoons to photographic images and videos, and even within those sub-categories the depravity of the images and the seriousness of the child abuse they depict may vary considerably. However, whether a sentencing judge views a representative sample of the images or is content to proceed on a sufficiently detailed written description, he or she should ordinarily make findings of fact as to the nature and egregious features of the pornography in a manner that extends beyond [Oliver nine-point scale] categories.*

**WA Court of Appeal**

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There, the trial judge had viewed samples but did not make findings of fact about the nature and features of the images which were the subject of each count, beyond noting that 'some of the material involved extremely young children, who were little more than babies, and some involved bondage'.<sup>220</sup>

On appeal, the parties provided an agreed written description which 'unfortunately' did no more than 'identify the [Oliver nine-point scale] category, which as noted above is not an entirely satisfactory basis for sentencing offences of this kind. It would have been of greater assistance to have a much more specific description'.<sup>221</sup>

The Office of the Director of Public Prosecutions for Western Australian (WADPP) advised the council a consultant state prosecutor was working with the police to formulate recommendations (including possible legislative amendments) that reflect the decision in *Kenworthy*. The WADPP is not routinely agreeing on descriptions of the nature and features of CEM with defence counsel (which has only occurred on a few occasions and which would mitigate the need for a sentencing judge to view the material).

The SA Court of Criminal Appeal acknowledged the 'guidance provided' regarding representative samples, written descriptions and findings of fact in *Kenworthy*, in its 2017 judgment in *R v Turvey*.<sup>222</sup> It stated the Oliver nine-point scale was of 'great assistance'. However:

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*... it is important that a sentencer not defer to the opinion of the authorities. That does not mean that in a case involving hundreds, perhaps thousands, of images, that the sentencing judge must view each and every image. It is enough that a sufficient sample be viewed such that the accuracy of any schedule produced by the police using [Oliver] Standard is verified and the judge has a sufficient appreciation of the content of the material to appreciate the gravity of the offending and record the same so that this Court may then discharge its function if called upon to do so. This approach accords with the guidance provided by the Western Australian Court of Appeal in *Kenworthy v The Queen (No 2)* ...*

**SA Court of Criminal Appeal**

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In *Turvey*, the court did not view all of the images and videos provided to it for sentencing, but did view approximately 100 chosen randomly.<sup>223</sup>

The question of whether a sample to be viewed is truly representative of the entire collection is another issue.

In 2014, a Queensland Supreme Court sentencing judge voiced concerns about the reliability of a representative sample, as set out in *Smit*, of a large volume of CEM:<sup>224</sup>

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*I have to say that I do not regard myself as materially assisted by viewing the images. That is because of the descriptions otherwise provided and the utility which the classifications themselves give in understanding the very serious nature of the offending. I am also troubled about how one can reliably get a representative sample of a large volume of material of this kind and about the variability of reactions of different judges to repeated exposure to such images. Moreover, when sentencing for these offences, substantial reliance is generally placed on comparable sentences. If it were necessary to look at images in this case to assess the offending, it seems to me difficult to say the comparable sentences would be useful without a similar exposure to the images the subject of the other sentences. Nevertheless I have carried out the exercise.*

**Queensland Supreme Court Judge**

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*R v Forbes*,<sup>225</sup> a 2014 case, highlights the reliance of this method on defence agreement. An Australian Capital Territory (ACT) Supreme Court judge viewed a sample of CEM at the CDDP's request. Penfold J had 'considerable concerns' about the sampling process,<sup>226</sup> and questioned the feasibility of the reference in *Smit* to 'a representative sample identified or agreed by the parties'.<sup>227</sup> *Smit* involved 43 images—'a collection readily viewable as a whole by a sentencing judge'.<sup>228</sup> *Forbes* involved 1500 items, a number 'still at the lower end of the spectrum in terms of the quantity of material'.<sup>229</sup> In order to agree the sample was representative, defence counsel would have to view the entire collection, or at least a random sample of each category, 'ideally several times larger than the sample size'.<sup>230</sup> Her Honour would have had to order defence counsel (if there was such a power) to view material (defence had not done so) so the parties could reach agreement about representativeness.<sup>231</sup>

Ultimately, Penfold J proceeded to sentence on the combined basis of defence counsel accepting the samples had not been chosen unfairly,<sup>232</sup> and Her Honour's findings about the relatively low-level of seriousness after viewing the sample.<sup>233</sup> However, Penfold J would have been 'very reluctant to proceed without finding a way for defence counsel to make submissions' about her assessment of the material if the sample 'increased the seriousness of the offence beyond what might have been assumed by reference to the AFP summary'.<sup>234</sup>

The sample the sentencing judge viewed was not 'identified or agreed by anyone as a representative sample of the material'. If the ACT was to adopt the WA approach, 'prosecuting and defending these kinds of offences, even for a sentencing process on a plea of guilty, will consume even more of the time of all participants in the process than it already does (and therefore would become even more expensive)'.<sup>235</sup>

### **Stakeholder views on viewing samples**

The Chief Judge of the District Court of Queensland quoted the *Smit* passage in his submission to the council, and advised that, while information currently provided may be sufficient for many judges, word pictures alone may not always fully inform judges who may not have had exposure to such material in their legal practice. In His Honour's view, the sentencing judge need not view all of the CEM, 'but it is beneficial that an appropriate sample should be provided' and 'an adequate sample would comprise six to 10 images for each relevant category'.<sup>236</sup>

The QLS stated<sup>237</sup> the C4ALL report alone provides insufficient information. The addition of a schedule of facts is preferable, as it provides a description of the activity involved. It is for the court to determine whether and when CEM is viewed, and doing so is appropriate where practicable. Where volume prohibits considering the CEM in its entirety, QLS supports viewing 'a sample of material that is representative, in terms of character and classification, of the whole of material in the matter'. Benefits of judicial viewing are:

- ensuring that sentencing decisions are well informed and based on a comprehensive understanding of the offence committed
- addressing concerns around the subjective nature of the classification process.

The LAQ stated judges ‘should not be required to view CEM as part of the sentencing process’.<sup>238</sup> The LAQ did envisage exceptional cases where it may be necessary, such as ‘where the Crown seeks to establish an offender’s conduct as being particularly heinous or where there is a dispute regarding the classification’.

The LAQ submitted that a judge is likely to be sufficiently informed by descriptions of CEM ‘appropriately classified with sufficient particularity using, for instance, the Oliver scale’. It is ‘difficult to see how showing a judge CEM might enhance the sentencing process’; a sentence adequately reflecting denunciation and deterrence is likely without judges being shown CEM.

The LAQ also highlighted the practitioner point of view: judicial viewing of CEM would also necessitate review of material by defence staff, and the LAQ prefers exposure by lawyers to this material to be the exception to the rule.

The QDPP made a similar point. While it was necessary on occasions for QDPP staff to view CEM to assess the correctness of classifications already made by QPS and the CCC, they should not be analysing it. It is not the function of the QDPP to gather and identify evidence. Classifying CEM is part of the evidence gathering phase of the investigation.<sup>239</sup>

The BAQ’s position is that ‘categorisation within the Oliver scale cannot be a substitute for the sentencing judge viewing the CEM, nor should the sentencing judge only rely on the descriptions that may be provided by QPS or Director of Public Prosecutions. A viewing of at least a representative sample should be required and the classification considered an assistive tool’.<sup>240</sup>

The BAQ suggested adding the provision of a sample of CEM to the court in section 9(7) of the PSA.<sup>241</sup> Sentencing judges would not use the Oliver scale in isolation to determine severity; viewing all CEM or a representative sample ‘forms a basis of the nature of the CEM and age of the children involved’.<sup>242</sup> However, a sentencing judge would not necessarily need to view even a sample ‘if both parties agree on the schedule of facts and it has sufficient detail to satisfy the sentencing requirements’.<sup>243</sup>

## Schedules of facts—detail and timing

Schedules of facts are frequently used in sentencing in Queensland. The prosecution prepares the schedule, which the defence can agree to (if the defence disputes the schedule it may become contested). These are tendered to the court as the factual basis for the sentence. A summary of the position of various Australian and international jurisdictions is provided in Appendix 6.

Schedules of facts are also useful tools well before sentence. During consultation, the QDPP advised that prosecutors prepare a schedule of facts when the indictment is drafted. This is provided to the defence to advise the defendant of the proposed basis for sentence. The QDPP prefers that this occurs prior to committal.

The council notes that, given the overwhelming majority of CEM prosecutions are resolved as pleas of guilty (see Chapter 2), being able to resolve the factual basis before committal would allow defendants to know where they stand in terms of the basis for any sentence, which would further encourage pleas of guilty being entered at committal and significantly reduce delay in the higher courts.

A schedule of facts cannot be produced without the police or other investigative body first providing the requisite details to a DPP office. The QDPP advised that, at times, there was such a dearth of material provided prior to committal that, in order to prove the existence of CEM so that a prima facie case could be proven (and to prevent the charges being struck out), police simply provided a hard drive containing CEM to the QDPP. QDPP staff then have to access, analyse and view the raw material, with the potential for the defendant, defence lawyer and magistrate also having to do so.

The Judicial Commission of NSW<sup>244</sup> noted the need for specificity in agreed facts because most CEM offences proceed by way of a plea of guilty:

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*... the factual basis upon which the parties ask the court to proceed should therefore be set out in an 'agreed statement of facts' which is comprehensive. It should include all of the relevant facts and circumstances upon which the court is to sentence the offender. A court can only make findings based on the agreed facts and the evidence before it. Where multiple offences are before the court, the child pornography relevant to each charge must be properly identified in the statement of facts. The court should be able to rely on the identification of child pornography the subject of the offences which is contained in the agreed statement of facts. Particular care is needed in cases involving voluminous material.*

**Judicial Commission of NSW**

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Queensland legal stakeholder feedback regarding use of a schedule of facts was positive. The Chief Judge of the District Court of Queensland advised 'properly prepared schedules of facts are of great assistance in sentencing for CEM offences'.<sup>245</sup>

The LAQ stated 'the most positive aspect of the current CEM approach is the continued use of schedules prepared by the QDPP in conjunction with tabulated results of forensic examinations (e.g. the C4M Report) which classify images according to the Oliver scale'.<sup>246</sup> Schedules for sentencing are 'very valuable'; they 'plainly demonstrate the basis for a sentence', and 'likely save court time in sentencing offenders' when the content is agreed and avoid uncertainty for the basis of the plea of guilty.<sup>247</sup>

The LAQ further pointed to the benefit of schedules supplanting the need for actual images to be used, because they enable prosecutors to place written and often graphic descriptions of images before the judge (while prosecutors retain the ability to present actual images).<sup>248</sup>

The BAQ stated that detail of the nature of the CEM is sometimes provided through schedules of facts, although their use is not legislated. The BAQ felt the use of detailed schedules of facts as a tool in sentencing should continue, and that consistency in information provided to sentencing judges is required to ensure consistency in sentencing.<sup>249</sup>

## Incorporating improved court-ordered parole into sentencing for CEM offences

In Queensland, there are three different types of parole order on which a prisoner may be released:<sup>250</sup>

- a parole order made by the parole board after the prisoner has reached his or her parole eligibility date under statute or as set by the sentencing court<sup>251</sup>
- an exceptional circumstances parole order made by the parole board at any time<sup>252</sup>
- a court ordered parole order, resulting from a fixed parole release date set by the court and required by statute to be made by the chief executive.<sup>253</sup>

A court *must* fix a parole release date for a sentence of three years or less which is not a serious violent or sexual offence.<sup>254</sup> It *may* fix a parole eligibility date for any sexual offence where imprisonment is imposed.<sup>255</sup> 'Imprisonment' in this context does not include an intensive correction order, prison-probation order or wholly or partially suspended prison sentence.<sup>256</sup>

If a court does not exercise its discretion to set a parole eligibility date for a sexual offender, the *Corrective Services Act 2006* (CSA) operates to deem the eligibility date as the day after the day on which the prisoner has served half the period of imprisonment sentenced.<sup>257</sup>

A court cannot make a recommendation for a person's release on parole,<sup>258</sup> and a parole order subsequently made by the parole board may start on or after the prisoner's parole eligibility date which had been set by the court at sentence.<sup>259</sup> Further, the board is not bound by the court's

eligibility date if it receives information about the prisoner that was not before the sentencing court and which causes the board to consider the prisoner unsuitable for parole.<sup>260</sup>

As the *Queensland Parole System Review Report* (the Sofronoff Report) noted, ‘in *Foster v Shaddock* [2016] QCA 36, the Court of Appeal held that the power of QCS to amend, suspend or cancel parole under section 205 of the CSA can be exercised whether the offender has actually been released pursuant to an existing parole order or not. In practice, the chief executive of QCS is required to issue the parole order in accordance with the legislation and then subsequently he can suspend or cancel the order’.<sup>261</sup>

The chief executive can amend or suspend a parole order, irrespective of whether it originates from a court order or board decision,<sup>262</sup> on the basis of failure to comply with the order or because of particular risks. The *Corrective Services (Parole Board) and Other Legislation Amendment Act 2017* will, once commenced on a date fixed by proclamation, remove the chief executive’s power to suspend parole; these decisions will reside with the board.<sup>263</sup>

The parole board can amend, suspend or cancel any parole order<sup>264</sup> on various grounds. On occasion, these powers can result in an offender with a court-ordered parole release date serving their entire head sentence.<sup>265</sup>

## Conditions of a parole order

When sentencing an offender to probation (section 94 of the PSA) or to an intensive correction order (section 115 of the PSA), the court may order that an offender:

- (a) submit to medical, psychiatric or psychological treatment; and
- (b) comply, during the whole or part of the period of the order, with the conditions that the court considers are necessary—
  - (i) to cause the offender to behave in a way that is acceptable to the community; or
  - (ii) to stop the offender from again committing the offence for which the order was made; or
  - (iii) to stop the offender from committing other offences.

Whether or not this order is made, each probation and intensive correction order has a mandatory requirement (sections 93(1)(d) and 114(1)(d) of the PSA) that the offender:

- (d) must take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer during the period of the order.

Section 200(1) of the CSA lists the conditions of a parole order created as a consequence of a judge ordering a parole release date. It includes: (b) to carry out the chief executive’s lawful instructions. Section 200(1) does not carry the same mandatory requirements of probation and intensive correction orders as described above.

Section 200(3) of the CSA is a provision similar to sections 94 and 115 of the PSA, and enables a parole board to include parole conditions requiring offenders to engage with relevant programs:<sup>266</sup>

- (3) A parole order granted by the parole board may also contain conditions the board reasonably considers necessary—

- (a) to ensure the prisoner’s good conduct; or
- (b) to stop the prisoner committing an offence.

Examples—

- a condition about the prisoner’s place of residence, employment or participation in a particular program
- a condition imposing a curfew for the prisoner
- a condition requiring the prisoner to give a test sample [emphasis added].

However, this subsection does not apply to court-ordered parole.<sup>267</sup>



## The relevance of parole to CEM offenders

At present a court cannot make an order for a fixed parole release date regarding CEM offences because these offences are defined as sexual offences.<sup>268</sup> The council recommends legislative change giving courts powers analogous to sections 94 (additional requirements of probation order) and 115 (additional requirements of intensive correction order) of the PSA, enabling them to fix parole release date orders for CEM offenders.

The implementation of recommendation 5 from the Sofronoff Report, which has been supported in principle by government, would allow its consideration as a potential reality. Table 3 provides a list of the relevant Sofronoff Report recommendations.

The underlying intention behind this recommendation is for a court-ordered program to be implemented during the prisoner's period of actual custody (if any), after their release on parole, or running through both periods. The fact that a judge-ordered program had not commenced during any actual component should not give rise to any amendment or suspension of parole blocking release from custody. If this recommendation is adopted, however, it is noted that offenders failing to comply with conditions would likely find themselves in custody for their breach, thereby contributing to the cohort of the prison population consisting of suspended parolees.

### The issues

While the courts have discretion to set the conditions of both probation and intensive corrections orders, they have no influence over the terms of a court-ordered parole order. The ability to impose wider conditions may currently risk being lost by legislative default.

As noted, of the 1565 offenders dealt with in the courts for CEM offending during the 10-year period, the majority (78.1%) received a custodial penalty of some sort. Of those, 35.7% received a partially suspended prison sentence and a further 36.7% received a wholly suspended sentence. Offenders who receive suspended sentences are not subject to formal supervision or oversight.

A court-ordered release date is automatic and not predicated on a parole board's scrutiny of an application after sentence. Under the parole system as it was when examined by the Sofronoff Report, parole board reports prepared for applicant prisoners with an eligibility date were also provided in conjunction with:<sup>269</sup>

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*the prisoner's Integrated Offender Management System (IOMS) record and physical file. Additionally, if required, the parole board may commission an independent psychological or psychiatric report or risk assessment to assist in the decision making for a particular matter.*  
**The Sofronoff Report**

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There was further assessment in the case of sexual offenders so applying for parole:<sup>270</sup>

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*... the parole board will also receive a specialised risk assessment prepared by the department. The sexual offending program assessment includes a baseline risk assessment based on the prisoner's history (STATIC-99R), and a dynamic risk assessment (STABLE-2007) that identifies risk indicators for treatment. The assessment also makes recommendations regarding the treatment programs the sex offender would be required to complete.*  
**The Sofronoff Report**

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This highlights the material which the board would have, which could influence a decision to impose a condition mandating participation in a program. A judge setting a parole release date (if this was a legal option), armed with a pre-sentence report, may be similarly informed on the benefit of future participation in a program at the time of sentence.

### Initial QCS feedback

The council secretariat met with the QCS during targeted consultation. With regard to mandatory treatment, QCS advised that:



- research shows it is a less effective approach for sexual offenders, compared to drug/alcohol offenders
- mandatory treatment is not best practice. A better approach would be mandatory introductory of assessments to identify offender treatment needs
- discretion in responding to each offender's situation is important
- offenders with certain psychopathies should be excluded from group work. For example, sadism offenders need to be removed because they use the group to feed their needs.

The practical consequences of potential increased demand on QCS resources would need to be explored, with extensive consultation. If appropriate programs were not available in the relevant region, an order mandating participation would be setting the offender up to fail.<sup>271</sup> The council obtained QCS data regarding treatment for 2011–12. Of the 229 CEM offenders from that period:

- 129 had no treatment/treatment unknown
- 52 had treatment (but not QCS sex offender treatment)
- 49 had QCS sex offender treatment (of which 28 also had external treatment).

**Table 3: Sofronoff Report recommendations relevant to this review**

No.	Sofronoff recommendation	Government response
5	Court ordered parole should apply to a sentence imposed for a sexual offence.	Supported in principle: The Queensland Government supports this recommendation in principle noting that currently many sexual offenders are released onto a non-custodial order or no supervision. Including sexual offenders in the Court Ordered parole regime will increase the number of stringent conditions which may be placed to sexual offenders, allowing for stronger and more robust supervision.
3	A Court should have the discretion to set a parole release date or a parole eligibility date for sentences of greater than three years where the offender has served a period of time on remand and the Court considers that the appropriate further period in custody before parole should be no more than 12 months from the date of sentence.	Supported in principle: The Queensland Government will have the Sentencing Advisory Council undertake a review of sentencing options, and consider this recommendation as part of that review.
17	Queensland Corrective Services should increase the number and diversity of rehabilitation programs, and training and education opportunities, available to prisoners in custody, including short term programs.	Supported: The Queensland Government will increase rehabilitation opportunities for prisoners. As part of a detailed implementation plan, increased rehabilitation opportunities will be rolled out over the next 4 years.
20	As a significant component of end-to-end case management, Queensland Corrective Services should increase the delivery of accredited programs to offenders supervised by the Probation and Parole Service, particularly in light of the issues associated with delivering programs in custody.	Supported: The Queensland Government will increase rehabilitation opportunities for prisoners and offenders.

Source: Queensland Government Response to Queensland Parole System Review Recommendations<sup>272</sup>

## Case studies

The following Queensland Court of Appeal judgments provide examples when courts were barred from setting a parole release date for sexual offenders and the risk of offenders not being able to complete programs in time for release on parole.

### *R v Hogg* [2007] QDC 367

- Unsuccessful application to reopen a sentence under section 188 of the PSA, on the basis that it was impossible to achieve parole at any point remotely near the eligibility date.
- Parole eligibility date set three months after sentence. Still in prison more than eight months later.
- Consideration of his application for parole was deferred until receipt of an exit report from the sexual offending program he had commenced. It was claimed that progress was delayed to allow new participants to catch up.
- 2006 PSA amendments conferred judicial power to fix definite parole release dates in certain circumstances, but not for CEM offences (possessing CEM in this case).
- No evidence before the court establishing that, at the sentence date, it was impossible for Mr Hogg to successfully apply for parole on or near his eligibility date. Recourse to section 188 of the PSA is limited, must be based on clear statutory criteria, and is not an avenue for judicial review of administrative decisions

### *R v Tracey* [2010] QCA 97

- Application for leave against sentence (allowed—three-year terms substituted for five-year ones).
- Pleaded guilty to indecent treatment offences (sexual offences, although not CEM offences).
- Argued parole eligibility date incompatible with delivery of required sexual offender program.
- What has happened in this case is suggestive of administrative deficiencies in urgent need of rectification<sup>273</sup>
- Defence had suggested wholly suspended sentences with short periods of actual custody, followed by three years probation with special conditions relating to psychiatric treatment and counselling<sup>274</sup>
- The psychiatric evidence indicates that, to reduce the risk of recidivism, he should undertake courses and be supervised. But there are no means of ensuring this unless he remains in custody or is subjected to a parole order. Because of section 160D of the PSA, the court must fix a parole eligibility date and the applicant may be denied the benefit of it<sup>275</sup>
- The applicant has already spent more time in custody than the primary judge anticipated, and without adjustment to the longer terms of imprisonment, he may be at risk of serving all or a substantial part of the head sentences<sup>276</sup>

*R v Lloyd* [2011] QCA 12

- Application for leave against sentence (allowed).
- Pleaded guilty to CEM offences; argued in part that prospect that he would be released at about the parole eligibility date was illusory and this was known at time of sentence.<sup>277</sup>
- Remained in custody six months after eligibility date, past half the head sentences.<sup>278</sup>
- 301 days served on remand was taken into account—courses not available on remand.<sup>279</sup>
- While eligibility not an entitlement,<sup>280</sup> applicant unlikely to be released on parole until he had served substantially the whole of his head sentence—unjust—could not undertake course in time.<sup>281</sup>
- Sentences suspended forthwith and two years probation; offender should participate in a suitable course regarding reoffending.<sup>282</sup>

*R v Waszkiewicz* [2012] QCA 22

- Application for leave against sentence (refused).
- Pleaded guilty to CEM offences and indecent treatment; contended parole eligibility date was illusory because applicant needed to complete a sex offender treatment program which was not available. Wanted his parole replaced with a suspension and operational period.
- The evident intent of section 160D of the PSA is that each sex offender would be considered individually with respect to suitability for early release into the community.<sup>283</sup>
- There may be individual sex offenders where either the sentencing court or the parole board can be confident that the offender's rehabilitation can be undertaken satisfactorily in the community by participating in personal or group therapy to address the offending behaviour and its causes (with Lloyd being an example).<sup>284</sup>
- But here, applicant identified no available treatment in his region and he had blatantly disregarded bail conditions. His late plea of guilty did not make him an obvious candidate for release prior to undertaking some treatment.<sup>285</sup>

*R v Goodall* [2013] QCA 72

- Application for leave against sentence (allowed, primarily on basis that the sentence was manifestly excessive because it lacked proportionality with other cases).
- Pleaded guilty to sexual offences. Eligibility date set at one third. Appeal based on timing of parole eligibility date and whether a suspended sentence was more appropriate.<sup>286</sup>
- It was significant that the court was not assured that the applicant would be in a position to receive any psychological or psychiatric treatment while in prison during the balance of his term in actual custody. The availability of relevant programs varied from prison to prison, as does the timing of programs during the year.<sup>287</sup>
- A prison-probation order was imposed, with a special condition that he submit to psychiatric or psychological treatment as may be directed by a corrective services officer.<sup>288</sup>

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**Recommendation 2**

***The council recommends adding a section to the Penalties and Sentences Act 1992 (Qld) giving judicial officers discretion to order additional requirements of a parole order (including to submit to medical, psychiatric or psychological assessment) when ordering a parole release date.***

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## Transmitting court reports to QCS

It is not uncommon for sentencing judges to order that a psychological or psychiatric report tendered by defence counsel be provided to QCS after sentence.

There are some legislative provisions which deal specifically with reports not produced by the defence. However, it appears that this power is an inherent one used by the court, augmented by the consent of the defence, which almost always produces and tenders the report.

As the QDPP pointed out, 'the prosecution may seek further assessment on a voluntary basis, or may itself apply for an order that the defendant be examined'.<sup>289</sup> A court can, on its own initiative and prior to sentence (in contemplation of a trial or pre-trial hearing), also order psychiatric or other medical assessment examination of the accused.<sup>290</sup>

Section 15 of the PSA states that, in imposing a sentence on an offender, a court may receive any information that it considers appropriate to enable it to impose the proper sentence. Section 344<sup>291</sup> of the CSA states the chief executive must prepare a pre-sentence report for a court about a stated person convicted of an offence, when required to do so by the court. The court must give a copy to the prosecution and defence and may order the report, or part of the report, not be shown to the convicted person. The report must be returned to the court before the end of the proceedings.<sup>292</sup>

QCS advised that sometimes a judge makes an order for case files to accompany the offender. However, in the absence of an order, it can take QCS a long time to obtain them. Psychological and psychiatric reports produced for sentencing often include collateral reports on family and comorbidity issues, and because this information is often invaluable for QCS, it is desirable that such reports be shared with QCS. QCS also advised that sentenced offenders may be referred to the same clinician they were seeing prior to being sentenced.

The council suggests that the Heads of Jurisdiction consider implementing recommendation 3 by means of practice directions specifically addressing the manner in which orders for provision of exhibits such as defence reports are made. The underlying objective in this recommendation is to assist with matching treatment to risk needs and to act as a baseline to assess risk towards the end of a prisoner's sentence. This will guide planning for community reintegration. The provision of reports can provide potential benefits for prisoners as well as corrections and the parole board, to demonstrate more robustly any changes that may have resulted during the course of incarceration or treatment.

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**Recommendation 3**

***The council recommends sentencing judicial officers order that any medical, psychiatric or psychological assessment or treatment reports submitted as part of CEM court cases be referred to Queensland Corrective Services to support rehabilitation efforts.***

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## Summary

This chapter summarised the key legislation regarding sentencing CEM offenders. The PSA sets purposes for the Act itself, as well as the Queensland sentencing process. It mandates broad sentencing criteria which a court is to consider, as well as specific overriding sentencing factors applied to particular crime types—including contact and CEM offending.

These specific groupings of sentencing factors have legislative histories that explain differences in their current provisions and reflect the differences in the nature of the offences to which they apply. Coupled with the existing social science research, these demonstrate that it cannot be assumed that a CEM offender is at risk of contact offending by virtue of being a CEM offender.

A body of intermediate appellate court case law has developed for CEM sentencing across Australia. It complements the PSA and Commonwealth *Crimes Act 1914*, which is also applied by Queensland courts in sentencing Commonwealth CEM offenders.

Recommendation 1 would expand the scope of section 9(7) of the PSA to better reflect the wide range of material involved in CEM offending and to legislate factors, already recognised by courts in appropriate circumstances, that are highly relevant to sentence (an offender's relationship to the child, where there is one, and the offender's interaction with the material).

Sentencing statistics reflect the very wide degree of material and behaviour that constitutes CEM offending. The majority of CEM offenders are sentenced to an order of imprisonment, with most receiving wholly or partially suspended prison terms.

Criminal practice issues are very important to timely and just CEM sentences and court processes. Classifications and associated reports are useful, and their significance is partly due to a lack of other evidence provided to prosecution bodies. They are not enough information by themselves, and are supplemented by schedules of facts containing further information. Meaningful progress of files through the court system can be stalled until these documents are produced.

Schedules of facts can also offset the need for judicial officers to view samples of CEM when sentencing offenders. There are mixed views about whether this can or should always be the case. There is great value placed on judges viewing material by many stakeholders, although this practice also means that lawyers may need to view the material as well.

An offender will be sentenced on the basis of details provided to the court. This has ramifications back through the process, from prosecutors to investigators, and is a matter to be considered from the initial stages of an investigation.

There are opportunities to expand on, and clarify, the role of sentencing judges in making orders regarding an offender's interaction with QCS after sentence. If a court can fix a parole release date for a sexual offender, further legislative amendment could allow the court to order rehabilitative programs as a condition of the parole order at sentence. Further, practice directions could be created regarding provision of reports used at sentence to QCS for use during the offender's sentence.

## Chapter 4: Classification of child exploitation material

Chapter 2 acknowledged the Oliver scale has for some time assumed a central role in the classification of CEM for Queensland courts.<sup>293</sup> This chapter describes the approach to classification used in other Australian states and territories, and provides an analysis of why Australia does not have a consistent national scheme.

It continues with a description of the shortfalls of the Oliver scale for classification, and outlines a range of alternative approaches used in other Australian jurisdictions and internationally. The chapter concludes with an overview of random sampling, its use in NSW and Victoria, and whether random sampling is suitable for Queensland.

### Australian context

While Australian police jurisdictions, and different agencies within jurisdictions, refer to their respective classification regime using various terms, they all mirror the nine categories associated with the Oliver scale adopted and modified by Queensland.

Table 4 outlines the current terminology used in relation to the classification approach adopted by each Australian state and territory. It shows the Child Exploitation Tracking System (CETS)—software that facilitates the storage and collation of images in line with the Oliver scale (described further below)—is used in:

- SA
- Victoria
- Tasmania
- NSW
- the ACT
- the Commonwealth

whereas Queensland and the Northern Territory (NT) both use the Oliver scale, and WA uses the ANZPAA<sup>294</sup> Child Exploitation Material Sentencing Classification Scheme.

Two jurisdictions—WA and NSW—are currently in the process of reconsidering their classification approach. On 1 April 2017, NSW commenced a six-month trial of a four category classification scheme based on the INTERPOL International Classification Scheme, while WA Police advised the council it is currently examining its policy on child exploitation material.

The council learned the decision to consider alternative classification approaches in both jurisdictions was due to similar issues identified in this review, such as observable delays associated with classification and the consequential flow-on effects to prosecution and sentencing, and the need to promote officer welfare and victim identification—see below.<sup>295</sup>



**Table 4: Current classification terminology used by Australian jurisdictions**

Jurisdiction	Current terminology
Queensland	Oliver 9-point scale
South Australia	CETS 9 category scheme
Victoria	CETS 9 category scheme
Northern Territory	Oliver 9-point scale
New South Wales	CETS 9 category scheme <i>As of 1 April 2017, NSW has launched a 6-month trial of the 4 category INTERPOL International Classification System</i>
Western Australia	ANZPAA Child Exploitation Material Sentencing Classification Scheme: 9 category scale <i>Currently under review</i>
Tasmania	ANVIL/CETS Scheme
ACT	ANVIL/CETS Scheme
Commonwealth (AFP)	ANVIL/CETS Scheme

Source: Targeted consultation with jurisdictional law enforcement and prosecutorial bodies.

## Australia's failed national solution

The degree of consistency highlighted in Table 4 is likely to be a legacy of a 2005 agreement by the then Australasian Police Ministers' Council (APMC) to implement a harmonised classification and sharing approach, proposed following a landmark Australian investigation, Operation Auxin.<sup>296</sup> Operation Auxin was part of a broader global CEM investigative effort, referred to as Operation Falcon, which culminated in more than 6600 people being arrested. This investigation marked a maturation of child exploitation offending, in particular the scale and global reach of the identified offenders, CEM collections and organised networking.<sup>297</sup> In the Australian context, Operation Auxin identified 720 people of interest, resulting in the arrest of more than 200 people, and seizure of more than 10 million CEM images.<sup>298</sup>

Operation Auxin exposed the state, national and international challenges of these offences. These challenges confirmed that issues raised in a 2001 assessment by the then Australian Bureau of Criminal Intelligence were still relevant.<sup>299</sup> That assessment scoped the current and projected scale of online CEM, stating there was a clear and prioritised need for coordination and cooperation at national and international levels.<sup>300</sup> At the same time, social science researchers and law enforcement agencies were building a stronger understanding about offenders and their behaviour, the use of technology to facilitate these crimes, the psychological impacts on investigative staff, and law enforcement practice and techniques.<sup>301</sup>

In response, the then CrimTrac (now amalgamated under the ACIC) initiated a national project to establish a national child abuse image library. It aimed to address persistent challenges that had been complicating attempts at cooperation and coordination at state, national and international levels by harmonising jurisdictional approaches to classifying CEM and information sharing.<sup>302</sup> QPS was selected to represent all state and territory jurisdictions on the project team.<sup>303</sup>

In 2010, the Australian National Victim Image Library (ANVIL), supported by CETS, was launched as the national solution. Specifically, ANVIL/CETS aimed to reduce investigator exposure to CEM, deliver time savings, enhance victim identification, reduce double-handling by investigators across jurisdictions, and provide a consistent platform for Australia's contribution to growing international collaborations against such offending.<sup>304</sup>

CETS was developed under a collaborative partnership between a Canadian police agency and Microsoft.<sup>305</sup> CETS is a central server, designed to facilitate the storage and collation of images in

line with the adapted Oliver scale.<sup>306</sup> To meet Australia's operational connectivity needs, additional aspects were added to the CETS commercial off-the-shelf product.<sup>307</sup> Standardising jurisdictional classification approaches was a fundamental prerequisite for achieving the full extent of the potential benefits of the ANVIL/CETS solution. Consequently in 2010, the APMC agreed to the ANVIL Categorisation Scheme, which replicated the adapted nine-category Oliver scale.<sup>308</sup>

The 2010 APMC agreement acknowledged a significant amount of CEM encountered was not new, but persistently recirculated across networks, sites and offenders. The council's review revealed specialised software systems have the potential to deliver immediate benefits for law enforcement agencies tasked with analysing and classifying seized CEM, and presenting this information to court. For example, material can be immediately eliminated if the resolution is too poor for analytical purposes, is a duplicate copy, has been previously categorised as a result of an earlier investigative effort, or is ignorable. This capacity can deliver time savings by:

- quarantining ignorable, duplicate or pre-categorised material, enabling a focus on new material
- enhancing officer wellbeing by reducing double-handling
- promoting victim identification efforts by directing resources consumed by classification
- assisting in court-related information by timely reporting along pre-formatted criteria.

