



# SRI LANKA: ONLINE CHILD SEXUAL EXPLOITATION *Legal Gap Analysis*

November 2019

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# ABBREVIATIONS

AG	Attorney General's Department
Budapest Convention	Convention on Cybercrime
CD	Cybercrime Division
CID	Criminal Investigation Department
CPU	Child Protection Unit
CRC	Convention on the Rights of the Child
CRC-OPSC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
CSAE & OS	National Consultation on Child Sexual Abuse, Exploitation and Online Safety
CSAM	Child Sexual Abuse Materials
CSE	Child Sexual Exploitation
CYPO	Children and Young Persons Ordinance
ECOSOC	United Nations Economic and Social Council
ECPAT	End Child Prostitution and Trafficking
EGDI	E-Government Development Index
FIU	Financial Intelligence Unit
ICT	Information and Communication Technology
ICTA	Information & Communication Telecommunication Authority
IGF	Internet Governance Forum
ILO	International Labour Organisation
INTERPOL	International Criminal Police Organization
IPID	Institute for Participatory Interaction in Development
ISPs	Internet service providers
KIIs	Key Informant Interviews
Lanzarote Convention	Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
Luxembourg Guidelines	Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse
MWCA	Ministry of Women and Child Affairs
NCPA	National Child Protection Authority
OCSE	Online Child Sexual Exploitation
OPSC	Optional Protocol on the Sale of Children, Child Pornography and Prostitution
PCA	Penal Code (Amendment) Act
PEaCE	Protecting Environment and Children Everywhere
SAIEVAC	South Asian Initiative to End Violence Against Children
SDGs	United Nations Sustainable Development Goals
SGBV	Sexual and Gender-Based Violence
SLCERT	Sri Lanka Computer Emergency Readiness Team
TRCSL	Telecommunications Regulatory Commission of Sri Lanka
UNICEF	United Nations International Children's Emergency Fund
VR	Verité Research
WCB	Women and Children's Bureau

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# INTRODUCTION

The Internet is usually associated with positive progress. However, new information and communication technologies (ICT) infrastructure can facilitate sexual exploitation of children and can create new variations of exploitation. ICT tools that are benign in other contexts, such as file sharing systems, live streaming, 'cloud' technologies, social networking platforms, and large-scale chat groups can facilitate online sexual exploitation of children.<sup>1</sup> Online child sexual exploitation (OCSE) includes 'any acts of sexual exploitation of children that are facilitated by ICT'.<sup>2</sup> There must be an online component to the crime for it to fall under the OCSE rubric. For instance, online platforms and systems are being used by perpetrators of child sexual exploitation to share and distribute child sexual abuse materials (CSAM). New forms of social media networks facilitate connection with, and solicitation of, children. Widespread access to information online alongside limited parental supervision can exacerbate the risk of OCSE.

With Sri Lanka witnessing increasing participation in ICT and growing levels of mobile phone penetration, it is inevitable that children in Sri Lanka have more access to the Internet. A survey conducted by Sri Lanka Computer Emergency Readiness Team (SLCERT) to investigate the use and perceptions of Sri Lankan youth<sup>3</sup> on the security and privacy of social media, found that a significant number of Sri Lankan youth have been subject to online victimisation. The survey defined 'youth' as those between 16 and 30 years of age, and found that 14% of youth had experienced the creation of fake accounts under their names, 11% experienced hacking of accounts, 9% had their photos used in abusive ways, 8% received threatening messages, 4% were subject to cyber bullying, and 3% had been victims of Internet fraud.<sup>4</sup>

This study was commissioned by PEaCE (Protecting Environment and Children Everywhere) to examine the legislative and policy framework pertaining to online child sexual exploitation in Sri Lanka. It will begin by providing an overview of OCSE globally and in Sri Lanka, and describe the methodology used for this study. Thereafter, it will set out the overarching international legal framework on OCSE and proceed to assess Sri Lanka's domestic legal and policy framework for combating OCSE. It will conclude with recommendations to improve the system to ensure accountability for and the prevention of OCSE.

