Classification of child exploitation material for sentencing purposes

Consultation paper

March 2017

Queensland Sentencing
Advisory Council
Inform. Engage. Advise.

Classification of child exploitation material for sentencing purposes: Consultation paper

This publication is available for download from the council's website
www.sentencingcouncil.qld.gov.au

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

The Queensland Sentencing Advisory Council is established by s198 of the *Penalties and Sentences Act 1992* (Qld). Its functions are detailed in s199 of the *Penalties and Sentences Act 1992* (Qld).

Further information:
Queensland Sentencing Advisory Council
GPO Box 2360, Brisbane Qld 4001
Tel: (07) 3224 7375
Email: info@sentencingcouncil.qld.gov.au

Contents

Queensland Sentencing Advisory Council

Queensland Sentencing Advisory Council (QSAC) provides independent research and advice, seeks public views and promotes community understanding of sentencing matters. Our role is to:

- **inform** the community about sentencing through research and education
- **engage** with Queenslanders to understand their views on sentencing
- **advise** on sentencing matters.

Part of our remit is to conduct public consultations on sentencing and matters about sentencing.

Call for submissions

Submissions are being called for as part of our review of the classification of child exploitation material (CEM) for sentencing purposes. We invite you to make a submission based on the questions in this consultation paper, or any issues arising from the terms of reference, by Monday 10 April 2017. The following information will assist you to prepare your response to the consultation paper.

> ## Submission deadline: Monday 10 April 2017

Preparing your submission

All submissions must be in writing. This consultation paper raises 10 questions that reflect the terms of reference provided to QSAC by the Attorney-General on CEM—see page 33. You are invited to respond to some or all of the questions. To assist in analysing responses, we would appreciate you identifying the relevant question number/s in your submission.

Submission length

Try to keep your responses succinct and focused on the question/s you are responding to. If you wish to provide attachments please indicate which question/s your attachment refers to.

How your submission will be used

All submissions to this consultation paper, as well as additional consultation conducted with key agencies, will inform our response to the terms of reference. A final document with recommendations will be provided to the Attorney-General on 31 May 2017 and released publicly via our website www.sentencingcouncil.qld.gov.au. Hard copies of our final report will also be available by contacting info@sentencingcouncil.qld.gov.au

This consultation paper reflects our commitment to listening to members of the public. Submissions are therefore considered public. Any personal information identified in this public consultation process will be collected only for the purpose of the review. We do not intend to use personal information within our final report. However, unless you explicitly request, details provided in your submission (other than personal information) may be directly or indirectly quoted in the final report, or other products associated with the final report. If you include details in your submission that you do not want publicly disclosed, please indicate this within your submission.

We may attribute comments to agencies which provide submissions to this public consultation process. If you agree to your name and/or part or all of your submission to be referred to as part of the ongoing reporting on this issue, but do not wish your name to be attached to your agency, please indicate this clearly within your submission.

The *Right to Information* (RTI) *Act 2009* may apply to submissions provided as part of this consultation process. If subject to a RTI application, submissions including those labelled *confidential*, will all be assessed as part of the RTI process.

While the terms of reference are restricted to reviewing the classification of CEM for sentencing purposes, we appreciate this topic area is emotive. Submissions containing offensive, derogatory, highly-specific information about actual offending and/or issues beyond the scope of these terms of reference will not be referred to in the final report and may be excluded from the consultation process.

Warning

Please note, the disclosure of details likely to lead to the identification of children who are or were involved in criminal proceedings, and complainants in sexual offences, is a criminal offence. We recommend against providing identifying details of any children named in proceedings or any complainant regarding a sexual offence. If you are committed to including such information, please seek legal advice before providing the details.

Making a submission

Please include in the heading of your email or clearly mark written correspondence with the title 'Submission on the classification of CEM'.

Please complete and include a submission form with your submission—see page 38.

Submitting via email:

info@sentencingcouncil.qld.gov.au

Submitting in writing:

QSAC
GPO Box 2360
Brisbane Qld 4001

Further information

(07) 3224 7375

info@sentencingcouncil.qld.gov.au

Assistance with your submission

If you require any assistance to participate in this public consultation process, please call us on (07) 3224 7375, or feel free to use the following services:

Translating and Interpreting Service

If you need an interpreter, contact the Translating and Interpreting Service (TIS) on 131 450 and tell them:

- the language you speak
- our name—Queensland Sentencing Advisory Council
- our telephone number—(07) 3224 7375.

TIS will arrange an interpreter so you can talk with us. This is a free service.

National Relay Service

The National Relay Service (NRS) is a free phone service for people who are deaf or have a hearing or speech impairment. If you need help contacting us, the NRS can assist. To contact the NRS you can:

- TTY/voice call—133 677
- Speak and Listen—1300 555 727
- SMS relay—0423 677 767

Consultation questions

Question 1 (page 9)

Do you believe the current Queensland legislation adequately defines child exploitation material? Please explain your answer.

Question 2 (page 9)

Do you think additional information needs to be added to the Queensland legislative definition of child exploitation material? Please explain your answer.

Question 3 (page 9)

Do you agree with Queensland's legislation specifying the age as under 16 years within the child exploitation material definition? Please explain your answer.

Question 4 (page 15)

Knowing what is currently guiding sentencing for child exploitation material (CEM) offences in Queensland, do you consider there are other factors that should guide sentencing of CEM offenders in Queensland? If so, what additional factors should be included in Queensland legislation?

Question 5 (page 17)

Given the role of the internet in facilitating child exploitation material (CEM), would you support further consideration of mechanisms to enhance cooperation within Australia and internationally to address the classification of CEM? Please provide any additional information to support your answer.

Question 6 (page 28)

Do you think a sentencing judge should view child exploitation material to inform sentencing decisions? If so, should this be a sample or all of the material?

Question 7 (page 29)

Do you think there is value in some degree of harmonisation in classification systems across Australia?

Question 8 (page 29)

Would you support the Queensland Government pursuing a secure mechanism for sharing classification results across Australian jurisdictions?

Question 9 (page 30)

Would you support simplifying the current nine point Oliver scale for classification purposes? Please provide any information to support your response.

Question 10 (page 32)

Do you think that sampling of images should be considered in Queensland?

Abbreviations

ANVIL	Australian National Victim Image Library
CAID	Child Abuse Image Database
CCC	Crime and Corruption Commission
CDPP	Commonwealth Director of Public Prosecutions
CEM	Child Exploitation Material
CETS	Child Exploitation Tracking System
Commission report	Queensland Organised Crime Commission Inquiry Report (2015)
COPINE	Combating Paedophile Information Networks in Europe (Project)
Cth	Commonwealth
Criminal Code (Qld)	*Criminal Code Act 1899* (Qld), Schedule 1
Criminal Code (Cth)	*Criminal Code Act 1995* (Cth), Schedule
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.
Hon	Honourable
ICSE DB	International Child Sexual Exploitation image database
MSO	Most serious offence
NSW	New South Wales
ODPP	Office of the Director of Public Prosecutions
PSA	*Penalties and Sentences Act 1992* (Qld)
Qld	Queensland
QPRIME	Queensland Police Records and Information Management Exchange
QPS	Queensland Police Service
QSAC	Queensland Sentencing Advisory Council
QWIC	Queensland Wide Inter-linked Courts
SA	South Australia
UK	United Kingdom

USA	United States of America
WA	Western Australia
YJA	*Youth Justice Act 1992* (Qld)

Glossary

Caution/ed	Section 14 of the *Youth Justice Act 1992* (Qld) establishes the purpose of cautions for young people:
	The purpose of this division is to set up a way of diverting a child who commits an offence from the courts' criminal justice system by allowing a police officer to administer a caution to the child instead of bringing the child before the a court for the offence.
Conference/d	Section 30 of the *Youth Justice Act 1992* (Qld) establishes the objective of restorative justice processes for young people as:
	The object of this part is to provide for the use of a restorative justice process for a child who commits an offence.
	Section 31(2) of the *Youth Justice Act 1992* (Qld) further establishes that:
	The restorative justice process is to be a conference.

Contact offence/s	An offence of a sexual nature committed in relation to a child under 16. This includes the following offences contained in the Criminal Code (Qld).

Offence	Maximum penalty	
s210 Indecent treatment of a child under 16 years	Child 12–15 years	14 years
	Child under 12 years/lineal descendant/has impairment of the mind	20 years
s213 Owner permitting abuse of children under 16 years on premises	Child 12–15 years	10 years
	Child under 12 years	14 years
	Child under 12 years and abuse is carnal knowledge	Life
s215 Carnal knowledge—child under 16 years	Child 12–15 years	14 years
	Child under 12 years or under care	Life (attempt—14 years)
	Child has impairment of the mind	Life
s218A Using internet to procure children under 16 years	10 years	
	Child/believed to be under 12 years	14 years

		Intentionally meets/goes to meeting place	14 years
	s218B Grooming children under 16 years	5 years	
		Child/believed to be under 12 years	10 years
	s219 Taking child for immoral purposes	Child 12–15 years	10 years
		Child under 12 years	14 years
		Child under 12 years and act is carnal knowledge	Life
	s229B Maintaining a sexual relationship with a child	Life	
Diversion/diverted	The charter of youth justice principles underlies the operation of the *Youth Justice Act 1992* (Qld) and outline: 5. If a child commits an offence, the child should be treated in a way that **diverts** 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).		
Oliver scale	A classification tool for grading the severity of CEM using the following nine categories: 1. Erotic posing with no sexual activity. 2. Sexual activity between children, or solo masturbation by a child. 3. Non-penetrative sexual activity between adults and children. 4. Penetrative sexual activity between children and adults. 5. Sadism or bestiality. 6. Anime, cartoons and drawings depicting children engaged in sexual poses or activity. 7. Non-illegal/indicative child material (often part of a series containing CEM). 8. Adult pornography. 9. Ignorable.		
Hash value/hash value technology	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.[1]		
Restorative justice	'A process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future'.[2]		
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'.[3]		

Introduction

In November 2016, the Attorney-General and Minister for Justice and Minister for Training and Skills, the Hon Yvette D'Ath MP referred a review of the classification of child exploitation material (CEM) for sentencing purposes to QSAC. The referral was in response to recommendation 4.11 of the Queensland Organised Crime Commission of Inquiry's 2015 report (commission report) on the extent, nature and impacts of organised crime in Queensland. The report recommended that the:

> Queensland Government proposed 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 Attorney-General specified a number of considerations for QSAC as part of its review. These considerations include:

- an examination of the effectiveness and ongoing suitability of Queensland's current CEM classification system referred to as the 'Oliver scale'
- the potential for alternative CEM classification systems used by other jurisdictions to be introduced in Queensland
- whether CEM classified by other jurisdictions should be relied upon for sentencing purposes in Queensland
- what, if any, additional factors were needed to improve Queensland's existing sentencing guidelines outlined in s9(7)(a) of the *Penalties and Sentences Act (1992)* (Qld) (PSA) for CEM offenders.