Combined with effective forensic analytical software, law enforcement and software architects project a cumulative reduction in manual review and workload for officers at the classification stage of approximately 80 per cent.<sup>309</sup>

Despite national agreement, the ANVIL/CETS solution failed to gain traction. At a practical level, there was no uniformity in the way jurisdictions participated in ANVIL/CETS, with some jurisdictions making limited contributions to the national library.

The inadequate number of updates to jurisdictions from the central repository confounded the promised reductions in double-handling. Ongoing legislative, technology and resource restrictions within each jurisdiction also precluded full engagement.<sup>310</sup> Microsoft officially stepped back from its direct involvement in CETS in 2013,<sup>311</sup> and Commonwealth and state agencies have now acknowledged the proposed ANVIL/CETS national solution is no longer viable.<sup>312</sup> In its last annual report as a discrete agency prior to amalgamation into the ACIC, CrimTrac stated it planned to 'commence the business case for the replacement of the current [CETS] in 2016–17'.<sup>313</sup>

In May 2017, the AFP suggested it will implement the US-led initiative Project VIC<sup>314</sup> in Australia, although it is too early to know how it will be rolled out.<sup>315</sup> The AFP's advice indicates it plans to use a sharing platform called Hubstream<sup>316</sup> to facilitate the mutual exchange of hash sets according to the previous ANVIL categorisation system (Oliver scale), but will move to a four-category scheme based on the INTERPOL International Classification System in phase two (see Table 6, p.66).

The AFP advises it will commence liaison with states and territories in the near future. In the intervening period, individual state and territory law enforcement agencies are continuing to address CEM offending in line with their respective capacities and priorities, including hardware and software architecture. While cooperation has ensured coordinated efforts have continued, the identified factors driving the need for the original ANVIL/CETS solution still persist, and have in fact expanded. Further discussion about technology solutions and opportunities is provided in Chapter 5.

## Shortcomings of the Oliver scale for classification

Unpacking Australia's previous attempt to establish a national solution to support cooperation and data sharing at national and international levels provides critical learnings for the council. The domestic experience, combined with knowledge from other jurisdictions, informed the council's assessment of the Oliver scale's effectiveness and ongoing suitability to meet the needs of all agencies within Queensland's criminal justice system.

Classification serves a number of complementary functions in the criminal justice system. Its core purpose is to provide an objective system to assess the seriousness of CEM. That objective assessment is then used by police, prosecutors and the courts for different, but complementary

functions. Figure 10 provides a brief illustration of the role of classification within Queensland's criminal justice system.

**Figure 10: The role of classification in Queensland's criminal justice system**



The council spent considerable time during consultation coming to an understanding of the various approaches to CEM classification for two reasons. First, the practical application of classification is a central focus of the terms of reference. Secondly, the reach and growth of this offending logically infers that other jurisdictions would have, or are faced with, similar challenges and tensions as Queensland.

With these considerations in mind, all Australian police and prosecution agencies, as well as various representatives in New Zealand, the United Kingdom, Canada and the United States, were consulted. The council asked about the classification approach used in their respective jurisdictions, and for an outline of how it is used in subsequent criminal justice processes.

This revealed classification is, or was, a contentious topic in all jurisdictions. Importantly, irrespective of jurisdiction, common themes emerged about the tensions or catalysts for change. The council found most jurisdictions identified the following challenges:

- diversion of finite law enforcement resources away from victim identification
- insufficient detail provided to support court processes and sentencing
- excessive time delays

- subjectivity in classification outcomes across officer, unit and agency levels
- officer wellbeing
- a need to reduce the duplication of effort
- questions about the utility of classification to influence sentencing given the required resource investment.

These themes are consistent with the issues identified in the QOCCI report which that triggered these terms of reference and the subsequent review. Several of these issues are expanded below, with additional issues that have been identified by the council.

## Oliver's effectiveness

Despite no legislative requirement for police to undertake classification, the Oliver scale has assumed a central and ongoing role in the criminal justice response to CEM offending in Queensland. However, the council heard varied opinions among agencies about classification and the effectiveness of the Oliver scale as the appropriate tool.

For example, law enforcement submissions noted the nine categories of Oliver (or CETS) increased classification time and subjectivity.<sup>317</sup> QPS is of the view the Oliver scale is no longer effective for several reasons:

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*The current volume of material being seized by police requires significant resources to view each and every image/video and then categorise into one of nine categories, six of which relate to a differing type of CEM. The extensive quantity of images/videos to be viewed inevitably diminishes the officer's ability to identify new or self-produced material which could lead to successful victim identification. Key issues which impact on the QPS ability to maintain this level of output include:*

- *the psychological wellbeing of investigators is placed at significant risk*
- *the ability of an investigator to identify images produced by the suspect will diminish proportionately to the volume of material required to be examined*
- *the skill of investigators in recognising victims, background features and offenders amongst a large volume of images is variable*
- *the process of viewing images seized is time consuming and drains the valuable investigative resources of agencies.*

### QPS

*Theoretically, categorisation of CEM has been utilised by the courts to assist in sentencing of offenders, providing an indication of the perceived seriousness of the offence which is based on the number of images, type of image and possibly age of the children. However this quantitative assessment is not necessarily supported by research (Elliot and Beech, 2009; McCarthy, 2010; Briggs, Simon, and Simonsen 2011; Marshall, 2000) which reflects other factors such as length and type of collecting, proximity to victim and self-production as factors indicative of serious offending behaviour.*

### QPS

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The council analysed the efforts of other countries to introduce alternative approaches to classification:

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*Project VIC has consulted with several countries about the subjective issues, error rates and long term sustainability of categorization schemes. We feel Canada, Sweden, Romania, Switzerland and the United States now have classifications tweaked for legalities, performance in the field, and risk reward issues. These new Category Schemas are all under (4) category choices.*

**Rich Brown, Project VIC**

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On the other hand, prosecutors and judicial officers advocated for ongoing use of the Oliver scale:

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*Unless other detailed and helpful material is included in the brief of evidence, such as detailed computer analysis, the C4All report assumes a remarkably large significance in the prosecution of these offences. It becomes the only real yardstick by which the objective criminality can be assessed ... The objective assessment of the criminality afforded by the more detailed 'Oliver scale' is considerably more desirable than what is effectively a two category scale underlying the INTERPOL scale.*

**QDPP**

*The classification is used in every instance where an offender is sentenced ... [it] forms an integral part of the information and facts placed before the court. The information will be taken into account by the judicial officer tasked with sentencing. At each sentence an explanation of the various classification levels is provided to the court.*

**CDPP**

*The [Oliver] scale has provided a useful guide to classification and has been accepted in this State for many years.*

**Judge Robertson, District Court of Queensland**

*I regard the so-called Oliver Scale as being of fundamental importance to the sentencing process. The nature of the CEM is of obvious relevance to assessing criminality and the Oliver Scale provides a useful tool in identifying the nature of that material. Moreover, to now dispense with the Oliver Scale may tend to make obsolete many of the comparable decisions frequently relied upon in sentencing proceedings. It is my view that the Oliver Scale provides a very useful general reference point and I am unable to suggest any worthwhile alternative.*

**Chief Judge, District Court of Queensland**

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Queensland's broader legal community appears to adopt a middle ground on the use of the current Oliver scale, acknowledging the onerous burden it places on law enforcement as primary classifiers, yet also appreciating its contribution to sentencing through the provision of detail about a defendant's collection:<sup>318</sup>

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*We would support a simplification of the Oliver scale. A truncated Oliver scale that recognised the present categories 4 and 5 separate to each other and to other images could be considered. ... Careful consideration would need to be given to the system of classification adopted to ensure that whichever system is adopted is properly suited to the task of sentencing ... Our view is that the Oliver scale represents the more comprehensive method by which CEM is identified without needing to expose a larger pool of people to the material. That larger pool would include judicial officers, defence lawyers and officers of the ODPP. The scale provides an objective and appropriate scheme of classification which is well suited to court purposes.*

**LAQ**

*In the Association's view, the impact of the current CEM process on defence practitioners may not be as great as on law enforcement and prosecution personnel. Our members do not regularly rely on the categories or report provided, rather they have the option to view the material as required and form a defence around the evidence. As long as our members continue to have the option of viewing all CEM in order to determine the description's nature and extent of the material, then the method of collating is not of great concern to us ... Judges rely on this data [classification information] in sentencing; however, this is not the only consideration. The scale is able to guide the judge on the types of content and the quantity of each category ... The use of categories in sentencing ensures consistent understanding.*

**BAQ**

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*Classification of CEM serves an important purpose. Crucially, it offers an indication of the objective seriousness of the material and informs sentencing decisions for judicial officers. The Society is of the view that the current nine point Oliver scale should be revised and simplified. The Society believes there is merit to the view that the growth of the scale from five to nine categories has created a more time intensive and subjective classification process. In consideration of this, the Society suggests that categories 7, 8, and 9 on the adapted Oliver scale be consolidated a single category named 'Related non-illegal material', similar to category three of the Interpol categorisation system.*

**QLS**

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## Finite resources

In Queensland, QPS is the primary agency responsible for the investigation of crimes against children. In its submission, QPS indicated victim identification remains its primary focus in CEM investigations, which involves 'looking for clues contained within an image or through associated metadata'.<sup>319</sup>

During consultation, the CCC and QPS both reiterated that classification using the Oliver scale diverts attention away from victim identification efforts, and that these functions are sufficiently specialised that they cannot be undertaken concurrently. Both agencies were also concerned file volumes per investigation continue to increase. Following the forensic processes outlined in Chapter 2, all seized files are reviewed to identify any possible CEM files, as well as against the Queensland hash set library. Any CEM image or video new to the Queensland database is then reviewed manually by an investigator for classification against the nine categories under the Oliver scale.

These concerns were similarly raised and discussed during the 2015 QOCCI: '[f]or law enforcement agencies, that task [classification] takes resources away from victim identification and the priority of rescuing those children from further harm. For the QDPP, the time taken by police to classify the images and video files often means delays in prosecuting offenders'.<sup>320</sup>

Prioritising victim identification over classification during CEM investigations, and an inability to undertake these functional responsibilities concurrently, was echoed by all law enforcement agencies consulted:

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*[C]hild sexual abuse material consists of images or movies that are created during the commission of a crime against a child ... In seeking to combat this crime, INTERPOL promotes an approach that focuses on identifying the victims and removing them from further harm. The specialist field of victim identification involves the analysis of child abuse images and videos for clues on the location where the images was produced—the most significant step towards identifying the victims, as well as their abusers.*<sup>321</sup>

**INTERPOL**

*Reliance on the scale and classification of images within the scale has led to a shift in focus on the seriousness of images, rather than an assessment of an offender's risk to the community. It also leads to a focus for investigations in assessment and categorisation of images to the detriment of other areas of policing, such as victim identification.*

**CCC (submission to the QOCCI 2015)**

*[W]e basically don't categorise the material for the same reasons as the member countries do from a judicial perspective. Our aim is primarily to identify children so categorization isn't our core task.*

**INTERPOL**

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Notably, submissions from the legal sector echoed the importance and priority of victim identification, and there was a strong willingness to consider new approaches to aid police with this critical work:



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*[t]he society acknowledges concerns that the classification of CEM can divert attention toward the categorisation of images and away from an assessment of the offender's risk to the community and victim identification. In our view, the classification of images should not be prioritised over these other important aspects of investigation and prosecution.*

**QLS**

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In 2016, QPS hosted a meeting between Australian law enforcement agencies, during which unanimous agreement was reached to simplify the existing classification systems. Law enforcement regarded this approach as the solution to ensuring victim identification was retained as the priority. Australian police, like their international counterparts, have indicated a preference for an international categorisation scheme comprising:

- INTERPOL Baseline category
- Jurisdictionally defined CEM category
- investigative interest category containing legal images which are related to the victim or potentially contain investigative clues to aid victim or offender identification efforts
- ignorable category.<sup>322</sup>

Strongly linked to the tension between classification and victim identification is the use of CEM hash set libraries or databases. Law enforcement agencies in Australia and overseas contribute to global databases of CEM file hash sets. Cross-referencing CEM seized in Queensland with hash sets within these repositories reduces the need to review an already classified image or video, and helps to prioritise victim identification by quarantining new files.

An inability to scan seized images against established datasets or libraries in other jurisdictions precludes these benefits. This issue has informed the council's suite of recommendations.

### Offender risk of contact offending or reoffending

The Oliver scale was not designed to assess or predict the extent to which an offender may offend, or the likelihood of whether or not the offender will reoffend. As noted in Chapter 1, the Oliver scale was derived from the COPINE scale, which comprised 10 categories of pictures.<sup>323</sup>

The COPINE typology is described as a continuum of increased deliberate sexual victimisation.<sup>324</sup> The original advice from SAP to the Court of Appeal of England and Wales identified two primary factors it considered should determine the seriousness of a CEM offence for the purpose of sentencing:

1. the nature of the indecent material (from images depicting nudity or erotic posing to those involving gross assault of children by adults, sadism or bestiality)
2. the extent of the offender's involvement with the material (ranging from possession for the offender's personal use to the original production of the images or wide-scale commercial distribution).<sup>325</sup>

The England and Wales Court of Appeal agreed with those factors in determining seriousness of a particular offence for the purpose of sentencing in *R v Oliver*. Specifically, the court assessed the nature of the indecent material according to the classification scale, and the extent (referred to as 'nature') of the offender's involvement ('activity') as increasing in seriousness with the offender's proximity to, and responsibility for, the original abuse.<sup>326</sup>

A review of the COPINE Project research findings reveals the primary intention of the COPINE scale was to identify new material, and to progressively guide law enforcement and judicial officers in the assessment of the nature of seized collections, and the implications this might have for both the investigative process and determining the severity of the offence.

The reviewers' findings indicated collections of child pornography are not accidental; they result from deliberate choices by an individual to acquire sexual material. They noted the sexual or erotic nature of the images lie in both the objective qualities of the material itself, and in the mind of the

collector. Furthermore, they asserted it is reasonable to assume the collecting choices made reflect in some sense the 'value' to the individual collector of the material they have access to:

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*Whether or not these choices in any way predict or influence subsequent behaviour (in terms of further collecting, making contact with others with similar interests, seeking out children to assault, and so on) are far from clear but are deserving of further investigation. A central issue here is the better understanding of the processes of collection, the factors that influence collecting behaviour, and the relationship between collecting and the collected material.<sup>327</sup>*  
**COPINE Project**

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Victimisation was a central topic of focus for the COPINE Project. They described their typology as a continuum of increased deliberate sexual victimisation, asserting that any particular example of a photograph attractive to an adult with a sexual interest in children could therefore be located along such a continuum of explicit or deliberate sexual victimisation. This continuum ranged from everyday and perhaps accidental pictures involving either no overt erotic content, or minimal content (such as showing a child's underwear) at one extreme, to pictures showing actual rape and penetration of a child, or other gross acts of obscenity, at the other. Taking this perspective focuses attention not just on illegality as a significant quality of pictures, but on the preferred type of picture selected by the collector.

They asserted that such a continuum enables the construction of a simple grading system that is of value in characterising collections, and also offers a more discriminating approach to indicate the qualities of a collection. They asserted that it may also contribute to improving knowledge of the factors that enable and sustain offender behaviour as the relations between collecting behaviour and the picture material become clearer. They believed that approaching a photographic collection of an adult with a sexual interest in children in this way may assist in developing a more discriminating approach to the management of offences by both law enforcement agencies and the courts. They emphasised that whether a picture is accidental or deliberate, each time a picture is accessed for sexual purposes it victimises the individual concerned. In a sense, the function of picture collections for the offender is repeatedly to victimise the child concerned, and the victim status is exaggerated by continuing use.<sup>328</sup>

While the COPINE Project's approach to conceptualising picture collections and child pornography in terms of a continuum emphasises the sense in which they viewed the sexualisation of pictures as being a psychological process,<sup>329</sup> they did not establish or assert links between the nature of the indecent material, the extent of the offender's involvement with the material, and the likelihood the offender will reoffend, or to what extent.

Specifically, this scale was designed to decisively 'classify material which is the subject of charges',<sup>330</sup> and was not designed or intended for purposes beyond a taxonomy linked to severity of charges.

Decision-making about any actual or potential risk the offender may pose should rely on risk assessment instruments that are robustly linked with the behaviour being assessed and valid for use with the relevant offender population.<sup>331</sup>

An assessment of risk should identify what risk factors predict which person will commit the particular kind of act being assessed, within a specified time period, under what circumstances, and to what extent.<sup>332</sup> It is clear the Oliver scale does not produce the type of outcomes that meet these content-specific and context-specific requirements. The authors of the COPINE and SAP scales did not purport to make predictions about risk, based on their continuum.

The QOCCI noted that attributing an assessment of offender dangerousness based on classification results using the Oliver scale was too simplistic.<sup>333</sup> While images classified as category 4 or 5 are more explicit, this 'elevates criminality rather than the indeterminate, or indeterminable, risk that the offender might pose a risk of contact offending'.<sup>334</sup> While categories 1 to 5 in the Oliver scale are characterised in ascending seriousness,<sup>335</sup> category 1 material (erotic posing without sexual activity) should not be considered 'mild in content'.<sup>336</sup>

As part of its complementary research, the council analysed a number of sentencing remarks for CEM cases which revealed that, at times, assumptions and inferences were made about seriousness based solely on the classification of material into categories. For example, in a 2016 Victorian Court of Appeal case, the Victorian and Commonwealth DPPs jointly argued that the sentencing judge placed undue weight on an offender possessing mostly category 1 material, without adequate analysis of the nature of the material, and suggested a large number within that category fell within the 'higher end of category 1 offending'.<sup>337</sup> The majority judgment stated:

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*The fact that the material accessed by the respondent was largely level 1 material did not detract from the gravity of the offending. The caution which must be exercised when assessing the objective gravity of offending by reference to the categorisation of material in child pornography cases has been stated by appellate courts in a number of cases.*<sup>338</sup>

**DPP v Garside**

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There are 'dangers' in giving too much emphasis to categorisation:

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*An assessment of the objective gravity of offending by reference to the categorisation of images and videos may lead to salient subjective features of the offending being given insufficient attention. There will be varying degrees of seriousness of the images within each particular category ... It is necessary to ensure that the absence of material in higher levels of classification, does not unconsciously result in a minimisation of the objective gravity of possession of lower level categories of material.*<sup>339</sup>

**DPP v Garside**

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Law enforcement agencies across jurisdictions, including Queensland, suggested it would be incorrect to immediately assume classification provides an accurate reflection of, or insight into, an offender's dangerousness. This is particularly the case if classification is considered in isolation from other information about the offender's role.<sup>340</sup> QPS provided a hypothetical example to illustrate this point. An offender may amass a collection of predominantly category 1 images and videos, which may be perceived as less serious in comparison to other cases that include other Oliver categories. However, if the fictional offender's collection resembles a child known to them, is routinely accessed and involves significant effort to systematically catalogue those images, including attributing commentary to images, this should raise concerns about the dangerousness of the offender.<sup>341</sup>

The QOCCI also highlighted concerns that reliance on the Oliver scale has shifted focus onto an assessment of the seriousness of the images according to the ascribed category level, rather than an assessment of an offender's risk to the community and the need to protect children.<sup>342</sup>

As discussed in Chapter 2, research acknowledges a correlation between CEM and contact offending.<sup>343</sup> However, limitations associated with conducting research in this area preclude a definitive assessment about whether CEM is a gateway offence predictive of crossover or escalated offending.<sup>344</sup> The issue of whether or not this link exists remains an area of dedicated research. During the 2012 public consultation process preceding changes to the UK's classification process, the Sentencing Council for England and Wales acknowledged that, while limitations associated with classification exist, it still retains an important function within criminal justice processes, in particular for courts:

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*Image level alone does not give a complete account of the offender's behaviour. However the court can only sentence on what is before it and the Council believes that, despite the limitations around using image level, the severity of the sexual offence depicted in the image can be an initial guide to the harm that will have been suffered by the victim depicted. Given the challenges presented by the classification of images, the Council proposes the levels of images can be simplified further.*<sup>345</sup>

**Sentencing Council for England and Wales**

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The Oliver scale was intended for use in guiding sentencing based on the classification of material which was the subject of charges. It can provide information about the level of depravity of the material, and some information about the extent to which the offender was involved with the material (e.g. possession, making, distribution). Beyond that limited extent, the Oliver scale cannot be used to make predictions of current or future risk of reoffending or dangerousness.

Dangerousness is not determined as a fixed personal characteristic persisting across time and context.<sup>346</sup> Therefore, the assessment of dangerousness relies on a process that incorporates empirically validated actuarial measures as the foundation of an assessment of risk, combined with a structured consideration of valid dynamic risk factors, to assist in formulating the nature of the risk presented by the offender, and a management strategy to reduce such risks.<sup>347</sup> Ultimately, however, decisions about the best approach or instrument to use should be made in the context of the assessment setting, the characteristics of the individual being assessed, and the specific purpose of the risk assessment.<sup>348</sup>

## Time delays

The QOCCI identified issues relating to ‘the enormous amount of time’ needed by law enforcement to classify ‘each of the millions of images found in the possession of offenders’.<sup>349</sup> The report noted concern that the time required for classification affected the QDPP and CDPP by causing delays in prosecuting offenders and subsequent sentencing proceedings. At the time of the council’s review, delays remained a particularly contentious issue. In fact, all Australian prosecutorial bodies consulted identified significant delays as one of the most pressing challenges associated with this offending area:

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*The main issue confronting most CEM prosecutions is delay ... Anecdotally, the delay arises from the time taken to conduct forensic examinations of electronic storage devices and to classify images after a defendant has been charged. The delay in obtaining the results of such examination and classification exercises then creates the unusual problems associated with delay in the criminal justice system, such as:*

- *unproductive court events*
- *delayed or hurried exercise of prosecutorial discretion to discontinue or present further charges against a defendant; and*
- *delays associated with obtaining instructions from defendants ...*

*Beyond the issue of delay and delay related issues, LAQ does not have any specific concerns about the current CEM approach.*

### LAQ

*Lengthy delays are almost always experienced in the preparation of categorisation reports by QPS.*

### QDPP

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The prosecution process outlined in Chapter 2 demonstrated it is often at the committal point in proceedings that tension arises between the disclosure requirements of the court and the capacity of the investigating agency to have undertaken and provided its analysis of the entire material detected in the case.

While prosecutors can technically establish their case by proving only one CEM image, an accused person has the right to know the full extent of allegations against him, hence requiring the full collection of material to be classified and provided to the prosecution.

Further, as noted in Chapter 3, the QDPP advised at times there was such a dearth of material provided prior to committal that, in order to prove the existence of CEM (so that a prima facie case could be proven at committal and the charges survive being struck out), police simply provided a hard drive to the QDPP. QDPP staff were then required to access, analyse and view the raw material, with the potential for the defendant, defence lawyer and magistrate also having to do so.

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Generally speaking, the AFP will provide the CDPP with the relevant forensic report and associated classification with the full brief, obtained prior to committal. In relation to referrals from the Queensland Police, the results of classification or forensic examination reports are not provided until after the committal proceedings and in most instances shortly before presentation of the indictment. Currently, when the information is sought post committal it is not forthcoming before indictments are to be presented. There have been examples where the classification has not been conducted and/or reports not being provided prior to sentence hearings. As such proceedings have been adjourned for that purpose. On occasion, in order to expedite matters CDPP prosecutors have conducted the task themselves, although this is highly undesirable, and it is not envisaged this will occur in the future. Yes, significant delays ... In matters referred by the AFP, the delay is experienced in brief preparation. The largest factor in receiving a full brief of evidence relates to the provision of the forensic examination report and classification. Matters can be adjourned for significant periods awaiting the receipt of the classification and forensic reports.

#### **CDPP**

Ideally the results of the classification are provided to the Office of Public Prosecutions with the brief prior to the committal mention however, delays are frequently experienced in obtaining such results.

#### **VDPP**

It is most likely that the defendant will decide on their plea before the committal hearing. The defendant and their legal representative cannot do this without an understanding of the evidence to be relied on by the prosecution ... At the point of committal hearing, it is imperative that the defence have all the evidence to be relied upon including the CEM.

#### **BAQ**

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To better understand the impact of delays on prosecution, the council conducted a series of duration analyses, focusing particularly on the time between charge and sentence for all CEM cases sentenced by Queensland courts in 2015–16. The council examined the delay between three key stages involved in the process:

- time between charge and committal hearing
- time between committal hearing and lodgement of a matter
- time between lodgement of a matter and sentencing.

Table 5 indicates the median time from charge to sentencing for matters finalised in 2015–16 was 13.86 months, with a range of 26 days to 4.26 years. The analysis also revealed a median time of 5.42 months between police charging a defendant to the committal proceeding, with a range of 6 days to 1.62 years. These findings demonstrate that processing a defendant from charge to committal was disproportionately responsible for the overall time taken to finalise these matters over this period.



**Table 5: Duration analysis—CEM cases finalised in 2015–16 by Queensland courts, by stage**

Variable	Total number	Mean (months)	Standard deviation (months)	Median (months)	Minimum (days)	Maximum (years)
Charge to committal*	157	6.29	3.55	5.42	6.00	1.62
Committal to lodgment**	177	4.81	2.47	4.63	0.00	1.35
Lodgment to sentence	183	4.43	4.67	3.35	0.00	3.18
Charge to sentence	163	15.03	7.26	13.86	26.00	4.26

Source: QPS QPRIME database, Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted January 2017

\* Involves the classification of CEM by police

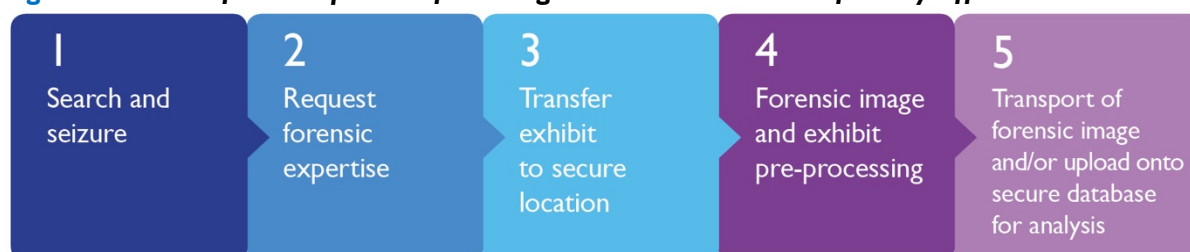
\*\* Where the matter involves an indictment, lodgment date is the date of presentation of the indictment

While analysis appears to confirm earlier assertions from key stakeholders that CEM classification delays a defendant's progression from charge to committal, it is difficult to definitively conclude that delays are solely due to the classification of material.

The council learned there are also delays during the investigation process, largely related to forensic analysis of seized devices. The forensic process undertaken by QPS is set out in Appendix 5.

Figure 11 details QPS's initial forensic process for seizing devices and copying content onto the secure SASDE<sup>350</sup> system, before provision to a dedicated officer for classification and investigation. This process is lengthy and administratively driven, and confirms that classification is only part of the overall delay problem. While the council appreciates there is no 'average' CEM seizure or case, it was disappointed to learn there is a lack of empirical information to demonstrate exactly what is causing the delay. This lack of data about these critical issues complicates any authentic visibility over this issue.

**Figure 11: Initial forensic process following exhibit seizure in the field by officers**



QPS identified some notable delays which require explicit mention:

- There is substantial disparity across the state in relation to time between seizure of a device and a request to EEEU for forensic expertise.
- Exhibits must be physically transferred to Brisbane for forensic processing onto the SASDE system. This process may involve transport to a secure location within a region before transfer on to Brisbane. Exhibit transportation is impacted by the physical distance between a seizure location and Brisbane, and availability of secure transportation mechanisms.
- Forensic processing onto SASDE may be delayed due to a range of variables, including EEEU's existing workload, multiple levels of encryption, corrupted files, a high volume of material, the number of devices involved and the type of data detected. Delay may also be caused when higher risk cases need to be prioritised.

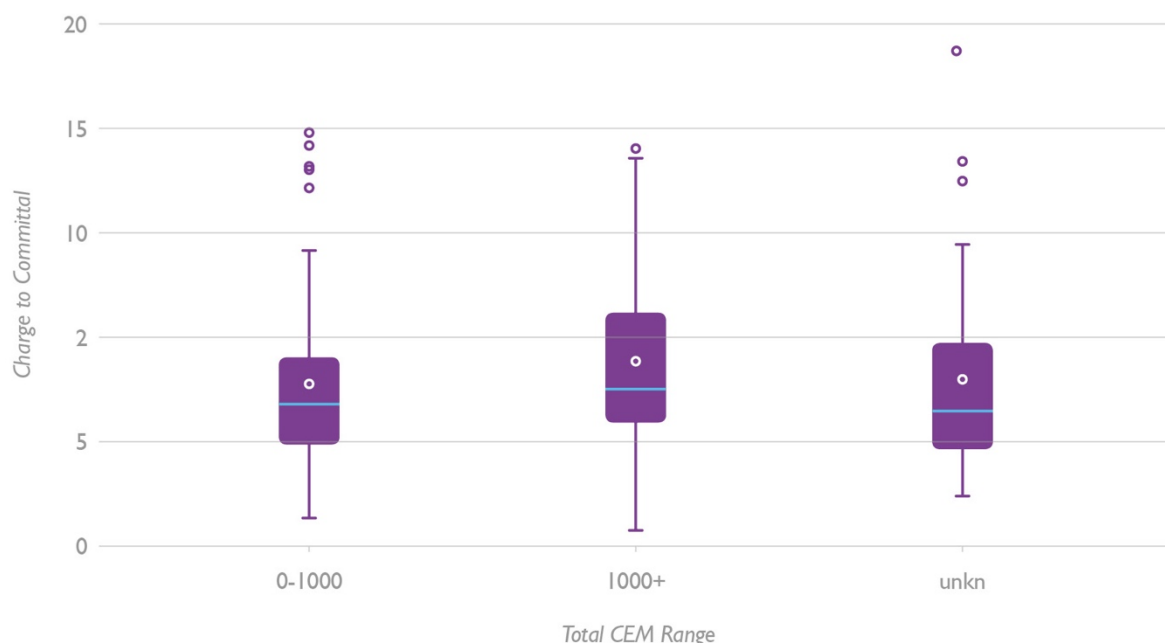
Irrespective of the inability to define or weigh factors responsible for delay between charge and committal, the council's analysis suggests any reduction in time during the initial stage has significant potential for reducing the time to finalise CEM matters in Queensland courts.



Given the continued increase in the volume of files typically seized in a CEM case, the council explored the relationship between the number of CEM files identified in a CEM case and the duration from charge to committal.

Figure 12 shows the time between charge and committal for CEM cases finalised during 2015–16, by the volume of CEM images. The analysis showed cases that involving more than 1000 CEM images took longer than matters involving fewer than 1000 CEM images. These findings highlight a secondary, yet equally critical issue about delay, that given the continued increase in the volume of files typically seized in a CEM case, it is likely that these delays will only increase if nothing changes. This analysis has contributed to the council’s consideration of a threshold process to help reduce delays, outlined in Chapter 5.

**Figure 12: Boxplot of the duration in months from charge to committal, for matters sentenced in 2015–16, by image volume**



Source: QPS – QPRIME database; Queensland Government Statisticians Office, Queensland Treasury – Courts Database, extracted January 2017

Note: For details on how to interpret the boxplot, refer to the Sentencing Spotlight technical information paper available via [www.sentencingcouncil.qld.gov.au](http://www.sentencingcouncil.qld.gov.au)

## Risk of error

When police seize devices, the electronic material must first be sifted through to determine which files are CEM. The CEM files are then classified into the nine Oliver scale categories.<sup>351</sup> Given the extremely large amounts of material that can be seized, this process requires significant police resources and time. Investigators must differentiate between six illegal and three non-illegal categories in terms of the nature of activities and the age of children depicted. QPS has a verification policy to mitigate risk that a file will be incorrectly classified. Verification requires agreement between two or more officers to the appropriate classification level of an image, video or written file.

In recognition of this resourcing impost and the imperative to examine potential savings, the council was specifically requested to ‘consider whether child exploitation material images that have already been classified in another jurisdiction should be able to be relied on by the courts when sentencing to reduce double-handling’.<sup>352</sup>

The council learned of classification errors at an individual officer level, investigative unit level, location level and agency level from law enforcement jurisdictions throughout the consultation

process. One law enforcement jurisdiction shared its analysis of findings from an assessment made under the ANVIL/CETS solution which revealed error rates of up to 26 per cent attributed to a range of factors, including:

- the complex range of possible categories under the nine-point classification tool
- differences in skill levels or training strategies of individual officers, as well as maintenance of these skills
- the range of jurisdictional (and sometimes competing) priorities.

This jurisdiction reported the error risks associated with the nine-point classification tool affected its confidence in relying on classification made by another jurisdiction for its own prosecutions.

Following an internal process, this particular jurisdiction reduced its internal error rate to one per cent. Interestingly, across all jurisdictions, legislative differences or definitional issues, including age, did not appear to cause as much concern for sharing across jurisdictions as classification error did.

At a May 2017 conference presentation, the AFP reported individual jurisdictions have now invested significant resources in establishing their own stand-alone systems to meet jurisdictional requirements.<sup>353</sup> This confirmed the council's own findings from Australian policing agencies that even when limited sharing was successful, the current Oliver-based classification scale was 'overly confusing and prone to errors and delays'.<sup>354</sup> Impediments to sharing hash set data, including classification results, completely undermine the utility of pursuing national cooperation. In its submission, Project VIC advised that 'error rates' and 'subjective issues' associated with classification tools involving too many categories was an international concern as well.<sup>355</sup>

Reducing double-handling by improving Queensland's capacity to rely on classifications undertaken in other jurisdictions has informed consideration of the council's recommendations in Chapter 5.

## Officer wellbeing

Concern about officers who are required to view CEM for investigative, classification, prosecution or defence purposes was discussed in the QOCCI report and during the council's consultation.

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*I accept without question that this task is unpleasant and possibly harmful.*

**Judge Robertson, District Court of Queensland**

*Given the distressing nature of the material in question, LAQ has occupational health and safety concerns in this area. In response to those concerns, LAQ has included in its Case Management Standards guidelines for handling child exploitation material (CEM). The Guideline was developed in accordance with other relevant best practice guidelines from the Queensland Police Service and the Office of the Director of Public Prosecutions (Qld).*

**LAQ**

*[T]here are potential adverse effects of exposure to large volumes of CEM ... [t]here is the potential to reduce intimacy with partners, disrupt relationships with children, and the latest diagnostic criteria explicitly allow for a diagnosis of Post-Traumatic Stress Disorder for people who have investigated child abuse (American Psychiatric Association, 2013). I can see no advantage to exposing people unnecessarily to CEM. Therefore, I would support mechanisms, such as sharing of classifications and the use of sampling, that limit exposure to CEM.*

**Professor Mark Kebbell, Griffith University**

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Both the LAQ and QDPP established internal guidelines for staff interaction with CEM, in response to QOCCI recommendations 4.2 and 4.3.<sup>356</sup> Reducing exposure to CEM is clearly an important aim of any regime adopted to manage and process this material.<sup>357</sup> The following illustrates the judicial sector's appreciation that classification processes can be particularly traumatic for officers.