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1. International standards define children as individuals under the age of eighteen years of age. See *UN General Assembly, Convention on the Rights of the Child*, (1989. November 20), United Nations, Treaty Series, vol. 1577, p. 3.
  2. Luxembourg Guidelines. (2016. January 28). *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*. Retrieved from <http://luxembourgguidelines.org/english-version/> [Accessed on: 28 January 2019]. Hereinafter Luxembourg Guidelines. (2016. January 28).
  3. Youth is defined as 16 – 30 years of age. See Sri Lanka CERT|CC. (2017). *Youth Survey on Social Media Security and Privacy*. Retrieved from <https://www.cert.gov.lk/Downloads/YourthSurvey2018.pdf> [Accessed on: 28 January 2019]. Hereinafter Sri Lanka CERT Cyber Security Awareness Survey 2015.
  4. The survey defines youth between ages of 16 – 30, which was their target population. Total sample size was 548 participants during an INFOTEL public exhibition held in November 2017 at BMICH, see also Sri Lanka CERT Cyber Security Awareness Survey 2015.

# BACKGROUND

## 1.1 Defining OCSE

There is no consistent legal definition of what constitutes OCSE in international and regional instruments. As a result, the protection regime has been inconsistent. There are variations in the legal definition between multilateral instruments, and among states. For example, across numerous multilateral instruments, the definition of *child sexual exploitation (CSE)* varies.<sup>5</sup> However, it can generally be described as where a child (under the age of eighteen years of age), takes part in sexual activity in exchange for something, either a benefit, promise, or gain.<sup>6</sup> This sexual activity is usually classified as a type of sexual abuse.

'Contact' and 'non-contact' sexual abuse refers to the types of harm experienced by the victim. 'Contact' refers to in-person sexual activity, while 'non-contact' refers to instances where the perpetrator does not have physical contact with the victim. The latter can include possession, distribution, or consumption of CSAM.<sup>7</sup>

OCSE encompasses both commercial and non-commercial sexual exploitation of children. Commercial exploitation of children involves the contact and non-contact sexual abuse of children for the purpose of financial gain. Part of the money may be directly paid

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5. Luxembourg Guidelines. (2016. January 28) p.24 - 27 , noting that the Convention of Rights of the Child, Article 34 defines sexual exploitation as "the exploitative use of children in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performances and materials"; The African Charter on the Rights and Welfare of the Child 1999, Article 27 defines sexual exploitation as, (a) the inducement, coercion or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; (c) the use of children in pornographic activities, performances and materials; The Optional Protocol on Child Pornography, Article 3 requires state parties to criminalise sexual exploitation which it defines as 'sale of children.' ;the Lanzarote Convention, the Council of Europe, refers to behaviour constituting sexual exploitation and sexual abuse in Article 18-23. ; The European Union Directive 2011/93, refers to acts such as making a child participate in pornographic performances, knowingly attending pornographic performances that include children, making a child participate in child prostitution, and engaging in sexual activities with a child where recourse is made to prostitution; The United Nations Secretary General's Bulletin: Special Measures for Protection for Sexual Exploitation and Abuse states that 'any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially, or politically from the sexual exploitation of another'.
  6. Luxembourg Guidelines. (2016. January 28), p. 24- 27.
  7. United Nations Office on Drugs and Crime. (2015). *Study on the Effects of new Information Technologies on the Abuse and Exploitation of Children*. Retrieved from [http://www.unodc.org/documents/Cybercrime/Study\\_on\\_the\\_Effects.pdf](http://www.unodc.org/documents/Cybercrime/Study_on_the_Effects.pdf). [Accessed on: 20 January 2019].

to the child or to a third party to further the exploitation. Commercial exploitation includes prostitution of children, trafficking in children, child sex tourism, and in some instances, child marriage. Meanwhile, non-commercial OCSE involves sexual exploitative acts committed for the purpose of personal gratification, such as grooming, live-streaming of child abuse or instances of trafficking of children where the trafficker abuses children they intend to exploit.<sup>8</sup>

Since OCSE is facilitated and conducted via ICT, it can be challenging to identify the different forms of OCSE. Additionally, these forms are constantly evolving with technology and to meet the specific cultural demands of countries. The following are current global trends in OCSE:

- child pornography (child sexual abuse images);
- commercial sexual exploitation of children;
- cyber-enticement;
- grooming or solicitation of children for sexual purposes;
- cyber-sexual harassment;
- cyber bullying
- and cyberstalking.<sup>9</sup>