The Attorney-General also flagged reducing time delays; prioritising victim identification; protecting officer well-being; and reflecting community concern about this issue as underlying imperatives for the review. The full terms of reference is provided at Appendix 1.

This review of the classification of CEM for sentencing purposes does not include consideration of:

- individual cases and sentences
- appeals against sentences for CEM offenders
- activities relating to the identification of CEM offenders; the seizure and analysis of storage devices used in CEM offending; or the investigation of CEM offenders
- risk assessments of CEM offenders
- offender treatment or risk of re-offending for CEM offenders
- costing any associated technical solutions to support classification.

Data used in this paper

Data contained in this consultation paper was obtained from the Queensland Police Service (QPS) and the Queensland courts for a 10-year period from 1 July 2006 to 30 June 2016. The QPS data was extracted from the Queensland Police Records and Information Management Exchange (QPRIME). The court data was extracted from the Queensland Wide Inter-linked Courts (QWIC) system.[4] As with all administrative data sets, QPRIME and QWIC have limitations. The primary limitation associated with using and interpreting administrative data for the criminal justice system is that the data relates only to cases formally recorded by the system as opposed to indicating the extent of offending across society. However, collectively the QPRIME and QWIC data provide a valuable insight into CEM offending in Queensland, CEM offenders, and how these offenders are dealt with in Queensland.

What is CEM?

As in other Australian states and territories, CEM-type offences are defined in legislation and increasingly prosecuted under both state and Commonwealth provisions. Prosecution of offenders under both legislative frameworks arises from the increasingly prominent role of the internet which is delivered into homes and workplaces via the telecommunications network. The Commonwealth retains responsibility for legislation about the telecommunications network, while states retain constitutional authority for crime generally.

While all Australian jurisdictions have legislation prohibiting CEM, each attaches its own definitions under its respective legislative framework. While a lack of consistency in legislative terminology across Australia complicates direct comparison and research effort,[5] all jurisdictions agree that such activity should be criminalised. Appendix 2 details the relevant Queensland and Commonwealth definitions, offence provisions and maximum penalties.

Across Australian jurisdictions, material defined as CEM in Queensland is variously referred to as 'child exploitation material', 'child abuse material' and 'child pornography'. It is also apparent that some jurisdictions separate material based on the nature of the activity depicted. The Queensland definition adopts a comprehensive approach, incorporating all material that depicts or describes children in a sexual context, in an offensive or demeaning context or being subjected to abuse, cruelty or torture (Criminal Code (Qld) s207A).[6] In addition, different 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.

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) for child pornography or child abuse material.[7] There is an aggravated offence when a person commits an offence against 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[8] are used and where an offender commits such offences overseas.[9]

It is not uncommon for offenders to be charged under Queensland provisions as well as Commonwealth legislation. Queensland courts can deal with both together.[10] Figure 7 on page 21 demonstrates that approximately 27 per cent of CEM offenders are charged under both Queensland and Commonwealth legislation. The elements of Queensland and Commonwealth offences overlap but are not identical.[11] The principles applicable to sentencing for CEM offences that have been consistently identified by Australian appeal courts, apply equally to state and Commonwealth offences.[12]

Question 1	**Do you believe the current Queensland legislation adequately defines child exploitation material?** **Please explain your answer.**
Question 2	**Do you think additional information needs to be added to the Queensland legislative definition of child exploitation material?** **Please explain your answer.**
Question 3	**Do you agree with Queensland's legislation specifying the age as under 16 years within the child exploitation material definition?** **Please explain your answer.**

How offenders are sentenced in Queensland

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.

Legislation

The PSA is the key legislation which guides sentencing for offences in Queensland. Four of the purposes of the PSA are particularly relevant to this consultation paper:

- 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 (s3(b))
- promoting consistency of approach in the sentencing of offenders (s3(d))
- providing fair procedures for imposing sentences (s3(e)(i))
- providing sentencing principles that are to be applied by courts (s3(f)).

Consistency in sentencing in this context refers to the application of consistent purposes and principles of sentencing for similar offences, rather than the application of the same sentence.[13]

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

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

Section 9(2) sets out the factors which a court is to consider in the sentencing process. Section 9(2)(a) establishes that imprisonment must only be imposed as a last resort and a sentence allowing an offender to stay in the community is preferable. However, these principles do not apply when the sentence relates to a CEM offence.

While s9(2) lists other general sentencing factors, s9(7) requires courts to have regard primarily to all of the following when sentencing CEM offenders:

- 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, 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 appropriate penalty in any particular case will depend on the particular circumstances of the case before the court.[14]

As it is not unusual for offenders charged with Queensland CEM offences to also face charges under the Commonwealth Criminal Code, the Commonwealth *Crimes Act 1914* influences sentencing decisions handed down to CEM offenders finalised in Queensland courts. The Commonwealth legislation 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 child abuse material 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.[15]

Case law

Sentencing factors established by the 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)[16] and 'quantity' should be assessed together. Both the number of images and the image content are relevant to the sentence,[17] including where there are Commonwealth access offences being considered alongside a Queensland possession offence.[18] This is consistent with the approach nationally.[19]

The significance of the volume of CEM material involved, while relevant, should not be overstated.[20] 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.[21] 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.[22]

In 2015, the NSW Court of Criminal Appeal[23] summarised the sentencing considerations that are applicable to sentencing for a CEM offence:

a. 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).[24]
b. The objective seriousness of the offending should be determined by reference to the following factors:
    i.   the nature and content of the material, in particular the age of the children and the gravity of the sexual activity depicted
    ii. the number of items or images possessed
    iii. whether the material is for the purpose of sale or further distribution
    iv. whether the offender will profit from the offence
    v.   in the case of possession or access of child pornography for personal use, the number of children depicted and thereby victimised
    vi. the length of time for which the pornographic material was possessed.
c. General deterrence is the primary sentencing consideration for offending involving child pornography.
d. Less weight is given to an offender's prior good character.
e. Offending involving child pornography occurs on an international level and is becoming increasingly prevalent with the advent of the internet as a means of allowing people to access and obtain child pornography.
f. Offending involving child pornography is difficult to detect given the anonymity provided by the internet.
g. The possession of child pornography material creates a market for the continued corruption and exploitation of children.
h. There is a paramount public interest objective in promoting the protection of children as the possession of child pornography is not a victimless crime—children are sexually abused in order to supply the market.
i. The fact that an offender does not pay to access a child pornography website or was not involved in the distribution or sale of child pornography does not mitigate the offending.

In February 2017, the Queensland Court of Appeal accepted that factors (c) to (i) are relevant to sentencing in Queensland.[25]

In an earlier case, the NSW Court of Criminal Appeal listed other factors relevant to assessing seriousness, while noting that there may be other relevant sentencing factors highlighted in future cases (Queensland cases applying similar factors have been added in endnotes):[26]

- whether actual children were used in the creation of the material[27]

- the extent of any cruelty or physical harm to the children that may be discernible from the material[28]

- in a case of dissemination or transmission, the number of people to whom the material was disseminated or transmitted[29]

- whether any payment or other benefit (including an exchange of material) was made, provided or received for the acquisition of images[30]

- the proximity of the offender's activities to those responsible for bringing the material into existence

- the degree of planning, organisation or sophistication employed by the offender in acquiring, storing, disseminating or transmitting the material[31]

- whether the offender acted alone or in a collaborative network of like-minded individuals[32]

- any risk of the material being seen or acquired by vulnerable people, particularly children

- any risk of the material being seen or acquired by those susceptible to act in the manner described or depicted.

The sentencing principles outlined in s9(2)(a) of the PSA, that prison *only* be imposed as a last resort and that a sentence allowing an offender to stay in the community is preferable, do not apply to *either* CEM (s9(6A)) or contact offending (s9(4)(a)). However, a further sentencing principle for contact offending requires that an offender serve an actual term of imprisonment unless exceptional circumstances exist (s9(4)(b)). This provision regarding contact offences does not exist for CEM related offences (s9(6A)). Figure 1 (see page 14) provides an account of amendments to Queensland legislation in relation to CEM and contact offences.

The Queensland Court of Appeal has made a number of decisions about the issue of actual imprisonment for both CEM and contact offenders. The court has noted that prison for CEM offenders is not inevitable. In contrast, the court has noted that contact offending against children should ordinarily result in prison unless exceptional circumstances exist (see *R v Quick*).[33] The seriousness attached to contact offending against children by the court influenced the subsequent legislative amendment in 2010 (s9(4)(b)) requiring actual imprisonment for these offenders (see Figure 1). In introducing the relevant legislation, the then Attorney-General acknowledged that s9(4)(b) enacted existing common law sentencing principles into statute.[34] The Queensland Law Society 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.[35]

In *R v Jones* the Queensland Court of Appeal also commented on the value of judicial discretion in sentencing. The court acknowledged that 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.[36]

In another case, in 2007, the court rejected an argument based partly on *R v Quick* that a wholly-suspended sentence for CEM offenders was manifestly inadequate.[37] The court decided in this case that possession of CEM (Criminal Code (Qld) s228D), while undoubtedly serious, did not equate with the gravity of the indecent treatment of a child offence. 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 (see Figure 1, specifically increases in 2013 to maximum penalties for CEM offences). In addition, the sentencing principle of prison as a last resort (s9(2)(a)) still applied for CEM offending (see Figure 1, specifically changes in 2008).

The Queensland Law Society raised similar concerns in response to increased penalties for CEM offences introduced in 2013. At this time, the Law Society argued that 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.

The Queensland Law Society called for research to be undertaken to assess whether increased penalties reduced offending.[38] The Department of Justice and Attorney-General 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. The department further suggested that such offences are not victimless and cause significant harm to children. The market for this material, the department suggested, needed to be targeted.[39]

Differences in the type of offending behaviour have resulted in minor differences in legislated sentencing factors for CEM and contact offenders. Ten sentencing factors are stipulated for contact offenders (PSA s9(6)) while seven factors are stipulated for CEM offenders (PSA s9(7)). Some of these sentencing factors are comparable across both offending types (s 9(6)(e)-(j) and s9(7)(b)-(g)). However, three differences reflect distinctions in the offending behaviour:

(a) the effect of the offence on the child (for contact offenders only)
(b) 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 nature of activity in the image)
(c) the need to protect the child or other children from the risk of the offender reoffending (for contact offenders only).

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. Recent Australian Institute of Criminology research revealed that 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'.[40]

In December 2016, the *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) introduced additional reform to Queensland's CEM offences (see Figure 1). 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 listed on pages 6–7. 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.

The circumstance of aggravation applies if an offender is part of a criminal organisation, which could include networked online child exploitation forums, and knows that 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.

In addition to this mandatory prison sentence, 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 enacted in the Criminal Code (Qld) in 2016:

• administering a CEM website (s228DA)

• encouraging use of a CEM website (s228DB)

• distributing information about avoiding detection (s228DC).

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 (see Figure 1).