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*It is to the enormous credit of the police officers who staff Taskforce Argos and other similar units of the police service around Australia and overseas, that they are prepared to continue to investigate these matters at what, I have got no doubt, is a significant amount of stress to them because being forced to deal with these sort of matters every day, day in, day out, must, itself be a very difficult and stressful part of being a police officer. So I commend them for their work.*

**R v Ironmonger (unreported, District Court of Queensland, Dearden DCJ, 23 September 2015)**

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Broader social science research also addresses the welfare impact of investigating and viewing this material. A 2014 study involving internet child exploitation investigators from all nine Australian police jurisdictions concluded ‘the average [CEM] investigator was not adversely affected by investigating [CEM] material, denoting resilience in the face of potential workplace stressors and challenges’.<sup>358</sup> However, the study warned that, despite this finding, CEM investigation should not be considered a risk free endeavour. Potential problems include: ‘negative emotional reactions (such as anger, sadness and disgust); discomfort interacting with children; reduced emotional and physical intimacy with partners; heightened awareness of the potential presence of child sex abusers; and symptoms of post-traumatic stress disorder (PTSD) such as intrusive recollections and hyperarousal’, with the possibility ‘for individual investigators to develop clinically significant levels of PTSD, depression and stress over time’.<sup>359</sup>

The 2014 study also interviewed a subset of 32 experienced CEM investigators from the nine Australian jurisdictions. This qualitative data indicated a variety of influences on investigator wellbeing, which was attributed to three factors:

1. selection of the most suitable applicants—for example, a background in criminal investigation (ideally with prior experience investigating sexual offences), computer literacy, emotional stability, good interpersonal skills and intrinsic motivation. The importance of intrinsic motivation offers a potentially important avenue for future research concerned with CEM investigator wellbeing. Investigators shared the common perception that CEM investigation is the most important law enforcement task they have ever performed. There appears to be evidence from both qualitative and quantitative studies that an important protective resource is the intrinsically high value placed on their work by the investigators. To date, however, the real world protective value of finding purpose in work as protection against vicarious trauma is underexplored
2. an ability to develop effective coping skills, which may vary between individual CEM investigators—influential coping skills included being willing to reciprocally engage in informal debriefings with colleagues, physical exercise, switching between CEM and non-CEM tasks and an ability to focus on the material as evidence<sup>360</sup>
3. characteristics of the CEM being viewed by investigators—for example, investigators reported higher distress viewing material which depicted victims under six years old, or where the difference in victim and offender age exceeded 20 years or involved signs of extreme suffering or, conversely, an absence of any signs of suffering. In addition, any resemblance between a victim and a child known to the investigator, and any violation of the social norms associated with sexuality and parenting, were also identified as factors increasing the likelihood of distress.<sup>361</sup>

When directly questioned about specific times of difficulty, all participants were able to discuss with researchers instances when they suffered either short- or long-term distress in response to specific images.<sup>362</sup> There was also recognition that individual CEM investigators may be the last to know they should discontinue an investigation. However, all participants believed they could identify when colleagues were no longer coping by observing work avoidant behaviours and personal changes (personality, appearance and behaviour). QPS has established significant policy mechanisms to reduce officer distress in this area, most notably pre-screening, opt-out provisions for officers, and a regime involving biannual or annual assessments by qualified support staff, depending on the extent to which an officer is involved in CEM investigation activities.

However, as the CDPP website states:

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*CEM cases can involve hundreds of thousands of depraved and disturbing images of children and the scale and seriousness of this industry poses challenges for investigation and prosecution ... Dealing with such material requires investigators, prosecutors and courts to hear or read stories of a disturbing nature and may involve viewing pornographic movies, photos and/or graphic material depicting explicit sexual acts involving serious harm to children. The CDPP has established an Employee Wellbeing Program designed to implement practical policies and guidelines to support employees who may be at risk of experiencing trauma as a result of exposure to potentially distressing materials.*<sup>363</sup>

**CDPP**

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## Compounding the violation of child victims

The council noted concerns that if classification is not completed in a timely manner by law enforcement, then more officers in the criminal justice system are more likely to be exposed to it. This may result in repeated and (possibly) unnecessary viewing by such officers (which may include forensic experts, prosecutors, defence representatives, court officers, jury members and judges), which ‘arguably compounds the violation and exposure of the child victims depicted in these images by further exposure and dissemination’.<sup>364</sup>

Children were exploited to create the images and videos, many of which record acts of child sexual abuse, and every time an image or video is viewed, a child’s trauma is perpetuated. One of the perpetual harms of CEM offences is ‘the publication of images of innocent children engaged in what ... they would prefer to have been kept private’.<sup>365</sup> The Tasmanian Court of Criminal Appeal, quoting an academic article, noted:

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*... the additional abuse to the child which is perpetrated by the distribution of images ... the child is debased in front of numerous people through the trade in such images and it keeps the images alive. It is not unusual for the police to find images that are tens of years old and thus when the police or other criminal justice agencies trace the adult, the feelings and trauma of abuse resurfaces.*<sup>366</sup>

**Director of Public Prosecutions v Latham**

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Ensuring classification is completed in a timely manner and results are reliable should reduce the need for others in the Queensland criminal justice system to view this material.

Given these issues, the council is of the view the Oliver scale may no longer be effective or suitable as a tool for law enforcement to use for presenting evidence to court in CEM cases.

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### Recommendation 4

#### **The council:**

- **acknowledges law enforcement agencies are unlikely to continue using the Oliver scale for classifying images involved in this evolving crime area**
  - **acknowledges the Oliver scale has limitations for law enforcement agencies including resource inefficiencies and diverting resources from victim identification efforts**
  - **recommends, if law enforcement ceases using the Oliver scale as its classification tool for CEM, it should adopt an effective alternative, such as the scheme outlined in recommendation 5 and supported by recommendation 6.**
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## Alternative classification approaches

The council was asked to ‘consider and review alternative classification systems’ that could replace the Oliver scale. This section provides an overview of three alternative classification systems: the INTERPOL International Classification System, the UK’s Sexual Offences Definitive Guideline and Canada’s three-category hybrid of the INTERPOL International Classification System.

### INTERPOL International Classification System

The INTERPOL International Classification System is a four-category system that differentiates between two types of illegal CEM and also incorporates non-illegal and ignorable images for their potential to provide ‘clues’ to identify victims and offenders (Table 6).

The INTERPOL Baseline (category 1) is used in a number of international jurisdictions because it identifies material that is illegal in all countries with CEM laws.<sup>367</sup> Law enforcement regards this INTERPOL Baseline material as ‘the worst of the worst’ CEM. The INTERPOL system retains an initial focus on a child’s age (13 years for the Baseline category), whereas the Oliver scale does not specify age.

**Table 6: INTERPOL International Classification System**

Category	Description
INTERPOL Baseline	Depicts real prepubescent child (under the age of 13 years approximately), and the child is involved in a sexual act, is witnessing a sexual act or the material is focused/concentrated on the child’s anal or genital region
Jurisdictionally defined CEM not classed as Baseline	Files that are illegal according to local legislation, either by way of age or content
Related non-illegal files	An image that forms part of a CEM series, but which is not in its own right illegal, although it may contain important clues or identifying information to assist investigations in relation to category 1 or 2 images
Ignorable	All other (legal) material which does not fit into categories 1–3

Given its application globally, the INTERPOL scale would facilitate Queensland’s integration with the approach taken in other countries, and therefore streamline access to pre-categorised material.<sup>368</sup> INTERPOL Baseline is used in conjunction with INTERPOL’s International Child Sexual Exploitation image database (ICSE DB).

Discussed below, the ICSE DB is used by 49 countries and Europol. QPS and CCC indicated to the council that this classification system would also reduce the time and subjectivity associated with using the current Oliver scale.

### Sexual Offences Definitive Guideline

The UK introduced the Sexual Offences Definitive Guideline in 2014.<sup>369</sup> The guideline was developed by the Sentencing Council for England and Wales, and involved extensive consultation with members of the public, judges, magistrates, legal practitioners, police from various districts, non-government organisations (such as the Internet Watch Foundation and the National Society for the Prevention of Cruelty to Children), victims, the Crown Prosecution Service, the Law Society and academics.

The Sentencing Council for England and Wales simplified the five-point Oliver scale into a three-category system to streamline classification and reduce the resource implications of the process (see Table 7).<sup>370</sup> Linkages exist between the Oliver scale categories and the new scale.

However, QPS advised that UK police still categorise associated and ignorable material into two further categories, resulting in a five-point scale.<sup>371</sup> The current UK system links to the Child Abuse Image Database (CAID), discussed below.

**Table 7: UK Sexual Offences Definitive Guideline**<sup>372</sup>

Category	Description	Oliver scale link
Category A	Images involving penetrative sexual activity Images involving sexual activity with an animal, or sadism	This category incorporates the former Oliver categories 4 and 5
Category B	Images involving non-penetrative sexual activity	This category incorporates the former Oliver categories 2 and 3  There is accordingly no longer a distinction between non-penetrative sexual activity between adults and children, and between children
Category C	Indecent images of children (under 18 years) not falling within category A or B <sup>373</sup>	This incorporates the former category I

In the UK, the CEM offences to which the guideline relates are known as indecent photographs of children, with children defined as aged under 18 years. In Queensland, a child, for the purposes of CEM offences, is aged under 16 years.

The guideline was designed to assist judicial officers with sentencing. Classification of the activity in detected material according to the three categories represents the ‘first step in a very prescriptive process’.<sup>374</sup> At this initial stage, the role of the offender according to each image is assessed against three additional categories (possession, distribution and production).

After this assessment, the most serious image will usually determine the overall category of the collection, unless it is ‘unrepresentative of the offender’s conduct’, in which case a lower category may be appropriate.

However ‘a lower category will not ... be appropriate if the offender has produced or taken (e.g. photographed) images of a higher category’.<sup>375</sup> The guideline involves nine steps, which mandate judicial consideration of predetermined offence categories, sentence category ranges, and aggravating and mitigating sentencing factors.

Heavily structured approaches to sentencing, such as the Sexual Offences Definitive Guideline, are not immediately transferrable to Queensland. The High Court of Australia has approved the ‘instinctive synthesis’ approach to sentencing, which precludes the use of sentencing guidelines.<sup>376</sup>

The council considered the suitability of the UK’s three-category system, however it is part of a complex guideline approach which is not applicable in Australian courts and is difficult to separate.

QPS was also critical of the UK system and regarded it as ‘too subjective’ and, because it applies to children under 18 years, it is unlikely to reduce time in preparing briefs for court.<sup>377</sup> QPS was of the view the UK three-category system does not easily connect with the ICSE DB.

### Canadian Classification System

Canada has adopted a three-category system based on the INTERPOL International Classification System. Canadian authorities tag hash sets with INTERPOL Baseline to ensure these files comply with the INTERPOL Baseline criteria when shared with the ICSE DB.<sup>378</sup>



**Table 8: Canadian Classification System**

Category level	Category description	Previous category
Child pornography	INTERPOL Baseline Other material illegal in Canada Comic/cartoon/anime	Child abuse material (CAM)
		Child exploitative material (non-CAM)/age difficult
		CGI/animation
Investigative interest	Indicative Discretion of the investigator Broken down into two parts, child nudity/age indeterminate, and any other relevant media file	Comparison images
Other material	Ignorable, non-pertinent	Non-pertinent
		Uncategorised

The approach taken by Canada enabled the council to examine how a jurisdiction moved from a previous six-scale tool to the more streamlined INTERPOL International Classification System. This has informed the council's recommendations contained in Chapter 5.

## Mechanisms supporting classification

There was strong support in submissions to the council for a national approach and investment in developing a consolidated database, both between domestic jurisdictions and overseas. Many agencies agreed with using a technological solution to enhance classification processes and reduce the burden on police to review every file.

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*I favour the recognition of accepted software programs as a means for making these assessments, and for reform to ensure that images need only be classified by one law enforcement agency.*

**Judge Robertson, District Court of Queensland**

*We can see benefit [sic] of a national classification system to simplify the existing categories and provide consistency across Australia. This would be extremely beneficial (sharing classification results) for cross-jurisdictional offences, will reduce misinterpretations and allow national consistency.*

**PACT**

*With the improvements in the capacity and transportability of the material/data there needs to be a network/system by which these can be matched for investigative and judicial purposes. Confirmation of such data should allow for further cooperation measures with all investigative authorities in Australia and overseas. Australia is one country and the borders of the states and territories should not allow for leniency or obscurity for offenders. Therefore it is important that information be shared of such results (classifications).*

**Private submission 2**

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## Hardware and software

Classification scales represent one part of an opportunity to reduce time, decrease officer exposure to material, and prevent the diversion of resources away from victim identification. Forensic and data analytics tools, such as Griffeye Analyze and BlueBear Law Enforcement Against Child

Exploitation (LACE) scan hash values of seized CEM images and videos and compare them with a database of previously encountered and classified hash values. Hash value technology, a unique numerical value considered a fingerprint for the image,<sup>379</sup> can match with seized files even if an image has been altered.<sup>380</sup>

Previously classified files can then be discounted for victim identification purposes, but are reliable for classification purposes. Double-handling is avoided and investigators can focus on classifying new images, and identifying as yet unknown children at risk. Reducing the number of times CEM must be viewed also has a positive outcome for investigator wellbeing, and reduces compounding the trauma of child victims.

A 2013 study of online CEM trafficking on the Gnutella peer-to-peer network using investigative 'RoundUp' software illustrates how many known CEM files are encountered by law enforcement. The software was programmed to recognise hash values of CEM images and videos identified in previous law enforcement investigations. Of the 384,000 CEM files RoundUp software could recognise, RoundUp observed 139,604 (36%) being shared worldwide on the Gnutella network, with 244,920 US computers sharing known CEM files.<sup>381</sup> A key finding of the study was the demonstrated benefit of the RoundUp software to identify CEM on the network.

Using hardware and software common across jurisdictions could deliver significant benefits in improving timeframes for prosecutions and reduce investigator workload. Applying a consistent scale for classifying images would also support a 'consistent pattern of sentencing in relation to each grade of seriousness'.<sup>382</sup> As the Queensland database expands, the benefits increase for both national and international investigations.

Below is a description of some software being used in jurisdictions in Australia or overseas to classify CEM more efficiently.

### **NetClean Analyze/Griffeye Analyze**

The QOCCI report noted QPS hoped NetClean Analyze would replace CETS nationally.<sup>383</sup> Founded in 2003, NetClean Analyze (now called Griffeye Analyze) describes itself as developing 'leading technology solutions' that are 'used worldwide by multinational companies, government agencies and internet service providers to fight child sexual abuse material'.<sup>384</sup>

QPS is currently testing Griffeye Analyze to assess whether it is suitable for Queensland. Initial findings indicate a capacity to classify images at four times the current rate, which would significantly reduce investigative timeframes and significantly increase opportunities to identify previously unknown child victims.

### **BlueBear Law Enforcement Against Child Exploitation**

Used by 49 law enforcement agencies throughout the world, BlueBear Law Enforcement Against Child Exploitation (LACE) offers a purpose built forensic tool that reduces manual review of CEM by:

- extracting files from devices, categorising seized material against previously processed cases, including quarantining duplicate files and modified files
- image matching and de-duplication of strictly identical images, and matching against a reference database using hash values
- filtering junk files
- assisting in generating files for manual review using facial detection.<sup>385</sup>

Manufacturers also suggest BlueBear LACE can reduce time associated with report generation by automating regular reports, including court-related documents. This tool facilitates direct imports and exports from ICSE DB, Project VIC, CAID and the Canadian National Media Library.

QPS advised the council it will commence a trial of BlueBear LACE later in 2017. Taskforce Argos also advised the council that, via BlueBear LACE, it will be able to tag all hash sets in the Queensland database with objective descriptors relevant to the images. A medium- to long-term investment

would mean these descriptors will further expedite classification and enhance the detail provided to prosecutors and judges.

### **International Child Sexual Exploitation Image Database**

The ICSE DB, hosted by INTERPOL, makes connections between victims, offenders and locations, and helps determine whether an image has been encountered before.<sup>386</sup> ICSE DB is a unique international database, connected to police agencies across 49 countries, as well as Europol and INTERPOL.<sup>387</sup> Importantly, the database incorporates the INTERPOL Baseline categorisation system, discussed earlier. It also allows local experts in law enforcement agencies to communicate and share information to make it easier to identify the children.<sup>388</sup>

### **Project VIC**

Project VIC is a global partnership which uses advanced technology to tackle child sexual exploitation and trafficking. Project VIC complements the ICSE DB<sup>389</sup> and integrates with various categorisation systems, including the INTERPOL Baseline system and the Griffeye Analyze software platform. Project VIC also has an international hash value database, originally coordinated by the Department of Homeland Security (USA) and the International Centre for Missing and Exploited Children.<sup>390</sup>

The project aims to improve and standardise technology available to law enforcement. More than 2500 law enforcement agencies in 40 countries use the technology developed by Project VIC's partners.<sup>391</sup> The database contains information on over two million images stored using hash value technology. Law enforcement personnel are able to expand the database by uploading new hash values and associated metadata.<sup>392</sup>

Project VIC advised the council:

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*Project VIC supports and encourages cooperation and information sharing between countries and states. In 2012 Project VIC launched an initiative to normalise CEM classifications within the 50 United States and three Federal Police Forces. This was combined with an initiative to implement a global data model specific to the crime set of Child Rescue and Child Exploitation Investigations. The Video Image Classification Standard – VICS Data Model is not used by all major tool providers serving the child exploitation and victim identification law enforcement community. VIC's data model is specifically engineered to carry classification and hashing algorithm data and enables successful aggregation and comparisons. The data model will allow for high level hash and category or classification matching and cross mapping. Project VIC supports and is an advocate for national hash sharing and aggregation. Project VIC also supports secure cloud tenant-to-tenant sharing and has initiatives started on this front. Project VIC United States has 180 police agencies successfully sharing over 3 million pertinent records. Project VIC Canada mirrors this effort thus putting all of Northern America on the same set of standards. This ecosystem also carries over to over 20 countries signing up and consuming the hash set to combat child exploitation in their jurisdictions.*

#### **Project VIC**

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### **Child Abuse Image Database**

Active since December 2014, CAID is the UK's image database that stores all images encountered by UK territorial police forces and the National Crime Agency.<sup>393</sup> The severity of images is graded for sentencing according to the UK Sexual Offences Definitive Guideline categories A, B and C. In CAID, an image is tagged as having a trusted grade if it has been categorised by three different police agencies.<sup>394</sup> CAID has an ability to interface with Project VIC and the ICSE DB.

Early feedback reported by the Home Office indicated image review times had reduced from three days to an hour for a case involving 10,000 images, enabling a shift from reviewing images to identifying victims.<sup>395</sup>

In relation to CAID, Norfolk Constabulary advised:

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*[T]he decision was made by the Government to have a national database of images/ hashes to avoid duplication and multiple viewing of images, to have the benefits of centralisation and continuity, to make time savings and to have a definitive list to share with industry to assist in having a takedown list.*

**Norfolk Constabulary, UK**

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## Random sampling

The terms of reference specifically requested the council to ‘assess the merits of using random sampling’ as adopted by NSW and Victoria. Both jurisdictions implemented random sampling regimes in response to the same triggers which led to this review, namely delays, welfare concerns, the diversion of resources from victim identification, and projections that these cases will continue to exponentially increase in size and complexity. As part of its consultation, the council approached both jurisdictions, as well as all other agencies, to gauge their reactions to random sampling as a suitable remedy for addressing the persistent and universal pressure points associated with CEM cases. As a result of this, as well as broader research about random sampling and its application to such cases, the council **does not** support random sampling for CEM prosecutions. Both NSW and Victoria acknowledged very real complications associated with the practical application of their respective regimes. The following discussion provides context to the council’s conclusion.

### Legislative random sampling scheme: NSW and Victoria

The legislative provisions for random sampling in these jurisdictions are sections 289A and 289B of the *Criminal Procedure Act 1986* (NSW) and sections 67A and 70AAAE of the *Crimes Act 1958* (VIC).<sup>396</sup> In 2010, the NSW Child Pornography Working Party recommended<sup>397</sup> a ‘legislative rebuttable presumption as to the quantity and gravity of child pornography material be created’. The working party stated that the presumption should be based on a genuine random sample of the seized images and ‘a statistician’s expertise should be sought in working out an appropriate sample size’.<sup>398</sup> It regarded the legislative rebuttable presumption as an interim measure and recommended a review after two years.<sup>399</sup>

This recommendation triggered the subsequent addition<sup>400</sup> of section 289B (Use of random sample evidence in child abuse material cases) into the *Crimes Act 1900* (NSW). Statements were made in the NSW Legislative Assembly<sup>401</sup> and Legislative Council<sup>402</sup> that the NSW Department of Justice and Attorney General would review the use of random sample evidence and relevant provisions two years after commencement. The review would examine whether:

- there had been any technological developments impacting on the need for the provisions
- the provisions had facilitated the prosecution of matters involving large amounts of material
- the provisions had reduced participants’ exposure to the material.

The council was unable to locate any evidence of the promised two-year review. As a result of NSW withdrawing from the consultation process for this project, it remains unknown whether this review was ever conducted. However, around the two-year post-enactment mark, section 289B was amended by the *Courts and Crimes Legislation Amendment Act 2012* (NSW) to:

- allow police to take a more representative sample of seized material (including innocuous material, rather than just a sample of child abuse material)
- remove a requirement that the sample and examination be conducted in accordance with the regulations, which do not appear to have been developed
- replace the term ‘authorised analyst’ with ‘authorised classifier’ via an amendment to the *Criminal Procedure Regulation 2010*, prescribing such persons as members of the NSW police force who had undertaken training.

Victoria, facing the same complications as NSW in its justice system, replicated the legislation in 2015.<sup>403</sup> The NSW and Victorian legislation:

- permit an authorised classifier to conduct an examination of a random sample of seized material—
  - ‘Seized material’ includes all seized material, not just CEM.<sup>404</sup> An amendment was made in 2012 so that CEM would not first have to be extracted from all of the material<sup>405</sup> and to allow for ‘a more representative sample’<sup>406</sup>
- enable the evidence of the authorised classifier (as to the nature and content of the random sample) to be admissible as evidence of the nature and content of the whole of the material from which the random sample was taken<sup>407</sup>
- allow a court to make a finding on the same basis<sup>408</sup>
- invite the use of an expert certificate (derived from section 177 of the *Uniform Evidence Acts*), which creates a rebuttable presumption as to its contents (this mechanism does not exist in Queensland).<sup>409</sup>

When the NSW Bill was being debated, the certificate was expected to ‘include factual evidence about the number of images contained in the sample, description of the content of the images, and descriptions of where the images fall on an agreed scale of seriousness, such as the CETS or the Oliver scale’.<sup>410</sup>

The legislation does not:

- define random sampling
- stipulate the classification scheme to be deployed for the sample
- outline the process to be adopted to determine the sample (such as its size relative to the total collection and the mathematical formula to be used).<sup>411</sup>

The legislation<sup>412</sup> also states the regulations may address the taking and admissibility of random sampling evidence under the sections, including providing for:

- the circumstances or classes of case in which the prosecutor may adduce evidence of the findings of an authorised classifier under the section
- the procedure for taking and examining random samples of material
- any further requirements as to the content of a certificate of an authorised classifier.

While various formulas can be deployed to calculate a sample size,<sup>413</sup> the regulations only currently address the definition of ‘authorised classifier’ regarding training requirements.<sup>414</sup>

## How random sampling is being applied in NSW and Victoria

Random sampling has been used in various NSW cases,<sup>415</sup> and described by the NSW Court of Criminal Appeal as ‘a process which provides further assistance to a sentencing court’.<sup>416</sup> The random sampling regime was intended to avoid the viewing and assessment of each CEM item<sup>417</sup> and facilitate faster analysis.<sup>418</sup> This reduces investigator occupational health and safety risks<sup>419</sup> and the compounding of victim violation.<sup>420</sup>

Three current and former NSW State Electronic Branch professionals reported random sampling had ‘significantly reduced backlogs’.<sup>421</sup> It reduced response times from three months to 24 hours,<sup>422</sup> with average computer processing times down two hours from nearly five,<sup>423</sup> enabled investigators to establish ‘the extent of their investigation in a short timeframe’, and provided courts with ‘a clear record of the quantity and severity of child abuse material on a device’.<sup>424</sup> This analysis also suggested reducing delays also benefited the accused and their families, as delays ‘would have a significant detrimental effect on the suspects’ family and work life’.<sup>425</sup>

Advice from Victoria received by the council indicated the state does not use a random sampling approach, but has instead adopted a threshold approach to CEM cases. In addition, Victoria Police will seek external expert advice about how best to establish and implement a random sampling approach that avoids concerns about it under-representing or over-representing the nature and



extent of an offender's CEM collection. At the time of writing this external determination by an expert body was still being undertaken and no outcomes were expected in the near future.<sup>426</sup>

### Can a random sample be generated for CEM?

Random sampling is the process of identifying a subset of a larger number in a way that aims to ensure the subset is representative of the total. It is a process of extrapolation to arrive at a presumed result which is accepted (or deemed) to be accurate. It is well accepted as a research methodology and is sometimes applied in a forensic context.<sup>427</sup> Within the context of CEM cases, the council identified a range of connotations attached to the terms 'sample', 'random sample' and 'representative sample'. In some instances in CEM case law, the term 'random sample' is used where the method employed was closer to a representative sample (or is neither, and just a sample). Such examples occur despite the absence of a legislative scheme via agreement of the parties (or the decision of defence not to challenge the sample). As noted by Professor Mark Kebbell in his submission to the council:

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*... [t]here are many different ways of sampling. They vary from the simple, 'pick a couple' of images to the sophisticated where sampling is guided by the statistical properties of the samples taken and confidence limits of the accuracy of the findings are calculated.*  
**Professor Mark Kebbell, Griffith University**

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NSW and Victoria share a legislative scheme permitting random sampling and extrapolation of results (discussed above). There is no similar legislative arrangement in place in Queensland for CEM images,<sup>428</sup> although in the case of illicit drugs, section 128 ('Analyst's certificate') of the *Drugs Misuse Act 1986* (Qld) provides a rebuttable presumption that an analyst's certificate is evidence that a result from an analysed sample of seized drugs can be presumed to apply to the whole amount.

Queensland does use random sampling for undersized scallops, where random sampling is permitted to identify a threshold percentage of scallops taken or possessed by a person. The method stipulated for determining a threshold percentage is outlined by regulation and involves collecting sample data about the total number by taking a random sample and counting the number of undersized scallops, or using the sample data and a statistical method to estimate, based on a probability of 95 per cent, the percentage of the total number.<sup>429</sup>

Consultation identified that NSW and Victoria implemented a sampling approach for charging and classification purposes. This is a different concept to judges viewing samples of files at sentence. The reason for random sampling is to particularise the prosecution case and produce a factual basis for sentence. This would be disclosed as part of a prosecution brief of evidence prior to the committal hearing. It is this express purpose that reveals the problem of using random sampling or any other type of sampling for CEM cases. For sampling to retain validity, the population from which it is drawn must be known. At an aggregate level, this is unrealistic for CEM cases, as the range and diversity of CEM is extreme, confounding attempts to establish random sampling as a legitimate tool for assessing an offender's collection or, as has been evident through the council's consultation and research, as a platform to make assumptions about the characteristics of the entire collection.

Determining total CEM volume on an estimate based on a sample requires 'considerable care'.<sup>430</sup> This is clearly demonstrated in the case of *Colbourn v The Queen*, where police counted the number of CEM files on 14 of the 83 seized compact discs, then assumed that the other 69 discs all contained similar quantities. In this case, police erroneously concluded there were 142,000 CEM images in total.<sup>431</sup> After sentence, a count of all CEM images on all 83 discs found 98,709 files, of which 17,768 were duplicates. On appeal, it was held the figure of 142,000 'involved such a substantial overestimate' the offender 'might have received a longer sentence than he would have received if the correct figure had been established', therefore representing a miscarriage of justice.<sup>432</sup>

Conversely, the sample may understate the actual significance and severity of the offending. The QOCCI report referred to a Western Australian example where an offender with a collection of 300,000 files had also physically abused three girls. The offender was charged only with possession of



CEM because a random sample review had not identified any of 14 files containing previously unseen footage of the children being abused. After analysis of all images, the 'new' files were found and the offender was charged with the contact abuse and sentenced to further imprisonment.<sup>433</sup>

In the Queensland context, difficulties in applying random sampling to CEM are also associated with the broad legislative definition that covers a wide range of activity, the relevant sentencing factors that cover multiple variables, and the wide variety of devices and electronic folders used to store CEM. The council **does not** recommend limiting the breadth of the current legislative considerations, a position agreed in all consultation. On this particular issue, 'expert advice' consistently supported the adoption of the broader term 'CEM' or 'child abuse material', suggesting that limiting the definition or using the term 'child pornography' undermines the range, severity, harm and abuse dimensions associated with this material.<sup>434</sup>

In Chapter 3, the case of *R v Forbes*<sup>435</sup> is referred to when discussing judicial viewing of samples. While in this case the prosecution claimed the sample method was 'random',<sup>436</sup> defence counsel did not agree.<sup>437</sup> Penfold J accepted 'the tendering of a genuinely random sample, provided the total numbers and the sample size were adequate, might have been a fair way to satisfy the general requirement for the sentencing judge to view some of the material'.<sup>438</sup> The method adopted was outlined as:

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*... the material had been recovered from the relevant hard drives in an order reflecting the way in which it was stored on the hard drives, and sorted into the five categories without changing the order in which the material within each category had been recovered. The sampling had involved taking a pre-determined number of items from the top of the list for each category.*<sup>439</sup>

**R v Forbes**

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However:

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*... there were a number of sets or collections of images of the same child in the same general location but in a variety of poses or activities. For this reason, the AFP's approach did raise the strong possibility that, at least for images, the 'sample' would consist not of the sampled number of unrelated images but of the sampled number of images from a smaller number of sets of images, so that the samples would be less reliably representative than they might otherwise be.*<sup>440</sup>

**R v Forbes**

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This case demonstrates the sampling technique used 'seemed to have the potential to render the samples considerably smaller and therefore less reliable than the raw numbers might suggest'.<sup>441</sup>

In contrast, agreed extrapolation was viewed favourably by the Queensland Court of Appeal in 2016 in *R v McDonald*,<sup>442</sup> as 'representative of the larger body' of CEM seized.<sup>443</sup> The sentencing judge had also described this as 'representative sampling'.<sup>444</sup> Of the sample, the images classified as CEM were categorised under the Oliver scale and 'the proportion of images in each category of the sample was then used to calculate the number of images stored on the applicant's devices in each category'.<sup>445</sup> Burns J wrote:<sup>446</sup>

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*... [i]mportantly from the point of view of assessing the degree to which the applicant cooperated with the administration of justice, he accepted that those calculations reflected the material in each category that he possessed. By doing so, he relieved the person or persons responsible in the police for categorising such material of the disturbing task of having to individually examine over 37,000 other images, approximately 30 per cent of which was child exploitation material.*

**R v McDonald**

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The acceptance 'that the proportions derived from the sampled image and video files was an accurate representation of the proportions that existed in the wider body of material' was a factor that afforded the offender 'a measure of special leniency'.<sup>447</sup> Stakeholders provided specific comments about sampling:

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*... [a] full analysis of all CEM is [not] required for sentencing purposes, [however] random sampling would not provide a satisfactory option. I would hold this view regardless of the classification scale being applied.*

**Chief Judge, District Court of Queensland**

*The accurate use of random sampling requires some assumptions to be made about the seized material which may or may not be true and which may not even be possible to establish. Furthermore the size of the required sample and the reliability of the result are determined by the number of categories into which images are being placed. Random sampling is therefore not an exact science but it could be considered to be more accurate if a reduced number of categories was used in the analysis.*

**QPS**

*... [t]he issue of sampling is fraught with the possibility that offenders may be dealt with by the criminal justice system on an unequal footing in cases where a court sentences on an unrepresentative sample. ... If the purpose of the sample is to determine the contents of a larger collection of images through extrapolation, then there should be the ability for a defendant to opt out or dispute such a method ... any method by which the images are selected should be a proper random method rather than an exercise of an investigator's discretion.*

**LAQ**

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However, the QDPP and BAQ were supportive of random sampling based on the NSW model. The QDPP noted:

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*How many images are necessary to categorise in order to obtain an understanding of the nature of the collection held will differ from case to case. It is therefore very difficult to impose a set standard that will apply to every matter in the absence of legislative imprimatur ... consideration could be given to adopting an analogue of the procedure permitted in New South Wales ... [it] should be drafted in terms of a rebuttable presumption - to the effect that the categories and proportions arising from random sampling are consistent with the whole ... The usual discretions to accept or reject evidence found in the Evidence Act 1977 [Qld] and at common law should be retained.<sup>448</sup>*

**QDPP**

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The BAQ stated random sampling based on the NSW model would be sufficient for sentencing purposes and 'may be beneficial'.<sup>449</sup> However, the BAQ would still require 'that defence counsel be able to select their own images, and ensure the sample selected is evidence of the whole catalogue'.<sup>450</sup> Regulations 'around the method and formula would be required in this jurisdiction, as we do not have sentencing guidelines, therefore the evidence produced needs to be correctly collated'.

This information has identified for the council that, while random sampling is not a viable option for this type of crime, thresholds may be an area in which improvements in time, officer welfare and resource savings can be realised while avoiding concerns about misrepresenting an offender's collection. It is critical to note from the outset, however, that the council has only considered thresholds for classification purposes, and appreciates all of an offender's collection must be viewed for victim identification purposes, particularly any new material identified in an offender's collection. Project VIC<sup>451</sup> clearly expressed this view, and QPS has also made its position clear to the council that thresholds, if considered, are only applicable to classification, not to the ongoing law enforcement efforts to identify and locate victims:

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*... [w]hilst the random sampling process may satisfy the judiciary, there remains an expectation that investigators will review all seized material to identify possible self-produced material and possible victims of the offender.<sup>452</sup>*

**QPS**

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This issue is revisited in Chapter 5.

## Summary

The council is of the view that the exponential growth of CEM offending, domestically and internationally, necessitates a classification solution that maximises cooperation and integration. The council acknowledges the Oliver scale is no longer meeting this need for law enforcement. While the Oliver scale has served an important role in criminal justice processes in the past, a different approach now requires development to ensure classification meets the needs of all stakeholders in Queensland's criminal justice system.

