

**Australian Proposal to the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes:
Criminalisation of Online Child Abuse Offences**

Substantive Criminal Law

Article [A] – child abuse material through a computer system

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally [without lawful excuse]¹ the following conduct:
 - a. accessing, controlling, transmitting, distributing, offering, procuring, producing, or making available child abuse material through a computer system², or
 - b. possessing child abuse material resulting from the conduct in subparagraph 1(a).
2. For the purposes of Article [A], the term ‘child abuse material’ shall include material that depicts or describes a child, or a representation of a child, who is implied to be, or appears to be engaging in sexual activities or in the presence of a person engaging in sexual activities, any representation of the sexual parts of a child³ for primarily sexual purposes, or a victim of torture, cruel, inhumane, or degrading treatment or punishment.

Article [B] – facilitation of child abuse material through a computer system

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally [without lawful excuse],⁴ creating, developing, altering, maintaining, controlling, moderating, assisting⁵, making available, advertising or promoting a computer system for the purposes of facilitating child abuse material as identified in Article [A].
2. For the purposes of paragraph 1, the term ‘facilitating child abuse’ shall include any of the conduct outlined in paragraph 1 for the purposes of allowing persons to access, transmit,

¹ This caveat is included to ensure the offence does not unintentionally capture certain legitimate situations— for example, where there may be a medical requirement to access or produce material which would otherwise be captured by this provision.

² ‘Computer system’ defined to mean any device or group of interconnected or related devices, where one or more of them performs automatic processing of data pursuant to a program. This may include input, output and storage facilities. It would also include standalone systems or one networked with other devices. Note that this term (or its definition) may be altered to ensure consistency with other provisions of the draft convention.

² Self-generated material may cover both material which is purely self-generated, and also coerced or extorted self-generated material. In these contexts, the provision aims to provide a general stance of extra caution around criminalisation but still leaving it to domestic legal systems to decide on their own proportionate and reasonable response.

³ Terminology from the Convention on the Rights of the Child Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography is a protocol to the(2000)

⁴ As per footnote 1.

⁵ ‘Assisting’ may ultimately be captured by extensions of criminal responsibility general provisions. Retained here until those provisions are considered.

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distribute, offer or make available, or produce, 'child abuse material' to themselves or other persons.

Article [C] –grooming or procuring of a child for sexual purposes through a computer system

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, through a [computer system] grooming, making a proposal, procuring or causing a child, to meet, witness, or participate in sexual activities.

Article [X] – general provisions related to the proposal

1. For the purposes of Articles [A, B, C] the term 'child' shall include all persons under 18 years of age. In addition, for the purposes of C, 'child' also includes a person who is believed to be under 18 years of age.⁶ For the purposes of Articles [A, B, C], a State Party may, however, require a lower age-limit, which shall be not less than 16 years.
2. For the purposes of Articles [A, B, C], criminal liability shall apply to persons 18 years of age and above. Each State Party may at any time declare to apply such criminal liability to persons under the age of 18 years. If a State Party does declare, they shall ensure there are appropriate safeguards in their domestic law to protect the child accused noting the impact of being subject to a criminal justice process may have on a child.
3. Where a State Party seeks to criminalise persons under the age of 18 years of age for Article A, it shall take due account of avoiding the over criminalisation of children that have self-generated material captured under Article [A] paragraph 2, and the need to respect their obligations under the *United Nations Convention on the Rights of the Child* and its Protocols.

Associated penalties

We propose an Article be included that provides for an obligation for State Parties to adopt legislative or other measures necessary to ensure that any criminal offences established under this Convention are punishable by effective, proportionate and dissuasive measures, which may include deprivation of liberty.

⁶ The addition of belief here is intended to cover situations where a person of interest or person being investigated for grooming or procuring children for sexual purposes, is engaging with a law enforcement officer online in an undercover capacity.

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Annexure A: Explanatory material to assist in understanding the proposal

Article [A] – child abuse material through a computer system

This proposed Article seeks to strengthen protective measures for children, including their protection against sexual exploitation, by ensuring State Parties have sufficient criminal law provisions to prevent the use of computer systems, the internet, digital devices, and digital services in the commission of sexual and exploitation offences against children.

Paragraph 1 requires State Parties to criminalise online child abuse material when committed intentionally. It criminalises various aspects of the life cycle of child abuse material, including accessing, controlling, transmitting, distributing, offering, procuring, producing and making available child abuse material through a computer system. The provision also seeks to criminalise the possession of child abuse material in line with the objectives of this Convention to cover conduct through the computer systems. Paragraph 2 seeks to define the term '*child abuse material*' to capture depictions, descriptions or representations of children implied to be, or appears to be, engaging in sexual activities, pictures of the sexual parts of a child for primarily sexual purposes, or material that has a child as a victim of torture, cruelty or physical abuse. This is intended to cover not only actual imagery of children being sexually abused, sexualised, or subject to torture or physical abuse, but also to include stories or depictions (such as drawings) of child sexual or physical abuse.