Cyber-solicitation, grooming and solicitation of children for sexual purposes are terms used interchangeably to refer to communications initiated by adults with children for the purpose of exploiting or sexually abusing minors.<sup>10</sup> In comparison, cyber-sexual harassment refers to threats, or intimidation by individuals or a group of individuals via ICT, with the intention to violate the dignity of another person.<sup>11</sup> Sexual harassment usually refers to adults as the perpetrators of the harassment and children as the victims.<sup>12</sup> Cyber-bullying is usually the repeated conduct of cyber-harassment, and although on its face is not related to sexual exploitation, in some instances where it contains elements of sexting, grooming and sexual extortion, it can result in sexual exploitation.<sup>13</sup> Cyber-bullying usually occurs between peers unlike sexual harassment.<sup>14</sup> Peers can be perpetrators of child sexual exploitation, known as peer on peer sexual exploitation.<sup>15</sup>

The number of incidents of OCSE is difficult to capture because many websites which engage in OCSE related activities are hosted on the 'dark web'.<sup>16</sup> In 2011, the United Nations Economic and Social Council passed a resolution on prevention, protection and international cooperation against the use of new information technologies to abuse and/or exploit children.<sup>17</sup> The Council expressed

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8. United Nations Office on Drugs and Crime. (2015). *Study on the Effects of new Information Technologies on the Abuse and Exploitation of Children*. See also Luxembourg Guidelines. (2016. January 28), p. 46.

9. Luxembourg Guidelines. (2016. January 28). p. 46.

10. Luxembourg Guidelines. (2016. January 28). p. 49 - 53.

11. Luxembourg Guidelines. (2016. January 28). p.22.

12. Luxembourg Guidelines. (2016. January 28). p.22.

13. Luxembourg Guidelines. (2016. January 28). p.22. See also *United Nations Office on Drugs and Crime. (2015). Study on the Effects of new Information Technologies on the Abuse and Exploitation of Children*.

14. Luxembourg Guidelines. (2016. January 28). p.22.

15. Luxembourg Guidelines. (2016. January 28). p.25.

16. The dark web or dark net is the hidden part of the Internet which is accessed via Tor. Tor is anonymity software that makes it challenging to trace the users' online activity. See *Glossary*. Retrieved from International Watch Foundation: <https://www.iwf.org.uk/glossary>. See also Key Informant Interviews, where interviewees noted that these websites were difficult to identify due them being hosted on the 'dark web'. Interviewees noted that websites that share adult content such as Jhub (which was originally a Sri Lankan site but has expanded in the last year to include content from South Asia), Pornhub, xxxhamster etc were usually responsive to complaints by victims whose images were non-consensually uploaded to these websites.

17. The Economic and Social Council. (2011). *Resolution 2011/33 'Prevention, protection and international cooperation*

concern about technological advances creating new variations of child exploitation and abuse, and called upon member states to raise awareness and implement legislation to criminalise such conduct.<sup>18</sup> Target 16.2 of

the United Nations Sustainable Development Goals (SDGs) calls on member states to 'end abuse, exploitation, trafficking and all forms of violence against, and torture of children' by 2030.<sup>19</sup>

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## 1.2 ICT usage in Sri Lanka

Sri Lanka has seen increased usage in ICT. Sri Lanka is currently ranked number 94 in the UN E-Government Development Index (EGDI) and has a high EGDI level in comparison to other countries. According to the 2018 UN E-Government Survey, Sri Lanka's total E-Participation Index is 64.13 percent.<sup>20</sup> Sri Lanka is ranked number 71 out of 164 on the Global Security Index 2017, and is considered a maturing country with regard to ICT.<sup>21</sup> As of September 2018<sup>22</sup>, there were 32,094,932 cellular mobile telephone subscriptions, 1,451,982 fixed broadband and narrowband subscriptions, and 5,673,985 mobile broadband subscriptions.<sup>23</sup>

With high mobile phone penetration and growing participation in ICT infrastructure, it is inevitable that children in Sri Lanka have increasing access to the Internet. The 'We are Social' and 'Hootsuite social media report' statistics for Sri Lanka determined that there are a total of 6.55 million active mobile internet users.<sup>24</sup> The average age of Sri Lankan children who first accessed the Internet was around 13 years of age.<sup>25</sup> Many children in Sri Lanka, approximately 53.6 percent of those surveyed in a UNICEF study, learned to access the Internet on their own.<sup>26</sup> Facebook was the most popular social media platform accessed by all participants; and was preferred among

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*against the use of new information technologies to abuse and/or exploit children.* Retrieved from [https://www.unodc.org/documents/commissions/CCPCJ/Crime\\_Resolutions/2010-2019/2011/ECOSOC/Resolution\\_2011-33.pdf](https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2010-2019/2011/ECOSOC/Resolution_2011-33.pdf).