The failure of ANVIL/CETS provides valuable lessons for Queensland. The council has examined these in detail when shaping its vision for Queensland, as well as the mechanisms designed to implement, support and evaluate Queensland's transition to this new approach. The recommendations presented in the remainder of this report represent a culmination of the council's research and consultation processes.

Queensland has an opportunity to strategically set a new direction for classification that will enhance collaboration with other law enforcement jurisdictions domestically and internationally, and assist in reducing delays in our criminal justice response.

## Chapter 5: Replacement system of classification—the Q-CEM Package

The previous chapters provide a foundation for the issues and drivers associated with CEM classification and its role in the criminal justice system, sentencing, and national and international law enforcement cooperation and sharing. Clear evidence from stakeholders, as well as the council's own data analyses, have highlighted concerning delays that are occurring in prosecuting and sentencing CEM offenders, particularly in relation to evidence not being supplied to court in accordance with legislated timeframes. Collectively, these analyses reinforce that an opportunity exists for Queensland to reduce delay through improved classification processes, while also addressing the factors which led the QOCCI to refer this issue for dedicated assessment, namely:

- *officer welfare*—by reducing the workload associated with manual review of offensive material
- *victim identification*—by freeing resources previously consumed by classification duties and isolating new material within a defendant's collection
- *national and international cooperation*—by establishing common language, analytical tools and sharing platforms in recognition that much of the CEM identified recirculates across sites, networks and people.

This chapter uses the council's findings as a platform to recommend a new approach to classification of CEM in Queensland. In developing this new approach—which the council has called the Q-CEM Package—stakeholder needs and functional roles have been considered, including the investigative and victim identification priorities of law enforcement, prosecutorial and defence imperatives and timings for court processes, and the legislative and case law factors that judicial officers are required to consider when sentencing CEM offenders. Critically, and fundamental to all recommendations proposed, the council suggests a staged and independent evaluation framework be developed to ensure the Q-CEM Package as a whole, as well as its individual components, delivers for all agencies. The evaluation will help to identify and address any unintended consequences which can occur during any major sector-wide reform. The evaluation framework will be discussed in greater detail in Chapter 6.

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### **Recommendation 5**

***The council recommends the adoption of the Q-CEM Package, incorporating a Classification of CEM Schema (CCS) and a Child Exploitation Material Analysis (CEMA) Report, as the most appropriate approach for presenting timely and adequate information about CEM before Queensland courts for sentencing.***

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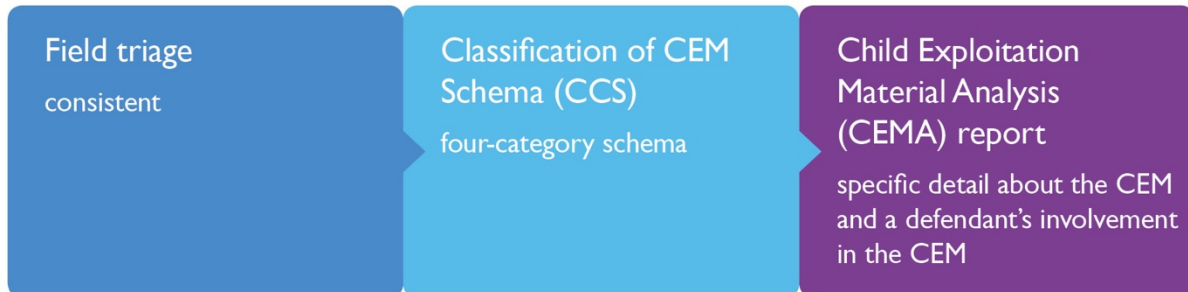
## Q-CEM Package: an integrated approach for Queensland

The proposed Q-CEM Package comprises three complementary elements which are designed to collectively address the role that classification of material now assumes in Queensland's criminal justice sector. The three elements are represented in Figure 13.

**Figure 13: Q-CEM Package**

## Q-CEM PACKAGE

Integrated package to provide timely and informative advice about a defendant's involvement in CEM for Queensland's criminal justice system



### Field triage: early and consistent documentation of detail

While the council's consultation and research identified potential benefits of streamlining classification, a process review indicates effective pre-classification (in-field) processes, if standardised, can trigger collection of critical, albeit sometimes partial, information at a particularly early stage in the investigative process. The flowchart documented in Appendix 5, which facilitated discussion about the potential complications and delays associated with forensic processes and initial analyses, also supports the need for standardising field practice as much as possible. For this reason, the council strongly recommends all associated administrative practices outlined in Appendix 5 should have timeframes attached. The proposed timeframes are discussed below, but will require input from practitioners who are better positioned to assess the viability of the council's proposals.

A more structured approach at the outset of an investigation would also enhance the overall product generated for court and sentencing purposes; in particular providing better information about how and why a defendant came to the attention of police, his occupation and other field assessment clues. This recommendation also reflects the council's appreciation of the difficulties such global crimes pose for police who operate at a local level, by promoting early (and standardised) documentation of factors which can then be shared to support investigative efforts elsewhere. In addition, a standardised field triage approach will ensure Taskforce Argos will be able to rely on consistent information in support of its role as the main conduit between QPS and other state, national and international law enforcement agencies.

QPS has advised triage is currently undertaken in a more ad hoc manner dependent on location, organisational area and operational priority. Managers within Taskforce Argos clearly value triage as a process for supporting and informing investigative efforts, and appreciate it can contribute to the timeliness and quality of information provided to prosecuting agencies. Consultation with both the CDPP and the QDPP indicated the standard of information from QPS varied considerably across the state, an issue also acknowledged by QPS at the agency level. As a result, the council recommends that, as a matter of priority, Taskforce Argos develops a field triage approach for consistency across the state. This will require inclusion in the QPS *Operational Procedures Manual*. While Taskforce Argos is well placed, in conjunction with EEEU, to develop an operationally responsive field triage approach, broader consultation beyond the policing environment suggests the following information should be included:

- risk of reoffending or escalated offending (in-field assessment based on investigative expertise)
- offender's occupation
- offender's access to children
- offender's offence history
- trigger for police attention.

The council appreciates some of the factors flagged may intersect with risk assessments undertaken by investigators using KIRAT. However, the council's recommendation relates to work in the field as opposed to the more involved assessments undertaken as part of KIRAT.

Limited information was obtained about KIRAT due to operational sensitivities, however, the council understands training of investigative staff in KIRAT is occurring in line with Taskforce Orion funding. The council's proposed field triage component of the Q-CEM Package should occur during the search and seizure phase of the investigation. QPS has identified five phases, or events, in an investigation of a CEM offence (reproduced in Table 9 below).

The council has revisited this process following concerns that administrative practice is contributing to time delays experienced prior to committal proceedings. As noted in the previous chapter, the time between charge and committal has been identified as the major contributor to overall time delays.

The council appreciates, however, that certain aspects of the process may, depending on the case, involve time delays that cannot be overcome. As a result, a Timeframe Report is proposed as a supplement following triage to ensure prosecutors are aware of unavoidable time delays at the earliest point.

The Timeframe Report (linked to event 4 in Table 9) is also designed to address a communication problem acknowledged by both QPS and the QDPP. Both agencies appreciate each case presents differently and timeframes can be protracted due to:

- significant numbers of devices
- varying levels of encryption or corruption<sup>453</sup>
- differences in the level of cooperation provided by defendants.

The QDPP acknowledged the forensic complication associated with this stage of the process for these cases, but indicated it is rarely advised of progress or complications that impact on prosecutions, and routinely discovers problems when pursuing an individual investigator about a specific case.

This was also acknowledged by QPS. As a result, the council recommends that at event 4, the proposed Timeframe Report be forwarded to prosecutors by investigators following advice from EEEU about the associated timeframes.

It is also recommended a separate section be added to a QPS Brief Checker's list for CEM cases that ensures timeframe projections have been assessed and documented by EEEU, and then communicated to the Police Prosecution Corps, QDPP or CDPP via the investigating officer.



**Table 9: Events and timeframes**

Event	Activities	Proposed timeframe
1. Search and seizure	Field triage undertaken Initial information collected Initial complexity of case considered	N/A
2. Request forensic expertise	Officers consider the case and initiate a request for forensic expertise if required. QPS indicates this is an automated request	<b>3 days</b> from seizure
3. Transfer exhibit to secure location	Any seized devices are forwarded in a secure manner to support Event 4. Dependent on location, this may require trans-shipment via a local exhibit facility to EEEU in Brisbane	<b>7–10 days</b> from seizure (the extended period is designed to accommodate distance). It is appreciated that this may require dedicated transfer in situations in which the CEM seizure is the only exhibit for transfer; however, the delays associated with this type and the other non-movable time delays in this initial period (i.e. forensic mirroring, classification and analysis) necessitate these are allocated priority
4. Forensic image and pre-processing (EEEU experts)	Forensic images are taken and initial processing on devices undertaken Report referred to prosecuting agency <sup>454</sup> at this point about time projections	<b>14 days</b> from seizure for Timeframe Report to be forwarded to the prosecuting agency with carriage of the matter at that time. This report must contain: <ul style="list-style-type: none"> <li>projected timeframes</li> <li>any identified complexities identified and how these may impact timeframes</li> <li>date of review</li> </ul>
5. Transfer of forensic image	Forensic image is returned to the investigator for classification and investigative purposes	Indeterminable as reliant on forensic imaging

### **Recommendation 6**

***The council recommends formalisation of an approved field triage process and a Timeframe Report for the prosecuting agency with carriage of the matter as a priority to support implementation of the Q-CEM Package.***

## **Classification of CEM Schema and the Child Exploitation Material Analysis Report**

The council's proposed approach provides law enforcement with a condensed classification tool from nine levels to four to address officer welfare needs and support the priority of victim identification and domestic and international cooperation and sharing imperatives. The council developed this approach to classification following extensive consultation and research. This area, far beyond any other in this review, proved the most controversial, and sparked considerable discussion across stakeholders.

Importantly from a system perspective, and critically in support of sentencing, the council has **not** recommended a condensed classification system in isolation from a mechanism to ensure adequate and timely detail about a defendant's CEM collection and his interaction with it is provided to prosecutors, defence and judicial officers. The council proposes the CEMA Report to address this need.

From the council's perspective, **no** attempt should be made to separate these two component parts of the Q-CEM Package. It is only when they are used together that they will meet the individual and collective needs of police, prosecution, defence and judicial officers.

The adverse impact that lack of detail in prosecution information has on sentencing was discussed in detail in Chapter 3. This issue remains if the Oliver scale is replaced only with the CCS. As noted in *Kenworthy v the Queen [No 2] [2016] WASCA 207*, if a bare description such as simply an Oliver nine-point scale category is all that is provided to the court, the court will proceed on the basis the material is towards the lower end of the range of seriousness:

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*If all we provide is that the material falls with the INTERPOL Baseline the court will take that the material is at the lower end of material depicting a real prepubescent child involved in a sex act, witnessing a sex act or it is focussed on the anal or genital area of the child. This will lead to lower sentences that do not reflect the criminality involved in the offending.*

**CDPP**

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The council's proposed evaluation framework, set out in Chapter 6, is designed to monitor implementation of both components, ensuring implementation is adequately supported and any unintentional consequences are quickly identified and addressed. The independent nature of the recommended evaluation will ensure that the views of each agency will continue to be sought as part of the implementation of this reform agenda.

While acknowledged as an integrated package, the following detail is provided about each component for ease of reference only. The CCS and the CEMA Report must be considered as a combined product specifically developed in response to persistent concerns raised by the legal profession, as outlined below.

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*The level of further detail [in a proforma statement] that it is envisaged would be achieved would however not, in my opinion, necessarily compensate for the loss of objective assessable criminality that would occur if the INTERPOL scale were also introduced, although it may in some cases. It is I think impossible to make a hard and fast statement about the utility, or otherwise, of the INTERPOL scale in every case. However I do consider it possible to say that in at least most cases the objective assessment of the criminality afforded by the more detailed 'Oliver scale' is considerably more desirable than what is effectively a two category scale underlying the INTERPOL scale. In saying that, I recognise that the Oliver scale is somewhat two dimensional and restrictive if not supplemented by other relevant considerations.*

**QDPP**

*We are aware of the proposal by Queensland Police for the introduction of the INTERPOL baseline approach to classification. It is envisaged that the strength of this approach is a faster, more streamlined process by reducing the number of classifications to predominantly categories one and two. Flowing from that the further benefit of such an approach would include the reduced resources required and therefore faster provision of the reports. The limitation of such an approach may be to hamper courts in undertaking a proper assessment of the objective criminality of the offending, although such a disadvantage may be lessened in the event that the court views a sufficient sample of the images.*

**CDPP**

*The INTERPOL scale does not have a mechanism for determining content of an image which is an important factor affecting sentence... The INTERPOL and UK scales move away from [Oliver's] particularity. At some point during a prosecution, that particularity would need to re-emerge.*

**LAQ**

*There has been some discussions in Western Australia about adopting a 'simplified' categorisation scheme that contains two categories – sexual activity and non-sexual activity. There are some concerns about the utility of adopting a simplified scheme.*

**WADPP**

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## Classification of CEM Schema

This four-category classification tool (Table 10) builds on the INTERPOL International Classification System by incorporating INTERPOL's Baseline category to embed a capacity for both future national and international cooperation and data sharing imperatives. However, the proposed CCS still retains a strong focus on Queensland-defined CEM, which may fall outside the Baseline category. The CCS will reduce the time required for classification, thereby supporting victim identification, officer welfare, and data sharing and cooperation priorities. However, it is difficult to definitively guarantee that time improvements will automatically result from the schema's adoption, particularly in the short term, for two main reasons.

Firstly, there is no capacity to authentically gauge how particular events and processes individually or collectively contribute to delays in the system for these cases. For example, forensic complications may compound or replace time delays traditionally attributed to the classification process. While this situation appears inherent with these offences and the associated variables, as highlighted by numerous agencies throughout consultation, QPS has not captured any meaningful representation of 'time' despite persistently identifying it as hampering them at an investigative level.

Secondly, the associated information technology designed to support QPS's full integration and cooperative sharing with other jurisdictions may require time to completely embed within the operational landscape. It is acknowledged Taskforce Argos has made significant contributions to achieving this level of integration within QPS. An added dimension is that cooperative efforts depend on the uptake and integration by other jurisdictions, which is a matter beyond the control of QPS. This issue has informed further recommendations contained in the next chapter. The council acknowledges collaboration with global counterparts should occur more seamlessly given the high degree of uptake of linked schema internationally.

**Table 10: Proposed Classification of CEM Schema for Queensland under the Q-CEM Package**

	Category level		Description
Illegal	1	INTERPOL Baseline files  (facilitates direct integration with over 49 countries and sharing of hash values)	Material (still and video) depicting real prepubescent child (under age of 13 years approximately) and the child is involved in a sexual act or is witnessing a sexual act, or the material is focused/concentrated on the child's anal or genital region.
	2	Other Queensland CEM files	Material (still, video, text, sound or drawing) depicting a real child between 13 and 15 years, or an animated representation of a child under 16 years, in a sexual context, including engaging in a sexual activity, in an offensive or demeaning context, or being subjected to abuse, cruelty or torture.  (Age and requirement for real child preclude inclusion in category 1)
Legal	3	Related investigative interest files (non-illegal)	Material that forms part of a CEM series but is not CEM. This material may contain clues for investigators, as offenders may be less likely to conceal identifiable features of an offender, a location or a victim.  (Not category 1 or 2)
	4	Ignorable files	Material considered legal and not relevant to an investigation.  (Not category 1,2 or 3)

## CEMA Report

The council heard repeated concerns about the lack of specificity of information currently presented about CEM for prosecution and sentencing purposes, as represented by comments received from the legal profession. These concerns remained central to any objection to moving from the nine-point Oliver classification tool to any scheme involving fewer categories. The council also appreciated investigators prioritising victim identification and notes QPS's formal submission that:

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*... it is very difficult to simultaneously conduct effective victim identification and categorise CEM, particularly where images are being categorised according to a nine point scale. Simplifying the category system would lead to less conflict in categorisation allowing better focus on victim identification of potential child victims.<sup>455</sup>*

**QPS**

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Protecting children and prosecuting offenders are critical objectives for Queensland's system, for the safety of Queensland's communities, and for the safety of children in other jurisdictions who are victimised by Queensland offenders. The council's proposed CEMA Report supports QPS to streamline classification processes and ensure comprehensive detail is provided to Queensland courts to support effective and timely prosecution and sentencing.

It is once again worth reiterating at this point that both the CCS and the CEMA Report are designed to work together and **not** separately. At the time of writing, this tension continues to exist for many Australian jurisdictions that continue to examine ways to address this issue. To ensure the CEMA Report addresses the needs of prosecutors and is able to be implemented, the council undertook separate and dedicated consultation with QPS, the QDPP and CDPP. This investment resulted in significant gains. As discussed earlier in the report, the council's research identified delays in the end-to-end process, particularly in police providing evidence to prosecutors within legislated timeframes.

The QDPP and CDPP raised concerns about police providing insufficient information to support court processes. This had resulted in significant delays, and at times prosecutors had been forced to drop charges due to a lack of evidence. QPS contends that, due to the nature of these offences, much of the information required takes time to provide. While the council was unable to definitively determine what factor or combination of factors is routinely consuming time in this initial stage, an inability for prosecutors to secure adequate details for committal proceedings is unequivocally the manifestation of the delay. Also, as noted previously, delay at this stage has flow-on effects for subsequent processes. Once again, this situation supports the proposed Timeframe Report to ensure prosecutors are provided, at the very least, with more detailed and representative case information for adjournments, including dates of future review.

The council developed the proposed CEMA Report based on the roundtable meeting with key agencies held on 28 April 2017 and subsequent consultation and research, including case law precedents in Australian and international jurisdictions. The council is of the view that, in addition to details routinely supplied for committal proceedings, the proposed CEMA Report should include the following information:

- how the offender came to police attention (linked to triage)
- how many devices were seized (linked to triage)
- relevant field information (linked to triage)
- results of classification outcomes and collection volume (as at that date)
- results, if possible, from internal QPS library tagging
- the time period over which the offender has collected the material
- if the material was directly solicited by the offender
- any evidence the offender is involved in networking
- any evidence about any distribution or making of CEM

- any attempts to conceal, corrupt or dispose of evidence
- evidence about the offender's interaction with the CEM, including but not limited to evidence of systematic cataloguing, manipulation and degree of viewing.

Importantly, the CEMA Report would support the application of recommendation 1(b) to amend section 9(7) of the PSA to include the role of the offender. The council also recommends the CEMA Report be required to include a *Justices Act 1886* (Qld) acknowledgement that the information is true to the best of the investigator's knowledge, and the person providing the information knows they may be liable to prosecution if there is false information. Some of the above detail will come from investigative efforts, such as interviewing, admissions and how police identified the offender, but some may require examination of seized devices.

The CEMA Report will require further field testing to ensure agency support and continued dedicated effort beyond the initial implementation. This will be particularly important with the CCC, as the council was unable to test the proposal within the timeframes.

The council suggests the independent body selected to evaluate the CEMA Report should have a role in coordinating the ongoing development and testing of the CEMA Report, as part of the Q-CEM Package. The council once again flags for this independent body that the timing of the provision of the information is the fundamental issue for consideration. This will be explored in greater detail in Chapter 6.

Lastly, the council advises the above list is a truncated version of information QPS advised it could deliver at an early stage, and which the QDPP and CDPP requested.<sup>456</sup> As a result, the items listed above represent less information than discussed with these key agencies. Additional factors were also identified as being relevant for this crime and offender type, and for broader case law analysis and research.

It is recommended testing of the CEMA Report occur as a matter of urgency as it must not be considered separate to adoption of the CCS. The council recommends the Q-CEM Package be formalised within QPS procedural and policy framework. It is also recommended all implementation and change management strategies are supported by Taskforce Argos, given its context expertise and centralised role. The proposed evaluation timeframes in recommendation 12 will apply to assessing the implementation and outcomes of the CEMA Report.

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### **Recommendation 7**

***The council recommends formalisation of the Q-CEM Package, incorporating the CCS and the CEMA Report, supported by approved field triage, into the QPS policy/procedural framework as a matter of urgency.***

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## **Dealing with complex or protracted investigations**

As discussed in Chapter 4, delays in CEM cases in criminal justice proceedings were frequently identified. In addition to the delays caused by classification, the council learned from research and consultation that delays were also occurring because of investigation and forensic analysis processes.

To better understand when delays were occurring and for what reason/s, the council engaged in a number of discussions with QPS where complex and protracted investigations were described. From these discussions, the council developed a strong appreciation of the investigative and forensic efforts involved in these cases. This is particularly so when an offender is uncooperative or has implemented methods to encrypt or conceal his collection. QPS advised such techniques can and do have significant implications for its investigations and forensic analyses, delaying progression of one or both functions depending on the level of sophistication.

These issues were highlighted in the QOCCI report and led to legislative amendments, as discussed in Chapter 2. Effective from 9 December 2016, a judge or magistrate can now order, as part of a search warrant, that certain information be divulged, such as passwords or encryption information.



Section 205A of the Criminal Code (Qld) creates a specific offence for anyone who fails to comply with the order, which carries a maximum penalty of five years imprisonment. Given the limited time since this amendment was introduced, the council was unable to assess the impact of these new provisions.

A second alternative is for police to progress initial charges as early as possible in the process, with additional offences charged at a later date if new material is detected. While consultation with QPS identified this is not its preferred approach, the council nevertheless recommends this for cases that are identified, at the search and seizure stage, as likely to be complex or protracted.

The council acknowledges this issue requires further consideration and discussion between investigators and prosecutors, and proposes this be included as part of the ongoing development of the CEMA Report, given its intended significant contribution to reducing delays. The council believes this change in approach will have significant benefits for victims, offenders and the criminal justice system.

## Classification threshold process

As discussed in Chapter 4, the council does not recommend the adoption of random sampling for classification purposes. However, during the council's consideration of sampling in line with the terms of reference, the use of thresholds was explored. A 'threshold' refers to where a collection is sampled, not in its entirety, but up to a particular point, or threshold. This could be time-based or based on the number of files.

Consultation with prosecuting and Australian law enforcement agencies revealed a threshold process could reduce delays, while still providing a strong appreciation of an offender's collection and his interaction with the collection for sentencing purposes. A threshold process is proposed as an additional tool rather than an alternative to the proposed CEMA Report. The council suggests a threshold be applied to the classification of material.

However, there are important distinctions to highlight between a threshold and sampling. First, thresholds are only considered for supporting timely prosecutions and sentencing, not in relation to further searches for offender-produced material or victim identification efforts.

Second, the council places value on a threshold process because it should support streamlining classification and the subsequent narrative provided about the nature of the material, as required by section 9(7) of the PSA. It will also support the council's proposed recommendation 1(b) to amend section 9(7) of the PSA, because police will have more time to investigate the offender's role. Further, the council believes a threshold process will also contribute to improved officer welfare by reducing the volume currently associated with classification and description requirements.

Finally, the council recognises there will be cases when a threshold process is not appropriate and should not be used. These situations may include where investigators identify new material made by an offender, an informed risk assessment requires additional material to be classified and described, or the defence objects to the threshold assessment. Of course the defence would always retain a capacity to examine, in a secure environment, all material seized by investigative officers.

To implement this recommendation, a threshold level will need to be agreed between police and prosecutors. The threshold will need to consider a time or numerical limit for images and videos, and whether it applies across all devices, or within each device. The council notes that a threshold process will need to align with any new occupational health and safety processes arising from Taskforce Orion's work.

### Using data to inform a threshold process

As discussed earlier in the report, the council analysed the sentencing remarks (where available) of 367 higher court matters finalised in 2011–12 and 2015–16. This analysis can contribute to the development of a threshold.<sup>457</sup> While some sentencing remarks provided no specificity as to the nature of the material seized, where such information was detailed, it was revealed that 43.9 per cent of cases involved CEM images only, and 44.2 per cent involved CEM images and videos (refer to



Table 11). Only 22 cases involved CEM videos only, with documents being present in even fewer cases. This suggests that a threshold process for images and videos would be most useful.

**Table 11: Type of CEM present in offences sentenced in 2011–12 and 2015–16**

CEM	N	%
Images only	129	43.88
Videos only	22	7.48
Documents only	5	1.70
Images and videos	130	44.22
Images and documents	1	0.34
Videos and documents	0	0.00
Images, videos and documents	7	2.38
Unknown/not referred to in sentencing remarks	73	
Total	367	100

Source: Analysis of sentencing remarks available from the QSiS

Further analysis of the 367 sentencing remarks reviewed showed that in 266 matters, the judicial officer discussed the volume of material in some way. The council's analysis found more than half (59.4%) of the cases involved fewer than 1000 CEM items. However, it is apparent there was a wide range of volume, with the minimum involving one image, and the maximum involving 938,178. This wide range was also observed across the type of CEM being analysed.

**Table 12: Quantity of CEM identified in sentencing remarks in 2011–12 and 2015–16**

	N*	Median	Mean	Maximum
Total CEM	266	403.5	13,990.17	938,178
Total images	228	658	16,014.86	938,178
Total videos	139	30	284.53	13,949
Total documents	11	22	520.36	2,836

Source: Analysis of sentencing remarks available from the QSiS

\* Refers to the number of cases with sufficient detail to identify the amount of CEM involved in the matter

**Table 13: Quantity of CEM identified in sentencing remarks, by sentencing outcome, for offenders sentenced in 2011–12 and 2015–16**

Amount of CEM	Custodial	Non-custodial	Total	% Custody
0–1000 files	119	39	158	75.32
1001+ files	105	3	108	97.22
Unknown/not specified in sentencing remarks	83	18	101	82.18
Total	307	60	367	83.65

Source: Analysis of sentencing remarks available from the QSiS

As noted previously, of the 367 sentencing remarks analysed, the judge referred to the classification of the material in 67.3 per cent of matters (n=247). References to classification ranged from summarising the nature of some material to specifically naming the Oliver scale. In 243 of these

cases, at least some details were provided about the categorisation level of some material involved in the case.

Sentencing outcomes were examined to determine the relationship (if any) between volume, either total or within a particular category, and imprisonment. The council's analysis suggests that the chance of a custodial sentence being imposed did not vary considerably, based on the presence of at least one image from each of the six categories. There was a slightly higher chance of custody if the matter involved any category 5 material (i.e. sadism, bestiality, child abuse), however, matters involving any category 6 material (animated or virtual) were also highly likely to receive custody.

**Table 14: Custodial outcome and classification in 2011–12 and 2015–16**

	Custodial	Non-custodial	Total	%
Any category 1	174	23	197	88.32
Any category 2	108	13	121	89.26
Any category 3	111	10	121	91.74
Any category 4	165	16	181	91.16
Any category 5	109	5	114	95.61
Any category 6	49	3	52	94.23

Source: Analysis of sentencing remarks available from the QSiS

The council also noted that, in 2016, the Queensland Court of Appeal took the view that even if the offender had been sentenced for 7500 CEM videos instead of 6500 (as was possessed), that 'would not have had any material effect on a proper assessment of the applicant's criminality so far as the possession count was concerned'.<sup>458</sup>

Based on the research and consultation undertaken with agencies, the council suggests an appropriate threshold for classification would be 1000 CEM images and 50 CEM video files. However, as noted above, investigators and prosecutors will need to determine whether the threshold applies across all devices, or within each device. It is also envisaged investigators would provide a description of the classified material to prosecutors pre-committal.

### **A threshold is not a representative sample**

As noted above, if a threshold process was adopted, it would apply only to classification. This means the classification outcomes of the threshold amount would **not** be a representative sample of the entire collection.<sup>459</sup> The threshold process would not apply to further searches for offender-produced material or for victim identification purposes.<sup>460</sup>

Applying a threshold would properly lead to sentencing judges acknowledging that, due to the method used, it is likely additional CEM in an offender's possession has not been presented for prosecution purposes. The council believes there is merit to applying a threshold process in Queensland, as an agreed threshold approach would:

- represent a pragmatic compromise in an effort to provide a fair factual basis for sentence, prior to committal
- provide offenders with certainty of the factual basis of a sentence
- minimise delay in court proceedings (both before and after committal)
- encourage a more detailed description of the material within the threshold
- free up police resources for victim identification and prosecuting further offences
- reduce exposure to large volumes of CEM, thereby improving officer welfare.

The appeal of thresholds over sampling (particularly random sampling) is that they reduce delay due to classification without the concerns about over-representing or under-representing criminal culpability through mathematical extrapolation.

## Legislating a threshold process

The use of a statutory certificate would make results from a threshold process admissible with a rebuttable presumption, and enshrine safeguards. As with all evidence, a threshold certificate would be required to be created and disclosed prior to committal hearing. It would ensure statewide uniformity and a universal approach to prosecutions.

Section 128 (Analyst's certificate) of the *Drugs Misuse Act 1986* (Qld) provides a useful illustration of a provision creating a rebuttable presumption as to the contents of a certificate. In that example, the certificate is evidence of the identity and quantity of the thing analysed or examined, the result of the analysis or examination, and the matters relevant to the proceedings.

The council recommends introducing a provision into the *Evidence Act 1977* (Qld) regarding a CEM certificate. The certificate would be evidence of the fact that an authorised officer conducted classification of seized material in accordance with a threshold process set by a regulation (most likely the *Evidence Regulation 2007*). That regulation may, or may not, also state the classification method, which could recognise the CCS in subordinate legislation.

The certificate should be in the approved form.<sup>461</sup> In response to risks associated with unrepresentativeness of the collection as a result of the threshold, the provision should also:

- confirm the defence can contest the certificate on the basis that it objects to a threshold classification
- confirm the right of the defence to access and view the material in accordance with existing restrictions on sensitive evidence in the Criminal Code (Qld)
- contain an express ability for a court to order a full classification report at its discretion.

The council notes these additional issues in respect to this recommendation:

- threshold classification in CEM matters is already evident in Queensland, albeit on an ad hoc basis<sup>462</sup>
- adopting a threshold process would not preclude different charges being preferred later (e.g. contact offending or distribution of CEM that was not apparent from the initial threshold analysis and associated brief)
- a threshold process would reduce the amount of CEM that must be viewed.

## Thresholds in other Australian jurisdictions

As noted above, other Australian jurisdictions have adopted thresholds, by either time or volume, in order to produce a timely, factual basis for sentence. A time threshold was adopted by police with VDPP cooperation in Victoria. Under this threshold Victoria Police only classify material for a maximum of three days. Effort is made to classify a blend of still images and movie files, in the order they are encountered. Victoria Police then use an automated software process to randomly select images in each category for evidentiary reports.<sup>463</sup>

South Australia Police have a threshold process for general possession offences, where no contact offending is suspected, of 1000 images and 50 videos.<sup>464</sup> The SADPP's submission noted that: <sup>465</sup>

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*... there is no legal requirement that all of the material be viewed. The amount viewed is the amount considered to be necessary to view and classify in order to prosecute. In practice, if it is not practical to classify each item due to the sheer volumes involved then the police officer will classify a representative sample.*

**SADPP**

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The Tasmanian DPP (TasDPP) *Prosecution Policy and Guidelines* state that:

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*... in instances where there are a significant number of images, police should review/classify a random selection of 1000 images across the different mediums seized (this is to include all the categories ...). In cases of a plea of guilty, police are to provide a sample across all categories for submission to the judge. The classification of 1000 images is subject to several exceptions and police officers should exercise discretion, depending on the circumstances of the case.*<sup>466</sup>

**TasDPP**

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Those exceptions can include where an accused produced images himself, a judicial officer has requested further information, the accused pleads not guilty, or an officer chooses to classify an entire library 'due to a particular investigation or, in the alternative, in the desire to locate and protect a subject of a particular image'.

The TasDPP's submission to the council explained a threshold of 1000 'was adopted following the examination of other jurisdictions' due to the increasing size of collections and the fact that the legislation speaks of material being CEM or not, and because 'there is no reference to scale within the legislation. The point of this is that classification is only one aspect of an investigation/sentence, but it is not the only tool'.<sup>467</sup>

The WADPP's submission stated WA Police:

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*... do not categorise material based on an assessment of a percentage amount of the material. Instead, the Western Australian Police have reviewed Court penalties for this type of offending and have determined 'thresholds' for examination, after which they consider there is a diminishing return in penalties given to the accused. They then conduct their examination and categorisation of the material based on the 'threshold' that they have determined applies to a case (with the thresholds varying from case to case).*<sup>468</sup>

**WADPP**

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The NTDP's submission advised 'in cases of a significant number of images a proportion of the images/movies only are categorised and the results presented to the court'.<sup>469</sup> In an effort to reduce delay, 'by agreement between the parties, a sample of the images are classified and then those results multiplied across the entire collection resulting in a representative categorisation for the purposes of sentence'.<sup>470</sup> Further advice indicated there is not a set formula to achieve this. Usually, police categorise until the NTDP becomes involved and then, dependent on the percentage already classified (being not a very small proportion), the NTDP approaches defence. However, there is 'no power to force defence to accept this even where the possession is not in contest'.<sup>471</sup>

### **Views of Queensland stakeholders**

There was general support from stakeholders for a threshold process. Thresholds were discussed directly with some key stakeholders and at the roundtable meeting held on 28 April 2017. Whereas stakeholders raised significant concerns about sampling (refer to Chapter 4 for more detail), the potential benefits of a threshold process for classification were recognised. Submissions responding to the consultation paper, understandably, primarily focused on random sampling. However, the QDPP submission noted 'the office has attempted to reduce delays by notifying investigators that we do not necessarily require classification of the whole of the seized material. It is unclear what gains in terms of the time of resolution have been achieved by this means'.<sup>472</sup> Furthermore, the QDPP accepted preparing classification reports 'can be next to impossible for the full selection of the images numbering in the hundreds of thousands or millions. Accordingly they will usually be prepared in respect of a proportion of the seized images only'.<sup>473</sup>

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### **Recommendation 8**

#### **The council recommends:**

- *consideration be given to introducing thresholds by adding a provision to the Evidence Act 1977 (Qld) regarding a CEM certificate. The certificate would be evidence of the fact an authorised officer conducted classification of seized CEM in accordance with the threshold method*
  - *a threshold method set by a regulation (most likely the Evidence Regulation 2007) to deliver time savings in the classification of CEM for Queensland courts*
  - *an independent body evaluate the use of a threshold process if implemented at six-month and two-year evaluation points.*
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## **Summary**

The council proposes the implementation of a new approach to classifying CEM which aims to address the criticisms of the Oliver nine-point scale outlined in earlier chapters, and to achieve the prosecution and sentencing needs of the courts. The Q-CEM Package includes a new four-level classification tool—the CCS—to be used in conjunction with the CEMA Report, which will provide more specific detail about the material seized and the offender’s involvement with the collection.