Figure 1: Timeline of legislative change for sentencing CEM and contact offenders

2003—Contact offences and penalties Changes to PSA for any offence of a sexual nature committed in relation to a child under 16 years (contact offences)	**s9(4)(a) PSA** imprisonment not considered a last resort
	s9(6) PSA sentencing factors for offenders guilty of contact offences stipulated
Changes to Criminal Code (Qld) for indecent treatment of a child	**s210 Criminal Code (Qld)** increase maximum penalties for indecent treatment of a child from: • 10 to 14 years (for a child aged between 12 and 16) • 14 to 20 years (for a child under 12)
2008—CEM Changes to PSA for CEM offences	**s9(6A) PSA** imprisonment not considered a last resort
	s9(7) PSA sentencing factors for offenders guilty of CEM offences stipulated
2010—Contact offences Changes to PSA for any offence of a sexual nature committed in relation to a child under 16 years (contact offences)	**s9(4)(b) PSA** actual imprisonment for offenders unless exceptional circumstances exist
2013—CEM offence penalties Changes to the Criminal Code (Qld) for CEM offences	**s228A Criminal Code (Qld)** • 10 to 14 years **s228B Criminal Code (Qld)** • 10 to 14 years **s228C Criminal Code (Qld)** • 10 to 14 years **s228D Criminal Code (Qld)** • 5 to 14 years

| 2016—CEM offence penalties, new offences and circumstances of aggravation

Changes to the Criminal Code (Qld) and PSA for CEM offences | **s228A Criminal Code (Qld)**
• 14 to 20 years
• 25 years if hidden network/anonymising service used

s228B Criminal Code (Qld)
• 14 to 20 years
• 25 years if hidden network/anonymising service used

s228C Criminal Code (Qld)
• 20 years if hidden network/anonymising service used

s228D Criminal Code (Qld)
• 20 years if hidden network/anonymising service used

s228DA Criminal Code (Qld)
• 14 years
• 20 years if hidden network/anonymising service used

s228DB Criminal Code (Qld)
• 14 years
• 20 years if hidden network/anonymising service used

s228DC Criminal Code (Qld)
• 14 years
• 20 years if hidden network/anonymising service used

s161R and s161V PSA
New serious organised crime circumstance of aggravation mandatory sentencing regime applies to all 7 CEM offences:
• Mandatory 7 years custody, cumulative on base sentence for CEM offence, plus mandatory control order.
• Judicial discretion if offender gives specific cooperation with law enforcement agencies. |

| **Question 4** | **Knowing what is currently guiding sentencing for child exploitation materials (CEM) offences in Queensland, do you consider there are other factors that should guide sentencing of CEM offenders in Queensland?**

If so, what additional factors should be included in Queensland legislation? |

How prevalent is CEM?

At state, national and international levels, public awareness of and concern about CEM is growing. While difficulties persist in quantifying the true nature of this type of offending, CEM is recognised as a crime of heightened global concern.[41] However, while the international dimension of this offending is increasingly acknowledged, CEM involves Queensland offenders and Queensland child victims.

The internet assumes a critical role in the documented increase in CEM, with much of this proscribed material accessed, downloaded and shared online.[42] Improvements in the capacity and transportability of electronic devices and the reach and quality of internet connections have clearly facilitated the growth of CEM, which has led to the establishment of dedicated investigative units in most, if not all Australian states and territories. In Queensland, the QPS has established Taskforce Argos and the Crime and Corruption Commission (CCC) has established the Cerberus criminal paedophilia team.

In 2016, additional funds were allocated to establish QPS Taskforce Orion to complement Taskforce Argos and enhance internal policing capacity and to improve their ability to coordinate and cooperate across Queensland's state boundaries at investigative, victim identification, and intelligence sharing levels. This increase has been acknowledged as critical to addressing this offending type as well as the increasing sophistication of motivated offenders. As noted by the commission report:

> '…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.'[43]

The following consumer information about internet usage and uptake in Australia and Queensland provides contextual information confirming that CEM offending is likely to continue to grow.

Internet use in Australia and Queensland

Australians consistently demonstrate a strong propensity for internet use.[44] The Australian Bureau of Statistics (ABS) confirmed that Australia registered approximately 13.3 million internet subscribers as at June 2016.[45] Table 1 provides more detailed information about the increase in uptake of the internet by Australian and Queensland households over a 10-year period from 2004–2005 to 2014–2015.[46]

Table 1: 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 that each Queensland household had multiple devices to access the internet.[47]

As at 2014–2015, 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%).[48] 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 online outside of school time.[49]

Question 5	**Given the role of the internet in facilitating child exploitation material (CEM), would you support further consideration of mechanisms to enhance cooperation within Australia and internationally to address the classification of CEM?**
	Please provide any additional information to support your answer.

Offence statistics

QPRIME data provides information about young people cautioned/conferenced by police according to the *Youth Justice Act 1992* (Qld) (YJA) for CEM related offences, while QWIC data relates to both adult and young offenders who have either been found guilty, or pleaded guilty to CEM offences in Queensland courts. Over the 10-year period, 1470 young people were cautioned or conferenced by the QPS for CEM offences, while 1565 offenders (28 young people and 1537 adults) were sentenced for CEM offences by Queensland courts. Figure 2 illustrates the number of young people cautioned/conferenced and offenders sentenced in Queensland courts for CEM offences by year over the 10-year period. Figure 2 demonstrates that while the number of CEM offenders considered by Queensland courts has fluctuated over the most recent 10 years, the number of young people dealt with by caution or conference has increased dramatically.

Figure 2: Offenders finalised in Queensland, 2006–07 — 2015–2016
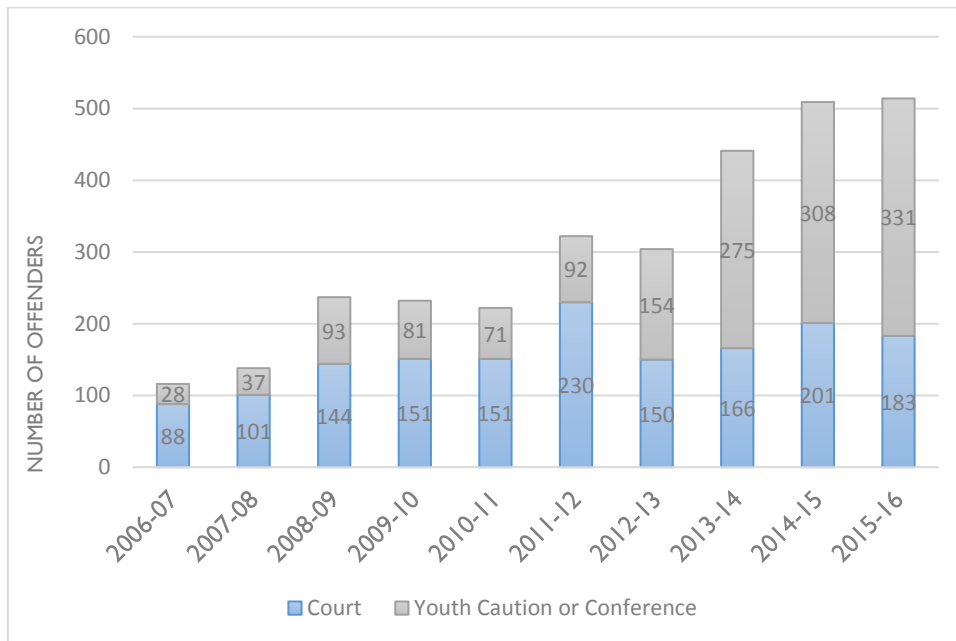
Source: QPRIME; QWIC. Note: Includes offenders convicted of both Queensland and Commonwealth Offences.

Offender characteristics

Table 2 summarises the characteristics for all offenders who were dealt with for a CEM offence. It shows that the number of young people diverted from court via formal caution/conference for the 10-year period (1470) was comparable to the number of offenders sentenced in Queensland courts (1565, including 28 youth). Of those young people who were cautioned or conferenced, 45.2 per cent were female. In comparison, only 1.5 per cent of offenders who were sentenced for matters involving CEM in court were female.

Table 2: **Offender characteristics, 2006–07 — 2015–16**

| Characteristic (at finalisation)	Young people diverted	Young people in court	Adults in court	Total court
Total offenders	1470	28	1537	1565
Gender	806 male (54.8%)	25 male (89.3%)	1516 male (98.6%)	1541 male (98.5%)
Average age	14.3 years old	16.7 years old	40.3 years old	39.9 years old

Source: QPRIME; QWIC

QPS advises that the majority of CEM offences for which young offenders were diverted from court relate to 'sexting' (see Glossary on page 6). QPS advises that in November 2016 they initiated a policy review and formalised a new direction for officers, via their *Operational Procedures Manual*, about responding to the issue of sexting. This approach promotes an educative response for young people who are sexting unless specific circumstances warrant a more formal approach. QPS also advises that classification of images is not undertaken when young people do not proceed to court.

Sentencing court level

While CEM offences are heard in all three court jurisdictions; Magistrates, District and Supreme, attesting to the very broad nature and type of offending, the overwhelming majority are dealt with in the District Court. Figure 3 provides a breakdown of sentenced matters by court for the 10-year period.

Figure 3: **Offenders sentenced by court type, 2006–07 — 2015–2016**

Supreme, 35, 2%
Childrens, 28, 2%
Magistrates, 78, 5%
District, 1424, 91%
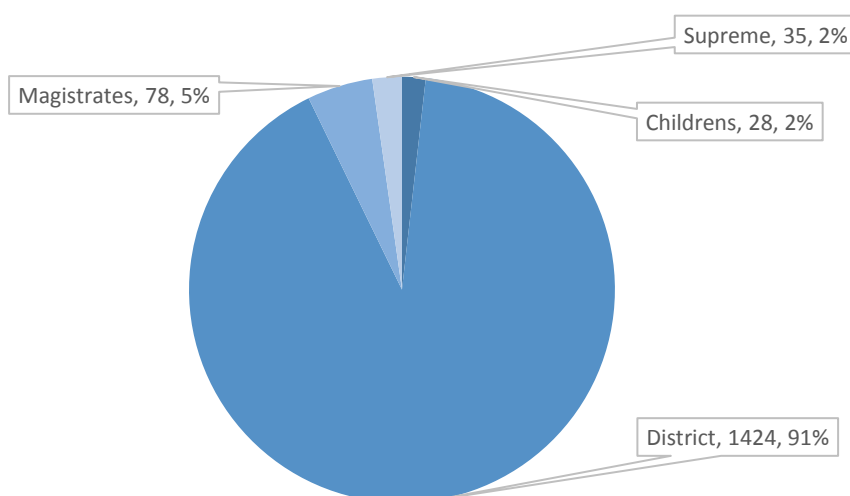
Source: QWIC

Offence profile

The 1470 young defendants dealt with by the QPS by way of caution or conference involved 3886 CEM related offences. These offences fell roughly into three even categories: possession offences (35%), distribution offences (34%) and production offences (30%). Commonwealth offences accounted for less than one per cent of all offences associated with the 1470 young people who were cautioned or conferenced over the 10-year period.