18. The Economic and Social Council. (2011). *Resolution 2011/33 'Prevention, protection and international cooperation against the use of new information technologies to abuse and/or exploit children.'*
19. United Nations. (n.d.). *Goal 16*. Retrieved from Sustainable Development Goals: <https://sustainabledevelopment.un.org/sdg16>.
20. United Nations. (2018). *E-Government Survey*. Retrieved from [https://publicadministration.un.org/egovkb/Portals/egovkb/Documents/un/2018-Survey/E-Government%20Survey%202018\\_FINAL%20for%20web.pdf](https://publicadministration.un.org/egovkb/Portals/egovkb/Documents/un/2018-Survey/E-Government%20Survey%202018_FINAL%20for%20web.pdf). [Accessed on: 28 January 2019].
21. Telecommunication Union. (2017). *Global Cybersecurity Index*. Retrieved from [https://www.itu.int/dms\\_pub/itu-d/opb/str/D-STR-GCI.01-2017-R1-PDF-E.pdf](https://www.itu.int/dms_pub/itu-d/opb/str/D-STR-GCI.01-2017-R1-PDF-E.pdf) [Accessed on: 28 January 2019]. Note: Maturing countries have developed complex commitments and engage in cybersecurity programmes and initiatives.
22. Sri Lanka's total population is 21.4 million people. World Bank. (n.d.). *Country Profile: Sri Lanka*. Retrieved from [http://www.trc.gov.lk/images/pdf/statis\\_q3\\_16112018.pdf](http://www.trc.gov.lk/images/pdf/statis_q3_16112018.pdf). [Accessed on: 5 February 2019].
23. Sri Lanka's Telecommunication Regulatory Commission. (2018). *Statistics 2018*. Retrieved from [http://www.trc.gov.lk/images/pdf/statis\\_q3\\_16112018.pdf](http://www.trc.gov.lk/images/pdf/statis_q3_16112018.pdf). [Accessed on: 5 February 2019].
24. Hootsuite and We are Social. (2019). *Digital 2019: Sri Lanka*. Retrieved from <https://datareportal.com/reports/digital-2019-sri-lanka>. [Accessed on: 29 May 2019].
25. Institute for Participatory Interaction in Development (IPID) (2018). *Keeping Children in Sri Lanka Safe and Empowered Online*. commissioned by UNICEF. Retrieved from [https://www.unicef.org/srilanka/sites/unicef.org.srilanka/files/2018-11/Unicef\\_Book\\_260118.pdf](https://www.unicef.org/srilanka/sites/unicef.org.srilanka/files/2018-11/Unicef_Book_260118.pdf) [Accessed on: 25 January 2019].
26. IPID (2018). *Keeping Children in Sri Lanka Safe and Empowered Online*. commissioned by UNICEF p. 23. The UNICEF study surveyed children between 11- 18 years of age. Total participants were 2559, with 1878 boys and 681 girls surveyed.

boys at 72 percent and among girls at only 33 percent. Girls preferred Skype at 40.6%. A very limited number of those surveyed used school computers to access the internet, with the majority using mobile phones.<sup>27</sup> Of those surveyed, 10 percent uploaded or sent online material that was inappropriate for their age<sup>28</sup>; and 41 percent admitted to sharing photographs and personal information online with unknown individuals.

The Hootsuite and We Are Social 'Global Digital Yearbook Report' for January 2019 ranked websites by the number of visitors and total page views in Sri Lanka. It revealed that facebook.com was visited approximately every 9 minutes and 43 seconds per day and ranked as the fourth visited website. Xhamster.com (a user generated-content based pornography website) was visited every 12 minutes and 58 seconds per day and ranked as the sixth visited website in Sri Lanka.<sup>29</sup>

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### 1.3 OCSE in Sri Lanka

Data and information on the prevalence and extent of OCSE in Sri Lanka is currently limited. However, stakeholders involved in combatting OCSE identified at least two common forms in Sri Lanka: 'image-based' sexual content and OCSE in relation to the commercial sex industry.<sup>30</sup> 'Image-based' OCSE is used in this brief to describe the dissemination of usually private sexual images or self-generated sexual content.<sup>31</sup> There are a variety of ways these images are taken and disseminated in Sri Lanka.