The council also recommends a field triage approach be taken at the search and seizure phase of the investigation to inform the development of the CEMA Report, and the development of a Timeframe Report to be provided by investigators to the prosecuting agency with carriage of the matter (whether it be the Police Prosecution Corps, QDPP or CDPP) to ensure prosecutors are aware of unavoidable time delay due to complex or protracted investigations.

Finally, the council proposes the adoption of a threshold process for classification, which could be set at 1000 images and 50 video files, to provide better information to courts for prosecution and sentencing. Should a threshold approach be accepted as a recommendation, this would need to be established by legislation.

## Chapter 6: Building Queensland's position

This chapter explains the council's rationale for its recommended approach to support, monitor and evaluate the Q-CEM Package, and highlights critical issues identified as part of the review beyond those specifically linked to classification or delays.

Throughout this report, the council has made reference to a proposed evaluation framework to support and monitor the implementation of the recommendations made. The council's commitment to independent, integrated and staged monitoring and evaluation reflects the broad appreciation that a reform agenda, particularly one that is externally driven, requires a mechanism to ensure momentum is maintained, reform integrity is retained, and unintended consequences are rapidly identified and addressed.

The need for evaluation also arises due to the potential impact of reform on all stakeholders involved across Queensland's criminal justice system (police, prosecutors, defence lawyers and judicial officers), as well as victims and offenders. In addition, CEM offences are projected to continue their exponential growth and adaption:

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*... child sex offending, particularly to feed the illicit and insatiable child exploitation material market, represents a risk with an upward trajectory ... That growth is likely to continue with ongoing advancements in technology.*<sup>474</sup>

**QOCCI Report**

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Various experts consulted as part of the council's review echoed the QOCCI's assessment that CEM offenders are displaying a capacity to rapidly acquire and exploit the opportunities presented by new technology.<sup>475</sup> This criminal adaptability in itself necessitates regular review to ensure our criminal justice system is positioned to meet the challenges it faces. For example, the *2016 Annual Report* of the Internet Watch Foundation (IWF) identified a 112 per cent increase in masking techniques, which in the CEM context conceal imagery from enforcement agencies, yet provide clues for accessibility to those with a sexual interest in children.<sup>476</sup> In addition, the use of pathways, 'pay for view' livestreaming and Bitcoin payments<sup>477</sup> for accessing material are also increasing. It is evident that techniques employed by CEM offenders can be used to perpetrate other crimes facilitated by the online environment.

The council acknowledges that Queensland has led many of the innovations and improvements to detect and investigate CEM and child sexual offences in the online environment. QPS, via Taskforce Argos, has established itself internationally in this investigative field. Continuing to build this reputation into the future represents a driving force behind the council's recommendations in this chapter.

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*The fact that Taskforce Argos officers routinely upload images to the database held by INTERPOL means that there is regular contact and collaboration with law enforcement agencies all around the world. This collaboration is strong and productive. It places Taskforce Argos firmly in the position as one of the world leaders in the investigation of online child sex offenders.*<sup>478</sup>

**QOCCI Report**

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### National and international cooperation

The council heard that, given the dynamics of CEM offending, particularly in relation to technological advances and improvements, it is imperative Queensland establishes an integrated system for managing these offences that is both nationally and internationally consistent. Adoption of the CCS will enable QPS to collaborate with international jurisdictions.

These offences are borderless—images or videos made in one country are items that become part of the collections of Queensland offenders. Similarly, images of Queensland children can become



instantly disseminated across the world. The IWF 2016 Annual Report revealed more than 90 per cent of child abuse images were held across the Netherlands, United States, Canada, France and Russia.<sup>479</sup> The involvement of numerous countries and their respective criminal justice processes alone demonstrates the complexity and limited utility of pursuing state, or even national efforts in isolation from international cooperation. This topic received a number of comments during the council's public consultation process:

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*With improvements in the capacity and transportability of the material/data, there needs to be a network/system by which these can be matched for investigative and judicial purposes. Confirmation of such data should allow for further cooperative measures with all investigative authorities within Australia and overseas.*

**Private submission 1**

*We appreciate that public awareness is growing in relation to CEM and that the internet plays a critical role in the documented increase in CEM due to rapid advancements in technology. Therefore, we strongly support enhanced mechanisms to enable better cooperation internationally to adequately classify and censor CEM.*

**PACT**

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As discussed in Chapter 4, the need to develop a national database, connected to an international library of verified hash sets, was identified as far back as 2005. This need has not abated. In fact, it has now become even more critical. The development of such a resource will mean all domestic jurisdictions would be able to routinely share hash sets as well as classified and verified CEM, in particular new material, and to rapidly determine whether seized material has already been identified and classified. Work will be required for this to occur and gain traction at a practical level across Australia.

The ANVIL/CETS experience provides an important illustration of what has been tried previously and what lessons were learnt from its obvious inability to deliver on its promise. The council's consultation with key stakeholders within Australia and internationally reveals a clear appetite for re-initiating a national approach. As noted previously, the AFP has already taken initial steps to assume a central role in national coordination. However, as a result of this review, and to safeguard the reputational position of the QPS in this investigative space, the council suggests that the Queensland Government take action to encourage other Australian jurisdictions to form a unified platform to enable this to occur.

The council has identified that the Law, Crime and Community Safety Council (LCCSC) is the most appropriate Australian coordinating body to pursue the issue of a national repository for data sharing of CEM at the national level for three reasons:

1. LCCSC's capacity to drive real change at state and national levels due to its positioning in the Australian policy and legislative landscapes. This body is coordinated by the Australian Government's Attorney-General's Department and reports directly to the Council of Australian Governments<sup>480</sup>
2. its membership comprises the first law officers and policing ministers from each Australian state and territory jurisdiction, the Australian Commonwealth Government and the New Zealand Government<sup>481</sup>
3. its priorities explicitly include cyber safety, especially for children, serious and organised crime, and ensuring Australian legislation and systems are modern, efficient and fit for purpose. These priorities all directly relate to the issue of national data sharing in CEM cases.<sup>482</sup>

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### **Recommendation 9**

***The council recommends the Queensland Government elevate the issue of coordination and cooperation in both classification approaches and data sharing to the national level via the Law, Crime and Community Safety Council.***

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Based on the recent reassessment of the ANVIL/CETS initiative, the council recommends that, in addition to elevating the task of coordinating national data sharing and cooperation to LCCSC, the removal of legislative barriers also be explicitly incorporated into initial discussions at this level.

The council is concerned that legislative barriers previously identified as part of the ANVIL/CETS proposal may not have been fully resolved. These may in effect re-emerge to thwart an attempt to promote national and, by implication, international sharing and cooperative efforts. Privacy implications may also require consideration at both individual jurisdictional and national levels. This additional dimension will require individual states and territories to proactively consider if legislative barriers to sharing CEM exist within their respective jurisdictions.

The council considers it important that a strong intelligence and research function is established due to the adaptability of offenders within the online environment to evolve in their offending, enabling them to avoid increasingly coordinated criminal justice responses. This issue was also acknowledged by the QOCCI: 'Given the reality of finite resources and the prevalence of online child sex offending, intelligence assessments are critical to the appropriate allocation of resources in this area'.<sup>483</sup>

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### **Recommendation 10**

***The council recommends the Queensland Government consider removing any legislative impediments to the sharing of CEM between law enforcement agencies, which include criminal intelligence organisations.***

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## **Mechanisms to protect children and prevent offending**

Throughout this report, the council has only briefly touched on the impact on victims of CEM offences. Many of the children appearing in images or videos are never identified, and the offenders who abuse the children in these images may therefore never be brought to justice. Many of the children depicted in CEM will never be aware material that shows them being abused is in the possession of so many people across so many countries. Other children become aware as young people or adults that they have been the victims of CEM offending. One submission received by the council outlined the devastating impact on the author and her daughter when it became apparent the daughter had been a victim of CEM and contact child sex offending:

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*He parked his car opposite a well-known girl's school at [location in Qld]. This is where my daughter attended school. It was also where my mother, myself and my sister attended ... [he] would watch girls arriving for school including my daughter and her friends ... The abuse on my daughter has had a lasting effect on her life and she has lived interstate for a number of years. This is because she has so many bad memories of her childhood. I have found that to victims of paedophiles the pain is always there ... In [our] case there were many victims who found it difficult to absorb court proceedings and this caused more anxiety to victims.*

***Private submission 2***

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While the obvious victims of these offences are the children and young people appearing in the material and their families, the council also acknowledges the devastating impact on the families of

CEM offenders. Many of the partners, children and other family members of CEM offenders have no idea of the hidden collections of their loved ones, and are sometimes caught up in police investigation and then court prosecution processes that cause uncertainty and shame. An article in *The Guardian* online provides some insight:

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*During the year between my dad's arrest and sentencing, my parents lived in a state of purgatory. Was he going to jail? Would their friends find out? Would it be in the papers? Would he be targeted? Other than telling no one outside the immediate family, and putting pressure on my sister and me to do the same, there was not much they could do but wait. Once the criminal proceedings had run their course, however, my dad told me that he and my mum wanted to 'normalise relations on all levels'. They wanted my dad to be welcomed back into our family home, and reintroduced to our children. My wife and I said no. We did not want to 'normalise relations'. Our relationship with my dad was not normal, nor could it ever be again, but we felt as if we were being pressured into acting as if none of this had ever happened.<sup>484</sup>*

**The Guardian**

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A submission made by a member of the public to the council also shows the emotional fallout for the members of the family of a child who had been a victim of child sex offending:

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*I would now like to point out from my recent experience of dealing with a sex offender in our own family, that they are often very narcissistic people and most of these characters do not have the ability to grasp the effect that they are making on others. When they assault and/or hurt a child, be it their own or somebody else's, they are actually assaulting the whole family.*

**Private submission 3**

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Another separate, yet equally insightful submission received from a community member reinforced that, despite being a global crime, these offences are not victimless:

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*In contrast to the perpetrators, the children upon whom they prey literally receive 'life sentences' in the form of physical, psychological and emotional disconnect resulting in significant disrupted adulthood lives in the form of dysfunctional relationships, profound psychological issues (including but not limited to PTSD, self-harm, eating disorders to name but a few).*

**Private submission 4**

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## **Sexting**

As has been demonstrated through the data presented in Chapter 2 of this report, 1470 young people under the age of 17 years were cautioned or conferenced by police for CEM offences over the 10-year dataset. This research also revealed the overwhelming majority of these cases involved sexting, an issue which led QPS to implement a new policy in November 2016 directing police to deal with these young people using 'an alternative approach focused on prevention and education'.<sup>485</sup>

This policy also encourages officers to advise young people who have either uploaded their image to a site or had their image uploaded to a site about options for redress.<sup>486</sup> At this stage, it is too early to determine the impact of this policy change on police practice.

The council received correspondence from the Youth Advocacy Centre Inc (YAC), however, that provided several specific cases detailing young people who were charged with a CEM offence in relation to a sexting incident. Concern that young people are criminalised for sexting has been raised in several jurisdictions.<sup>487</sup> While it is accepted that these cases pre-date the 2016 QPS policy change, the council is keen to ensure this issue is monitored.

Adequately addressing sexting is an important and complicated issue for Queensland. Recent research indicates a need to distinguish between types of sexting, for example, consensual sexting between two people as opposed to the forwarding or releasing of images to other parties without

consent, even if provided to the original person consensually, sometimes referred to as image-based abuse.<sup>488</sup>

Authorities must be in a position to access a range of options to respond appropriately to individual cases, for example, educative responses for sexting, with stronger justice responses when sexting may in fact be associated with more exploitive or coercive aspects. In addition, the state holds an important responsibility to inform young people that, even in cases of sexting, these images can easily transcend the intended recipient and become lost to the young person, and potentially become part of the CEM market. The IWF in its *2016 Annual Report* attributed the increase in images of young people assessed as being aged between 11–15 years old to sexting or ‘self-produced’ content and noted ‘[t]his can have serious repercussions for young people and we take this trend very seriously’.<sup>489</sup>

### **Queensland as a cyber safety champion**

In 2015, the Commonwealth Government established the Office of the Children’s eSafety Commissioner. This agency provides online safety education for children and young people, as well as a complaints mechanism for young people who experience cyberbullying and image-based abuse.<sup>490</sup> The eSafety Commissioner also hosts an online content scheme, which enables individuals to report offensive and illegal online content to ensure it is removed wherever it is hosted.

Throughout the course of this review, the council has been impressed with the work of this agency. To date, the eSafety Commissioner has proved an important addition to the cyber safety landscape, and is closely linked with educative and enforcement efforts to promote safer online environments for all Australian young people.

This agency has also ‘demystified’ the virtual environment for parents and, through the use of case studies, assists parents in initiating conversations with their young people about online safety. The Office of the eSafety Commissioner’s own research reveals that while the overwhelming majority (90%) of parents view the online environment as beneficial for young people, 55 per cent recognise both the benefits and the risks, and not all parents feel confident in their capacity to protect their children online.<sup>491</sup>

In Queensland, there have been a number of initiatives to replicate similar efforts to raise awareness and educate children and young people about staying safe online. For example, during the course of the review, the council became aware of numerous and often complementary or linked initiatives across Education Queensland (EQ), QPS, the Queensland Family and Child Commission (QFCC), various private schools, local governments, other state government agencies, private organisations, the non-government sector and other community groups.

Typically, these initiatives target similar concerns about cyber safety and address comparable audiences. While local responsiveness is critical, the council believes Queensland would benefit from consistent messages on which local initiatives could be based, and a coordinated effort in which information is freely provided about what works and what does not work in cyber safety.

As a result, the council recommends the establishment of an eSafeQ Commissioner position to solidify Queensland’s place as a leader in cyber safety, complement local, state and national activities in this area, including working with the Office of the eSafety Commissioner, and assume the lead for Queensland in relevant research and discussions with industry and government.

This proposal is designed to promote and support local activities by optimising the collective effort that has already been invested in this area. The issue of sexting would be a good topic for the eSafeQ Commissioner to address by designing interventions to assist parents to talk to their children about cyber safety. Research indicates that sexting is common, and for the most part becoming normalised among young people in their early to late teens, and the majority of young people involved in sexting are using devices within their homes.<sup>492</sup>

The council also recommends continued research effort into areas associated with this work. For example, the issue of sexting must be monitored, particularly as concerns raised by YAC relate to young people who may be drawn into the criminal justice system when they clearly should not be. Monitoring the impact on young people of any policy or legislative responses relating to CEM

offending is of critical importance. The council also believes a significant opportunity exists in Queensland to undertake dedicated and targeted research and strategy testing in the crime prevention space for families, parents and young people.

Finally, the 2016 Youth, Technology and Virtual Communities Conference revealed developing work in relation to intervention strategies to encourage offenders to engage in help-seeking behaviour. This appears to be an emerging field, and preliminary advice suggests this warrants further consideration.

One initiative that appears to be having some success is an automated pop-up screen triggered when a user clicks on a link to an inappropriate site or image.<sup>493</sup> The screen alerts the user to the illegal nature of the material and provides a link to a help-seeking website. A second initiative located in the UK is a helpline for people seeking assistance to overcome their sexual interest in children.<sup>494</sup> Any reduction in the illegal market that can be achieved by such initiatives merits proper review.

The council has given some consideration to the question of which agency would be best positioned to assume this key role. The council notes the QFCC is best positioned, if equipped, to extend its current work program to address these identified areas. With appropriate resourcing, the QFCC could:

- develop consistent messaging about how to stay safe online
- inform policy and legislation development, evaluation and reform
- support local responses
- promote targeted and responsive education and community awareness campaigns
- consider and evaluate the growing area of crime prevention for both vulnerable groups, parents, young people and offenders
- conduct or commission research, monitoring and evaluation activities
- liaise with and coordinate the activities of relevant groups across government and non-government sectors.

The QFCC's current reputation across stakeholders at local, state and Commonwealth levels reinforces the logic behind this suggestion. Its role and functions already include a significant amount of cross-government coordination, a research agenda and an overall role of improving the child protection and family support system.<sup>495</sup>

In addition, the council is aware that the QFCC has undertaken work to host the Out of the Dark (OOTD) project, conducting a range of activities to encourage online safety for children, young people and their families, an initiative developed in response to the findings of the QOCCI report. The scope of the activity to date has focused on ensuring the many existing resources and strategies to encourage online safety are available to children and families.

In March 2017, the QFCC hosted a week of events which included a learning forum for professionals, an internal online safety education session for QFCC staff, the QFCC Principal Commissioner's visit to a Brisbane secondary school, and a public OOTD Expo held at the State Library of Queensland.

It is estimated the events reached more than 700 children, young people, families and professionals who work with families. A survey of expo attendees identified 100 per cent of the OOTD learning forum attendees rated the information received as very beneficial or somewhat beneficial for them and their organisations, and all intended to use the online safety strategies promoted by the event.

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### **Recommendation 11**

***The council recommends the establishment of an eSafeQ Commissioner position to meet the challenges associated with online offending and protect Queensland children and families in the virtual environment.***

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## Reform evaluation

Embarking on reform requires an equally strong commitment to monitoring and evaluation. A useful working definition of evaluation is the systematic collection and analysis of information to make judgments about the effectiveness, efficiency and appropriateness of a program or initiative. Evaluation typically involves comparing a program or initiative and its impact to predetermined objectives to assess whether the program or initiative has been successful.<sup>496</sup>

There are strong reasons to evaluate programs and initiatives, whether new or longstanding. They include:

- understanding whether a program or initiative has been implemented in a manner which is faithful to the original plan
- demonstrating the effective use of resources, or the need for additional resources
- providing evidence about why a policy or process is not working
- assessing whether the objectives of a program or initiative are achievable
- providing evidence for decisions or changes to a program or initiative.

The recommendations made in this report are specifically designed to achieve the following objectives:

1. improvement in the time taken by police to prepare briefs of evidence, leading to improvement in the time taken to charge matters and move them to the court for prosecution
2. reduction in the exposure of individual police officers to CEM
3. improved consistency in undertaking classification work across Queensland
4. better cooperation with law enforcement agencies nationally and internationally
5. better alignment with international efforts to catalogue and classify material
6. improved information provision to courts for sentencing decisions.

Only by conducting a planned, independent evaluation can the effectiveness of the recommendations, and their implementation, be properly assessed. Before the evaluation framework can be designed, the goals and objectives of the initiatives implemented need to be clarified so they are specific and measurable.

While the objectives outlined above provide clarity in terms of the overarching aims of reform, they lack the specificity that will be required to determine the research questions to be asked and to design the data collection method required to measure impact. This is a considerable task, and will require additional effort following any decision about the proposed suite of recommendations. The council recommends that an independent body should be engaged to undertake this work.

The council proposes monitoring and evaluation activities at three time intervals:

1. three months post adoption—at this point, activities should focus on implementation and testing of recommendations, as well as development of the appropriate evaluation criteria. In addition, a protocol for the collection of statistical information that will be integral to later evaluation work should be established and data collection should commence (see recommendation 12)
2. six months post adoption—at this point, activities should be designed to provide an initial assessment about the operationalisation of the adopted recommendations. The independent body should also examine progress on data capture and reporting, the extent of implementation, and any identifiable unintended consequences as well as remedial actions. Stakeholder assessment may also begin at this point
3. two years post adoption—the final proposed evaluation would include both a process and outcome evaluation, with a focus on what, if any, ongoing effort is required or amendments are needed. This final stage is also designed to consider the future needs of this area, as well as what learnings have been extracted from both the reform and the implementation processes.



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## Recommendation 12

*The council recommends an integrated, staged and independent evaluation framework be adopted to monitor and assess the implementation and effectiveness of the Q-CEM Package to deliver the intended outcomes for Queensland.*

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### Information for effective evaluation

Throughout this review, the council experienced difficulties in securing data about key issues directly relevant to the terms of reference. It is noted the QOCCI experienced comparable problems two years prior to this review when attempting to gain valid measures of the same issues, a realisation that led to the recommendation for a dedicated crime statistics body.<sup>497</sup>

The council suggests this problem extends even further than being able to measure crime, but also points to a need to examine relevant government investment and activities. QPS advised the QOCCI that the time necessarily dedicated to classification was excessive and interfered with investigative and victim identification commitments. The council was unable to assess this issue with any degree of certainty. While the council appreciates the main role of policing is not gathering statistical information, when an issue is repeatedly raised by an agency as problematic it is in their interest to initiate a monitoring process to provide relevant evidence.

As a result, QPS was not able to quantify the time it takes to classify material in CEM cases. The council accepts that there is no such thing as a standard CEM case. However, an inability to gauge the diversity of CEM cases or differences in time and human resource investment through measurement was particularly problematic. This gap in information became particularly evident when QPS notified the council that beyond the classification work, there were additional issues contributing to time delays, although they had no capacity to quantify the extent of these other delays in any detail.

Information systems need to be developed or reconfigured to enable QPS to document these aspects of its work, and therefore to document claims about the time it takes to classify material. This will now become even more critical as Queensland embarks on reform in this area. While the council appreciates the specifics of monitoring and evaluation adopted will require more consideration, the following information, at a minimum, is immediately needed to establish a baseline for measuring the impact of any changes made to the current arrangements:

- number and pattern of hours associated with classifying material
- workplace health and safety mechanisms and any detail about how and why they are used (recorded in a non-identifiable manner)
- indicators outlining the degree of complexity associated with these cases, the material collected (including types and how collected) and forensic requirements, potentially acquired via file reviews for CEM cases.

As the evaluation progresses, it will also be important to track process-related issues such as training that is undertaken, and the interagency liaison and policy levers that are implemented. Assessing how implementation and change management were instigated, sustained and monitored is as critical as effectively assessing impacts or outcomes associated with reform.

Time, resource deployment and officer welfare have all triggered the proposed reform agenda. Any shift in these factors post-implementation as outcome measures over the short, medium and long term will obviously interest internal and external stakeholders. In addition, the imperative to support national and international cooperation has been influential in the design of the council's suite of recommendations. As a result, the council also flags this issue as a potential outcome measure.

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### **Recommendation 13**

***The council recommends law enforcement agencies undertaking classification for Queensland courts immediately commence documenting baseline information and establish data collection mechanisms.***

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## **Anticipated resources**

The reform agenda proposed by the council in this report is not cost or resource neutral. The recommendations envisage considerable change, not only to the way the classification system currently works, but also to the framework in place to enable national and international cooperation.

While it is not the role of the council to specifically recommend resource requirements, it is acknowledged that resources will inevitably be required. This section of the report provides guidance about what resources will be needed and how these should be deployed.

The first issue relates to the existing work being undertaken by QPS as a result of Taskforce Orion.<sup>498</sup> This initiative pre-dated the council's review, but also resulted from the work of the QOCCI.

The Queensland Government provided law enforcement with additional funds to examine, develop and test staff welfare programs, specific software innovations to assist in classification and victim identification efforts, and statewide capacity building. Significant synergies exist between the Taskforce Orion initiatives and the council's terms of reference, both designed to improve law enforcement and overall criminal justice practice and outcomes in the area of CEM.

The council acknowledges the important work this funding is facilitating and notes the proposed reporting on the outcome to government in the latter part of 2017. The council recommends an end-of-funding report provide definitive guidance about the outcomes, including preliminary findings and learnings to inform future practice and direction.

The council recommends the initiatives being undertaken as part of Taskforce Orion be viewed as inextricably interwoven with the suite of recommendations proposed as part of this review. As a result, all reporting from Taskforce Orion must be incorporated into the council's proposed evaluation framework.

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### **Recommendation 14**

***The council recommends the evaluation of Taskforce Orion provide definitive guidance about current and projected resource and maintenance requirements associated with the trialled technology and welfare management, and any practice improvements or learnings derived from the trial.***

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The second issue relates specifically to capacity building within QPS as the primary agency undertaking classification in Queensland. The council has identified the following key tasks, which are linked to the implementation, change management and evaluation of the Q-CEM Package.

Any resources provided to undertake the work proposed below should be co-located within Taskforce Argos in recognition of this unit's functional responsibilities and established authority for setting practice standards across the state for investigations within this area. It is also suggested any additional resources be dedicated for a period of three years to facilitate design and implementation, and to support independent evaluation of the reforms.

## Project management

A range of project management activities will be required which will involve interpreting the council's recommendations into a change management strategy, and implementing this strategy across Queensland in cooperation with the functional lead, Taskforce Argos.

This will involve integrating the Q-CEM Package into the existing QPS policy and procedural framework, the design and delivery of training or development mechanisms for officers, and effective change management. Project managing the implementation of the recommendations will involve high level negotiation with stakeholders such as:

- middle to senior management within QPS
- liaison with the QDPP, and the proposed eSafeQ Commissioner
- interstate counterparts in relation to the Q-CEM Package
- independent evaluator.

The tasks would also involve overseeing the data collection requirements for the evaluation work, as well as for operational reporting.

## Research and intelligence

The council recognises the opportunity for QPS to commence dedicated research about policing practice in this area, to support both national and international efforts, and to build on the reputation Queensland already holds in this area. Having a research role would also enable QPS to provide timely and reliable information from the law enforcement perspective about this offending to feed into the crime prevention, government coordination and capacity building roles of the proposed eSafeQ Commissioner.

In its report, the QOCCI noted a resourcing gap in the intelligence capability of Taskforce Argos.<sup>499</sup> The council considers that any research undertaken by QPS in this area could also enable QPS to strengthen its capacity in its collection and use of intelligence.

## Forensic analysis

The forensic analysis capacity within QPS is located in the EEEU in the financial crimes investigative area of State Crime Operations Command. Taskforce Argos is also located within this Command, albeit under separate senior management.

The council was informed the forensic analysts are located within this area because almost all organised crime investigation involves a digital footprint, and therefore requires some level of forensic analysis. As a result, CEM cases are subject to prioritisation processes across this broader range of crimes. It is acknowledged, however, that re-prioritisation does occur when needed to elevate CEM cases. In response to this issue the QOCCI stated:

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*Taskforce Argos also requires full-time dedicated forensic computer analysts. The Electronic Examination of Evidence Unit employs District Electronic Evidence Technicians, who are deployed across the state to assist with investigations of various types. The Unit is housed in the Fraud and Cyber Crime Group. Given the nature of the work, it is not unreasonable that Taskforce Argos has dedicated specialist resource such as are available to the Cerberus Unit at the Crime and Corruption Commission (CCC) ... a minimum of two full-time forensic technicians to be assigned to the unit ... The Commission supports the provision of those additional resources.*<sup>500</sup>

**QOCCI**

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The issue of resources was raised a number of times during the course of the review. In the absence of reliable data, it is difficult to determine how forensic resourcing is impacting on delays or, conversely, if enhanced forensic capacity would assist in reducing delays currently experienced in CEM cases. It is noted forensic delay was identified by QPS as being likely to continue in light of the increased sharing between offenders of methods to conceal or embed corrupted files within CEM

collections to confound investigative efforts. This is particularly poignant in relation to emerging trends in new manifestations of CEM.

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### **Recommendation 15**

#### **The council:**

- **acknowledges the suite of recommendations have resource implications for QPS as the agency with primary responsibility for classification in Queensland**
  - **recommends QPS be allocated additional resources for a three-year period to support the implementation and evaluation of the Q-CEM Package.**
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Finally, as with the QOCCI, the council considered the current arrangements in Queensland involving a division of resources and expertise across two agencies in Queensland—the CCC and the QPS. As a result of the council’s separate consideration of this issue, it became clear there has been a long history associated with this division. Opinion appears to be divided in terms of whether this split should be retained.

Currently, it appears to the council that these two agencies are undertaking similar work, and there appears to be a degree of overlap in effort. This was acknowledged by both agencies, although both also agreed existing protocols were sufficient to avoid confusion. The working relationship appeared effective across the two agencies, as was also noted by the QOCCI.<sup>501</sup>

Both agencies highlighted accessing the powers of the CCC for certain qualifying investigations was a benefit, an issue again highlighted by the QOCCI.<sup>502</sup> The need to avoid duplication has been highlighted in previous three-yearly reviews of the CCC by the Parliamentary Crime and Corruption Committee (this review process will now move to every five years).<sup>503</sup> This was also echoed to the QOCCI:

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*Cerberus is staffed by experienced police officers, forensic computing experts and an intelligence analyst. It also has the support of legal and administrative staff. The CCC told the Commissioner that Cerberus is conscious of the need to avoid duplication of law enforcement energies.*

**QOCCI Report**

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While the CCC told the QOCCI its work differs from Taskforce Argos, it nevertheless remains that there are two agencies focused on the same offending behaviour. Both agencies have a capacity to proactively identify targets and operate within covert and Darknet areas. It was also noted Taskforce Argos holds the function of receiving national and international referrals from other agencies, and can forward a referral to the CCC if necessary.<sup>504</sup> Some of these referrals occur as a result of the forensic capacity of the CCC, an issue also identified by the QOCCI and discussed above in relation to recommendation 15.

Full consideration of this division of finite resources was beyond the defined terms of reference and the time parameters of the council. However, given resourcing was raised as a contributing factor to delay, and strong evidence exists for proposing and supporting coordination at national and international levels, it raises a question about whether efforts should be consolidated into Taskforce Argos, particularly given the finite resources available for this area.

As a result, the council proposes that a review of the operations of the two agencies and the work they conduct in identifying and classifying CEM should be undertaken. The proposed review must focus on how to effectively allocate finite resources to address this offending. The single or dual agency model must be considered in terms of the best position for Queensland.

The council approached the CCC about proposing an independent review, and it acknowledged this was a potential outcome of this report. The CCC noted access to its coercive powers for such investigations will continue in line with legislation.

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#### **Recommendation 16**

*The council proposes an independent review be undertaken of current arrangements in which state-based forensic and investigative resources specific to this offending type are divided between the CCC and QPS.*

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## Summary

This chapter has presented the council's recommendation to systematically evaluate its proposed Q-CEM Package outlined in Chapter 5. The council emphasised throughout this report its reforms should be monitored and evaluated to guard against unintended consequences, assess implementation and change management practices, and measure the impact of targeted reform.

The council has recommended this evaluation be:

- informed by improved data capture and evaluation of complementary initiatives undertaken as part of Taskforce Orion
- independent, yet undertaken in cooperation with key stakeholders
- staged at the three and six month points, as well as after two years to comprehensively monitor and evaluate the impact of reform.

Evaluation should also focus on the resource implications of the reforms proposed by the council.

As with most reform agendas, particularly those which impact across a sector, it is important that potential resource implications are considered. The council identified and presented its considerations of the resource implications associated with the implementation, change management and evaluation stages of the Q-CEM Package. Two other resource considerations were raised by the council. The first relates to building on Queensland's reputation through the proposal of an eSafeQ Commissioner position, potentially suitable for the QFCC given its current influence across government in linked functional areas. The second issue relates to the current division of law enforcement resources across two agencies in Queensland targeting the same offences, albeit, at times, different areas of this crime category.

Calling for such a review is not new and recognises that responsible public administration requires a commitment to periodically reconsider how resources, particularly finite resources, are allocated.

Collectively, the discussion and associated recommendations presented in this chapter are designed to extend Queensland's position as a jurisdiction well equipped at the state-level to meet the increasingly global nature of this technology-enabled crime.

# Appendix I: Terms of reference

## Classification of child exploitation material for sentencing purposes

I, Yvette D'Ath, Attorney-General and Minister for Justice and Minister for Training and Skills, having regard to:

- the observations of the Queensland Organised Crime Commission of Inquiry (the Commission), as outlined in the Commission's 2015 report, of the alarming demand for increasingly depraved material involving the abuse of children. These observations noted that membership of some highly networked child exploitation material sites requires the production and uploading of new material – on a regular basis – increasing the demand for child victims;
- the concerns expressed to the Commission by law enforcement and prosecution agencies regarding the 'Oliver scale', a child exploitation material classification system used by Queensland courts in sentencing offenders. The concerns relate to the enormous amount of time it takes police officers and civilians in the employ of law enforcement agencies, to assign one of six classifications to each of the millions of images found in the possession of offenders – such task depleting resources from victim identification and the priority of rescuing those children from further harm. Further, the time taken by law enforcement to classify the images and video files often means delays in prosecuting offenders;
- the significant extra funding the Queensland Government has provided, and will provide over the next four years, to the Queensland Police Service and the Crime and Corruption Commission to combat organised crime, in particular to enhance investigations into child exploitation; and the significant extra funding to be provided over the next four years to the Office of the Director of Public Prosecutions to ensure it is properly resourced to pursue convictions of serious and organised criminals – and the Government's expectation that such extra resources will result in an increase in the identification and prosecution of child exploitation material offenders;
- recommendation 4.11 made by the Commission, that the Sentencing Advisory Council, once established, as a matter of priority, review the use of the current 'Oliver scale' classification system, other classification options, and the merits of using random sampling, in the sentencing process;
- the definition of *child exploitation material* contained in section 207A of the Criminal Code;
- section 9(7) of the *Penalties and Sentences Act 1992* that requires a court sentencing a *child-images offender* to have regard to, among other things, the nature of any image of a child that the offence involved, including the apparent age of the child and the activity shown;
- the function of the Queensland Sentencing Advisory Council to provide requested advice on matters relating to sentencing; and
- the expectation of the Queensland Government and the community that child exploitation material offenders are sentenced in a way that reflects the nature and seriousness of the offending conduct;

refer to the Queensland Sentencing Advisory Council, pursuant to section 199(1) of the *Penalties and Sentences Act 1992*, a review of the system used to classify child exploitation material for the sentencing process.



In undertaking this reference, the Queensland Sentencing Advisory Council will:

- consider and review the effectiveness and suitability of using the current 'Oliver scale' classification system to classify the severity and type of child exploitation material for use in the sentencing process;
- consider and review alternative classification systems, including but not limited to, the United Kingdom's Sentencing Council's Sexual Offences Definitive Guideline which replaced the 'Oliver scale' in 2014 with a three category scale;
- consider whether child exploitation material images that have already been classified in another jurisdiction should be able to be relied on by the courts when sentencing to reduce double-handling by Queensland Police Service and Crime and Corruption Commission officers;
- assess the merits of using random sampling of seized child exploitation material as provided for under section 289B of the *Criminal Procedure Act 1986* (NSW) and section 70AAAE of the *Crimes Act 1958* (Vic);
- in considering and assessing the above systems, have regard to the issue raised in the Commission's report regarding the competing interests of the need for a sentencing court to have a clear and accepted method of objectively assessing the criminality and severity of the offending behaviour against the diversion of law enforcement resources away from victim identification and the priority of rescuing those children from further harm;
- consider whether any other factors should be added to the sentencing guidelines in section 9(7)(a) of the *Penalties and Sentences Act 1992*, such as the total volume of images, determined 'scale' of the images, and whether any children depicted in the images are known to the offender;
- determine if use of the Australian National Victim Image Library (ANVIL) and Child Exploitation Tracking Software (CETS) or other similar database tools used by itself or in conjunction with Project VIC (which provides a forum for information and data sharing between domestic and international law enforcement agencies investigating offending involving the sexual exploitation of children) would reduce the amount of time child exploitation team members spend on the classification process;
- have regard to relevant research, reports and publications relevant to sentencing practices in child exploitation material offences;
- consult with key stakeholders, including but not limited to the legal profession, the Queensland Police Service, the Crime and Corruption Commission, academics and the judiciary; and
- advise on any other matter considered relevant to this reference.