The 1565 defendants sentenced in Queensland courts involved a total of 4312 CEM related offences. These offenders sentenced by Queensland courts also had an additional 4074 non-CEM related offences dealt with at the same time. Of the 4312 CEM offences dealt with by Queensland courts, the majority (50%) were possession offences (under Queensland legislation), followed by all relevant Commonwealth offences (34%). It should be noted that one charge of possession of CEM may cover hundreds, or thousands of different CEM files. The circumstances of the case, including how many storage devices were located, if the located devices were found in different places, and the associated timeframes of the offending will influence the number of charges preferred against an offender and how many files each charge will cover.[50] Figure 4 provides a breakdown of CEM offences by jurisdiction, Queensland or Commonwealth, for all offenders over the 10-year period.

Figure 4: **CEM offences finalised by QPS and Queensland Courts over 10-year period**
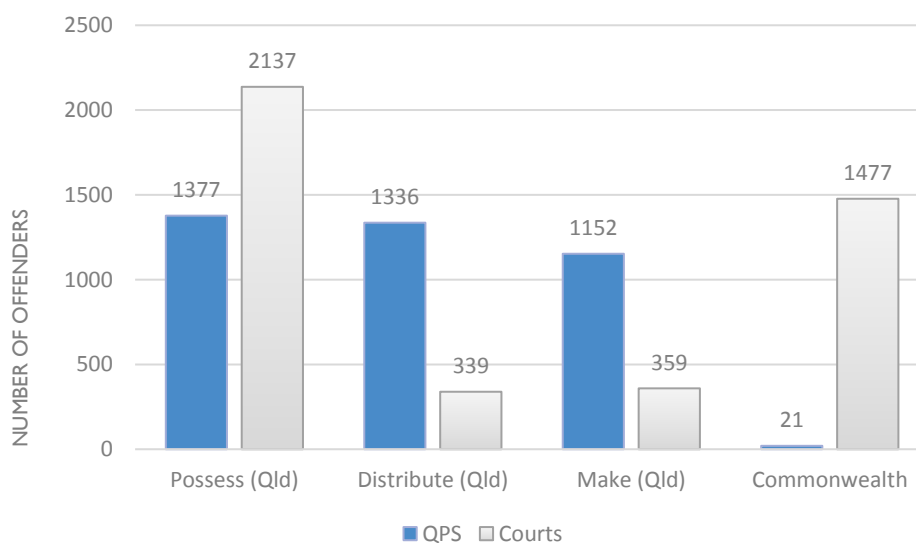
Source: QWIC; QPRIME

CEM and associated offending

Of the 1565 defendants sentenced in court, most (66%) involved CEM offences alone. Another 11 per cent of defendants were charged with CEM offences in addition to other offences considered to be less serious than their CEM offences, and the remaining 23 per cent had CEM offences in conjunction with other, more serious offending (see Figure 5 below). Of the 354 offenders where an offence other than CEM was their most serious offence (MSO), 90 per cent (n= 320) had a contact offence.

Figure 5: **CEM and associated offending for offenders sentenced in Queensland courts, 2006–07 — 2015–16**

CEM + non CEM offence (Non CEM MSO*) (n = 354)

CEM + non CEM offence (CEM MSO*) (n = 173)

CEM only (n = 1038)

*MSO = most serious offence
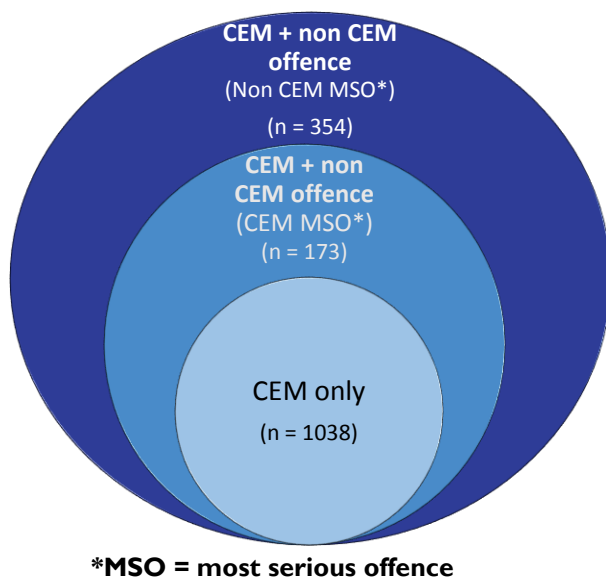
Source: QWIC

For offenders whose MSO was a CEM offence (n = 1211), possession of CEM was the most common. Figure 6 provides a further breakdown of the types of CEM offences for offenders sentenced in Queensland courts whose MSO was a CEM offence.

Figure 6: **Profile of CEM offence as MSO for offenders sentenced in Queensland courts, 2006–07 — 2015–16**

Commonwealth, 268, 22.1%

Make (Qld), 55, 4.5%

Distribute (Qld), 82, 6.8%

Possess (Qld), 806, 66.6%
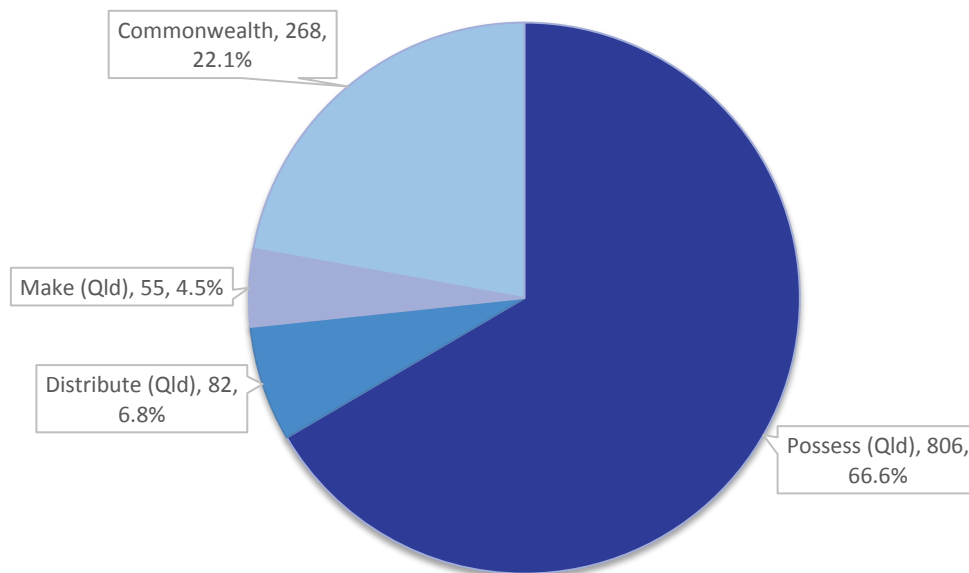
Source: QWIC

Sentencing outcomes for offenders sentenced in Queensland courts

Of the 1565 CEM offenders sentenced in Queensland courts over the 10-year period, 65 per cent (n = 1017) were charged with Queensland offences only. Figure 7 shows the source of charges against offenders for CEM matters sentenced in Queensland courts across the 10-year period.

Figure 7: Court finalisations by jurisdictional source of offence, 2006–07 — 2015–16
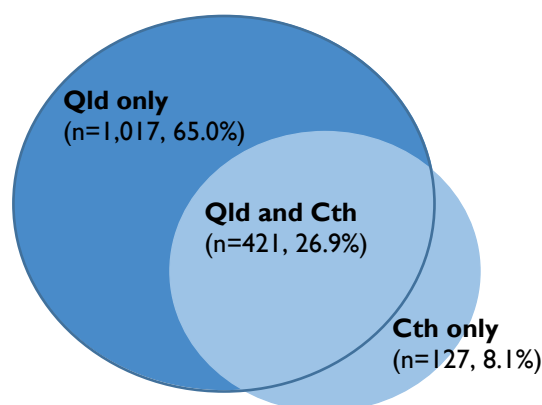

Qld only
(n=1,017, 65.0%)

Qld and Cth
(n=421, 26.9%)

Cth only
(n=127, 8.1%)

Source: QWIC

For all offenders sentenced in the courts with at least one CEM offence (n = 1565), the majority (n = 1223; or 78%) received a custodial penalty. Of those who received a custodial penalty, the majority received a suspended sentence (n = 887; or 73%), either wholly or partially.

Table 3 provides a breakdown of sentencing outcomes by MSO for offenders finalised by Queensland courts over the 10-year period. Tables 4 and 5 provide additional detail about the types of custodial and non-custodial outcomes for offenders sentenced in Queensland courts by MSO.

When interpreting tables 3, 4 and 5, it should be noted that under current data recording conventions, a recognisance order is considered a non-custodial order. However, for Commonwealth offences a recognisance release order may incorporate imprisonment or probation.[51] As a result, official data presented in Table 3 reveals that 210 or 78.4% of offenders with Commonwealth offences as their MSO received a custodial order; however, due to data recording and reporting conventions, this figure under-represents the true proportion of offenders who received custodial sentences and over represents the true proportion of offenders who received non-custodial sentences (reported as 58 or 21.6% in Table 3). This data recording and reporting issue similarly affects figures presented for Commonwealth offences in Tables 4 and 5.

Table 3: Sentencing outcomes by MSO and by jurisdictional source, 2006–07 — 2015–16

Most serious offence	N	Non-custodial (%)	Custodial (%)
Possess (Qld)	806	216 (26.7%)	590 (73.2%)
Distribute (Qld)	82	11 (13.4%)	71 (86.6%)
Make (Qld)	55	18 (32.7%)	37 (67.3%)
Commonwealth	268	58 (21.6%)	210 (78.4%)
Non-CEM*	354	39 (11%)	315 (89.0%)
Total	1565	342 (21.9%)	1223 (78.1%)

* 90.4% (n= 320) of non-CEM MSO involve contact offences.