In some cases, images shared between consensual partners (usually female nude photos, shared with respective male partners as an act of love or to demonstrate comm-

itment) are subsequently shared online without the subject's consent.<sup>32</sup> For example, nude photographs are shared among boys via messaging applications, such as WhatsApp.<sup>33</sup> This sexual content is then uploaded to a database of nude photographs. This database is then shared among participants (usually boys). To access the database, participants must submit a nude image of a female. In some cases, specific boys will be contacted to acquire nude images from specific females.<sup>34</sup> In those instances, there are circumstances where boys will coerce the girls into sending nude images, by either blackmailing them or by offering a financial benefit.<sup>35</sup> A second way image-based OCSE occurs, is when images that are available on social media are altered

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27. IPID (2018). *Keeping Children in Sri Lanka Safe and Empowered Online*. commissioned by UNICEF p.21. In government schools, 74.8 percent surveyed used smartphones to connect to the internet.
  28. IPID (2018). *Keeping Children in Sri Lanka Safe and Empowered Online*. commissioned by UNICEF p.53 -55. The definition of 'inappropriate' material is unclear from the report.
  29. Hootsuite and We are Social. (2019). *Digital 2019: Sri Lanka*. Based on Alexa's estimates of the average daily amount of time that visitors spend on the sites for days when they visit the site, measured in minutes and seconds. Retrieved from <https://datareportal.com/reports/digital-2019-sri-lanka>. [Accessed on: 29 May 2019].
  30. Key Informant Interviews with Grassrooted Trust (Ltd.) et al.
  31. Key Informant Interviews with Grassrooted Trust (Ltd.) et al. *See also* Luxembourg Guidelines. (2016. January 28). p. 44.
  32. Key Informant Interviews.
  33. Key Informant Interviews with Grassrooted Trust (Ltd.) noted that such databases are content driven.
  34. Key Informant Interview.
  35. Key Informant Interviews with Grassrooted Trust (Ltd.), observed that many girls are blackmailed by exposure of the nudes to friends or family and are coerced into sending more. Other females are given monetary compensati-

to look like nude images, which are then used to extort girls into sending actual images. These images are then also leaked onto pornography websites.<sup>36</sup> A third is where girls are contacted via social media and are paid in exchange for nude images. These databases are circulated among groups within a certain geographical area, as the common denominator is proximity to the perpetrator.<sup>37</sup> For example, nude databases of girls in Batticaloa will be circulated in that specific geographical area among local socio-cultural groups; this same nude database will not be in demand in Colombo, which comprises a different

socio-cultural group.<sup>38</sup>

Furthermore, in Sri Lanka, there are more boys than girls in the sex tourism industry mainly in the coastal areas.<sup>39</sup> This became notorious in 1994 when an exposé written by the U.K.'s *The Independent*, revealed that several European tourists travelled to Sri Lanka for the purpose of sex tourism, exploiting Sri Lankan boys. During such exploitation, many perpetrators would film their interactions, and in some instances distribute the material online.<sup>40</sup>

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on, the current going rate is around 500 rupees for photographs of breasts, around 2500 for more explicit nudes. In other instances, van drivers of school vans, or boys in these school vans hand out phones in exchange for nudes.

36. Key Informant Interview.

37. Key Informant Interview.

38. Key Informant Interview.

39. Frederick, J. (2010). *Sexual Abuse and Exploitation of Boys in South Asia: A Review of Research 41 Findings, Legislation, Policy and Programme Responses*. UNICEF Innocenti Working Papers, p.21. Retrieved from [https://www.unicef-irc.org/publications/pdf/iwp\\_2010\\_02.pdf](https://www.unicef-irc.org/publications/pdf/iwp_2010_02.pdf) [Accessed on: February 5, 2019].

40. Frederick, J. (2010), p. 21.



# 2

## RESEARCH DESIGN AND METHODOLOGY

This study comprises three main components:

- 1.** A review of the domestic and international legal framework on child sexual exploitation online
- 2.** A review of current policy dealing with child sexual exploitation online
- 3.** Recommendations to improve legal and policy framework on child sexual exploitation online

Verité Research (VR) identified the following research questions, which correspond to the above components:

- 1.** What is the international framework on OCSE?
- 2.** What is Sri Lanka's legal and policy framework on OCSE?
- 3.** Is the existing Sri Lankan legal framework on OCSE consistent with the international framework?
- 4.** What are the institutions involved in the protection system and how do these institutions respond to OCSE in Sri Lanka?