The Queensland Sentencing Advisory Council is to provide a report on its examination to the Attorney-General and Minister for Justice and Minister for Training and Skills by 31 May 2017.

Dated the 22 day of November 2016

**YVETTE D'ATH**

**Attorney-General and Minister for Justice  
Minister for Training and Skills**

## Appendix 2: Notes on methodology—data analysis

The council used a variety of data sources for the research in this review. The council requested data from three key agencies in the criminal justice system: Queensland Police Service (QPS), Queensland courts and Queensland Corrective Services (QCS). The council also reviewed relevant sentencing remarks on the Queensland Sentencing Information Service (QIS) website.

The council was interested in data about offenders charged (QPS data), matters finalised in Queensland courts (Queensland courts data) and offenders under corrective services supervision (QCS data) in relation to CEM offending.

Outlined below is a summary of the various data sources used, the analyses undertaken and the limitations of the data sources and analysis conducted.

### QPS data

All QPS data was extracted from the QPRIME database in March 2017. ‘Reported offences’ data was obtained for the period 1 July 2006 to 30 June 2016, relating to all young people cautioned or conferenced in relation to CEM-related offences during this period. ‘Charges’ data was obtained for the 10-year period 1 July 2006 to 30 June 2016, for all offenders charged with CEM offences.

### Courts data

‘Court finalisation’ data was extracted from the Queensland Government Statistician’s Office, Queensland Treasury – Courts Database in January 2017. This data comprised the period 1 July 2005 to 30 June 2016 and incorporated all matters finalised in Queensland courts that involved at least one CEM offence. For full details of the specific offences extracted, see the appendix attached to the *Sentencing Spotlight on child exploitation material offences*, available on the council’s website ([www.sentencingcouncil.qld.gov.au](http://www.sentencingcouncil.qld.gov.au)).

### Corrections data

Data was obtained from the QCS Integrated Offender Management System in April 2017. This data related to all offenders under QCS supervision as a result of being sentenced during 2011–12 for CEM-related offences.

In addition, point-in-time QCS data was also obtained for all offenders under QCS supervision in relation to at least one CEM offence for the five-year period 30 June 2012 to 30 June 2016. The point-in-time was at 30 June for each of the respective years.

### Sentencing remarks

The council reviewed sentencing remarks on the QIS database for offenders sentenced for CEM-related offences for multiple purposes, such as applied case law, application of the Oliver scale and classification more broadly, and as part of the cohort analysis. The cohort analysis specifically looked at available sentencing remarks for all offenders sentenced during 2011–12 and 2015–16.

## Analysis

### 10-year penalty and sentencing trends

Using the ‘Court finalisation’ data and QPS ‘Reported offences’ data, the penalty and sentencing outcomes of all CEM offenders in Queensland between 2006–07 and 2015–16 were analysed. This analysis was undertaken to understand how QPS dealt with young offenders in relation to these offences, and the outcomes of all offenders dealt with in Queensland courts over the 10-year period. Details were provided in relation to offender characteristics, offence type combinations and associated outcomes. Initial results of this analysis were reported in the *Classification of child exploitation material for sentencing purposes: Consultation paper*, available on the council’s website ([www.sentencingcouncil.qld.gov.au](http://www.sentencingcouncil.qld.gov.au)).

A more detailed analysis of this data further explored factors such as plea, court location, co-offending and sentence duration over the period. This analysis was published by the council as the *Sentencing Spotlight on child exploitation material offences* on 9 May 2017.

Additional analysis of the 'Court finalisation' data over the 10-year period examined specific factors of interest, including court duration and offences withdrawn or dismissed during the period.

In addition, while the court data provided a useful summary of events, the council was keen to explore any reoffending patterns of individuals within the court data. The court data obtained did not contain a reliable indicator to track individuals over time, as QPS Single Person Identifier (SPI) was not always noted in the court system. Due to this, the council linked events contained within the court data based on name and date of birth. This was done using a data linking software tool known as LinkKing.<sup>505</sup> This tool works in conjunction with the Statistical Analysis System (SAS), and uses both deterministic and probabilistic matching techniques to account for anomalies in data systems in relation to common administrative data errors relating to issues, such as the use of nicknames and transposed details.

### **Cohort analysis**

The council examined the interaction between offenders, QPS and the QCS to further understand the formal use of classification details in the sentencing process. To do this, the council selected two offender cohorts within the 10-year period for an in-depth analysis. The two cohorts were offenders sentenced during 2011–12 and 2015–16. Using the QPS SPI, the council was able to link offenders to their respective court finalisations. This enabled analysis of the duration between reporting, charging and court lodgement for these offenders.

The 2015–16 cohort was selected to enable 10 years of prior offending to be examined. In addition, as this group was the most recent to be finalised by Queensland courts, it provided an ability to examine the application of current case law and legislation (up to 30 June 2016) to these cases.

The 2011–12 cohort was selected to facilitate an examination of: prior offending over a six-year period; interaction with the QCS, including any supervision and any treatment undertaken at that time; and any future offending over a five-year period. For those finalised in 2011–12, details of their interactions with the QCS and any treatment programs undertaken were obtained and linked to their court finalisation data.

In addition, for both cohorts, their sentencing remarks were obtained where available, and thematically coded to identify whether formal reference was made to the classification of the CEM, and details in relation to the quantity and nature of the material involved in the case.

### **Limitations**

Caution should be used when interpreting the data and associated analysis, particularly due to the following:

- The data from Queensland courts, QPS and QCS was derived from their administrative systems, which are designed for operational, rather than research, purposes. The accuracy of information presented in this report reflects how administrative information is structured, entered, maintained and extracted from the administrative system.
- All of the administrative databases are continually updated as more information is entered into the system. Data presented is valid as at the date extracted.
- Sentencing details based on court data are summarised in relation to the original, or 'first instance', judgment relating to the offences dealt with. Information relating to any appeals and their outcomes are not included in the 'court finalisation' data maintained by Queensland Treasury.
- For the purposes of linking records within the court data, as a computational methodology was chosen for linking, it is acknowledged that some events may have been linked based on consistent names and dates of birth that were actually of different people, and similarly, it is possible that due to significant data entry errors, the program was not able to link events that did in fact involve the same person.

- As QPS data obtained did not incorporate the names of the offenders, in order to combine the QPS data with the courts data, the SPI was relied upon, which was not available for all court records.
- The sentencing remarks, as obtained from the QSI database, provide a useful source to outline the details of the material involved in the case where they have been specifically commented on by the presiding judge in sentencing, however, it is noted that these remarks may not incorporate all details of the material presented in evidence.

## Appendix 3: Queensland and Commonwealth legislation—definitions and offences

**Table 1: Queensland legislative framework**

Legislation	Framework		
Queensland Criminal Code	Definition		
	<p>s207A  <b>child exploitation material</b> means material that, in a way likely to cause offence to a reasonable adult, describes or depicts a person, or a representation of a person, who is, or apparently is, a child under 16 years —</p> <p>(a) in a sexual context, including for example, engaging in a sexual activity; or</p> <p>(b) in an offensive or demeaning context; or</p> <p>(c) being subjected to abuse, cruelty or torture.</p> <p>s207A  <b>material</b> includes anything that contains data from which text, images or sound can be generated.</p>		
	Offence provisions		Maximum penalties (if anonymising service or hidden network is used)
	s228	Obscene publications and exhibitions	
	s228(2)(a)	Under 16 years	5 years
	s228(2)(b)	Under 12 years	10 years
	s228(3)(a)	Under 16 years	5 years
	s228(3)(b)	Under 12 years	10 years
	s228A	Involving child in making exploitation material	20 years (25 years)
	s228B	Making child exploitation material	20 years (25 years)
	s228C	Distributing child exploitation material	14 years (20 years)
	s228D	Possessing child exploitation material	14 years (20 years)
	s228DA	Administering child exploitation material website	14 years (20 years)
	s228DB	Encouraging use of child exploitation material website	14 years (20 years)
	s228DC	Distributing information about avoiding detection	14 years (20 years)

**Table 2: Commonwealth legislative framework**

Legislation	Framework
Commonwealth Criminal Code	Definition
	<p>s473.1  <b>child abuse material</b> means:</p> <ul style="list-style-type: none"> <li>(a) material that depicts a person, or representation of a person who: <ul style="list-style-type: none"> <li>(i) is, or appears to be, under 18 years of age; and</li> <li>(ii) is, or appears to be, a victim of torture, cruelty or physical abuse;</li> </ul> and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or</li> <li>(b) material that describes a person who: <ul style="list-style-type: none"> <li>(i) is, or is implied to be, under 18 years of age; and</li> <li>(ii) is, or is implied to be, a victim of torture, cruelty or physical abuse;</li> </ul> and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.</li> </ul> <p><b>child pornography</b> material means:</p> <ul style="list-style-type: none"> <li>(a) material that depicts a person, or representation of a person who is or appears to be, under 18 years of age and who: <ul style="list-style-type: none"> <li>(i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or</li> <li>(ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;</li> </ul> and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or</li> <li>(b) material the dominant characteristic of which is the depiction, for a sexual purpose, of: <ul style="list-style-type: none"> <li>(i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or</li> <li>(ii) a representation of such a sexual organ or anal region; or</li> <li>(iii) the breasts, or representation of the breasts, of a female person who is, or appears to be, under 18 years of age;</li> </ul> in a way that reasonable persons would regard as being, in all the circumstances, offensive; or</li> <li>(c) material that describes a person who is, or is implied to be, under 18 years of age and who: <ul style="list-style-type: none"> <li>(i) is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or</li> <li>(ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;</li> </ul> and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or</li> <li>(d) material that describes: <ul style="list-style-type: none"> <li>(i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or</li> <li>(ii) the breasts of a female person who is, or is implied to be, under 18 years of age;</li> </ul> and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.</li> </ul>

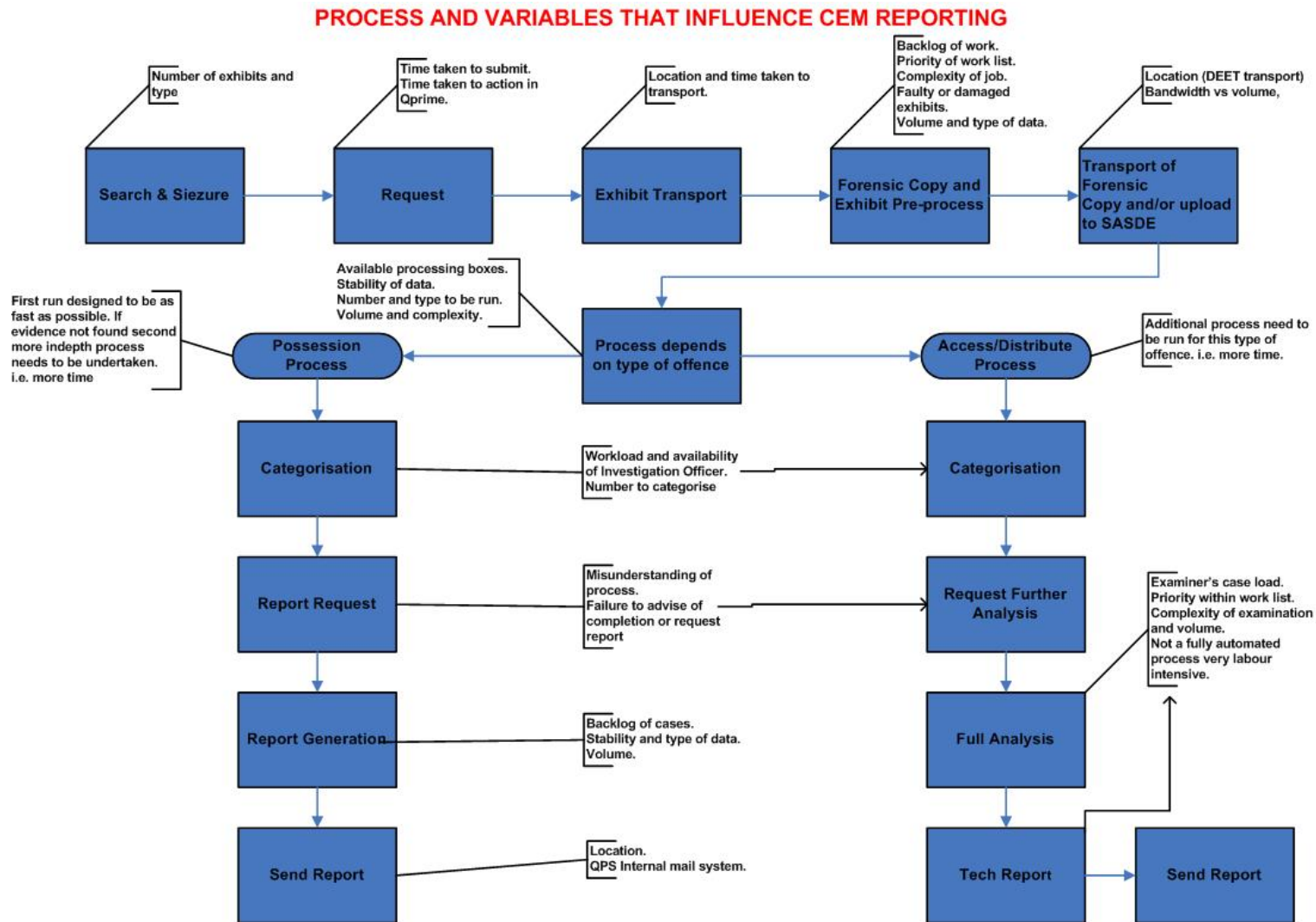


	Offence provisions		Maximum penalties
Commonwealth Criminal Code	s474.19	Using a carriage service for child pornography material	15 years
	s474.20	Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service	15 years
	s474.22	Using a carriage service for child abuse material	15 years
	s474.23	Possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service	15 years
	s474.24A	Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people (refers to s474.19; s474.20; s474.22; s474.23)	25 years
	s471.16	Using a postal or similar service for child pornography material	15 years
	s471.17	Possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service	15 years
	s471.19	Using a postal or similar service for child abuse material	15 years
	s471.20	Possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service	15 years
	s273.5	Possessing, controlling, producing, distributing or obtaining child pornography material outside Australia	15 years
	s273.6	Possessing, controlling, producing, distributing or obtaining child abuse material outside Australia	15 years
	s273.7	Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people	25 years
	s471.22	Aggravated offence – offence involving conduct on 3 or more occasions and 2 or more people (refers to s471.16; s471.17; s471.19; s471.20)	25 years
Customs Act 1901 (Cth)	s233BAB(5)	Importing a tier 2 good (child abuse material or child pornography)	2500 penalty units, or 10 years, or both
	s233BAB(6)	Exporting a tier 2 good (child abuse material or child pornography)	2500 penalty units, or 10 years, or both

## Appendix 4: Timeline of legislative change for sentencing CEM and contact offenders in Queensland

<p><b>2003—Contact offences and penalties</b></p> <p>Changes to PSA for any offence of a sexual nature committed in relation to a child under 16 years (contact offences)</p> <p>Changes to Criminal Code (Qld) for indecent treatment of a child</p>	<p><b>s9(4)(a) PSA</b> imprisonment not considered a last resort</p> <p><b>s9(6) PSA</b> sentencing factors for offenders guilty of contact offences stipulated</p> <p><b>s210 Criminal Code (Qld)</b> increase maximum penalties for indecent treatment of a child from:</p> <ul style="list-style-type: none"> <li>• 10 to 14 years (for a child aged between 12 and 16)</li> <li>• 14 to 20 years (for a child under 12)</li> </ul>
<p><b>2008—CEM</b></p> <p>Changes to PSA for CEM offences</p>	<p><b>s9(6A) PSA</b> imprisonment not considered a last resort</p> <p><b>s9(7) PSA</b> sentencing factors for offenders guilty of CEM offences stipulated</p>
<p><b>2010—Contact offences</b></p> <p>Changes to PSA for any offence of a sexual nature committed in relation to a child under 16 years (contact offences)</p>	<p><b>s9(4)(b) PSA</b> actual imprisonment for offenders unless exceptional circumstances exist</p>
<p><b>2013—CEM offence penalties</b></p> <p>Changes to the Criminal Code (Qld) for CEM offences</p>	<p><b>s228A Criminal Code (Qld)</b> • 10 to 14 years</p> <p><b>s228B Criminal Code (Qld)</b> • 10 to 14 years</p> <p><b>s228C Criminal Code (Qld)</b> • 10 to 14 years</p> <p><b>s228D Criminal Code (Qld)</b> • 5 to 14 years</p>
<p><b>2016—CEM offence penalties, new offences and circumstances of aggravation</b></p> <p>Changes to the Criminal Code (Qld) and PSA for CEM offences and to the <i>Police Powers and Responsibilities Act 2000</i>, <i>Crime and Corruption Act 2001</i> and Criminal Code (Qld) regarding enhanced warrant powers to obtain passwords etc.</p>	<p><b>s228A Criminal Code (Qld)</b> • 14 to 20 years • 25 years if hidden network/anonymising service used</p> <p><b>s228B Criminal Code (Qld)</b> • 14 to 20 years • 25 years if hidden network/anonymising service used</p> <p><b>s228C Criminal Code (Qld)</b> • 20 years if hidden network/anonymising service used</p> <p><b>s228D Criminal Code (Qld)</b> • 20 years if hidden network/anonymising service used</p> <p><b>s228DA Criminal Code (Qld)</b> • 14 years • 20 years if hidden network/anonymising service used</p> <p><b>s228DB Criminal Code (Qld)</b> • 14 years • 20 years if hidden network/anonymising service used</p> <p><b>s228DC Criminal Code (Qld)</b> • 14 years • 20 years if hidden network/anonymising service used</p> <p><b>s161R and s161V PSA</b> <b>New serious organised crime circumstance of aggravation mandatory sentencing regime applies to all 7 CEM offences:</b></p> <ul style="list-style-type: none"> <li>• Mandatory 7 years custody, cumulative on base sentence for CEM offence, plus mandatory control order</li> <li>• Judicial discretion if offender gives specific cooperation with law enforcement agencies</li> <li>• <b>ss154, 154A and 154B of the <i>Police Powers and Responsibilities Act 2000</i>; ss88A, B and C of the <i>Crime and Corruption Act 2001</i> and s205A of the Criminal Code (Qld):</b> warrant and post-warrant powers to demand information and assistance regarding stored information</li> </ul>

## Appendix 5: QPS forensic process for investigating CEM offences



Source: Provided by QPS

## Appendix 6: Schedules of facts and sample viewing

### Viewing CEM samples and using schedules of facts in sentencing—by jurisdiction<sup>506</sup>

Jurisdiction	Do judges view CEM for sentencing?	Are agreed schedules of facts used in sentencing?
Queensland	Rarely. It is usually a small sample, often being a dozen or so images.	They are routinely used in sentence hearings where there has been no trial. They are not necessarily agreed statements of facts. They represent a summary of all information that the court may rely on in sentencing.
Northern Territory	Very rarely and only if required as part of a contested hearing.	Yes. A brief summary of the ages of the children and the extent of the conduct, along with serious examples, are provided as part of the agreed Crown facts presented to the court.
Australian Capital Territory	Not usually. On occasion sentencing judicial officers have been requested to view material.	Yes. They include the type/number of charges, classification/number /activities depicted in the files, information about the accused's custodial status and whether they were on conditional liberty, as well as information about the detection of the offence/strength of the case. <sup>507</sup>
Commonwealth	A court sample of still images is collated and provided to the sentencing judicial officer; generally up to 9 images per category. The defence is advised of the sample and can view the images. Most judges will view at the prosecutor's request, sometimes reluctantly. Samples are always offered and emphasise depravity. Image content often cannot be properly conveyed by verbal description or classification.	Yes. Detailed information that depicts the background of the matter (e.g. how the offending was detected), circumstances of the offending, antecedents and classification of material.
Victoria	CEM is available for the judge or magistrate to view if required. Usually a judicial officer will view a random sample prepared by police. The number of images viewed varies depending on the size of the sample required to be prepared to properly represent the nature of the material seized.	An agreed statement of facts can be used in the summary jurisdiction. It would generally contain a summary of the circumstances of the offending, a description of the nature and amount of material seized, the age and number of victims involved, whether any of the victims was identified, the offending time period, the use to which that material was put and whether the offender made any admissions to police. This is not usually the case in the higher courts—a prosecution opening and defence response, and oral submissions, are usually used to inform the court.
Tasmania	Yes. It is at the discretion of the investigating officer as to what and how many images are provided to the court. However the DPP requests an example of the 'best' and worst in each category.	No.

South Australia	Occasionally, if judges seek to, or accept an invitation (made if there is considered to be a reason why that would be useful) to do so. They are able to view the whole or some of the material if they wish.	No.
Western Australia	It is the practice of sentencing judicial officers to view 'samples' of the CEM in each category.	No. Agreed schedules of facts are not used in sentencing in a formalised manner. Ordinarily, however, there will be discussions between the parties and certain facts will be agreed (and presented by the prosecutor).
United Kingdom	Yes. However, less so now in low risk cases where a standardised forensic report is used. The images may need to be made available to the judge and defence unless agreement is reached that this is unnecessary (which generally occurs, as regards judges, in low risk cases).	The standardised forensic report is used, where a streamlined process is followed. It gives the number of images in each category. In all proceedings (not just those relating to indecent images), the defendant may put forward a basis of plea which the Crown may or may not agree.
New Zealand	Judges are provided an opportunity to view the material and this is usually taken up. Judges would tend to only view a sample of the images (less than 50). Videos are not generally viewed—screenshots are utilised. The court is provided with the images and a text schedule describing the contents.	For a guilty plea, a summary of facts is read. Summaries can be several pages long to cover additional factors. A schedule explaining the nature of the representative sample is attached. This is disclosed to the defence early to allow for review.
New South Wales	No response.	No response.

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## Endnotes

- <sup>i</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 310, 311.
- <sup>ii</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 310, 311. accessed 15 February 2017.
- <sup>iii</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 294.
- <sup>iv</sup> Esafety website, <<https://www.esafety.gov.au/esafety-information/esafety-issues/sexting>> (accessed 14 February 2017).
- <sup>5</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 261.
- <sup>6</sup> COPINE Project, Child Studies Unit, Department of Applied Psychology, *Combating Paedophile Information Networks in Europe* (University College Cork, 2001); Tony Krone, A typology of Online Child Pornography Offending', *Trends & Issues in Crime and Criminal Justice* 279 (Australian Institute of Criminology, 2004).
- <sup>7</sup> *R v Oliver* [2002] EWCA Crim 2766.
- <sup>8</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 359—based on sentencing remarks and decisions available online, the first reference to the Oliver scale is in the decision of *R v Quinn* (unreported, District Court of Queensland, Nase DCJ, 15 October 2007).
- <sup>9</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 349.
- <sup>10</sup> Regarding Queensland offences see *R v McDonald* [2016] QCA 200; *R v MBM* [2011] QCA 100; *R v Hickey* [2011] QCA 385. Regarding Commonwealth offences see *R v Smith* [2010] QCA 220. Regarding combined Queensland and Commonwealth offence prosecutions see *R v Grehan* [2010] QCA 42; *R v Sykes* [2009] QCA 267; *R v Garget-Bennett* [2010] QCA 231.
- <sup>11</sup> *R v McDonald* [2016] QCA 200 at [16] per Burns J (McMurdo P and Philippides JA agreeing).
- <sup>12</sup> Judicial Commission of NSW, *Sentencing offenders convicted of child pornography and child abuse material offences* (2010), 2.
- <sup>13</sup> As noted in *R v McDonald* [2016] QCA 200 at [16]; *R v MBM* [2011] QCA 100 at [8]; *R v Hickey* [2011] QCA 385 at [5]. The *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013*, s13 amended the definition of CEM to include 'a representation of a person'.
- <sup>14</sup> See Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 349, referencing *R v Campbell* [2009] QCA 128 and the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013*.
- <sup>15</sup> See, e.g. *R v Hore* [2016] SASC 21 at 3.
- <sup>16</sup> Australian Law Reform Commission website, <<http://www.alrc.gov.au/law-reform-process>> (accessed 6 May 2017).
- <sup>17</sup> Specific questions were put to Victoria and NSW regarding their random sampling legislation. Victoria responded.
- <sup>18</sup> The Spotlight can be accessed at <<http://www.sentencingcouncil.qld.gov.au>>
- <sup>19</sup> Janis Wolak, Marc Liberatore and Brian Neil Levine, 'Measuring a year of child pornography trafficking by U.S. computers on a peer-to-peer network', *Child Abuse and Neglect*, 1, (2013).
- <sup>20</sup> Richard Wortley and Stephen Smallbone, *Internet child pornography: Causes, investigation and prevention* (Praeger, 2012), 2.
- <sup>21</sup> *R v Rivo* [2012] VSCA 117.
- <sup>22</sup> Michael C Seto, *Internet sex offenders* (United Book Press, 2013), 40; Richard Wortley and Stephen Smallbone, *Internet child pornography: Causes, investigation and prevention* (Praeger, 2012), 25–26.
- <sup>23</sup> Michael C Seto, *Internet sex offenders* (United Book Press, 2013), 22.
- <sup>24</sup> United States Sentencing Commission, *Federal child pornography offenses* (2012), 85.
- <sup>25</sup> Tony Krone and Russell G Smith, 'Trajectories in online child sexual exploitation offending in Australia', *Trends and Issues in Crime and Criminal Justice* 524 (Australian Institute of Criminology, 2017), 4.
- <sup>26</sup> United States Sentencing Commission, *Federal child pornography offenses* (2012), vii.
- <sup>27</sup> Submission from Tony Krone, Associate Professor, University of Canberra.
- <sup>28</sup> Tony Krone and Russell G Smith, 'Trajectories in online child sexual exploitation offending in Australia', *Trends and Issues in Crime and Criminal Justice* 524 (Australian Institute of Criminology, 2017).
- <sup>29</sup> Australian Bureau of Statistics, *8153.0 – Internet Activity, Australia, December 2016*.
- <sup>30</sup> Australian Bureau of Statistics, *8146.0 – Household use of information technology 2004–05; 2014–15*.
- <sup>31</sup> Australian Bureau of Statistics, *8146.0 – Household use of information technology 2014–15*.
- <sup>32</sup> Office of the Children's eSafety Commissioner website (June 2016), <<https://www.esafety.gov.au/about-the-office/research-library>> (accessed 1 March 2017).
- <sup>33</sup> Office of the Children's eSafety Commissioner website (June 2016), <<https://www.esafety.gov.au/about-the-office/research-library>> (accessed 1 March 2017).
- <sup>34</sup> Criminal Code (Qld) s 207A.
- <sup>35</sup> Criminal Code (Cth) s 473.1, re definition of both child abuse material and child pornography material.

- <sup>36</sup> The eSafety Commissioner defines sexting as ‘the sending of provocative or sexual photos, messages or videos ... generally sent using a mobile phone but can also include posting this type of material online’, <<https://www.esafety.gov.au/esafety-information/esafety-issues/sexting>> (accessed 14 February 2017).
- <sup>37</sup> Criminal Code (Qld) s 228DB.
- <sup>38</sup> Tony Krone and Russell G Smith, ‘Trajectories in online child sexual exploitation offending in Australia’, *Trends and Issues in Crime and Criminal Justice* 524 (Australian Institute of Criminology, 2017).
- <sup>39</sup> *R v Mara* [2009] QCA 208 at [23] per Wilson J (de Jersey CJ and Keane JA agreeing); *R v Porte* [2015] NSWCCA 174 at [55] per Johnson J (Leeming JA and Beech-Jones J agreeing). See also R G Kenny, *An introduction to criminal law in Queensland and Western Australia* (LexisNexis Butterworths Australia, 7<sup>th</sup> Edition, 2008), 9 at [1.23] referring to the Constitution s 77(iii) and the *Judiciary Act 1903* (Cth).
- <sup>40</sup> See *R v Wood* [2015] NSWCCA 231 at [37] and [40] per Johnson J (Gleeson JA and Garling J agreeing) and *R v De Leeuw* [2015] NSWCCA 183 at [71]–[72] per Johnson J (Ward JA and Garling J agreeing).
- <sup>41</sup> Regarding child pornography – Criminal Code (Cth) ss 474.19 and 474.20. Regarding child abuse material – Criminal Code (Cth) ss 474.22 and 474.23. Note also the *Customs Act 1901* (Cth) s 233BAB(5) as to importation of child pornography. See also Crime and Corruption Commission, *Child sexual victimisation in Queensland: An overview of legal and administrative developments since 2000* (2015), 4, 8, 10.
- <sup>42</sup> Criminal Code (Cth) ss 471.16 and 471.17 regarding child pornography material and ss 471.19 and 471.20 regarding child abuse material. S 471.22 is an aggravated offence—where a person commits an offence against one or more of the other four offences on three or more separate occasions and the commission of the offence involves two or more people.
- <sup>43</sup> Criminal Code (Cth) ss 273.5, 273.6 and 273.7.
- <sup>44</sup> Tony Krone, ‘A typology of Online Child Pornography Offending’, *Trends & Issues in Crime and Criminal Justice* 279 (Australian Institute of Criminology, 2004), 1; Marie Henshaw, James RP Ogloff and Jonathan A Clough, ‘Looking beyond the screen: A critical review of the literature on the online child pornography offender’, *Sexual Abuse: A Journal of Research and Treatment*, (2015), 3.
- <sup>45</sup> Tony Krone and Russell G Smith, ‘Trajectories in online child sexual exploitation offending in Australia’, *Trends and Issues in Crime and Criminal Justice* 524 (Australian Institute of Criminology, 2017), 4.
- <sup>46</sup> Tony Krone and Russell G Smith, ‘Trajectories in online child sexual exploitation offending in Australia’, *Trends and Issues in Crime and Criminal Justice* 524 (Australian Institute of Criminology, 2017), 1.
- <sup>47</sup> United States Sentencing Commission, *Federal child pornography offenses* (2012), 73.
- <sup>48</sup> Michael C Seto, *Internet sex offenders* (United Book Press, 2013), 28.
- <sup>49</sup> Marie Henshaw, James RP Ogloff and Jonathan A Clough, ‘Looking beyond the screen: A critical review of the literature on the online child pornography offender’, *Sexual Abuse: A Journal of Research and Treatment*, (2015), 5–8.
- <sup>50</sup> Tony Krone and Russell G Smith, ‘Trajectories in online child sexual exploitation offending in Australia’, *Trends and Issues in Crime and Criminal Justice* 524 (Australian Institute of Criminology, 2017), 4.
- <sup>51</sup> Tony Krone and Russell G Smith, ‘Trajectories in online child sexual exploitation offending in Australia’, *Trends and Issues in Crime and Criminal Justice* 524 (Australian Institute of Criminology, 2017), 11.
- <sup>52</sup> United States Sentencing Commission, *Federal child pornography offenses* (2012), 75.
- <sup>53</sup> Submission from Tony Krone, Associate Professor, University of Canberra.
- <sup>54</sup> United States Sentencing Commission, *Federal child pornography offenses* (2012), 76.
- <sup>55</sup> Marie Henshaw, James RP Ogloff and Jonathan A Clough, ‘Looking beyond the screen: A critical review of the literature on the online child pornography offender’, *Sexual Abuse: A Journal of Research and Treatment*, (2015), 3.
- <sup>56</sup> United States Sentencing Commission, *Federal child pornography offenses* (2012), 77.
- <sup>57</sup> Richard Wortley and Stephen Smallbone, *Internet child pornography: Causes, investigation and prevention* (Praeger, 2012), 39.
- <sup>58</sup> *R v Grehan* [2010] QCA 42; *R v Westlake* (unreported, District Court of Queensland, Dearden DCJ, 30 September 2016); *R v Robinson* (unreported, District Court of Queensland, Smith DCJ, 1 August 2013).
- <sup>59</sup> *R v Howe* [2017] QCA 7 at [6] per Douglas J (Fraser and Philippides JJA agreeing).
- <sup>60</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 299.
- <sup>61</sup> Refer to the definition in the Glossary.
- <sup>62</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 357; Queensland Police Service, *Annual Report 2015–16*, 29–32.
- <sup>63</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 261.
- <sup>64</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 358.
- <sup>65</sup> Queensland Police Service *Annual Report 2015–16*, 32.
- <sup>66</sup> Hon Mark Ryan, Queensland Minister for Police, Fire and Emergency Services and Minister for Corrective Services, ‘Child Victim Identification Team now one of the strongest in the world’, Media release (1 March 2017).