Source: QWIC

Table 4: Custodial sentencing outcomes by MSO and by jurisdictional source, 2006–07 — 2015–16

Custodial penalties					
Most serious offence	Custodial penalty (n)	Imprisonment (% of custodial penalty)	Intensive correction order (% of custodial penalty)	Partially suspended (% of custodial penalty)	Wholly suspended (% of custodial penalty)
Possess (Qld)	590	82 (13.9%)	51 (8.6%)	183 (31.0%)	274 (46.4%)
Distribute (Qld)	71	11 (15.5%)	3 (4.2%)	27 (38.0%)	30 (42.3%)
Make (Qld)	37	8 (21.6%)	3 (8.1%)	13 (35.1%)	13 (35.1%)
Commonwealth	210*	30 (14.3%)	0 (0.0%)	87 (41.1%)	90 (42.9%)
Non-CEM	315	143 (45.4%)	4 (1.3%)	126 (40.0%)	42 (13.3%)
Total	1223	274 (22.4%)	61 (5.0%)	436 (35.7%)	449 (36.7%)

* Note: For three of these Commonwealth offences the sentence suspension type is unknown.
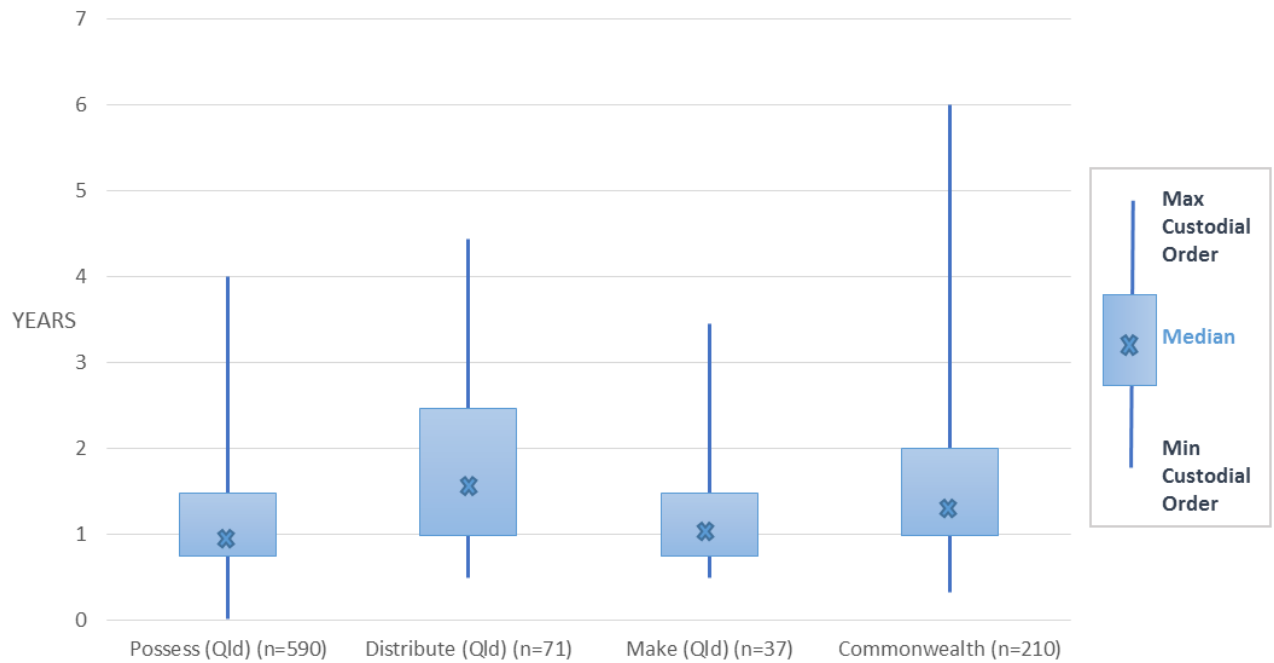
Source: QWIC

Table 5: Non-custodial sentencing outcomes by MSO and by jurisdictional source, 2006–07 — 2015–16

Non-custodial penalties					
Most serious offence	Non-custodial penalty (n)	Community Service (% of non-custodial penalty)	Convicted, not punished (% of non-custodial penalty)	Fined (% of non-custodial penalty)	Good behaviour/ recognisance (% of non-custodial penalty)	Probation (% of non-custodial penalty)
Possess (Qld)	216	36 (16.7%)	5 (2.3%)	49 (22.7%)	14 (6.5%)	112 (51.9%)
Distribute (Qld)	11	4 (36.4%)	0 (0.0%)	1 (9.1%)	0 (0.0%)	6 (54.4%)
Make (Qld)	18	2 (11.1%)	0 (0.0%)	2 (11.1%)	3 (16.7%)	11 (61.1%)
Commonwealth	58	2 (3.4%)	0 (0.0%)	4 (6.9%)	32 (55.2%)	20 (34.5%)
Non-CEM	39	11 (28.2%)	1 (2.6%)	4 (10.3%)	4 (10.3%)	19 (48.7%)
Total	342	55 (16.1%)	6 (1.8%)	60 (17.5%)	53 (15.5%)	168 (49.1%)

Source: QWIC

For those sentenced to a custodial penalty, the median duration of the custodial order was 1.2 years, though this varied considerably based on the type of CEM offence as the MSO. Figure 8 summarises the median duration of custodial orders for those offenders who had a CEM offence as their MSO. Figure 8 incorporates further details relating to the minimum and maximum penalties received, and the range which covers the middle 50 per cent of sentences.

Figure 8: Quartile plot of median duration of custodial orders received where a **CEM offence was the MSO, 2006–07 — 2015–16**

Source: QWIC

Classifying CEM in Queensland Courts

The identification and investigation of CEM offences is beyond the scope of the terms of reference. 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.

Quantifying the true extent of CEM offending and the criminal justice response involved in preventing, detecting and prosecuting CEM offenders is particularly difficult given the diversity of cases encountered,[52] and the lack of administrative data which monitors the criminal justice resource investment targeting such offending. Anecdotally, the QPS has indicated that once forensic analysis of seized device/s excludes known non-illegal images, an average CEM investigation involves in excess of 100,000 individual files. However, the range of images varies significantly from extreme collectors with libraries of images gathered over significant periods of time to offenders with smaller collections. Additional diversity exists in the extent to which offenders will go to conceal files. Under current arrangements, an investigating officer will be required to view and classify all files which can include still images, video files and other depictions.

The time associated with forensic analyses of devices to quarantine files for classification by investigators may be significant depending on a range of issues. These issues include, but are not limited to, the level of security on devices and files, and the operational imperative to prioritise forensic analyses according to risk. For example, the QPS has indicated that priority is attached to CEM cases in which a child is considered to be at risk. Following the seizure of devices suspected of containing CEM, the QPS adopts a risk assessment approach to determine when forensic analyses must occur:

- for priority cases, analysis commences immediately
- for cases involving some other risk, analysis begins within seven days
- for cases not involving identifiable risk factors, analysis commences within one month.

The time then associated with the forensic analysis of CEM cases after this triaged assessment depends on the quantity of images detected and the complexities and securities associated with the individual case. Forensic examiners upload a mirror image of the seized device/s on the Statewide Access Seized Digital Evidence database. Investigators are then able to access this secured information for the purpose of classifying individual images, investigation and victim identification.

Formal adoption of classification only occurred relatively recently, with a decision by the Court of Appeal of England and Wales in the case *R v Oliver*[53] assuming a critical role in its acceptance as a mechanism for grading the severity of images. Classification serves a number of complementary purposes within the criminal justice system. For law enforcement it informs charging decisions and may also direct investigative efforts, including victim identification. For prosecutors it provides reliable and uniform assessments of the material. For judicial officers it informs sentencing decisions by providing an indication of the objective seriousness of the images. The following information provides more detail about how classification of CEM is currently undertaken in Queensland.

Queensland's current classification approach

While there is no statutory requirement to classify images, the Oliver scale is generally applied in Queensland courts for CEM cases. In 2016, the Queensland Court of Appeal confirmed the acceptance of Oliver as a classification tool in Queensland courts for informing sentencing decisions.[54] The Oliver scale enables an image to be categorised according to the nature of the activity depicted. The five original categories identified in the Oliver scale reflect the perceived seriousness of the activity depicted in particular files in levels of increasing seriousness.

The five categories of the Oliver scale, as originally devised, are:

1. erotic posing with no sexual activity
2. sexual activity between children, or solo masturbation by a child
3. non-penetrative sexual activity between adults and children
4. penetrative sexual activity between children and adults
5. sadism or bestiality.[55]

In Australia, an adapted Oliver scale was implemented to incorporate a sixth category,[56] *anime, cartoon or virtual image*, in line with case law and legislative amendment.[57] However, for practical purposes, the Oliver scale has now become a nine-point scale,[58] with the extra three categories covering material which is not illegal but which is connected to the case. The expanded Oliver scale added the following categories to the original five-point scale:

6. anime, cartoons and drawings depicting children engaged in sexual poses or activity
7. non-illegal/indicative child material (often part of a series containing CEM)
8. adult pornography
9. ignorable.

The growth of the Oliver scale from five to nine categories has raised concerns that the classification process has become increasingly time intensive and subjective.[59] The higher the number of categories, the higher the potential for classification delay and subjectivity at investigator, investigative unit, organisational and jurisdictional levels, thus undermining confidence in the accuracy of the process. This is particularly true for video files which may include a range of activity over an extended period of time.

The Oliver scale is used in Queensland in sentencing for both state-based and Commonwealth offences.[60] It forms the basis of the classification systems used across all Australian jurisdictions, although significant jurisdictional differences exist in the names attached to the scale, and in the mechanisms employed to record classification results and store detected images.

Issues associated with the Oliver scale and classification

While the Oliver scale has been acknowledged as facilitating an objective approach to measuring the seriousness of the offending[61] and enables comparison of offenders, there are nevertheless concerns about its use. These concerns are outlined below.

Diverting resources from victim identification

In its submission to the Queensland Organised Crime Commission of Inquiry, the CCC identified challenges for policing in using the Oliver scale. The CCC argued that the Oliver scale shifts investigator focus in two ways:

1. By diverting attention to the seriousness of images over an assessment of an offender's risk to the community.
2. By diverting attention to the assessment and categorisation of images over other areas of policing, such as victim identification.[62]

This tension between prosecution and protection and the associated competing resource demands has been similarly raised by the QPS. These concerns potentially arise regardless of the classification system used and require constant monitoring to ensure adherence to the process does not divert investigative effort, or fail to provide sufficient information to prosecutors and judicial officers to support sentencing.

Serving one purpose

The Oliver scale is not suitable for assessing or projecting offender dangerousness. Rather, this scale assesses the objective seriousness of the material identified. The commission report noted that

courts often say that the significance of the quantity of worst-category CEM is the greater actual harm to the children depicted: 'It is that factor that elevates criminality rather than the indeterminate, or indeterminable, risk that the offender might pose a risk of contact offending.'[63] While the Oliver scale is one of ascending seriousness (in respect of categories 1–5),[64] category 1 (low) material can have significant gravity and should not be assumed to be mild in content.[65]

Causing time delays

The commission report 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'.[66] The report noted concern that the time required for classification diverted law enforcement resources 'away from victim identification and the priority of rescuing those children from further harm' and affected the Office of the Director of Public Prosecutions (ODPP) by causing delays in prosecuting offenders. Such delays flow onto subsequent sentencing proceedings.

The vast majority of CEM offences (both state and Commonwealth) are sentenced in the District Court (91% for this review's 10-year data). However, a charged person (defendant), who is presumed innocent, must first go through a process in the Magistrates Court before the charge is sent to the District Court. The most common way to transfer charges to the District Court is via a committal hearing. At the committal hearing, a defendant can plead guilty and then be committed to the District Court for sentencing, or plead not guilty, or not enter a plea. In the two latter situations, the defendant will be committed for trial in the District Court.[67]

The Queensland Criminal Code 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.[68] 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 Court has developed practice directions and a case conferencing procedure designed to streamline the committal process and set out timeframes for prosecution disclosure of evidence. 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 things that would tend to help the case of the accused person.[69]

It is often at the committal point in proceedings that a tension arises between the disclosure requirements and the capacity of the investigating body (QPS/CCC) to have undertaken and provided its analysis of the entire material detected in the case. While the prosecution can technically establish its case by proving only one CEM image, an accused person has a right to know the full extent of the allegations against them requiring the full collection of images to be classified and provided to the prosecution.

