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## Online child abuse/exploitation: A lack of laws or a lack of implementation?

a month ago | BY PEaCE (ECPAT Sri Lanka)



The advent of the internet and information communications technology (ICT) has opened up ways for children and young people worldwide to gain self-learning and social development opportunities. S. Livingstone, J. Byrne, and J. Carr's "One in three:

Internet governance and children's rights", a study published by the United Nations International Children's Emergency Fund in 2016, notes that children under 18 account for one in three Internet users in the world. The study also acknowledges that this will continue to increase in terms of the number of children accessing the internet and the time that they spend online.

On the darker side of things, however, the internet has also resulted in creating dangerous spaces for children. It is no secret that there are multiple spaces online that have made it possible for perpetrators to trick and take advantage of innocent children. While many people note that children can be protected by regulating the time they spend on online platforms, Senior Advisor of Save the Children International J. Zoltner notes that parents, who are best positioned to help their children, are often unable to do so as they are not knowledgeable enough to supervise their child's internet use. While teachers may offer more knowledge on this matter, children may not be willing or comfortable to confide in them for fear of being shamed. These reasons, together with the lack of awareness of online child abuse and exploitation within the media, have resulted in no reports being made, thereby leading to a lack of public awareness. Moreover, the social stigma surrounding child abuse, in general, as observed in N. Fernando, W. Seneviratne, M. De Silva, H. Abubackar, and J. Cooray's "Online violence against children in Sri Lanka: A national research on the incidence, nature and scope", has led to a lack of any attempt to take legal action against online child abuse or exploitation, thus allowing the perpetrators to continue in their dangerous schemes. With this understanding in mind, this article aims to note the potential harm that can be caused to a child and offer some clarity as to the reason why online child abuse and exploitation cases are ignored in Sri Lanka. Is it because there is a lack of laws, or is it the lack of their implementation?

While the increase in child abuse and exploitation cases in Sri Lanka has gained attention in the media in recent years and months, as noted above, there are comparatively very few cases of online child sexual exploitation and abuse being reported. This should not be misinterpreted to mean that there are barely such online incidents that take place. Instead, it points to a much more significant problem, which is that crimes committed online towards children have always been a grey area due to

the innumerable ways that the internet has made it possible to abuse and exploit children. Hence, the lack of knowledge on the forms of online child sexual exploitation and abuse has led to legal provisions of Sri Lanka being ambiguous on whether modern threats posed to children are criminalised.

It should be noted at the outset that online child abuse and exploitation or online child sexual exploitation and abuse does not have a universal definition. Various jurisdictions and multilateral treaties have adopted various descriptions. In Verité Research's study titled "Sri Lanka: Online child sexual exploitation legal gap analysis", a common definition adopted for the purposes of understanding online child sexual exploitation and abuse was the following: "Situations where a child (under the age of 18 years) takes part in sexual activity in exchange for something, either a benefit, promise, or gain."

Online child sexual exploitation and abuse include the commercial and non-commercial sexual exploitation of children, with the former including cases of contact and non-contact sexual abuse for the purpose of financial gain. A key aspect of online child sexual exploitation and abuse is that it is constantly evolving, resulting in myriad forms of online child abuse emerging. This includes cyberbullying, online grooming, sexting, child porn and child sexual abuse material, sextortion, revenge porn, and live streaming.

### **Is there a lack of laws?**

In considering whether online child sexual exploitation and abuse are criminalised in law internationally, among others, three central instruments recognise the importance of doing so. This includes the Convention on the Rights of the Child (CRC), which has been interpreted to prohibit online child sexual exploitation and abuse (note that the CRC does not expressly prohibit online child sexual exploitation and abuse as it was introduced in 1989.); the Luxemburg Guidelines (Terminology Guidelines for the protection of children from sexual exploitation and sexual abuse), which define child exploitation to cover online child sexual exploitation through the words "any use of ICT that results in sexual exploitation or causes a child to be sexually exploited or that results in or causes images or other material documenting

such sexual exploitation to be produced, bought, sold, possessed, distributed, or transmitted”; and the Budapest Convention (Convention on Cybercrime), which expressly prohibits child sexual abuse material in online systems.