Article [B] – facilitation of child abuse material through a computer system

This proposed Article aims to ensure State Parties criminalise those that facilitate child abuse material online but may not be directly involved in the day-to-day operations or lifecycle of child abuse material. For example, the offence would apply to an individual or service provider that develops, implements and maintains a technical platform (including a website or chatroom) with full knowledge that their service is being used by a child abuse online network to produce, access, etc, child abuse material.

Paragraph 1 sets out the obligation to criminalise such conduct and the various aspects of developing and administering a technical platform for the purpose of facilitating child abuse.

Paragraph 2 seeks to define the term '*facilitating child abuse*' to include computer systems **for the purposes** of allowing persons to access, transmit, distribute, offer or make available, or produce child abuse material themselves or other persons. Often computer systems that deal globally in child abuse material involved persons who are responsible for the technical platforms and services they utilise, which may not actually involve direct interactions with child abuse material.

Article [C] – solicitation, engagement, grooming or procuring of a child for sexual purposes

This proposed Article aims to ensure State Parties criminalise the grooming or procuring of children online for sexual purposes. Communications technologies, such as the Internet, are now making it significantly easier for perpetrators to engage with children for the purposes of grooming or procuring them for sexual purposes without the traditional barriers otherwise available in the physical world. Grooming and procuring offences are targeted at offenders who use the anonymity of the Internet to win the trust of a child as a first step to future sexual abuse or physical harm of the child, and allow law enforcement to intervene before a child is physically assaulted.

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Paragraph 1 sets out the obligation to criminalise conduct that involves grooming (activities that make it easier to procure a child for sexual activity) or procuring (encouraging, enticing, recruiting or coercing, whether by threats, promises or otherwise) a child for sexual purposes.

Paragraph 2 sets out the relevant definitions to paragraph 1. Of particular importance is the age of the victim and the perpetrator. For example, Australian law provides a very limited age buffer at the upper limit of the age range in recognition that there may be legitimate relationships between young persons between the ages of 16 years and above. Defining a child to include persons under the age of 18 years may result in unjust outcomes where a person who is 17 years of age engages in consensual sexual activity with a person who is 18 years of age.

Article [X] – general provisions related to this proposal

Paragraph 1 seeks to define the age of the child for the purposes of child abuse material as all persons under the age of 18 years. In recognising that the age of consent may be different across various legal systems, the proposal also allows for a State Party to require a lower age limit but restricts this at no lower than 16 years of age. This balances domestic legal system requirements with the need to sufficiently protect children from the extreme harms caused by sexual and physical abuse. This is in line with a number of international instruments, such as the Budapest Convention and the UN Convention on the Rights of the Child (see Article 1).

For the purposes of Article [C], Paragraph 1 also seeks to define the meaning of child to mean both a real child under the age of 18 years, and a person who is believed to be under the age of 18 years. This is intended to cover situations where undercover operations are being used to identify and investigate grooming and procuring activities online. For example, where a person approaches an undercover law enforcement officer in a chat room on the belief they are under the age of 18 years with the intention of grooming or procuring them for sexual purposes.

Paragraph 2 sets out that criminal liability shall apply to persons 18 years of age and above. However, State Parties can declare they will apply criminal liability to persons under that specified age recognising that there may be circumstances where it may be appropriate to criminalise the behaviour of children (such as behaviour that results in significant harm to another child, e.g. sexualised blackmail or physical abuse). In doing so, State Parties allowing for the criminalisation of children should avoid over criminalisation and ensure there are appropriate safeguards and limitations in place. For example, Australian Commonwealth criminal law requires that the prosecutorial body seek approval from Australia's Attorney-General before pursuing the prosecution of a child for online child sexual abuse offences.

Paragraph 2 obliges State Parties to take due account of avoiding over criminalising children where the child self-generates material that could meet the definition of child abuse material. This recognises that a child may intentionally or unintentionally self-generate material without any intention that such behaviour be exploitative in nature or have criminal intentions. Over criminalisation may have significant ramifications for a child's future, including human development, and enjoyment of their rights.

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Annexure B: table of terms to assist in interpreting the proposal

The following table is provided for ease of understanding of this proposal and is not intended to form a part of this proposal, but merely to provide clarity and guidance about what is meant by these terms in the interpretation of the proposal.

Terminology and meaning	
Access	Displaying material by a computer or any other output of the material from a computer system, or copying or moving the material in a computer system, or execution of a program.
Control or possession	Having possession of a computer system, data storage device, or other device, that holds or contains the material. Having control of data held in a computer system, data storage device or other device, that is in the possession of another person.
Transmission	To communicate or broadcast material by way of a computer system.
Distribution	To publish, exhibit, communicate, supply or transmit material to a group of persons by way of a computer system.
Offer	To attempt to illicit, do, or make, material by way of a computer system.
Procure	Encourage, entice or recruit a person to engage in activity related to the material.
Production	Producing material.
Making available	Can include but is not limited to, describing how to obtain access to material, or describing methods that are likely to facilitate access to material.
Participate	The term participate shall include recruiting or coercing a child to participate in sexual activities.
Engaging	The term engaging shall include direct or indirect engagement of a child to participate in sexual activities

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