- 5.** What are the challenges and gaps that exist within the domestic legal framework and what measures can be taken to address these gaps?

VR used primarily secondary research, but this study was a combination of primary and secondary research. Primary research included Key Informant Interviews (KIIs) with relevant stakeholders in the protection system. Secondary research included a review of the international legal framework and national laws and policy on OCSE. (See Annexure 1 for a sample set of questions asked during the interviews).

The scope of this study is limited to assessing the legal and policy framework in Sri Lanka. Thus, the causes, modality, prevalence and emerging trends of OCSE are not specifically addressed in this brief. Many of the findings on prevalence were based on a limited number of KIIs and could not be corroborated through independent sources, as there is limited data and research on prevalence in Sri Lanka. The identity of the individual from the Attorney General's Department has been kept confidential. Through-out the study there will be partial attribution to informants but not complete attribution to maintain confidentiality at the request of some informants.

**Table 1: Key Informant Interviews**

Institution	Name and Designation	Date of Interview
National Child Protection Authority	Ms. Marini De Livera, Former Chairperson NCPA	January 2019
	Mr. Champika Ayagama, Chief Investigation Officer	February 2019
Attorney General's Department	Identity of individual kept confidential	October 2019
Cybercrime Division – Criminal Investigation Department	Ms. Dharshika Kumari, Supervising Officer	March 2019
Sri Lanka Computer Emergency Readiness Team (SLCERT)	Mr. Roshan Chandraguptha, Principal Information Security Engineer	March 2019
Grassrooted Trust (Ltd.)	Mr. Hans Billimoria, Director	January 2019
ECPAT International	Ms. Marie- Laure Lemineur, Deputy Executive Director Programs for ECPAT International	April 2019
Ministry of Education	Ms. Sarojini Wickremesinghe, Assistant Director (Counseling)	May 2019
University of Sri Jayewardene-pura	Dr. Thusitha Abeysekara, Attorney-at-Law, PhD Computer Law	June 2019

# 3

## INTERNATIONAL STANDARDS ON OCSE

This section sets out ten key international instruments on OCSE and Sri Lanka's current status in relation to each. These instruments are identified in table 2 below.

**Table 2:** International Institutions relevant to OCSE

International Instrument	Sri Lanka's status
Convention on the Rights of the Child (CRC)	Ratified: 12 July 1991
ILO Worst Forms of Child Labour Convention, 1999 (No. 182)	Ratified: 1 March 2001
Budapest Convention – Convention on Cybercrime (Council of Europe)	Acceded: 29 May 2005
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OPSC)	Ratified: 22 Sept. 2006
Palermo Protocol - Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	Ratified: 15 June 2015
Rio Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents – World Congress 2008	Sri Lanka is a member state
WeProtect Global Alliance	Sri Lanka is a member state
South Asian Initiative to End Violence Against Children (SAIEVAC)	Sri Lanka is a member
Luxembourg Guidelines	N/A
Lanzarote Convention – Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Council of Europe)	Sri Lanka is not a state party

## Convention on the Rights of Child

The Convention on the Rights of Child (CRC), which Sri Lanka ratified on 12 July 1991, codified four core principles which are inherent to the dignity and development of every child. The four principles are: 1) non-discrimination; 2) devotion to the best interest of the child; 3) the right to life; and 4) survival, development, and respect for the views of the child.<sup>41</sup> The CRC defines a child as under eighteen years old, unless under the domestic legislation, age of majority is earlier.

The CRC specifically prohibits child sexual exploitation (CSE) under its protection provisions.<sup>42</sup> It places an affirmative responsibility on state parties to prevent sexual exploitation and abuse, which is defined as: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; (c) the exploitative use of children in pornographic performances and materials. Although the CRC does not specifically mention the term 'online child sexual exploitation', it has been interpreted to

prohibit OCSE.