After the committal hearing, the ODPP examines the police evidence and prepares an indictment. The indictment outlines the charge/s and is presented in the District Court. Legislation requires the ODPP to present an indictment within six months of the committal hearing.[70] However, ODPP guidelines[71] specify that indictments should be presented as soon as reasonably practicable, but no 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 an accused person 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 an accused person 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.

Impacting officer well-being

Concern about officers who are required to view CEM for investigative and classification purposes were discussed in the commission report. Broader social science research also addresses the welfare impact of investigating this material. The 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 Commonwealth Director of Public Prosecutions (CDPP) website states:

> '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 Well-being Programme 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.'[72]

Reducing exposure to these images is clearly an important aim of any regime adopted to manage and process this material.[73]

A 2014 study involving internet child exploitation investigators from all nine Australian police jurisdictions concluded that 'the average [CEM] investigator was not adversely affected by investigating [CEM] material, denoting resilience in the face of potential workplace stressors and challenges'.[74] However, it should not be considered a completely 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'.[75]

Compounding the violation of child victims

Concerns have been expressed that repeated viewing by officers (which could include forensic experts, prosecutors, defence representatives, court officers, jury members and judges) 'arguably compounds the violation and exposure of the child victims depicted in these images by further exposure and dissemination'.[76] One of the harms involved in CEM offences is 'the publication of images of innocent children engaged in what … they would prefer to have been kept private'.[77] These issues have led many jurisdictions to re-examine their respective approaches to classification of CEM.

Classification and sentencing

The results of classification of seized material are provided to prosecutors. In Queensland, the raw result is provided in a document QPS refer to as the C4P case report. This report allocates the number of images classified against each Oliver scale category, but does not provide any specific detail about the actual activity within the image. Arguably, this means classification results in isolation do not satisfy the requirements of s9(7)(a) of the PSA that a sentencing judicial officer has regard primarily to the nature of any image of a child, including apparent age and the activity depicted.

This disconnect between basic reporting of classification results and legislative requirements for sentencing raises a question about whether judicial officers should view CEM when making

sentencing decisions. A second question is what level of detail the prosecution should provide beyond the classification information. It has been stated that classification levels provide 'only marginal assistance' to courts involved in imposing or reviewing CEM sentences.[78] Even if they help achieve some consistency of approach in sentencing, they do not address all relevant issues.[79]

The Western Australia (WA) Court of Appeal has observed that the England and Wales Court of Appeal's decision in *R v Oliver* did not suggest classification should be a substitute for sentencing judges viewing the relevant pornographic material.[80] These findings highlight the question of how much material sentencing judges should view. The WA Court of Appeal commented that the sentencing judge, having viewed the 43 images involved, provided findings 'well beyond the limited description in the DPP's list', further noting that a judge should ordinarily view a representative sample.[81] The NSW Court of Criminal Appeal agreed this is appropriate in order to assess the material's depravity, including for appeal judges.[82] Appeal courts have however identified the need to retain objectivity and a sense of proportion when viewing a sample of images in sentencing.[83] The NSW Court of Criminal Appeal in considering a sentence where a judge viewed a representative sample to 'get a general perception' of the material involved, stated it was unnecessary for all or even most of the material to be viewed as the classification was sufficient to ascertain the nature of the harm.[84] Some sentencing judges have criticised the practise of viewing samples. Collectively, they suggest that viewing samples is unnecessary as classification results indicate the seriousness of material involved and further, written descriptions provide specific detail about the nature of images (such as schedules of facts discussed below).[85]

A NSW District Court judge in possession of classification results stated that no judge should be forced to watch over an hour of CEM videos as it was unnecessary and contributed to victim harm, even in the context of judicial proceedings.[86] An Australian Capital Territory (ACT) Supreme Court judge noted that a technique intended as a 'random' sample by investigators was not accepted as such by the defence.[87] In order to agree, 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'.[88]

A Queensland Supreme Court judge also voiced concerns about the reliability of a representative sample of a large volume of CEM material, as well as the variability of reactions of different judges to repeated exposure. The judge warned that if a sample is viewed as part of the sentencing process, comparative sentences may not be useful unless the sentencing judge views the images involved in those precedent cases as well.[89] The Queensland Court of Appeal recently noted an offender's cooperation with police by agreeing to a representative sample.[90] Of the sample, the images classified as CEM were categorised (using 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'.[91]

A schedule of facts is frequently used in sentencing in Queensland. This document is prepared by the prosecution, can be agreed to by the defence and is tendered to the sentencing court as the factual basis for the sentence. The WA Court of Appeal noted that a judge may not need to view a representative sample if the parties provide a sufficiently detailed description.[92] For sentencing however, the schedule requires detail well beyond the Oliver classification including a description of the activity involved as the seriousness depicted even within sub-categories, can range considerably.[93] The court criticised a description which only identified the CETS [Oliver] categories involved and therefore sentenced the offender on the assumption, favourable to him, that the images were 'towards the lower end of the range of seriousness of photographic images falling within those categories'.[94]

| Question 6 | **Do you think a sentencing judge should view child exploitation material to inform sentencing decisions?** |
| | **If so, should this be a sample or all of the material?** |

Alternative classification approaches

In 2010, the Australian National Victim Image Library (ANVIL), supported by the Child Exploitation Tracking System (CETS), was proposed as a potential solution for harmonising jurisdictional approaches to classifying CEM and sharing classification results across Australia.[95] CETS is software which facilitates the storage and collation of images in line with the adapted Oliver scale. The agreement at the 2010 national forum for police ministers also acknowledged that a significant amount of CEM encountered in individual cases had already been classified as part of earlier investigations. Anecdotal advice from both the QPS and the CCC suggests that up to 85 per cent of images detected as part of one CEM investigation may have already been encountered in previous investigations. Being able to rely on a previous classification, as opposed to repeatedly classifying the same image, represents a potential time saving opportunity, and enables investigators to focus on new images for the purposes of victim identification. A significant health and safety benefit is that officers are protected from exposure to some images.[96] It was hoped that the use of ANVIL across Australia could reduce the amount of time investigations spend on classifying material by up to 80 per cent.[97]

Despite this agreement, the CETS and ANVIL solution failed. Consultation with QPS and the CCC indicates that the system was not maintained, and it appears that each state and territory, and even different law enforcement agencies/units within jurisdictions, have now reverted back to maintaining individual libraries. CrimTrac, the former custodian which has since merged with the Australian Criminal Intelligence Commission, stated in its annual report that it planned to 'commence the business case for the replacement of the current [CETS] in 2016–17'.[98]

Question 7	**Do you think there is value in some degree of harmonisation in classification systems across Australia?**
Question 8	**Would you support the Queensland Government pursuing a secure mechanism for sharing classification results across jurisdictions?**

Aside from retaining the current Oliver scale, two alternative classification systems exist, the Interpol categorisation system and the United Kingdom's Sexual Offences Definitive Guideline.

The Interpol categorisation system

This is a four-category system which differentiates between two different types of illegal CEM and also incorporates non-illegal and ignorable images for their potential to provide 'clues' to identify victims and offenders:

1. Interpol Baseline—depicting 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.

2. Other illegal files—files that are illegal according to local legislation either by way of age or content.

3. 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.

4. Ignorable—all other (legal) material which does not fit into categories 1–3.

This system retains an initial focus on the child's age (13 years for the baseline category), whereas the Oliver scale does not specify an age.

The Interpol scale would facilitate integration with classifications undertaken across a number of international jurisdictions. The QPS and CCC also indicate that this classification system would reduce time and subjectivity associated with the current nine point Oliver scale. Category one of the

Interpol system is used in conjunction with Interpol's International Child Sexual Exploitation image database (ICSE DB), discussed below.

Sexual Offences Definitive Guideline

The United Kingdom introduced the Sexual Offences Definitive Guideline in 2014.[99] The illegal categories in the current guideline have been reduced from five, which reflected the original Oliver scale, to three. The Sentencing Guidelines Council (UK) recommended a simplification of the existing Oliver-based five-point scale into the three-category system to streamline classification and reduce the resource implications of the process.[100] Linkages still exist between the Oliver scale and the new guideline. The categories are:

- Category A—Images of children (under 18 years) involving penetrative sexual activity and images involving sexual activity with an animal, or sadism. This category incorporates the former [Oliver] levels 4 and 5.
- Category B—Images of children (under 18 years) involving non-penetrative sexual activity. This category incorporates the former levels 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.[101]

The guideline has been designed to guide sentencing for judicial officers. Classification of the activity in the detected material according to the three categories represents the 'first step in a very prescriptive process'.[102] 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 offending image will usually determine the 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 (for example photographed) images of a higher category'.[103]

Use of the guideline involves nine steps which mandate judicial consideration of predetermined offence categories, sentence category ranges and aggravating and mitigating sentencing factors.

Question 9	Would you support simplifying the current nine point Oliver scale for classification purposes? Please provide any information to support your response.

Mechanisms supporting classification

Hardware and software

Classification scales represent one part of an opportunity to reduce time, decrease officer exposure to images, and prevent the diversion of resources away from victim identification. Software and hardware such as Griffeye Analyze and Project VIC scan CEM images and compare them with a database of previously encountered and classified images. 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 well-being.

Hardware and software which integrates across jurisdictions could deliver benefits for cross-matching. Using a consistent scale for classifying images would also support a 'consistent pattern of sentencing in relation to each grade of seriousness'.[104] As a database expands, the benefits increase for both national and international investigations. The following software is used by different jurisdictions both in Australia and/or overseas to classify CEM more efficiently.

NetClean Analyze/Griffeye Analyze

The commission report noted that in identifying a replacement for CETS, the QPS hoped that NetClean Analyze (now called Griffeye Analyze) would supersede CETS nationally.[105] Founded in 2003, NetClean 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'.[106] QPS is currently testing Griffeye Analyze to assess whether it could provide the benefits it claims it can deliver. Initial suggestions include projecting a capacity to classify images at four times the current rate, which would significantly reduce investigative timeframes, as well as significantly increase opportunities to identify previously unknown child victims

International Child Sexual Exploitation image database

The International Child Sexual Exploitation image database (ICSE DB), hosted by Interpol, is able to make connections between victims, offenders and locations and helps determine whether an image has been seen before.[107] The database supports the cooperation of the police forces across 49 countries, as well as Europol and Interpol.[108] 'Hash value' technology, a unique numerical value considered a fingerprint for the image,[109] can match with seized files even if an image has been altered.[110] This database incorporates the Interpol Baseline categorisation system. The only category applied in the ICSE DB is the Interpol Baseline (the first of the four categories listed above). As a result, 'baseline' images are considered illegal in any country with CEM offence legislation.