It should be noted that Sri Lanka ratified the CRC in 1991 and acceded to the Budapest Convention in 2005. In relation to the latter, it was the first country in South Asia to sign and ratify the Convention, enabling the national legislation – the Computer Crime Act, No. 24 of 2007 – to be passed. Regardless of this, however, online child sexual exploitation and abuse are not expressly recognised or criminalised in Sri Lanka’s substantive law.

Sri Lanka’s substantive law relating to online child sexual exploitation and abuse includes the Penal Code, and the said Computer Crime Act. Article 27(13) of Sri Lanka’s Constitution further recognises that the State is entrusted with the special care of children. The major flaw in each of the substantive laws in Sri Lanka is that the Penal Code does not identify ICT as a means of facilitating the sexual exploitation of children. Moreover, although the Computer Crime Act recognises cybercrime, it does not criminalise online child sexual exploitation and abuse. Taken in another way, the Computer Crime Act does not consider the possibility of using ICT to enable the sexual exploitation of children. Consequently, there is a need to assess and interpret the current provisions on the sexual exploitation of children that is criminalised in Sri Lanka’s legislation to determine whether the spirit of the law firstly criminalises various forms of sexual exploitation and, secondly, whether such provisions can be read broadly to encompass online child sexual exploitation and abuse.

Provisions that impliedly cover online child sexual exploitation and abuse under the Penal Code as amended include Section 286A on the obscene publication of a child; Section 286B on the duty of a person providing a service by computer to prevent the sexual abuse of a child; Section 286C on the duty to inform of the use of a premise for child abuse; Section 288A on the hiring or employing of children to act as procurers; Section 345 on sexual harassment; Section 360A on procurement; Section 360B on the sexual exploitation of children (it is necessary to read Section 360B together with the additional provisions of the Penal Code to address the gap that exists); Section 360C on trafficking; Section 360E on soliciting a child; Section 363 on rape; Section

365B on grave sexual abuse; Section 365C on the publication of matters relating to certain offences; and Section 372 on extortion.

As a general comment, although online child sexual exploitation and abuse is impliedly criminalised as per the above provisions, legal gaps exist. For instance, the Penal Code does not define what amounts to “obscene” or “indecent”, leaving judges with too much space for interpretation. Hence, problems may occur when questions of morality and immorality are used to determine such answers. What this means is that the wide scope of interpretation has led to online forms of child abuse like grooming to be a crime based on the judge’s interpretation.

Further, the Penal Code does not leave room for criminalising simulated representations or realistic images that appear to be a child. This refers to advanced technological capabilities that allow perpetrators to smartly create images of a child in a sexually explicit manner. In other words, children are no longer required to actually take an image or engage in such activities to be subjected to child abuse or exploitation. The lack of provisions to safeguard children in this regard is a point of concern with technologies such as artificial intelligence on the rise.

Moreover, the Penal Code does not make reference to the mental status, which is producing child sexual abuse materials with the consciously formed intent of distributing it through a computer system. Sri Lanka also does not criminalise sexual abuse, as it only recognises sexual intercourse when it comes to hiring or employing children as sexual procurers. All the above gaps have also meant that Sri Lanka has failed to uphold the conditions specified under international treaties or conventions. An interesting point to note is that the Penal Code uses gendered language. Sections of the Penal Code often use phrases such as “a man is said to commit”. Such wording leads to a belief that, firstly, male children cannot be victims, and secondly, that online child sexual exploitation and abuse can only be conducted by male adults. This is further heightened when the victim is described in such provisions in gendered terms (Ex: the Penal Code uses the pronoun ‘her’ when referring to consent).

One of the central confusions surrounding legal provisions related to children has also been the lack of consistency in identifying who amounts to a child. For instance, the Age of Majority (Amendment) Act, No. 17 of 1989, recognises the age of majority at 18

years, while the Penal Code and its Amendments of 1995, 1998, and 2006 have defined a child as under 18 years only in specific provisions: Sections 286A, 308A on cruelty, 360B, 360C, and 365B.