The CRC is augmented by the Optional Protocol on the Sale of Children, Child Pornography and Prostitution (OPSC), which is focused on addressing child pornography facilitated by ICT.<sup>43</sup> The OPSC includes the sale of children in the definition of sexual exploitation of children in Article 3.<sup>44</sup> Sri Lanka acceded to the OPSC in 2006. Under the OPSC, 'sexual exploitation' includes the sale of children, child prostitution, child sex tourism, and child pornography. The OPSC defines the 'sale of children' as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration'; 'child prostitution' as 'the use of a child in sexual activities for remuneration or any other form of consideration'; and 'child pornography' as 'any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes'.<sup>45</sup>

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## Luxembourg Guidelines on Terminology

Identifying what constitutes online sexual exploitation of children varies between international instruments. If a crime is clearly defined and terminology is consistently used

throughout legislation, perpetrators and victims will be easier to identify, thus enhancing the protection system. In January 2016, there were efforts to create a cohesive

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41. UNICEF. *What is the CRC?* Retrieved from [https://www.unicef.org/rightsite/237\\_202.htm](https://www.unicef.org/rightsite/237_202.htm). [Accessed on: February 6, 2019].

42. UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577. Article 34. Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. [Accessed on: 28 January 2019].

43. UN Committee on the Rights of the Child (CRC). (2000. May 25). Preamble of the Optional Protocol on the Sale of Children, Child Pornography and Prostitution. *UN Doc, A/RES/54/263*. <https://www.ohchr.org/Documents/ProfessionalInterest/crc-sale.pdf>. [Accessed 28 January 2019].

44. Luxembourg Guidelines. (2016. January 28). p. 24.

45. UN Committee on the Rights of the Child (CRC). (2000. May 25). Preamble of the Optional Protocol on the Sale of Children, Child Pornography and Prostitution. *UN Doc, A/RES/54/263*, Article 2.

system through an Inter-Agency Working Group<sup>46</sup>, where terminology was defined to enhance the child protection system. These efforts, which were coordinated by End Child Prostitution and Trafficking (ECPAT), are known as the 'Luxembourg Guidelines' on 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse.'

Under the Luxembourg Guidelines a 'child is a victim of sexual exploitation when she/he takes part in a sexual activity in exchange

for something (gain, benefit, promise) from a third party, perpetrator or by the child her/himself.'<sup>47</sup> It further expands on the definition of OCSE, as 'include[ing] 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.'<sup>48</sup> In other words, OCSE occurs if at any point of the practice to exploit children sexually, there is some connection to, or facilitation by the online environment.

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## Convention on Cybercrime (Budapest Convention)

The Convention on Cybercrime is the only multilateral treaty that addresses cybercrime. It is commonly referred to as the Budapest Convention.<sup>49</sup> Sri Lanka was the first country in South Asia to sign and ratify the Convention. The enabling national legislation is the Computer Crime Act, No. 24 of 2007. The Budapest Convention specifically prohibits child pornography in article 9. However, Sri Lanka availed itself of the four reservations

provided for in article 9.<sup>50</sup> It therefore avoided the obligation to criminalise this conduct.<sup>51</sup>

First, Sri Lanka is not bound to criminalise through domestic legislation 'procuring child pornography through a computer system or oneself or another person'; which is essentially downloading child pornography.<sup>52</sup>

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46. The Luxembourg Guidelines on Terminology were spearheaded by ECPAT International. The Interagency Working Group included regional groups, relevant UN Agencies, and international civil society members. Retrieved from <http://luxembourgguidelines.org/partners/>. [Accessed on: 28 January 2019].

47. Luxembourg Guidelines. (2016. January 28), p.24.

48. Luxembourg Guidelines. (2016. January 28), p. 27.

49. Council of Europe. Budapest Convention. (2001. November 23). *Convention on Cybercrime*. European Treaty Series. No 185.

50. Reservation contained in a Note Verbale from the Embassy of Sri Lanka to Belgium, dated 26 May 2015, and in the instrument of accession, deposited simultaneously on 29 May 2015 – Or. Engl. In accordance with Article 42 and Article 9, paragraph 4, of the Convention, Sri Lanka reserves the right not to apply sub-paragraphs 1(d) and (e) and sub-paragraph 2(b) and (c). Retrieved from [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/declarations?p\\_auth=gEUG7A7q&coeconventions\\_WAR\\_coeconventionsportlet\\_enVigueur=false&coeconventions\\_WAR\\_coeconventionsportlet\\_searchBy=state&coeconventions\\_WAR\\_coeconventionsportlet\\_codePays=LKA&coeconventions\\_WAR\\_coeconventionsportlet\\_codeNature=2](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/declarations?p_auth=gEUG7A7q&coeconventions_WAR_coeconventionsportlet_enVigueur=false&coeconventions_WAR_coeconventionsportlet_searchBy=state&coeconventions_WAR_coeconventionsportlet_codePays=LKA&coeconventions_WAR_coeconventionsportlet_codeNature=2). [Accessed on 14 January 2019].