Project VIC

Project VIC complements the ICSE DB[111] and allows for the use of various categorisation systems including the Interpol Baseline system and the Griffeye Analyze software platform. 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.[112] The aim is to improve and standardise technology available to law enforcement. There are 25 companion countries. 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.[113]

Child Abuse Image Database

The Child Abuse Image Database (CAID) is the UK's image database that has been active since December 2014. CAID stores all images encountered by UK territorial police forces and the National Crime Agency.[114] 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.[115]

Early feedback found 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.[116]

Sampling versus full classification

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 well accepted as a research methodology and is sometimes applied in a forensic context.[117] For example, drug offence legislation provides 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. There is no similar legislative arrangement in place in Queensland for CEM images.[118]

In 2010, NSW introduced random sampling legislation for CEM cases[119] and this has since been recognised in various NSW cases.[120] The NSW legislation was replicated in Victoria in 2015. The random sampling regime was intended to avoid the viewing and assessment of each item and allow for faster analysis. This reduces the effect of repeated viewing of CEM on investigator occupational health and safety risks and the compounding of victim violation.[121] In 2012, three current and former NSW State Electronic Branch professionals reported that random sampling had reduced response

times from three months to 24 hours[122] with average computer processing times reduced to two hours from nearly five.[123] This has enabled investigators to 'fast track' the work they need to undertake to provide evidence to the court. In the context of CEM offending, this paper has already documented that sampling can be used when the defence and prosecution agree on the sample and the methodology used to generate the sample.

The NSW and Victorian random sampling legislation does not provide for either the classification scheme to be used or the process to be followed in determining the sample (such as its size relative to the totality of the material).[124] It appears there is no uniform random sampling method required, which could pose adverse risks to consistency in sentencing.

Issues with sampling

Other than in NSW and Victoria, sampling is not legislated for classifying CEM for courts anywhere else in Australia.[125] In discussing 'considerable concerns' about a sampling process which was ultimately not defined as either representative or random, an ACT Supreme Court judge stated 'tendering of a genuinely random sample, provided the total numbers and the sample size were adequate, might [be] a fair way to satisfy the general requirement for the sentencing judge to view some of the material' although the sampling technique used in that matter 'seemed to have the potential to render the samples considerably smaller and therefore less reliable than the raw numbers might suggest.[126]

Determining total CEM volume on an estimate based on a sample requires 'considerable care'.[127] In *Colbourn v The Queen*, Australian Federal Police officers had counted the number of CEM files on 14 of the 83 seized compact discs, assumed that the other 69 discs all contained similar quantities of CEM and erroneously concluded that there were 142,000 CEM images in total.[128] 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 that the figure of 142,000 'involved such a substantial overestimate' that the offender 'might have received a longer sentence than he would have received if the correct figure had been established', and that there had been a miscarriage of justice.[129]

Conversely, the sample may understate the actual significance and severity of the offending. The commission report referred to a WA example where an offender who had a collection of 300,000 files had also physically abused three girls. He was charged only with possessing CEM based on a random sample, which 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.[130]

Question 10	Do you think that sampling of images should be considered in Queensland?

Appendix 1: Terms of reference

CLASSIFICATION OF CHILD EXPLOITATION MATERIAL

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: Queensland and Commonwealth legislation—definitions and offences

Table 1: **Queensland legislative framework**

Legislation	Framework		
	Definition		
	s207A **child exploitation material** 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 — (a) in a sexual context, including for example, engaging in a sexual activity; or (b) in an offensive or demeaning context; or (c) being subjected to abuse, cruelty or torture. s207A **material** includes anything that contains data from which text, images or sound can be generated.		
Queensland Criminal Code	**Offence provisions**		**Maximum penalties** **(if anonymising service or hidden network is used)**
	s228 s228(2)(a) s228(2)(b) s228(3)(a) s228(3)(b)	Obscene publications and exhibitions Under 16 years Under 12 years Under 16 years Under 12 years	 5 years 10 years 5 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
	Definition

Commonwealth Criminal Code	s473.1
	
	child abuse material means:
	
	(a) material that depicts a person, or representation of a person who:
	
	    (i) is, or appears to be, under 18 years of age; and
	
	    (ii) is, or appears to be, a victim of torture, cruelty or physical abuse;
	
	and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
	
	(b) material that describes a person who:
	
	    (i) is, or is implied to be, under 18 years of age; and
	
	    (ii) is, or is implied to be, a victim of torture, cruelty or physical abuse;
	
	and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.
	
	child pornography material means:
	
	(a) material that depicts a person, or representation of a person who is or appears to be, under 18 years of age and who:
	
	    (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
	
	    (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;
	
	and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
	
	(b) material the dominant characteristic of which is the depiction, for a sexual purpose, or:
	
	    (i) a sexual organ of the anal region of a person who is, or appears to be, under 18 years of age; or
	
	    (ii) a representation of such a sexual organ or anal region; or
	
	    (iii) the breasts, or representation of the breasts, or a female person who is, or appears to be, under 18 years of age;
	
	in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
	
	(c) material that describes a person who is, or is implied to be, under 18 years of age and who:
	
	    (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
	
	    (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;
	
	and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
	
	(d) material that describes:
	
	    (i) a sexual organ of the anal region of a person who is, or appears to be, under 18 years of age; or
	
	    (ii) the breasts of a female person who is, or is implied to be, under 18 years of age;
	
	and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.

	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; 474.20; 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 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
	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

Appendix 3: Submission form—classification of child exploitation material for sentencing purposes

Thank you for your submission on the review of the classification of child exploitation material for sentencing purposes.

Please complete this form and include with your written submission. Questions marked with an * are required.

Personal details	
Name*	
Organisation*	
Position	
Email address*	
Postal address	
City*	
State*	
Postcode	
Phone number*	
Mobile number	
Privacy*	
Unless you indicate otherwise, your submission and your name and organisation may be used within the final report.	☐ **My submission is official:** Queensland Sentencing Advisory Council may refer to and quote from this submission in its final report and identify my organisation (if relevant) but not my contact details. ☐ **My submission is anonymous but quotable:** Queensland Sentencing Advisory Council may refer to and quote from my submission in its final report provided but will not identify my name or my organisation's name or my contact details. ☐ **My submission is private and confidential:** The information is this submission is for the Queensland Sentencing Advisory Council's information only and is not to be referred to or quoted from.
I am happy to be added to the Queensland Sentencing Advisory Council stakeholder database so I can be kept informed about its work.	☐ yes ☐ no

Queensland Sentencing Advisory Council manages personal information in accordance with *the Information Privacy Act 2009 (Qld)*. The information you provide will only be used for the purpose of informing the review of the classification of child exploitation material for sentencing purposes. Your personal information will not be released to another party without your consent unless required or permitted by law.

Endnotes

1 Trend Micro website, <https://www.trendmicro.com/vinfo/us/security/definition/hash-values> accessed 15 February 2017.

2 Heather Douglas, Kimberly Everton-Moore, Sue Harbidge and Laurie Levy. *Criminal Process in Queensland and Western Australia* (Thomson Reuters, 2010) 153 citing T Marshall, Restorative Justice: An Overview, Report (London Home Office Research Development and Statistics Directorate, 1999).

3 Esafety website, <https://www.esafety.gov.au/esafety-information/esafety-issues/sexting> accessed 14 February 2017.

4 The 10-year data set incorporates current legislative provisions under the Criminal Code (Qld) and provisions under the *Classification of Films Act 1991* (Qld); *Classification of Publications Act 1991* (Qld); and *Classification of Computer Games and Images Act 1995* (Qld).

5 Tony Krone and Russell G Smith, 'Trajectories in online child sexual exploitation offending in Australia' (Trends and Issues in Crime and Criminal Justice No 524, Australian Institute of Criminology, 2017).

6 Crime and Corruption Commission, 'Child sexual victimisation in Queensland: An overview of legal and administrative developments since 2000' (2015).

7 Regarding child pornography – Criminal Code (Cth) sections 474.19 and 474.20. Regarding child abuse material - Criminal Code (Cth) sections 474.22 and 474.23. Note also the *Customs Act 1901* (Cth), s233BAB(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.

8 Sections 471.16 and 417.17 regarding child pornography material and sections 471.19 and 471.20 regarding child abuse material. Section 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.

9 Sections 273.5, 273.6 and 273.7.

10 *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* 7th Edition LexisNexis Butterworths Australia 2008, 9 at [1.23] referring to s77(iii) of the Constitution and the *Judiciary Act 1903* (Cth).

11 As noted in the analogous Victorian context in *R v Fulop* [2009] VSCA 296 at [11] per Buchanan JA (Nettle JA agreeing).

12 See *R v Wood* [2015] NSWCCA 231 at [37] and [40] per Johnson J (Gleeson JA and Garling J agreeing).

13 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?' (2013) 76 *Law and Contemporary Problems* 265, 270-271.

14 *R v Verburgt* [2009] QCA 33 at 7 per McMurdo P.

15 *Kenworthy v The Queen [No 2]* [2016] WASCA 207 at [158] to [180], noting that whilst the Commonwealth *Crimes Act 1914* s17A(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 s9(6A)); the imposition of a sentence other than imprisonment for importing or accessing child pornography under the Commonwealth offences remains, in fact, exceptional.

16 *R v Hickey* [2011] QCA 385 at [19], per Mullins J (McMurdo P and Chesterman JA agreeing).

17 *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]–[19] per Burns J (McMurdo P and Philippides JA agreeing). See further Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 350 and See *R v Hickey* [2011] QCA 385 at [12], [14] and [15] regarding number of images and seriousness of categories.

18 *R v Grehan* [2010] QCA 42 at [42] per Chesterman JA (Holmes and Muir JJA agreeing).

19 *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).

[20] *R v Vantoosten* [2009] QCA 54 at [18]–[19] per Muir JA (Keane JA and Daubney J agreeing).

[21] *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).

[22] *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'.

[23] *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.

[24] Note the position in Queensland that whilst s9(6A) of the PSA removes a constraint upon the imposition of a sentence involving actual imprisonment, it does not follow that any person convicted of possessing CEM under s228D of the Criminal Code (Qld) must be sentenced to actual imprisonment: *R v Verburgt* [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 [s9(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].

[25] *R v Howe* [2017] QCA 7 at [25] per Douglas J (Fraser and Phillipides JJA agreeing).

[26] *Minehan v R* [2010] NSWCCA 140 at [94]–[95] per Hulme J (Macfarlane JA and Johnson J agreeing).

[27] *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]).

[28] *R v Vantoosten* [2009] QCA 54 at [18]–[19].

[29] *R v Salsone; ex parte A-G (Qld)* [2008] QCA 220 at [30].

[30] *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.

[31] *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].

[32] *R v Mara* [2009] QCA 208 at [6]–[10], [37].

[33] *R v Quick ex parte Attorney-General* [2006] QCA 477 at [5] per de Jersey CJ (Chesterman J agreeing).

[34] Queensland, 'Second Reading—Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010', *Parliamentary Debates*, Legislative Assembly, 3 August 2010 (Cameron Dick, Attorney-General) 2308.

[35] Scrutiny of Legislation Committee, Legislation Alert, Issue No 09 of 2010, 24/[29], citing the Queensland Law Society's submission at 2.

[36] *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'.

[37] *R v Richardson; ex parte A-G (Qld)* [2007] QCA 294.

