



New obligation for ISPs and ICHs to report child pornography and child abuse material

Internet Service Providers (ISPs) and Internet Content Hosts (ICHs) will have an obligation to report material they have reasonable grounds to believe is child pornography or child abuse material to the Australian Federal Police (AFP), when amendments to the Criminal Code Act 1995 (Criminal Code) commence on 1 March 2005.

The full text of these amendments (the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004*) can be located at:
<http://scaleplus.law.gov.au/html/bills/0/2004/0/2004080501.html>

New Offences

The most relevant offences for ISPs and ICHs are those relating to:

- the use of the Internet to access, transmit and make available child pornography and child abuse material in sections 474.19 and 474.22, and
- the possession or production of such material with intent to place it on the Internet in sections 474.20 and 474.23.

Child pornography and *child abuse material* will be defined in section 473.1 of the *Criminal Code*.

Child abuse material means material that:

- depicts or describes a person under 18 years of age and 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 offensive.

Child pornography material means material that:

- depicts, represents or describes a person under 18 years of age who is engaged in, or appears to be engaged in, a sexual pose or sexual activity or 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.

Child pornography material also includes material the dominant characteristic of which is the depiction, representation, or description, for a sexual purpose, of a sexual organ or the anal region of a person under 18 years of age; or the breasts of a female person under 18 years of age, in a way that reasonable persons would regard as being, in all the circumstances, offensive.

The new offences complement existing offences in the *Customs Act 1901* prohibiting the importation of such material into Australia. Each of the new offences in the Criminal Code carries a maximum penalty of ten years imprisonment.

New reporting obligations for ISPs and ICHs

New section 474.25 places an important obligation on ISPs and ICHs:

474.25 Obligations of Internet service providers and Internet content hosts

A person commits an offence if the person:

- (a) is an Internet service provider or an Internet content host; and
- (b) *is aware* that the service provided by the person can be used to access particular material that the person has *reasonable grounds to believe* is:
 - (i) child pornography material; or
 - (ii) child abuse material; and
- (c) does not refer details of the material to the Australian Federal Police *within a reasonable time after becoming aware* of the existence of the material.

This provision is intended to ensure that where complaints are made to ISPs and ICHs about particular material accessed using their services, and there appears to be some basis for those complaints, that material, or the details of how to access that material (for example, the website address), is sent to the Australian Federal Police.

An ISP or ICH will only be under an obligation to report something to the AFP where they have *reasonable grounds to believe* the material is child pornography material or child abuse material.

The amendments do not impose an obligation on ISPs and ICHs to take additional measures to ensure their services are not being used in this way, for example, by monitoring usage. If a person complains to an ISP or ICH about material that is obviously not child pornography or child abuse material, the ISP or ICH will not be under an obligation to make a report to the AFP.

Content filtering and access-prevention arrangements

The amendments to the *Criminal Code* will provide a defence to the offences contained in sections 474.19, 474.20, 474.22 and 474.23 for persons engaged in the manufacture or development, or updating, of content filtering technology (including software) at sections 474.21(4)(b) and 474.24(4)(b) of the *Criminal Code*.

This will enable scheduled filter software manufacturers, without committing an offence, to update their filters in accordance with Australian Broadcasting Authority (ABA) notifications issued under Schedule 5 to the *Broadcasting Services Act* (BSA) so that prohibited internet content or potential prohibited content cannot be accessed when using such software.

Overlap with existing obligations of ISPs and ICHs

Child pornography material would generally be ‘prohibited content’ under the Online Content Co-Regulatory Scheme, created by Schedule 5 to the BSA. Under this Scheme, the ABA handles and investigates complaints from the public about prohibited internet content or potential prohibited internet content and can order Australian internet content hosts (ICHs) not to host such content.

The amendments to the *Criminal Code* will also provide a defence for persons engaging in conduct for the sole purpose of assisting the ABA under Schedule 5 to the BSA to detect prohibited or potentially prohibited content at sections 474.21(4)(a) and 474.24(4)(a). This will enable ICHs, without committing an offence, not to host sites that contain prohibited or potentially prohibited content in accordance with a notice issued by the ABA under Schedule 5 to the BSA.

Who should ISPs and ICHs contact?

ISPs and ICHs can report websites that may contravene the child pornography and child abuse material provisions, by letter to OCSET Operations Monitoring Centre, Australian Federal Police, PO Box 3997, Robina Town Centre, Qld 4230 or email to **National-OCSET-OMC@afp.gov.au** (National Online Child Sex Exploitation Team Operations Monitoring Centre).

The AFP may need to contact ISPs and ICHs to discuss reports made by the general public concerning material located on that carrier. ISPs and ICHs are asked to make contact with the AFP to provide their details of a suitable contact person. This can be done by contacting the AFP OCSET Operations Monitoring Centre contact officer Federal Agent Lesley Wright on 07 5553 8717 or at the email and address details provided above.

This material is provided as general information. ISPs and ICHs are encouraged to obtain their own independent legal advice on the operation of legislation where there is uncertainty about their legal obligations.