In contrast, the Children and Young Persons Ordinance, No. 48 of 1939 defines a child to be 14 years and anyone between 14 to 16 years to be a “young person”. Other provisions of the Penal Code consider the age of consent to be 16, implying a child to be below 16 years of age. Sections 75 (“Nothing is an offence which is done by a child under eight years of age”) and 76 (“Nothing is an offence which is done by a child above eight years of age and under 12, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion”) of the Penal Code further note that the minimum age of criminal responsibility is 12 years. The varying standards to assess who a child is under each statute thus make it difficult to truly protect all children.

### **Is there a lack of implementation?**

At times, although the law impliedly criminalises online child sexual exploitation and abuse, it is not implemented. This is seen by Section 286B of the Penal Code on the duty of a person providing a service by a computer to prevent the sexual abuse of a child. According to this, internet service providers (ISPs) have an affirmative duty to report instances of the sexual abuse of children in addition to requiring them to turn over any identifying information to law enforcement. In theory, this would mean that ISPs would proactively need to block access to content sites that display child sexual abuse images. Unfortunately, it is doubtful as to whether the criminalisation of the failure to report incidents of online abuse is implemented.

There are various actors involved in curtailing online child sexual abuse and exploitation and in enforcing the law. A few of the institutions that play a key role in implementing the law include the National Child Protection Authority (NCPA), the Cyber Crime Division of the Criminal Investigations Department (CID), the Bureau for the Prevention of the Abuse of Children and Women (CWB), and the Attorney General's Department (AG). The NCPA receives complaints through its helpline ‘1929’, which is a 24-hour toll-free, trilingual hotline. The role of the NCPA, however, is limited

to the preliminary investigation as it merely documents all information and advises or refers the case to the Cyber Crime Division of the CID. For the CID to investigate any case of child abuse, there is a need for a complaint to be lodged. Currently, the highest number of online child sexual exploitation and abuse complaints lodged is related to sextortion which refers to the practice of extorting money or sexual favours from someone, threatening to reveal evidence of their sexual activity. There is at present, difficulty in finding the perpetrator due to the difficulty of tracking internet protocol addresses in Sri Lanka. The lack of prompt action taken by the CID therefore, has been a complaint and a reason as to why one may not report it. The same study by Verité Research notes that, on average, it takes three months for online content to be taken down.

The CWB's role has mostly been in forwarding complaints to the CID. Sometimes, the CID would forward this to the Sri Lanka Computer Emergency Readiness Team (SLCERT), thereby demonstrating the general lack of knowledge even among the key law enforcement institutions on online child sexual exploitation and abuse. One point of importance is that the CWB has been criticised for blaming the victim. Hence, victims that have come forward often end up getting re-victimised, heightening why victims are reluctant to report it.

The AG's Department's efficiency in addressing or trying all cases related to child abuse in court has been painstakingly slow. For example, at the end of 2017, the Child Protection Unit had 17,582 pending cases, per Verité Research. The latest statistics by the NCPA note that the number of complaints against child abuse in 2022 alone was 10,497. On average, the highest number of reports are being made in the Western Province (3,320), the Southern Province (1,486) and the North Western Province (1,226). Of particular interest is that the AG's Department has mostly used Section 286A of the Penal Code to prosecute the offence of online child sexual exploitation and abuse.

In answering the question set out at the very beginning then, this article leads to the conclusion that Sri Lanka does not have a definitive answer. There is a lack of laws in some respect when it comes to criminalising online child sexual exploitation and abuse, especially when comparing them to international standards, whilst there is



also a lack of implementation or enforcement due to certain weaknesses in the law enforcement institutions as well.

***(PEaCE – ECPAT Sri Lanka [Protecting Environment and Children Everywhere – End Child Prostitution in Asian Tourism Sri Lanka] is a non-governmental organisation focused on child protection by way of ending the sexual abuse and exploitation of children)***

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