[38] Queensland Law Society submission to the Legal Affairs and Community Safety Committee 4 February 2013 at 4-5, regarding the Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012. Available at <https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/CLCEDDAB> accessed 28 February 2017.

[39] Department of Justice and Attorney-General response, 11 February 2013, to submissions concerning the Legal Affairs and Community Safety Committee's examination of the Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012. Available at <https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/CLCEDDAB > accessed 28 February 2017.

[40] Tony Krone and Russell G Smith, 'Trajectories in online child sexual exploitation offending in Australia' (Trends and Issues in Crime and Criminal Justice No 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.

[41] Tony Krone and Russell G Smith 'Trajectories in online child sexual exploitation offending in Australia' (Trends and Issues in Crime and Criminal Justice No 524, Australian Institute of Criminology, 2017).

[42] Ibid.

[43] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 293.

[44] Tony Krone and Russell G Smith 'Trajectories in online child sexual exploitation offending in Australia' (Trends and Issues in Crime and Criminal Justice No 524, Australian Institute of Criminology, 2017).

[45] ABS 81530 'Internet Activity, Australia, June 2016'.

[46] ABS 8146.0 'Household use of information technology' 2004–05; 2014–15.

[47] ABS 8146.0 'Household use of information technology' 2014-15.

[48] ESafety Commissioner, June 2016.

[49] ESafety Commissioner, June 2016.

[50] Further, the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* amended s568 (Cases in which several charges may be joined) of the Criminal Code (Qld) to add a subsection (10A). It allows a single charge in an indictment against a person for an offence against section 228A, 228B, 228C and 228D to 'allow the Crown to better reflect on the face of the indictment that the possession involved multiple acts of possession and the accumulation of the material over an extended timeframe', although in practice this is used when an offender indicates a guilty plea: Explanatory notes to the Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012, 6.

[51] *Crimes Act 1914* (Cth) sections 19AC and 20(1)(b).

[52] Tony Krone and Russell G Smith 'Trajectories in online child sexual exploitation offending in Australia' (Trends and Issues in Crime and Criminal Justice No 524, Australian Institute of Criminology, 2017).

[53] [2002] EWCA Crim 2766; [2003] 1 Cr App R 28; [2003] 2 C. App R.(S) 15; [2003] Crim L R 127; *Times*, December 6, 2002.

[54] *R v McDonald* [2016] QCA 200 at [16] per Burns J (McMurdo P and Philippides JA agreeing).

[55] *R v Oliver* [2002] EWCA Crim 2766 at [10].

[56] As noted in *R v McDonald* [2016] QCA 200 at [16] (footnote 5); *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'.

[57] 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*.

[58] See, eg, *R v Hore* [2016] SASC 21 at 3.

[59] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 349; QSAC consultation with QPS and CCC.

[60] Regarding Qld 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.

[61] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 355.

[62] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 349, quoting the CCC submission 33 May 2015 at 67–68.

[63] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 352.

[64] *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).

[65] *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.

[66] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 349.

[67] See sections 104, 105, 110A and 113 of the *Justices Act 1886* (Qld).

[68] Section 68(1) of the *Judiciary Act 1903* (Cth), applies state laws regarding procedure for committal and trial to persons charged with Commonwealth offences dealt with in state courts.

[69] There is a separate practice direction regarding matters that are exclusively Commonwealth offences, matters prosecuted by the Commonwealth DPP and matters that are state offences investigated and prosecuted by the Commonwealth. This practice direction also requires case conferencing and recognises partial and full briefs of evidence.

[70] Criminal Code (Qld) s590.

[71] Office of the Director of Public Prosecutions (Qld), *Director's Guidelines* 30 June 2015, part 10, (viii) and (iii).

[72] Commonwealth Director of Public Prosecutions, *Child Exploitation* <https://www.cdpp.gov.au/crimes-we-prosecute/child-exploitation> accessed 2 February 2016. 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.

[73] Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material' (2012) 9 *Digital Investigation* S99, S100.

[74] 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.

[75] 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.

[76] New South Wales Department of Justice and the Attorney General, *Report of the Child Pornography Working Party* (2010) 31.

[77] *R v Ross* [2009] NSWDC 104 at [3] per Berman SC DCJ.

[78] *Smit v State of Western Australia* [2011] WASCA 124 at [17] per McLure P (Pullin JA and Mazza J agreeing).

[79] 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.

[80] *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]; *The State of Western Australia v McCarthy* [2014] WASCA 210 at [14] per Mazza JA (McLure P and Buss JA agreeing).

[81] *Smit v State of Western Australia* [2011] WASCA 124 at [17] per McLure P (Pullin JA and Mazza J agreeing).

[82] *R v Porte* [2015] NSWCCA 174 at [76] per Johnson J (Leeming JA and Beech-Jones J agreeing).

[83] *Smit v State of Western Australia* [2011] WASCA 124 at [17] per McLure P (Pullin JA and Mazza J agreeing); *R v D'Alessandro* [2010] VSCA 60 at [18] per Harper JA (Williams AJA agreeing). See also *R v Miao* [2016] NSWDC 181 at [11] per Berman SC DCJ, where the risk of feelings of disgust and emotional reaction to offending was identified.

[84] *Fitzgerald v R* [2015] NSWCCA 266 at [36] per Hoeben CJ at CL (Price and Button JJ agreeing).

[85] *R v Miao* [2016] NSWDC 181 at [11] per Berman SC DCJ; *R v Stephen Mark Edmondson* (unreported, Supreme Court of Queensland, Peter Lyons J, 17 December 2014, 3.

[86] *R v Miao* [2016 NSWDC 181 at [6] and [9]–[11] per Berman SC DCJ. The judge rejected the tender of a representative sample which the Crown had sought to tender on the basis that the judge 'may' have wished to view it.

[87] *R v Forbes* [2014] ACTSC 91 at [19], [24] per Penfold J.

[88] *R v Forbes* [2014] ACTSC 91 at [13]-[14] per Penfold J. Defence counsel did not do so in that case.

[89] *R v Stephen Mark Edmondson* (unreported, Supreme Court of Queensland, Peter Lyons J, 17 December 2014, 3. His Honour 'nevertheless..carried out the exercise' of viewing the sample.

[90] *R v McDonald* [2016] QCA 200 at [20] per Burns J (McMurdo P and Philippides JA agreeing).

[91] *R v McDonald* [2016] QCA 200 at [17] per Burns J (McMurdo P and Philippides JA agreeing).

[92] *Kenworthy v The Queen [No 2]* [2016] WASCA 207 at [139]-[140] per Buss P, Mazza and Mitchell JJA. See also *R v Zarb* [2014] VCC 1517 at [73] per Priest J, dissenting on the result but making a similar comment on this procedural matter (which was not discussed by Neave and Kyrou JJA).

[93] *Kenworthy v The Queen [No 2]* [2016] WASCA 207 at [139]-[140] per Buss P, Mazza and Mitchell JJA. 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.

[94] *Kenworthy v The Queen [No 2]* [2016] WASCA 207 at [186] per Buss P, Mazza and Mitchell JJA.

[95] New South Wales Department of Justice and the Attorney General, *Report of the Child Pornography Working Party* (2010) 31.

[96] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 352; 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.

[97] 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.

[98] *CrimTrac Annual Report 2015–2016* at 47.

[99] Robert Bryan, 'Sentencing Guidelines Council—Indecent images of children', *news@one*, May 2014 at 1 (available at <http://www.onepaper.co.uk/wp-content/uploads/2014/07/N12_Indecent_images_of_children.pdf> accessed 7 February 2017.

[100] Sentencing Council (UK), *Sexual Offences Guideline Consultation*: Section Six: Indecent Images of children (2012).

[101] Quoted from Robert Bryan, 'Sentencing Guidelines Council – Indecent images of children', *news@one*, May 2014 at 4 (available at <http://www.onepaper.co.uk/wp-content/uploads/2014/07/N12_Indecent_images_of_children.pdf> accessed 7 February 2017).

[102] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 353.

[103] Sentencing Council (UK), *Sexual Offences Definitive Guideline* (2014) 76.

[104] New South Wales Department of Justice and the Attorney General, *Report of the Child Pornography Working Party* (2010) 37.

[105] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 352.

[106] NetClean website <https://www.netclean.com/> accessed 7 February 2017.

[107] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 352.

[108] 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 available at <http://www.bmi.bund.de/SharedDocs/Reden/EN/2014/interpol.html> accessed 7 February 2017).

[109] Trend Micro website, <https://www.trendmicro.com/vinfo/us/security/definition/hash-values> accessed 15 February 2017.

[110] 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.

[111] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 352.

[112] Rich Brown, *Project VIC: Finding Strength in Information Sharing* <http://blog.netclean.com/project-vic-finding-strength-in-information-sharing/> accessed 7 February 2017.

[113] International Centre for Missing and Exploited Children website <http://www.icmec.org/project-vic/> accessed 3 February 2017).

[114] Home Office (UK), *The Child Abuse Image database (CAID)* (November 2015) at 2 (Available at < https://www.gov.uk/government/publications/child-abuse-image-database> accessed 14 February 2017).

[115] 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) at 2 (available at < https://www.judiciary.gov.uk/wp-content/uploads/2016/.../bcm-newsletter-issue-6.pdf> accessed 14 February 2017).

[116] Home Office (UK), *The Child Abuse Image database (CAID)* (November 2015) at 3 (Available at < https://www.gov.uk/government/publications/child-abuse-image-database> accessed 14 February 2017).

[117] Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material' (2012) 9 *Digital Investigation* S99, S101.

[118] See, eg, *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).

[119] By the addition of s289B ('Use of random sample evidence in child abuse material cases') into the *Crimes Act 1900* (NSW) through the *Crimes Amendment (Child Pornography and Abuse Material) Act 2010*. There were further amendments to the scheme introduced by the *Courts and Crimes Legislation Amendment Act 2012*.

[120] *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].

[121] *Crimes Amendment (Child Pornography and Other Matters) Act* 2015 (Vic), See also the Explanatory Memorandum at 8 and Victoria, 'Second Reading—Crimes Amendment (Child Pornography and Other Matters) Bill 2015', *Parliamentary Debates*, Legislative Assembly, 5 August 2015 (Martin Pakula, Attorney-General) 2419.

[122] Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material' (2012) 9 *Digital Investigation* S99, S99.

[123] Brian Jones, Syd Pleno and Michael Wilkinson, 'The use of random sampling in investigations involving child abuse material' (2012) 9 *Digital Investigation* S99, S105.

[124] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 353.

[125] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 354.

[126] *R v Forbes* [2014] ACTSC 91 at [8], [15], [18]. [19] and [24] per Penfold J.

[127] Warner, 'Sentencing for Child Pornography' (2010) 84 *Australian Law Journal* 384, 389.

[128] *Colbourn v The Queen* [2009] TASSC 108 (see [15]–[17]).

[129] *Colbourn v The Queen* [2009] TASSC 108 at [17] per Blow J (Crawford CJ and Porter J agreeing).

[130] Michael Byrne QC, *Queensland Organised Crime Commission of Inquiry Report* (2015) 354, referring to information from Paul Griffiths of the QPS.