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- <sup>67</sup> Further detail contained in the Glossary.
- <sup>68</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 293.
- <sup>69</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 365.
- <sup>70</sup> *Crime and Corruption Act 2001* s 74.
- <sup>71</sup> *Crime and Corruption Act 2001* ss 177(1), 179 and 180(3).
- <sup>72</sup> *Crime and Corruption Act 2001* s 82.
- <sup>73</sup> *Crime and Corruption Act 2001* s 180(1)(b).
- <sup>74</sup> *Crime and Corruption Act 2001* s 190(2) regarding answering a question at a hearing and s 185(2) regarding a notice to produce a stated document or thing at a commission hearing under an attendance notice.
- <sup>75</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 340, Recommendations 4.7, 4.8 and 4.9.
- <sup>76</sup> *Police Powers and Responsibilities Act 2000* amended s 154, and new ss 154A and 154B and *Crime and Corruption Act 2001* new ss 88A, 88B and 88C.
- <sup>77</sup> *Serious and Organised Crime Legislation Amendment Act 2016* ss 43, 302 and 303.
- <sup>78</sup> *Police Powers and Responsibilities Act 2000* s 150AA and *Crime and Corruption Act 2001* s 85A.
- <sup>79</sup> *Police Powers and Responsibilities Act 2000* s 150AA and *Crime and Corruption Act 2001* s 85A.
- <sup>80</sup> *Police Powers and Responsibilities Act 2000* s 150AA and *Crime and Corruption Act 2001* s 85A.
- <sup>81</sup> *Police Powers and Responsibilities Act 2000* s 154 and *Crime and Corruption Act 2001* s 88A.
- <sup>82</sup> However, the *Crime and Corruption Act 2001* power (s 88A(2)) does not include this in the case of giving access to the device, whereas the *Police Powers and Responsibilities Act 2000* does (s 154(2)).
- <sup>83</sup> *Police Powers and Responsibilities Act 2000* s 154A(3)(a) and *Crime and Corruption Act 2001* s 88B(3)(a); *Police Powers and Responsibilities Act 2000* s 154A and *Crime and Corruption Act 2001* s 88B.
- <sup>84</sup> *Police Powers and Responsibilities Act 2000* s 154A(3)(a) and *Crime and Corruption Act 2001* s 88B(3)(a); *Police Powers and Responsibilities Act 2000* s 154A and *Crime and Corruption Act 2001* s 88B.
- <sup>85</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 364.
- <sup>86</sup> Unique numeric values associated with digital files.
- <sup>87</sup> Communication at the 2017 conference *Youth, Technology and Virtual Communities Conference*.
- <sup>88</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 364.
- <sup>89</sup> Submission from the Queensland Police Service.
- <sup>90</sup> Submission from the Queensland Police Service.
- <sup>91</sup> Submission from the Queensland Police Service.
- <sup>92</sup> Submission from the Office of the Director of Public Prosecutions for Queensland.
- <sup>93</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 367.
- <sup>94</sup> Office of the Commonwealth Director of Public Prosecutions *Annual Report 2015–16*, 14.
- <sup>95</sup> The CDPP has six national practice groups; Office of the Commonwealth Director of Public Prosecutions *Annual Report 2015–16*, 40.
- <sup>96</sup> Submission from the Office of the Commonwealth Director of Public Prosecutions.
- <sup>97</sup> Office of the Commonwealth Director of Public Prosecutions *Annual Report 2015–16*, 52.
- <sup>98</sup> The remaining 11% of offenders sentenced in court were dealt with summarily in the lower courts, or proceeded via a bench charge sheet.
- <sup>99</sup> In relation to the 10-year period examined, while there were 1565 defendants sentenced for CEM, there were an additional 506 defendants who were charged for CEM offences, but were ultimately dismissed or discharged.
- <sup>100</sup> See Queensland Magistrates Courts, *Practice Direction No. 10 of 2010: Times, and Procedures from Callovers to Conclusion in Criminal Matters*.
- <sup>101</sup> See *Justices Act 1886* (Qld) s 110A.
- <sup>102</sup> See *Justices Act 1886* (Qld) ss 83A(5AA), 110B and 110C and Queensland Magistrates Courts, *Practice Direction No. 12 of 2010: Witnesses Giving Evidence in Committal Proceedings*.
- <sup>103</sup> See *Justices Act 1886* (Qld) ss 114 and 115 and Queensland Magistrates Courts, *Practice Direction No. 14 of 2010: Registry Committals*.
- <sup>104</sup> See *Justices Act 1886* (Qld) ss 104, 108, 110A and 113.
- <sup>105</sup> As prescribed by Criminal Code (Qld) ss 590AB–AM (especially s 590AH); see Office of the Director of Public Prosecutions for Queensland, *Director's Guidelines* (30 June 2015), 10. See also *Justices Act 1886* (Qld) ss 83A–83F regarding Magistrates Courts disclosure obligation directions and Queensland Magistrates Courts, *Practice Direction No. 13 of 2010: Disclosure*. The *Judiciary Act 1903* (Cth) s 68(1) applies state laws regarding procedure for committal and trial to persons charged with Commonwealth offences dealt with in state courts.
- <sup>106</sup> See Queensland Magistrates Courts, *Practice Directions 8–15 of 2010 and 22 of 2011*, <<http://www.courts.qld.gov.au/courts/magistrates-court/practice-directions>> (accessed 26 May 2017).
- <sup>107</sup> Criminal Code (Qld) ss 590AN–AX.



<sup>108</sup> There is a separate practice direction regarding matters that are exclusively Commonwealth offences, matters prosecuted by the CDPP and matters that are state offences investigated and prosecuted by the Commonwealth. It also requires case conferencing and recognises partial and full briefs of evidence: Queensland Magistrates Courts, *Practice Direction No. 22 of 2011: Commonwealth Criminal Matters*.

<sup>109</sup> Council data shows that 78 CEM offenders (5% of all Queensland CEM offenders) were sentenced in Queensland Magistrates Courts from 2006–07 to 2015–16. Commonwealth CEM offences cannot be dealt with summarily because their maximum penalties exceed the statutory threshold of 10 years imprisonment (*Crimes Act 1914* (Cth) s 4J(1)). Queensland CEM offences include the offences in Criminal Code Chapter 22, as well as older offences in the *Classification of Computer Games and Images Act 1995*, *Classification of Films Act 1991* and *Classification of Publications Act 1991*. The QPS OPM (7.11) requires police officers to charge only the Code offences. Since 2010, s 552B of the Criminal Code (Qld) has mandated summary disposition of pleas of guilty (unless the defendant elects trial by jury) to offences of a sexual nature, without a circumstance of aggravation, with a complainant aged 14 or over at the offence date, where the offender is liable to a maximum of over 3 years imprisonment. Prior to 2010, this was at the defendant's election (and without the 3-year requirement). It may be that this provision is little used for CEM offences because very few cases involve only children aged 14 or 15.

<sup>110</sup> Criminal Code (Qld), s 590.

<sup>111</sup> Office of the Director of Public Prosecutions for Queensland, *Director's Guidelines* (30 June 2015), 10.

<sup>112</sup> Criminal Code (Qld) s 561. While they can be used in a wider scope, ex-officio indictments are discussed in this report only in the relevant context of sentencing after defence request the process. Ex-officio indictments can also be used for Commonwealth offences.

<sup>113</sup> Office of the Director of Public Prosecutions for Queensland, *Director's Guidelines* (30 June 2015), 11.

<sup>114</sup> As to CDPP power to present ex-officio indictments, see *Director of Public Prosecutions Act 1983* (Cth) s 6(2A). As to policies, see the Commonwealth Director of Public Prosecutions, *Guidelines and Directions Manual, Ex officio Indictments* (2012), <<https://www.cdpp.gov.au/publications/ex-officio-indictments-gd-manual>> (accessed 26 May 2017) and *Prosecution Policy of the Commonwealth – Guidelines for the Making of Decisions in the Prosecution Process*, [6.28]–[6.32], <<https://www.cdpp.gov.au/prosecution-process/prosecution-policy>> (accessed 26 May 2017). These do not have the level of detail in the QDPP Guidelines.

<sup>115</sup> See Office of the Director of Public Prosecutions for Queensland, *Director's Guidelines* (30 June 2015), 11.

<sup>116</sup> An example of exceptional circumstances is where a defendant has a matter on indictment before a court for sentence and wants other offences to be dealt with at the same time: Office of the Director of Public Prosecutions for Queensland, *Director's Guidelines* (30 June 2015), 11.

<sup>117</sup> Police should forward the ex-officio brief within 14 days of its request: Office of the Director of Public Prosecutions for Queensland, *Director's Guidelines* (30 June 2015), 13.

<sup>118</sup> Office of the Director of Public Prosecutions for Queensland, *Director's Guidelines* (30 June 2015), 13.

<sup>119</sup> Refer to the Glossary for a definition of QP9 – this is a QPS 'court brief' – the initial allegations of fact produced at the time of charging.

<sup>120</sup> Office of the Director of Public Prosecutions for Queensland, *Director's Guidelines* (30 June 2015), 12.

<sup>121</sup> Queensland Magistrates Courts, *Practice Direction No. 15 of 2010: Ex officio Indictments* at [3.3], [3.5], [4.2] and [7.1].

<sup>122</sup> *Penalties and Sentences Act 1992* (Qld) s 15(1).

<sup>123</sup> *Penalties and Sentences Act 1992* (Qld) s 10.

<sup>124</sup> Sarah Krasnostein and Arie Freiberg, 'Pursuing consistency in an individualistic sentencing framework: If you know where you're going, how do you know when you've got there?', *Law and Contemporary Problems* 265, 76 (2013), 270–271.

<sup>125</sup> *Penalties and Sentences Act 1992* (Qld) s 9(2)(a).

<sup>126</sup> Antecedents refers to prior offending history and personal background, both favourable and unfavourable, including personal, family, social, employment and vocational circumstances, and the offender's current way of life and its interaction with the lives and welfare of others: *Jones v Morley* (1981) 29 SASR 57, 63.

<sup>127</sup> See *Penalties and Sentences Act 1992* (Qld) ss 161R, 161V and 13A, 13B.

<sup>128</sup> By the *Serious and Organised Crime Legislation Amendment Act 2016* (Qld), s 91.

<sup>129</sup> *Kenworthy v The Queen* [No 2] [2016] WASCA 207 at [158] to [180], noting that while the Commonwealth *Crimes Act 1914* s 17A(1) prohibits a court from imposing imprisonment for a federal offence unless satisfied that no other sentence is appropriate in all the circumstances (the opposite of Queensland *Penalties and Sentences Act 1992* s 9(6A)); the imposition of a sentence other than imprisonment for importing or accessing child pornography under the Commonwealth offences remains, in fact, exceptional.

<sup>130</sup> See Appendix 3 for full details of maximum penalties for CEM offences.

<sup>131</sup> See *R v De Leeuw* [2015] NSWCCA 183 at [71]–[72] per Johnson J (Ward JA and Garling J agreeing).

<sup>132</sup> *R v Hickey* [2011] QCA 385 at [19] per Mullins J (McMurdo P and Chesterman JA agreeing).

<sup>133</sup> *R v Grehan* [2010] QCA 42 at [42] per Chesterman JA (Holmes and Muir JJA agreeing). This passage was affirmed in *R v Lloyd* [2011] QCA 12 at [11] per Chesterman JA (de Jersey CJ and White JA agreeing). See also *R v McDonald* [2016] QCA 200 (the heading preceding the analysis at [15]–[18]) per Burns J (McMurdo P and Philippides JA agreeing); Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 350; and *R v Hickey* [2011] QCA 385 at [12], [14] and [15] per Mullins J (McMurdo P and Chesterman JA agreeing) regarding number of images and seriousness of categories.

<sup>134</sup> *R v Grehan* [2010] QCA 42 at [42] per Chesterman JA (Holmes and Muir JJA agreeing).

<sup>135</sup> *R v De Leeuw* [2015] NSWCCA 183 at [71]–[72] per Johnson J (Ward JA and Garling J agreeing): The objective seriousness of the offence is in part measured by the nature and content of the material, in particular the age of the children and the gravity of the sexual activity depicted and the number of items or images possessed. The same points were also made in *R v Gent* (2005) 162 A Crim R 29 at [99] per Johnson J (McClellan CJ at CL and Adams J agreeing); approved by the Queensland Court of Appeal in *R v Mara* [2009] QCA 208 at [21] per Wilson J (de Jersey CJ and Keane JA agreeing) and *R v Sykes* [2009] QCA 267 at [20] per Mullins J (Holmes JA and Philippides J agreeing).

<sup>136</sup> *R v Vantoosten* [2009] QCA 54 at [18]–[19] per Muir JA (Keane JA and Daubney J agreeing).

<sup>137</sup> *R v Mara* [2009] QCA 208 at [21] per Wilson J (de Jersey CJ and Keane JA agreeing); applying *R v Gent* (2005) 162 A Crim R 29 at [99] per Johnson J (McClellan CJ at CL and Adams J agreeing).

<sup>138</sup> *R v Vantoosten* [2009] QCA 54 at [18]–[19] per Muir JA (Keane JA and Daubney J agreeing). See also *Smit v State of Western Australia* [2011] WASCA 124 at [17] per McLure P (Pullin JA and Mazza J agreeing): ‘The relative perversion and debauchery of the pornographic material is a relevant sentencing factor’.

<sup>139</sup> *Minehan v R* [2010] NSWCCA 140 at [94]–[95] per Hulme J (Macfarlane JA and Johnson J agreeing).

<sup>140</sup> *R v Campbell* [2009] QCA 128 at [39], [46]; *R v MBM* [2011] QCA 100 at [22]; *R v Hampson* [2011] QCA 132 at [29], [44]).

<sup>141</sup> *R v Vantoosten* [2009] QCA 54 at [18]–[19].

<sup>142</sup> *R v Salsone; ex parte A-G (Qld)* [2008] QCA 220 at [30].

<sup>143</sup> *R v Richardson; ex parte A-G (Qld)* [2007] QCA 294 at [20], [26], [39]; *R v Gordon; ex parte Cth DPP* [2009] QCA 209 at [42]; *R v Plunkett* [2006] QCA 182 at 3; *R v Daw* [2006] QCA 386 at 3.

<sup>144</sup> *R v Daw* [2006] QCA 386 at 4; *R v Plunkett* [2006] QCA 182 at 3; *R v Mara* [2009] QCA 208 at [6]–[10], [37].

<sup>145</sup> *R v Mara* [2009] QCA 208 at [6]–[10], [37].

<sup>146</sup> *Minehan v R* [2010] NSWCCA 140 at [96] per Hulme J (Macfarlane JA and Johnson J agreeing).

<sup>147</sup> *Minehan v R* [2010] NSWCCA 140 at [95] per Hulme J (Macfarlane JA and Johnson J agreeing).

<sup>148</sup> *R v De Leeuw* [2015] NSWCCA 183 at [72] per Johnson J (Ward JA and Garling J agreeing). The cases referred to within this passage have been removed. See further *DPP (Cth) v Garside* [2016] VSCA 74 at [25] per Redlich and Beach JJA.

<sup>149</sup> Note the position in Queensland that while s 9(6A) of the *Penalties and Sentences Act 1992* (Qld) removes a constraint upon the imposition of a sentence involving actual imprisonment, it does not follow that any person convicted of possessing CEM under s 228D of the Criminal Code (Qld) must be sentenced to actual imprisonment: *R v Verburt* [2009] QCA 33 at page 6 per Holmes JA and at page 7 per McMurdo P, Chesterman JA agreeing (‘the appropriate penalty for such an offence will always turn on the circumstances of each case, primarily those set out in [s 9(7)] *Penalties and Sentences Act*’: Per McMurdo P). See further *R v Lovi* [2012] QCA 24 at [37], *R v Grehan* [2010] QCA 42 at [31]–[32] and *R v Sykes* [2009] QCA 267 at [26].

<sup>150</sup> Factors 3, 4, 6 and 7 from the list of factors reproduced here from *R v De Leeuw* [2015] NSWCCA 183 as well as the points about general deterrence and prior good character from *Minehan v R* [2010] NSWCCA 140 (also reproduced in *De Leeuw*).

<sup>151</sup> *R v Howe* [2017] QCA 7 at [25] per Douglas J (Fraser and Philippides JJA agreeing).

<sup>152</sup> *R v Verburt* [2009] QCA 33 at page 6 per Holmes JA and at page 7 per McMurdo P, Chesterman JA agreeing (‘the appropriate penalty for such an offence will always turn on the circumstances of each case, primarily those set out in [s 9(7)] *Penalties and Sentences Act*’: Per McMurdo P). See further *R v Lovi* [2012] QCA 24 at [37], *R v Grehan* [2010] QCA 42 at [31]–[32] and *R v Sykes* [2009] QCA 267 at [26].

<sup>153</sup> *R v Quick ex parte Attorney-General* [2006] QCA 477 at [5] per de Jersey CJ (Chesterman J agreeing) and *R v Pham* [1996] QCA 003 at 3 per Fitzgerald P, Davies JA and Mackenzie J.

<sup>154</sup> Inserted by s 5 of the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010*, numbered as s 9(5) of the *Penalties and Sentences Act 1992* (Qld) at that time. See Appendix 4.

<sup>155</sup> Queensland, ‘Second Reading—Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010’, *Parliamentary Debates*, Legislative Assembly, 3 August 2010 (Hon Cameron Dick, Attorney-General) 2308.

<sup>156</sup> Scrutiny of Legislation Committee, Parliament of Queensland, *Legislation Alert, Issue No 09 of 2010*, (2010) 24/[29], citing the Queensland Law Society’s submission.

<sup>157</sup> *R v Jones* [2011] QCA 147 at [27] per Daubney J (Muir and White JJA agreeing). This case referred to sentencing for both Commonwealth and Queensland CEM offences. The relevant passage was prefaced with a reference to 'offences involving child pornography'.

<sup>158</sup> *R v Richardson; ex parte A-G (Qld)* [2007] QCA 294.

<sup>159</sup> See Appendix 4, specifically increases in 2013 to maximum penalties for CEM offences.

<sup>160</sup> See Appendix 4, specifically changes in 2008.

<sup>161</sup> Annette Bradfield, President, Queensland Law Society, 'Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012' [Letter to the Research Director, Legal Affairs and Community Safety Committee] 4 February 2013, 4–5. Available at <<https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/CLCEDDAB>> accessed 28 February 2017.

<sup>162</sup> John Sosso, Director-General, Department of Justice and Attorney-General response to submissions concerning the Legal Affairs and Community Safety Committee's examination of the Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012 [Letter to the Hon Ian Berry MP, Chair, Legal Affairs and Community Safety Committee], 11 February 2013, 11, <<https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/CLCEDDAB>> (accessed 28 February 2017).

<sup>163</sup> *Penalties and Sentences Act 1992* (Qld) ss 9(6)(e)–(j) and 9(7)(b)–(g).

<sup>164</sup> Although *Penalties and Sentences Act 1992* (Qld) s 9(1)(e) makes protecting the Queensland community a purpose of sentencing generally, and s9(7)(g) stipulates anything else about the safety of children under 16 the court considers relevant – mirrored in 9(6)(j) regarding contact offending.

<sup>165</sup> Tony Krone and Russell G Smith, 'Trajectories in online child sexual exploitation offending in Australia', (*Trends and Issues in Crime and Criminal Justice* 524, Australian Institute of Criminology, 2017) 1, examining a cohort of 152 Commonwealth CEM offenders and noting that no studies of offending trajectories of online child sexual exploitation offenders had been conducted in Australia.

<sup>166</sup> Submission from His Honour Judge Robertson of the District Court of Queensland. The term 'jurisprudence' means the theory or philosophy of law, and can include the constitution, court rulings, regulations, legislation, bills, charters, ordinances, code, canon or any other document which helps understand law.

<sup>167</sup> *R v Jones* [2011] QCA 147 at [27] per Daubney J (Muir and White JJA agreeing). This case referred to sentencing for both Commonwealth and Queensland CEM offences. The relevant passage was prefaced with a reference to 'offences involving child pornography'.

<sup>168</sup> Explanatory notes to the Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012, 1.

<sup>169</sup> John Sosso, Director-General, Department of Justice and Attorney-General response to submissions concerning the Legal Affairs and Community Safety Committee's examination of the Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012 [Letter to the Hon. Ian Berry MP, Chair, Legal Affairs and Community Safety Committee], 10 December 2012, 3, <<https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/CLCEDDAB>> (accessed 29 May 2017).

<sup>170</sup> Legal Affairs and Community Safety Committee, Parliament of Queensland, *Report No. 23 (Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012)* (2013) 13, citing submissions from the Queensland Council for Civil Liberties and Queensland Law Society.

<sup>171</sup> *Serious and Organised Crime Legislation Amendment Act 2016* s 76.

<sup>172</sup> S 228DB Encouraging use of child exploitation material website; s 228DC Distributing information about avoiding detection.

<sup>173</sup> *Minehan v R* [2010] NSWCCA 140 at [94]–[95] per Hulme J (Macfarlane JA and Johnson J agreeing); *R v Campbell* [2009] QCA 128 at [39], [46]; *R v MBM* [2011] QCA 100 at [22]; *R v Hampson* [2011] QCA 132 at [29], [44] and *R v Oliver* [2002] EWCA Crim 2766 at [15].

<sup>174</sup> *R v Oliver* [2002] EWCA Crim 2766 at [9], emphasis added.

<sup>175</sup> See further, *Penalties and Sentences Act 1992* (Qld) ss 9(1)(e) and 9(7)(g).

<sup>176</sup> Submission from the Bar Association of Queensland.

<sup>177</sup> Submission from the Queensland Law Society.

<sup>178</sup> United States Sentencing Commission, *Federal child pornography offenses* (2012), 320. Other factors identified were the content of an offender's child pornography collection, degree of an offender's engagement with other offenders and whether an offender has a history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offence.

<sup>179</sup> Examples of Court of Appeal cases in which contact and CEM offences were charged are *R v Waszkiewicz* [2012] QCA 22; *R v BCX* [2015] QCA 188; *R v Lewis-Grant* [2015] QCA 252; *R v BBS* [2009] QCA 205; *R v BCY* [2015] QCA 200; and *R v Carmichael & Armbruster* [2009] QCA 41 at [18] per Muir JA (Atkinson and P Lyons JJ agreeing).

<sup>180</sup> The reasons for this are discussed above in this chapter.

<sup>181</sup> *R v MBM* [2011] QCA 100 at [15] per White JA (Fraser and Chesterman JJA agreeing).

<sup>182</sup> *R v MBM* [2011] QCA 100 at [24] per White JA (Fraser and Chesterman JJA agreeing).



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- <sup>183</sup> The Sentencing Council for England and Wales, *Sexual Offences Definitive Guideline* (2013) 78.
- <sup>184</sup> *R v Oliver* [2002] EWCA Crim 2766 at [17].
- <sup>185</sup> *R v Oliver* [2002] EWCA Crim 2766 at [20](v).
- <sup>186</sup> Reference being made in 247 of 367 cases.
- <sup>187</sup> *Smit v State of Western Australia* [2011] WASCA 124 at [17] per McLure P (Pullin JA and Mazza J agreeing).
- <sup>188</sup> Pierrette Mizzi, Tom Gotsis, Patrizia Poletti, *Sentencing offenders convicted of child pornography and child abuse materials offences* (Judicial Commission of New South Wales, 2010), 12.
- <sup>189</sup> Submission from the Bar Association of Queensland.
- <sup>190</sup> Submission from the Bar Association of Queensland.
- <sup>191</sup> *Director of Public Prosecutions (Cth) v Garside* [2016] VSCA 74 at [71] per Redlich and Beach JJA.
- <sup>192</sup> *R v Hickey* [2011] QCA 385 at [5] per Mullins J (McMurdo P and Chesterman J agreeing).
- <sup>193</sup> The prosecution has a statutory duty to make disclosure of the prosecution case to the defence: Criminal Code (Qld) ss 590AB–AX.
- <sup>194</sup> Submissions of the Office of the Director of Public Prosecutions for Queensland and Office of the Commonwealth Director of Public Prosecutions.
- <sup>195</sup> Submission from the Office of the Commonwealth Director of Public Prosecutions.
- <sup>196</sup> Submission from the Office of the Commonwealth Director of Public Prosecutions.
- <sup>197</sup> Submission from the Office of the Director of Public Prosecutions for Queensland.
- <sup>198</sup> Submission from the Office of the Director of Public Prosecutions for Queensland.
- <sup>199</sup> Addendum submission from the Office from the Director of Public Prosecutions for Queensland.
- <sup>200</sup> Addendum submission from the Office from the Director of Public Prosecutions for Queensland.
- <sup>201</sup> The CDPP made a similar point, reproduced in Chapter 5.
- <sup>202</sup> *Thompson v R* [2004] EWCA (Crim) 669 Thomas LJ, Holland and Baker JJ.
- <sup>203</sup> *Thompson v R* [2004] EWCA (Crim) 669 at [9] (iii) per Thomas LJ, Holland and Baker JJ.
- <sup>204</sup> *Thompson v R* [2004] EWCA (Crim) 669 at [12] per Thomas LJ, Holland and Baker JJ.
- <sup>205</sup> *Thompson v R* [2004] EWCA (Crim) 669 at [10] per Thomas LJ, Holland and Baker JJ.
- <sup>206</sup> *Thompson v R* [2004] EWCA (Crim) 669 at [12] per Thomas LJ, Holland and Baker JJ.
- <sup>207</sup> *Thompson v R* [2004] EWCA (Crim) 669 at [11](iii) per Thomas LJ, Holland and Baker JJ.
- <sup>208</sup> *Thompson v R* [2004] EWCA (Crim) 669 at [14] per Thomas LJ, Holland and Baker JJ.
- <sup>209</sup> *Kenworthy v The Queen* [No 2] [2016] WASCA 207 at [186] per Buss P, Mazza and Mitchell JJA.
- <sup>210</sup> *R v Oliver* [2002] EWCA Crim 2766 at [10].
- <sup>211</sup> *Smit v State of Western Australia* [2011] WASCA 124 at [17] per McLure P (Pullin JA and Mazza J agreeing). See also *R v Walshe* [2016] ACTSC 267 at [20] per Burns J; *R v Oliver* [2002] EWCA Crim 2766 at [10]; and *The State of Western Australia v McCarthy* [2014] WASCA 210 at [14] per Mazza JA (McLure P and Buss JA agreeing).
- <sup>212</sup> *R v Porte* [2015] NSWCCA 174 at [76] per Johnson J (Leeming JA and Beech-Jones J agreeing). See also *R v De Leeuw* [2015] NSWCCA 183 at [86] and [141] per Johnson J (Ward JA and Garling J agreeing).
- <sup>213</sup> *R v Porte* [2015] NSWCCA 174 at [73] per Johnson J (Leeming JA and Beech-Jones J agreeing).
- <sup>214</sup> *R v Porte* [2015] NSWCCA 174 at [76] per Johnson J (Leeming JA and Beech-Jones J agreeing).
- <sup>215</sup> *Fitzgerald v R* [2015] NSWCCA 266 at [16] and [36] per Hoeben CJ at CL (Price and Button JJ agreeing).
- <sup>216</sup> *R v Porte* [2015] NSWCCA 174 at [78] per Johnson J (Leeming JA and Beech-Jones J agreeing).
- <sup>217</sup> *R v Miao* [2016] NSWDC 181 at [6] and [9]–[11] per Berman SC DCJ.
- <sup>218</sup> *R v Miao* [2016] NSWDC 181 at [11] per Berman SC DCJ.
- <sup>219</sup> *Kenworthy v The Queen* [No 2] [2016] WASCA 207 at [139] per Buss P, Mazza and Mitchell JJA. The New South Wales cases of *R v Porte* [2015] NSWCCA 174 and *Fitzgerald v R* [2015] NSWCCA 266 were not cited in that judgment. Note the Oliver scale was referred to as CETS in that judgment.
- <sup>220</sup> *Kenworthy v The Queen* [No 2] [2016] WASCA 207 at [140] per Buss P, Mazza and Mitchell JJA.
- <sup>221</sup> *Kenworthy v The Queen* [No 2] [2016] WASCA 207 at [186] per Buss P, Mazza and Mitchell JJA.
- <sup>222</sup> *R v Turvey* [2017] SASFC 28 at [141] per Hinton J, Nicholson and Lovell JJ agreeing.
- <sup>223</sup> *R v Turvey* [2017] SASFC 28 at [142] per Hinton J, Nicholson and Lovell JJ agreeing.
- <sup>224</sup> *R v Stephen Mark Edmondson* (unreported, Supreme Court of Queensland, P Lyons J, 17 December 2014), 3.
- <sup>225</sup> *R v Forbes* [2014] ACTSC 91.
- <sup>226</sup> *R v Forbes* [2014] ACTSC 91 at [8] per Penfold J.
- <sup>227</sup> *R v Forbes* [2014] ACTSC 91 at [11] per Penfold J.
- <sup>228</sup> *R v Forbes* [2014] ACTSC 91 at [12] per Penfold J.
- <sup>229</sup> *R v Forbes* [2014] ACTSC 91 at [13] per Penfold J.
- <sup>230</sup> *R v Forbes* [2014] ACTSC 91 at [13]–[14] per Penfold J.
- <sup>231</sup> *R v Forbes* [2014] ACTSC 91 at [19] per Penfold J.
- <sup>232</sup> *R v Forbes* [2014] ACTSC 91 at [19] per Penfold J.
- <sup>233</sup> *R v Forbes* [2014] ACTSC 91 at [23] per Penfold J.

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- <sup>234</sup> *R v Forbes* [2014] ACTSC 91 at [23] per Penfold J.
- <sup>235</sup> *R v Forbes* [2014] ACTSC 91 at [24] per Penfold J.
- <sup>236</sup> Submission from His Honour Chief Judge KJ O'Brien of the District Court of Queensland.
- <sup>237</sup> Submission from the Queensland Law Society.
- <sup>238</sup> Submission from Legal Aid Queensland.
- <sup>239</sup> Submission from the Office of the Director of Public Prosecutions for Queensland.
- <sup>240</sup> Submission from the Bar Association of Queensland.
- <sup>241</sup> Submission from the Bar Association of Queensland.
- <sup>242</sup> Submission from the Bar Association of Queensland.
- <sup>243</sup> Submission from the Bar Association of Queensland.
- <sup>244</sup> Judicial Commission of New South Wales, *Sentencing offenders convicted of child pornography and child abuse material offences* (2010), 9.
- <sup>245</sup> Submission from His Honour Chief Judge KJ O'Brien of the District Court of Queensland.
- <sup>246</sup> Submission from Legal Aid Queensland.
- <sup>247</sup> Submission from Legal Aid Queensland.
- <sup>248</sup> Submission from Legal Aid Queensland.
- <sup>249</sup> Submission from the Bar Association of Queensland.
- <sup>250</sup> *Foster v Shaddock & Ors* [2016] QCA 36 at [33] per Atkinson J (McMurdo P and Fraser JA agreeing).
- <sup>251</sup> *Corrective Services Act 2006* (Qld) sections 178, 180, 186, 187, 188, 193, 194 and definition of 'parole order' in schedule 4(b) and (c).
- <sup>252</sup> *Corrective Services Act 2006* (Qld) sections 176, 177.
- <sup>253</sup> *Corrective Services Act 2006* (Qld) s 199(1) but note the ouster in s 199(2). See further *Penalties and Sentences Act 1992* (Qld) s 160G(3)(a).
- <sup>254</sup> *Penalties and Sentences Act 1992* (Qld) s 160B(3).
- <sup>255</sup> *Penalties and Sentences Act 1992* (Qld) s 160D.
- <sup>256</sup> *Penalties and Sentences Act 1992* (Qld) s 160A(6).
- <sup>257</sup> *Corrective Services Act 2006* (Qld) s 184(2).
- <sup>258</sup> *Penalties and Sentences Act 1992* (Qld) s 160A(3).
- <sup>259</sup> *Corrective Services Act 2006* (Qld) s 180(4).
- <sup>260</sup> *Corrective Services Act 2006* (Qld) s 192.
- <sup>261</sup> Walter Sofronoff QC, *Queensland Parole System Review* (2016) at [419]; see further [420]-[421] and [397](d).
- <sup>262</sup> *Corrective Services Act 2006* (Qld) s 201.
- <sup>263</sup> *Corrective Services (Parole Board) and Other Legislation Amendment Act 2017* (Qld), sections 9, 11.
- <sup>264</sup> *Corrective Services Act 2006* (Qld) s 205.
- <sup>265</sup> See *Foster v Shaddock* [2016] QCA 36.
- <sup>266</sup> Section 200 was renumbered by s 7 of the *Corrective Services (Parole Board) and Other Legislation Amendment Act 2017*. This amendment commenced on assent on May 26 2017. Section 200(3) had been s 200(2).
- <sup>267</sup> See Walter Sofronoff QC, *Queensland Parole System Review* (2016) at [323], referencing *Corrective Services Act 2006* (Qld) s 200(1) and at [324], referencing [what is now] *Corrective Services Act 2006* (Qld) s 200(3) [formerly s 200(2)].
- <sup>268</sup> *Penalties and Sentences Act 1992* (Qld) s 160, definition of 'sexual offence' read with *Corrective Services Act 2006* (Qld) schedule 4. Whilst some Commonwealth sexual offences are included in this definition, including the *Customs Act 1901* CEM offence of importing tier 2 goods in s 233BAB, its CEM offences are not.
- <sup>269</sup> Walter Sofronoff QC, *Queensland Parole System Review Issues Paper* (2016), 10.
- <sup>270</sup> Walter Sofronoff QC, *Queensland Parole System Review Issues Paper* (2016), 10.
- <sup>271</sup> See programs listed in Walter Sofronoff QC, *Queensland Parole System Review* (2016), 324, appendices 11 and 12 and Walter Sofronoff QC, *Queensland Parole System Review Issues Paper* (2016),
- <sup>272</sup> Queensland Government, *Response to Queensland Parole System Review Recommendations* (2016), 4, <<https://parolereview.premiers.qld.gov.au/>> (accessed 25 May 2017).
- <sup>273</sup> *R v Tracey* [2010] QCA 97 at [18].
- <sup>274</sup> *R v Tracey* [2010] QCA 97 at [15].
- <sup>275</sup> *R v Tracey* [2010] QCA 97 at [24].
- <sup>276</sup> *R v Tracey* [2010] QCA 97 at [25].
- <sup>277</sup> *R v Lloyd* [2011] QCA 12 at [3].
- <sup>278</sup> *R v Lloyd* [2011] QCA 12 at [4].
- <sup>279</sup> *R v Lloyd* [2011] QCA 12 at [2] and [17].
- <sup>280</sup> *R v Lloyd* [2011] QCA 12 at [18].
- <sup>281</sup> *R v Lloyd* [2011] QCA 12 at [20].
- <sup>282</sup> *R v Lloyd* [2011] QCA 12 at [23].
- <sup>283</sup> *R v Waszkiewicz* [2012] QCA 22 at [32].
- <sup>284</sup> *R v Waszkiewicz* [2012] QCA 22 at [33].

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- <sup>285</sup> *R v Waszkiewicz* [2012] QCA 22 at [34].
- <sup>286</sup> *R v Goodall* [2013] QCA 72 at [3].
- <sup>287</sup> *R v Goodall* [2013] QCA 72 at [18].
- <sup>288</sup> *R v Goodall* [2013] QCA 72 at [20].
- <sup>289</sup> Submission from the Office of the Director of Public Prosecutions for Queensland, citing Criminal Code (Qld) s 590AA(2)(g) and (h) of the (Pre-trial directions and rulings).
- <sup>290</sup> Criminal Code (Qld), ss 590AA(2)(g) and (h).
- <sup>291</sup> See *Corrective Services Act 2006* (Qld) ss 344(1), (6), (7) and (8).
- <sup>292</sup> See also *Penalties and Sentences Act 1992* (Qld) ss 166A, 166B, 172A, 172B in the context of reports regarding indefinite sentences.
- <sup>293</sup> See also Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry* (2015), 350.
- <sup>294</sup> Australia New Zealand Policing Advisory Agency.
- <sup>295</sup> Targeted consultation with jurisdictional representatives.
- <sup>296</sup> CrimTrac, Australian National Victim Image Library (ANVIL): Business case (2010). *Law-Enforcement-in-Confidence*.
- <sup>297</sup> CrimTrac, Australian National Victim Image Library (ANVIL): Business case (2010). *Law-Enforcement-in-Confidence*; Tony Krone 'International police operations against online child pornography', *Trends and Issues in Crime and Criminal Justice* 296 (Australian Institute of Criminology, 2005).
- <sup>298</sup> CrimTrac, Australian National Victim Image Library (ANVIL): Business case (2010). *Law-Enforcement-in-Confidence*; Tony Krone 'International police operations against online child pornography', *Trends and Issues in Crime and Criminal Justice* 296 (Australian Institute of Criminology, 2005).
- <sup>299</sup> CrimTrac, Australian National Victim Image Library (ANVIL): Business case (2010). *Law-Enforcement-in-Confidence*.
- <sup>300</sup> CrimTrac, Australian National Victim Image Library (ANVIL): Business case (2010). *Law-Enforcement-in-Confidence*.
- <sup>301</sup> Tony Krone and Russell G Smith, 'Trajectories in online child sexual exploitation offending in Australia', *Trends and Issues in Crime and Criminal Justice* 524 (Australian Institute of Criminology, 2017); Tony Krone 'International police operations against online child pornography', *Trends and Issues in Crime and Criminal Justice* 296 (Australian Institute of Criminology, 2005); Submission from Professor Mark Kebbell, Griffith University.
- <sup>302</sup> New South Wales Department of Justice and the Attorney General, *Report of the Child Pornography Working Party* (2010), 31.
- <sup>303</sup> Targeted consultation with the Crime and Corruption Commission.
- <sup>304</sup> Submission from the Queensland Police Service; CrimTrac, Australian National Victim Image Library (ANVIL): Business case (2010). *Law-Enforcement-in-Confidence*.
- <sup>305</sup> Paris Cowan, 'Police slow to utilise national child exploitation database', *itnews* (12 September 2013), <<http://www.itnews.com.au/news/police-slow-to-utilise-national-child-exploitation-database-356855>> (accessed 7 February 2017).
- <sup>306</sup> Submission from the Queensland Police Service.
- <sup>307</sup> CrimTrac, Australian National Victim Image Library (ANVIL): Business case (2010). *Law-Enforcement-in-Confidence*.
- <sup>308</sup> CrimTrac, Australian National Victim Image Library (ANVIL): Business case (2010). *Law-Enforcement-in-Confidence*.
- <sup>309</sup> Targeted consultation with the Queensland Police Service; Blue Bear LES, 'Forensic solutions in the fight against online child exploitation', <<http://www.bb-les.ca/solutions-lace-features.aspx>> (accessed 3 May 2017); Paris Cowan, 'Police slow to utilise national child exploitation database' *itnews* (12 September 2013), <<http://www.itnews.com.au/news/police-slow-to-utilise-national-child-exploitation-database-356855>> (accessed 7 February 2017).
- <sup>310</sup> Targeted consultation with the Queensland Police Service.
- <sup>311</sup> Targeted consultation with various content experts, including the Queensland Police Service, Australian Federal Police and the Australian Criminal Intelligence Commission; Paris Cowan, 'Police slow to utilise national child exploitation database' *itnews* (12 September 2013), <<http://www.itnews.com.au/news/police-slow-to-utilise-national-child-exploitation-database-356855>> (accessed 7 February 2017).
- <sup>312</sup> Targeted consultation with the Australian Federal Police.
- <sup>313</sup> CrimTrac *Annual Report 2015–2016*, 47.
- <sup>314</sup> Refer to the Glossary for more details.
- <sup>315</sup> Revealed at the *Youth, Technology and Virtual Communities Conference* by the AFP on 4 May 2017.
- <sup>316</sup> Refer to the Glossary for more details.
- <sup>317</sup> Submission from the Queensland Police Service; Submission from the Victoria Police.
- <sup>318</sup> Submissions from Legal Aid Queensland and the Queensland Law Society; Submission from the Bar Association of Queensland.

- <sup>319</sup> Submission from the Queensland Police Service.
- <sup>320</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry* (2015), 349.
- <sup>321</sup> INTERPOL, *Victim Identification Laboratory* (September 2013); Obtained at the Youth, Technology and Virtual Communities Conference May 2017.
- <sup>322</sup> Targeted consultation with all Australian law enforcement jurisdictions and international law enforcement agencies and projects of INTERPOL, Project VIC, and the Royal Canadian Mounted Police.
- <sup>323</sup> COPINE Project, Child Studies Unit, Department of Applied Psychology, *Combating Paedophile Information Networks in Europe* (University College Cork, 2001).
- <sup>324</sup> Max Taylor, Gemma Holland and Ethel Quayle, 'Typology of paedophile picture collections', *The Police Journal*, 74 (2001), 97–107.
- <sup>325</sup> United Kingdom Sentencing Advisory Panel, *Advice to the Court of Appeal – 10: Offences involving Child Pornography* (August 2002) Ministry of Justice Library.
- <sup>326</sup> *R v Oliver* [2002] EWCA Crim 2766.
- <sup>327</sup> Max Taylor, Gemma Holland and Ethel Quayle, 'Typology of paedophile picture collections', *The Police Journal*, 74 (2001), 97–107.
- <sup>328</sup> Max Taylor, Gemma Holland and Ethel Quayle, 'Typology of paedophile picture collections', *The Police Journal*, 74 (2001), 97–107.
- <sup>329</sup> Max Taylor, Gemma Holland and Ethel Quayle, 'Typology of paedophile picture collections', *The Police Journal*, 74 (2001), 103.
- <sup>330</sup> Judicial Commission of New South Wales, *Sentencing offenders convicted of child pornography and child abuse material offences* (2010), 12.
- <sup>331</sup> Alice Mary Conroy and Daniel C Murrie, *Forensic assessment of violence risk: A guide for risk assessment and risk management* (John Wiley & Sons, 2007).
- <sup>332</sup> Webster, CD and Hucker, SJ, *Violence risk: Assessment and management* (John Wiley & Sons, England, 2007).
- <sup>333</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 352.
- <sup>334</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 352.
- <sup>335</sup> *R v Sykes* [2009] QCA 267 at [6] per Mullins J (Holmes JA and Philippides J agreeing). See also *Smit v State of Western Australia* [2011] WASCA 124 at [16] per McLure P (Pullin JA and Mazza J agreeing) and *R v Hancock* [2011] NTCCA 14 at [10] per Mildren J (Riley CJ and Southwood J agreeing).
- <sup>336</sup> *R v Porte* [2015] NSWCCA 174 at [77] per Johnson J (Leeming JA and Beech-Jones J agreeing) (in relation to CETs). See also *Heathcote (a pseudonym) v The Queen* [2014] VSCA 37 at [22]–[25] per Tate JA (Sifris AJA agreeing), where the Court of Appeal viewed images and drew a conclusion about the wickedness and depravity of level 1 images (being at the 'high end' of that level) which detracted from counsel's submissions about level 1 and the moral gravity of offending. See further *Director of Public Prosecutions (Cth) v Watson* [2016] VSCA 73 at [46] per Redlich and Beach JJA; *R v De Leeuw* [2015] NSWCCA 183 at [140] per Johnson J (Ward JA and Garling J agreeing).
- <sup>337</sup> *DPP (Cth) and DPP v Garside* [2016] VSCA 74 at [30]–[36] per Redlich and Beach JJA.
- <sup>338</sup> *DPP (Cth) and DPP v Garside* [2016] VSCA 74 at [67] per Redlich and Beach JJA.
- <sup>339</sup> *DPP (Cth) and DPP v Garside* [2016] VSCA 74 at [71] per Redlich and Beach JJA.
- <sup>340</sup> Targeted consultation with the Queensland Police Service and the Crime and Corruption Commission.
- <sup>341</sup> Targeted consultation with the Queensland Police Service.
- <sup>342</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 349–350.
- <sup>343</sup> David Middleton, *Internet sex offenders, assessment and treatment of sex offenders: A handbook* (2009), 206; Tony Krone and Russell G Smith, 'Trajectories in online child sexual exploitation offending in Australia', *Trends and Issues in Crime and Criminal Justice* 524 (Australian Institute of Criminology, 2017); Submission from Tony Krone, Associate Professor, University of Canberra.
- <sup>344</sup> David Middleton *Internet sex offenders, Assessment and treatment of sex offenders: A handbook* (2009), 206; Tony Krone and Russell G Smith, 'Trajectories in online child sexual exploitation offending in Australia', *Trends and Issues in Crime and Criminal Justice* 524 (Australian Institute of Criminology, 2017); Ethel Quayle, 'The COPINE project', 5 *Irish Probation Journal*, (2008), 65–83; Hannah L Merdian, Jo Thakker, Nick Wilson and Doug Boer, 'Assessing the internal structure of the COPINE scale', *Psychology, Crime & Law*, 19(1) (2013), 21–34; Jody Osborn, Ian Elliot, David Middleton and Anthony Beech, 'The use of actuarial risk assessment measures with UK internet child pornography offenders', *Journal of Aggression, Conflict and Peace Research*, 2(3) (2010), 16–24; Submission from Tony Krone, Associate Professor, University of Canberra.
- <sup>345</sup> The Sentencing Council for England and Wales, *Sexual Offences Guideline Consultation* (2012), 79.
- <sup>346</sup> Dominic Doyle, James RP Ogloff and Stuart DM Thomas, 'An analysis of dangerous sexual offender assessment reports: Recommendations for best practice', *Psychiatry, Psychology and Law*, 18 (2011), 537–556.
- <sup>347</sup> James Vess, 'Risk assessment of sexual offenders for extended supervision orders in New Zealand: Basic principles and current practice' (2009) 18 *Journal of Child Sexual Abuse*, 174–189.



- <sup>348</sup> Karl Hanson, 'The psychological assessment of risk for crime and violence', *Canadian Psychology*, 50 (2009), 172–182.
- <sup>349</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 349.
- <sup>350</sup> Defined in the Glossary.
- <sup>351</sup> Submission from the Queensland Police Service.
- <sup>352</sup> Terms of reference (see Appendix 1).
- <sup>353</sup> Australian Federal Police Presentation to *Youth, Technology and Virtual Communities Conference*, 4 May 2017.
- <sup>354</sup> Australian Federal Police Presentation to *Youth, Technology and Virtual Communities Conference*, 4 May 2017.
- <sup>355</sup> Submission from Project VIC.
- <sup>356</sup> The *Queensland Organised Crime Commission of Inquiry Report* (2015) recommended both organisations consider implementing guidelines similar to the CDDP's *Online child exploitation conduct of matters guideline*, particularly as it relates to limiting the time a member of staff is exposed to child exploitation material in any one sitting.
- <sup>357</sup> Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material', *Digital Investigation*, 9 (2012), S99, S100.
- <sup>358</sup> Richard Wortley, Stephen Smallbone, Martine Powell and Peta Cassematis, *Understanding and managing the occupational health impacts on investigators of internet child exploitation* (Griffith University & Deakin University Australia, 2014), 66.
- <sup>359</sup> Richard Wortley, Stephen Smallbone, Martine Powell and Peta Cassematis, *Understanding and managing the occupational health impacts on investigators of internet child exploitation* (Griffith University & Deakin University Australia, 2014), 66.
- <sup>360</sup> Martine Powell, Peta Cassematis, Mairi Benson, Stephen Smallbone and Richard Wortley, 'Police officers' strategies for coping with the stress of investigating internet child exploitation', *Traumatology: An International Journal*, 20(1) (2014), 32–42.
- <sup>361</sup> Martine Powell, Peta Cassematis, Mairi Benson, Stephen Smallbone and Richard Wortley, 'Police officers' strategies for coping with the stress of investigating internet child exploitation', *Traumatology: An International Journal*, 20(1) (2014), 103–111.
- <sup>362</sup> Martine Powell, Peta Cassematis, Mairi Benson, Stephen Smallbone and Richard Wortley, 'Police officers' strategies for coping with the stress of investigating internet child exploitation', *Traumatology: An International Journal*, 20(1) (2014), 103–111.
- <sup>363</sup> The Office of the Commonwealth Director of Public Prosecutions, *Child Exploitation*, <<https://www.cdpp.gov.au/crimes-we-prosecute/child-exploitation>> (accessed 2 February 2017). This concern has been widely noted, see New South Wales Department of Justice and the Attorney General, *Report of the Child Pornography Working Party* (2010), 31.
- <sup>364</sup> New South Wales Department of Justice and the Attorney General, *Report of the Child Pornography Working Party* (2010), 31.
- <sup>365</sup> *R v Ross* [2009] NSWDC 104 at [3] per Berman SC DCJ.
- <sup>366</sup> *Director of Public Prosecutions v Latham* [2009] TASSC 101 at [35] per Porter J (Evans J agreeing), quoting Alisdair Gillespie in *Sentences for Offences Involving Child Pornography* [2003] Crim LR 81, emphasis added. See also *Director of Public Prosecutions (Cth) v Watson* [2016] VSCA 73 at [45] per Redlich and Beach JJA, citing *Edwards v The Queen* [2013] VSCA 188 at [19] and *R v Fulop* (2009) 236 FLR 376.
- <sup>367</sup> Submission from the Queensland Police Service.
- <sup>368</sup> Submission from the Queensland Police Service.
- <sup>369</sup> Robert Bryan, 'Sentencing Guidelines Council—Indecent images of children', *news@one* (May 2014), 1, <[http://www.onepaper.co.uk/wp-content/uploads/2014/07/N12\\_Indecent\\_images\\_of\\_children.pdf](http://www.onepaper.co.uk/wp-content/uploads/2014/07/N12_Indecent_images_of_children.pdf)> (accessed 7 February 2017).
- <sup>370</sup> The Sentencing Council for England and Wales, *Sexual Offences Guideline Consultation: Section Six: Indecent Images of children* (2012).
- <sup>371</sup> Submission from the Queensland Police Service.
- <sup>372</sup> Quoted from Robert Bryan, 'Sentencing Guidelines Council – Indecent images of children', *news@one* (May 2014), 4, <[http://www.onepaper.co.uk/wp-content/uploads/2014/07/N12\\_Indecent\\_images\\_of\\_children.pdf](http://www.onepaper.co.uk/wp-content/uploads/2014/07/N12_Indecent_images_of_children.pdf)> (accessed 7 February 2017).
- <sup>373</sup> Quoted from Robert Bryan, 'Sentencing Guidelines Council – Indecent images of children', *news@one* (May 2014), 4, <[http://www.onepaper.co.uk/wp-content/uploads/2014/07/N12\\_Indecent\\_images\\_of\\_children.pdf](http://www.onepaper.co.uk/wp-content/uploads/2014/07/N12_Indecent_images_of_children.pdf)> (accessed 7 February 2017).
- <sup>374</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 353.
- <sup>375</sup> The Sentencing Council for England and Wales, *Sexual Offences Definitive Guideline* (2013), 76.
- <sup>376</sup> *Markarian v The Queen* [2005] HCA 25.
- <sup>377</sup> Submission from the Queensland Police Service.
- <sup>378</sup> Submission from the Queensland Police Service.

- <sup>379</sup> Trend Micro website, <<https://www.trendmicro.com/vinfo/us/security/definition/hash-values>> (accessed 15 February 2017).
- <sup>380</sup> Digital News Asia, *Interpol to use Microsoft PhotoDNA to help ID child abuse victims* (23 April 2015), <<https://www.digitalnewsasia.com/digital-economy/interpol-to-use-microsoft-photodna-tech-to-help-identify-child-abuse-victims>> (accessed 7 February 2017).
- <sup>381</sup> Janis Wolak, Marc Liberatore and Brian Neil Levine, 'Measuring a year of child pornography trafficking by U.S. computers on a peer-to-peer network' *Child Abuse and Neglect* (2013), 7.
- <sup>382</sup> New South Wales Department of Justice and the Attorney General, *Report of the Child Pornography Working Party* (2010), 37.
- <sup>383</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 352.
- <sup>384</sup> NetClean website, <<https://www.netclean.com/>> (accessed 7 February 2017).
- <sup>385</sup> BlueBear website, <<http://bb-les.ca/>> (accessed 25 May 2017).
- <sup>386</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 352.
- <sup>387</sup> INTERPOL, *Crimes against children: Victim identification*, <<https://www.interpol.int/Crime-areas/Crimes-against-children/Victim-identification>> (accessed 7 February 2017). See further Dr Thomas de Maizière, *Interpol's International Child Sexual Exploitation Database* (speech delivered 4 November 2014), <<http://www.bmi.bund.de/SharedDocs/Reden/EN/2014/interpol.html>> (accessed 7 February 2017).
- <sup>388</sup> INTERPOL, 'What is the INTERPOL's ICSE database?', <[https://www.interpol.int/News-and-media/Videos/\(video\\_id\)/36189](https://www.interpol.int/News-and-media/Videos/(video_id)/36189)> (accessed 25 May 2017).
- <sup>389</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 352.
- <sup>390</sup> Rich Brown, *Project VIC: Finding strength in information sharing*, <<http://blog.netclean.com/project-vic-finding-strength-in-information-sharing/>> (accessed 7 February 2017).
- <sup>391</sup> Project VIC website, <<http://www.projectvic.org/>> (accessed 25 May 2017).
- <sup>392</sup> International Centre for Missing and Exploited Children website, <<http://www.icmec.org/project-vic/>> (accessed 3 February 2017).
- <sup>393</sup> Home Office (UK), *The Child Abuse Image database (CAID)* (November 2015), 2, <<https://www.gov.uk/government/publications/child-abuse-image-database>> (accessed 14 February 2017).
- <sup>394</sup> Lord Justice Fulford, 'The Child Abuse Image Database (CAID) is now available to all Police Forces', *Better Case Management (BCM) Newsletter* (Issue 6, 29 January 2016), 2, <<https://www.judiciary.gov.uk/wp-content/uploads/2016/.../bcm-newsletter-issue-6.pdf>> (accessed 14 February 2017).
- <sup>395</sup> Home Office (UK), *The Child Abuse Image database (CAID)* (November 2015), 3, <<https://www.gov.uk/government/publications/child-abuse-image-database>> (accessed 14 February 2017).
- <sup>396</sup> S 70AAAE will be replaced by new s 51V, through the *Crimes Amendment (Sexual Offences) Act 2016* (Vic), which replaces the term 'child pornography' with 'child abuse material'. Section 2 of the *Crime Amendment (Sexual Offences) Act 2016* (Vic) deems commencement as at 1 July 2017, unless there is an earlier proclamation date.
- <sup>397</sup> NSW Department of Justice and the Attorney General, *Report of the Child Pornography Working Party* (2010), 3 and 34, Recommendation 4.
- <sup>398</sup> NSW Department of Justice and the Attorney General, *Report of the Child Pornography Working Party* (2010), 32.
- <sup>399</sup> NSW Department of Justice and the Attorney General, *Report of the Child Pornography Working Party* (2010), 34.
- <sup>400</sup> Through the *Crimes Amendment (Child Pornography and Abuse Material) Act 2010* (NSW). There were further amendments to the scheme introduced by the *Courts and Crimes Legislation Amendment Act 2012* (NSW).
- <sup>401</sup> New South Wales, 'Crimes Amendment (Child Pornography and Abuse Material) Bill 2010 – Agreement in Principle', *Legislative Assembly Hansard*, 10 March 2010 (Hon Barry Collier, Miranda – Parliamentary Secretary).
- <sup>402</sup> New South Wales, 'Crimes Amendment (Child Pornography and Abuse Material) Bill 2010 – Second Reading', *Legislative Council Hansard*, 20 April 2010 (Hon Michael Veitch, Parliamentary Secretary).
- <sup>403</sup> *Crimes Amendment (Child Pornography and Other Matters) Act 2015* (VIC). See also the Explanatory Memorandum to the *Crimes Amendment (Child Pornography and Other Matters) Bill 2015* (VIC), 8.
- <sup>404</sup> Ss 289B(1) (VIC) and 70AAAE(1) (NSW).
- <sup>405</sup> Explanatory Note to the *Courts and Crimes Legislation Amendment Bill 2011* (NSW) 3, schedule 1.1.
- <sup>406</sup> New South Wales, 'Courts and Crimes Legislation Amendment Bill 2011 – Agreement in Principle', *Legislative Assembly Hansard*, 24 November 2011 (Hon Greg Smith, Epping – Attorney General and Minister for Justice).
- <sup>407</sup> Ss 289B(2) and 70AAAE(2).
- <sup>408</sup> Ss 289B(3) and 70AAAE(3).
- <sup>409</sup> Ss 289B(4), (5) and ss 70AAAE(4),(5). As to actual certificates of expert witnesses see s 177 of the *Evidence Act 1995* (NSW) and s 177 of the *Evidence Act 2008* (VIC).



- <sup>410</sup> New South Wales, 'Crimes Amendment (Child Pornography and Abuse Material) Bill 2010 – Agreement in Principle', *Legislative Assembly Hansard*, 17 March 2010 (Hon Barry Collier, Miranda – Parliamentary Secretary).
- <sup>411</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 353.
- <sup>412</sup> Ss 289B(8) and 70AAAE(8).
- <sup>413</sup> See the discussions in Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material', *Digital Investigation* S99, 9 (2012), S101-S103; and Robert-Jan Mora and Bas Kloet, *Digital forensic sampling: The application of statistical sampling in digital forensics* (27 March 2010), <<https://blogs.sans.org/computerforensics/files/2010/03/statisticalforensictriage.pdf>> (accessed 7 February 2017).
- <sup>414</sup> *Criminal Procedure Regulation 2010* (NSW) s 27A and *Crimes (Child Pornography) Regulations 2015* (VIC) s 5.
- <sup>415</sup> See, e.g. *R v Wood* [2015] NSWCCA 231 at [11], [18]; *R v Gavel* [2014] NSWCCA 56 at [43]; *R v Porte* [2015] NSWCCA 174 at [79]; *R v Robertson* [2015] NSWDC 372 at [6]; *R v Schipanski* [2015] NSWDC 381 at [35].
- <sup>416</sup> *R v Porte* [2015] NSWCCA 174 at [78] per Johnson J (Leeming JA and Beech-Jones J agreeing).
- <sup>417</sup> *Crimes Amendment (Child Pornography and Other Matters) Act 2015* (VIC), Explanatory Memorandum 8.
- <sup>418</sup> New South Wales, 'Crimes Amendment (Child Pornography and Other Matters) Act 2015 – Second Reading', *Legislative Assembly Hansard*, 5 August 2015 (Hon Martin Pakula, Attorney-General); *Crimes Amendment (Child Pornography and Other Matters) Act 2015*, Explanatory Memorandum, 8.
- <sup>419</sup> New South Wales, 'Crimes Amendment (Child Pornography and Other Matters) Act 2015 – Second Reading', *Legislative Assembly Hansard*, 5 August 2015 (Hon Martin Pakula, Attorney-General). See also Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material', *Digital Investigation* S99, 9 (2012), SS105–106.
- <sup>420</sup> New South Wales, 'Crimes Amendment (Child Pornography and Other Matters) Act 2015 – Second Reading', *Legislative Assembly Hansard*, 5 August 2015 (Hon Martin Pakula, Attorney-General).
- <sup>421</sup> Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material', *Digital Investigation* S99, 9 (2012), S106.
- <sup>422</sup> Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material', *Digital Investigation* S99, 9 (2012), S99.
- <sup>423</sup> Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material', *Digital Investigation* S99, 9 (2012), S99, S105.
- <sup>424</sup> Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material', *Digital Investigation* S99, 9 (2012), S99, S106.
- <sup>425</sup> Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material', *Digital Investigation* S99, 9 (2012), S99, S105.
- <sup>426</sup> Direct consultation Victoria police.
- <sup>427</sup> Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material', *Digital Investigation* S99, 9 (2012), S99, S101.
- <sup>428</sup> See, e.g. *R v McDonald* [2016] QCA 200 at [17] per Burns J (McMurdo P and Philippides JA agreeing), but note *Colbourn v The Queen* [2009] TASSC 108 at [15] and [17] per Blow J (Crawford CJ and Porter J agreeing).
- <sup>429</sup> *Fisheries Regulation 2008* s 167(2).
- <sup>430</sup> Kate Warner, 'Sentencing for child pornography', *Australian Law Journal*, 84 (2010), 384, 389.
- <sup>431</sup> *Colbourn v The Queen* [2009] TASSC 108 (see [15]–[17]).
- <sup>432</sup> *Colbourn v The Queen* [2009] TASSC 108 at [17] per Blow J (Crawford CJ and Porter J agreeing).
- <sup>433</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 354, referring to information from Paul Griffiths of the Queensland Police Service.
- <sup>434</sup> Common theme at the *Youth, Technology and Virtual Communities Conference*, 2–4 May 2017; INTERPOL *Online child abuse material: Q & A* (January 2017), obtained at the *Youth, Technology and Virtual Communities Conference*, May 2017.
- <sup>435</sup> *R v Forbes* [2014] ACTSC 91. The context of the discussion was around a sample for the judge to view on sentence, but the concerns regarding random sampling still apply.
- <sup>436</sup> *R v Forbes* [2014] ACTSC 91 at [15] per Penfold J.
- <sup>437</sup> *R v Forbes* [2014] ACTSC 91 at [19] per Penfold J.
- <sup>438</sup> *R v Forbes* [2014] ACTSC 91 at [15] per Penfold J.
- <sup>439</sup> *R v Forbes* [2014] ACTSC 91 at [15] per Penfold J.
- <sup>440</sup> *R v Forbes* [2014] ACTSC 91 at [17] per Penfold J.
- <sup>441</sup> *R v Forbes* [2014] ACTSC 91 at [18] per Penfold J.
- <sup>442</sup> *R v McDonald* [2016] QCA 200.
- <sup>443</sup> *R v McDonald* [2016] QCA 200 at [20] per Burns J (McMurdo P and Philippides JA agreeing).
- <sup>444</sup> *R v McDonald* (unreported, District Court of Queensland, Burnett DCJ, 19 November 2015).
- <sup>445</sup> *R v McDonald* [2016] QCA 200 at [17] per Burns J (McMurdo P and Philippides JA agreeing).

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<sup>446</sup> *R v McDonald* [2016] QCA 200 at [17] per Burns J (McMurdo P and Philippides JA agreeing).

<sup>447</sup> *R v McDonald* [2016] QCA 200 at [39] per Burns J (McMurdo P and Philippides JA agreeing).

<sup>448</sup> Submission from the Office of the Director of Public Prosecutions for Queensland.

<sup>449</sup> Submission from the Bar Association of Queensland.

<sup>450</sup> Submission from the Bar Association of Queensland.

<sup>451</sup> Submission from Project VIC.

<sup>452</sup> Submission from the Queensland Police Service.

<sup>453</sup> QPS discussed a case in which corrupted, embedded files repeatedly crashed imaging processes and as a result extended these timeframes significantly.

<sup>454</sup> This would be the Police Prosecution Corps, QDPP or CDPP, depending on region, charge type and stage of the matter.

<sup>455</sup> Submission from the Queensland Police Service.

<sup>456</sup> For instance, the CDPP suggested the following are some additional points considered desirable to include in such a statement:

- is the material stored on the offender's computer or has it been moved to other devices
- if the material is stored on the computer is it readily accessible or in a cached or temporary file
- is the material organised/curated
- is encryption used
- if the material was solicited by the offender did it originate from overseas and is there any evidence indicative of live streaming
- was the material obtained from the Darknet, TOR, paid sites, peer to peer, exclusively child abuse websites or forums
- does the offending involve the use of hidden networks or anonymising services
- internet search history including search terms used.

<sup>457</sup> The council analysed 230 finalised CEM matters from 2011–2012 and 2015–2016, building an original sample of 413 court events. Sentencing remarks were available in 88.9 per cent of cases (n=367), which correlated to all Supreme Court matters, 92.61 per cent of all District Court matters, and 42.9 per cent of all Childrens Court of Queensland matters. Unfortunately remarks were not available for the Childrens or Magistrates Court matters.

<sup>458</sup> *R v McDonald* [2016] QCA 200 at [36] per Burns J (McMurdo P and Philippides JA agreeing).

<sup>459</sup> Refer to Chapter 4 for sampling.

<sup>460</sup> Submission from the Queensland Police Service: 'Whilst the random sampling process may satisfy the judiciary, there remains an expectation that investigators will review all seized material to identify possible self-produced material and possible victims of the offender'.

<sup>461</sup> See *Evidence Act 1977* s 95A(3) which requires a DNA evidentiary certificate to be in the approved form, which can be approved by the chief executive: s 134B.

<sup>462</sup> *R v Noordhuis* (unreported, District Court of Queensland, Kingham DCJ, 14 June 2016): The offender possessed 938,178 images, of which police classified 31 per cent; and *R v Smith* (unreported, District Court of Queensland, Farr SC DCJ, 6 September 2016): This offender possessed hundreds of thousands of images and over 10,000 movies. The police classified around 200,000 images and 613 videos, and the offender was sentenced only in relation to the classified material.

<sup>463</sup> Advice from Joint Anti-Child Exploitation Team, Crime Command, Victoria Police, 29 March 2017.

<sup>464</sup> Advice from Joint Anti Child Exploitation Team, Special Crimes Investigation Branch, South Australia Police.

<sup>465</sup> Submission from the Office of the Director of Public Prosecutions for South Australia.

<sup>466</sup> Office of the Director of Public Prosecutions for Tasmania, *Prosecution Policy and Guidelines*, October 2016, 55.

<sup>467</sup> Submission from the Office of the Director of Public Prosecutions for Tasmania.

<sup>468</sup> Advice from the Western Australian Police that it is working on an updated policy in relation to CEM inspections and they would hold on providing any feedback until the policy is completed and approved by their executive (3 April 2017).

<sup>469</sup> Submission from the Office of the Director of Public Prosecutions for the Northern Territory.

<sup>470</sup> Submission from the Office of the Director of Public Prosecutions for the Northern Territory.

<sup>471</sup> Advice from Senior Crown Prosecutor, Office of the Director of Public Prosecutions for the Northern Territory.

<sup>472</sup> Submission from the Office of the Director of Public Prosecutions for Queensland.

<sup>473</sup> Submission from the Office of the Director of Public Prosecutions for Queensland.

<sup>474</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 369.

<sup>475</sup> See Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), Chapter 4.

<sup>476</sup> Internet Watch Foundation, *2016 Annual Report*, 5.

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- <sup>477</sup> Internet Watch Foundation, *2016 Annual Report*, 18.
- <sup>478</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 362.
- <sup>479</sup> Internet Watch Foundation, *2016 Annual Report*, 12.
- <sup>480</sup> Law, Crime and Community Safety Council website, <<https://www.ag.gov.au/About/CommitteesandCouncils/Law-Crime-and-Community-Safety-Council/Pages/default.aspx>> (accessed 31 March 2017).
- <sup>481</sup> Law, Crime and Community Safety Council website, <<https://www.ag.gov.au/About/CommitteesandCouncils/Law-Crime-and-Community-Safety-Council/Pages/default.aspx>> (accessed 31 March 2017).
- <sup>482</sup> Law, Crime and Community Safety Council website, <<https://www.ag.gov.au/About/CommitteesandCouncils/Law-Crime-and-Community-Safety-Council/Pages/default.aspx>> (accessed 31 March 2017).
- <sup>483</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 359.
- <sup>484</sup> Anonymous, *The Guardian* (6 May 2017), <[www.theguardian.com/lifeandstyle/2017/may/06/my-father-the-respectable-paedophile](http://www.theguardian.com/lifeandstyle/2017/may/06/my-father-the-respectable-paedophile)> (accessed 8 May 2017).
- <sup>485</sup> Queensland Police Service, *Operational Procedures Manual* Issue 55, Public Edition, November 2016, chapter 7, 37–38.
- <sup>486</sup> Queensland Police Service, *Operational Procedures Manual* Issue 55, Public Edition, November 2016, chapter 7, 37–38.
- <sup>487</sup> Carolina Villacampa, ‘Teen sexting: Prevalance, characteristics and legal treatment’, *International Journal of Law, Crime and Justice*, 49 (2017), 10–21.
- <sup>488</sup> Carolina Villacampa, ‘Teen sexting: Prevalance, characteristics and legal treatment’, *International Journal of Law, Crime and Justice*, 49 (2017), 10–21.
- <sup>489</sup> Internet Watch Foundation, *2016 Annual Report*, 9.
- <sup>490</sup> Office of the Children’s eSafety Commissioner, <[www.esafety.gov.au/about-the-office/role-of-the-office](http://www.esafety.gov.au/about-the-office/role-of-the-office)> (accessed 20 May 2017).
- <sup>491</sup> Office of the Children’s eSafety Commissioner, <<https://esafety.gov.au/-/media/cesc/documents/infographics/ocesc-kids-online.pdf>> (accessed 20 May 2017).
- <sup>492</sup> Carolina Villacampa, ‘Teen sexting: Prevalance, characteristics and legal treatment’, *International Journal of Law, Crime and Justice*, 49 (2017), 10–21.
- <sup>493</sup> Information obtained at the *Youth, Technology and Virtual Communities* conference, May 2017.
- <sup>494</sup> Information obtained at the *Youth, Technology and Virtual Communities* conference, May 2017.
- <sup>495</sup> The Queensland Family and Child Commission, Role and Functions as per <<https://www.qfcc.qld.gov.au/our-role>> (accessed 14 April 2017).
- <sup>496</sup> Queensland Government, Department of the Premier and Cabinet, *Criminal justice evaluation framework: Guidelines for evaluating criminal justice initiatives* (2014).
- <sup>497</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 274–282.
- <sup>498</sup> Defined in the Glossary for ease of reference.
- <sup>499</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 359.
- <sup>500</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 359.
- <sup>501</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 366.
- <sup>502</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 366.
- <sup>503</sup> Parliamentary Crime and Corruption Committee, Parliament of Queensland, Report No. 97: *Review of the Crime and Corruption Commission* (2016), <<https://www.parliament.qld.gov.au/documents/committees/PCCC/2016/five-year-review/05-rpt-97-30jun2016.pdf>> (accessed 30 May 2017).
- <sup>504</sup> Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015), 365–366.
- <sup>505</sup> For further details see <<http://www.the-link-king.com/>>.
- <sup>506</sup> This information was gleaned from targeted consultation, primarily with each jurisdictions’ DPPs or equivalent.
- <sup>507</sup> In *R v Arthur* [2017] ACTSC 23 at [15] per Robinson AJ, an agreed statement of facts included an Oliver (called ANVIL) breakdown of images per level, and had a further description of six representative images ‘for the purpose of more fully understanding the nature of the offending for which the offender is to be sentenced’. Each description had the file name and a one-to-three sentence description of age and activity. See also *R v White* [2016] ACTSC 237 at [24] per Elkaim J.





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