51. However, under the OPSC (which Sri Lanka is a party to) the definition of child pornography does include simulated images of children, and it requires state parties to ensure that uncertainty as to the actual age of the victim should not prevent prosecution. OPSC, Article 2 and Article 8.

52. Council of Europe. Budapest Convention. (2001. November 23). *Explanatory Report to the Convention on Cybercrime*. European Treaty Series. No 185. Retrieved from <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c0e5b>. [Accessed on 29 January 2019].

Second, Sri Lanka need not criminalise 'possessing child pornography in a computer system or on a computer data storage medium'<sup>53</sup> which proscribes mere possession of the material on various computer systems.<sup>54</sup>

Third, Sri Lanka is not bound to criminalise images that *appear to be* a minor engaged in sexually explicit conduct;<sup>55</sup> and

Fourth, Sri Lanka is not required to criminalise *realistic images representing* minors engaged in sexually explicit conduct. These images are usually not real children. Therefore, Sri Lanka is choosing not to criminalise the behaviour of perpetrators that drive the demand for these types of images.<sup>56</sup>

of non-existent children. Thus, the definition of child pornography should encompass both real and virtual images.<sup>57</sup> Additionally, by prohibiting the image itself, it allows for criminalisation through the passage of time. For example, although the sexual abuse image is of a child at a specific time, the child will continue to grow into adulthood; however, the image can remain on the Internet and be viewed by individuals. The Budapest Convention encourages the criminalisation of the image/recording itself, regardless of whether at the time of prosecution the individual depicted is a child. However, Sri Lanka availed itself of the reservation in Article 9, reportedly due to concerns that law enforcement would find it challenging to determine the age of the virtual images and wanted to steer clear of criminalising adult pornography.<sup>58</sup>

One significant aspect of the Budapest Convention is the description of child pornography, which includes the prohibition of images appearing to be a child. With the number of Internet users in the world steadily increasing, the medium for child pornography has evolved to individuals not only accessing child pornography online but also to creating simulated representation of realistic images

The Budapest Convention places an affirmative obligation on member states to not only criminalise child pornography offences in their domestic legislation, but also to ensure that principles of extradition apply to the crime. If state parties do not have an independent extradition treaty, the Budapest Convention may<sup>59</sup> be considered the legal basis for extradition.<sup>60</sup> Furthermore, it calls for mutual assistance among state parties for accessing

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53. Council of Europe. (2001. November 23). *Explanatory Report to the Convention on Cybercrime*. European Treaty Series. No 185.

54. The statutory intent is that by mere possession of child pornography, it creates a demand for such material. Therefore, by criminalising possession, each participant's conduct in a child pornography supply-demand chain is affected. Council of Europe. (2001. November 23). *Explanatory Report to the Convention on Cybercrime*.

55. According to the Luxembourg Guidelines this material can include 'the practice whereby young adults are recorded or photographed in child-like poses, staged with props to reinforce the impression of youth; this has been referred to as "pseudo-infantile pornography" or "initiation pornography"'. See Luxembourg Guidelines. (2016. January 28), p. 41.

56. According to the Explanatory Report to the Convention on Cybercrime, Council of Europe, these morphed/alterd images are sometimes used to encourage children to participate in acts and form a 'subculture favouring child abuse'. See Council of Europe. (2001. November 23). *Explanatory Report to the Convention on Cybercrime*. European Treaty Series. No 185.

57. Luxembourg Guidelines. (2016. January 28), p. 34 – 42.

58. Key Informant Interview. Questions were raised during the round table discussions as to how to determine if an image was a 'child', an individual under the age of eighteen in the child sexual abuse image. It was further noted that this concern was raised by other states as well.

59. Article 24 of the Budapest Convention specifically uses the word 'may' and not 'shall' to suggest that states are not obligated to use the convention itself as a basis for extradition if no extradition treaty exists.

60. It is irrelevant what the actual sentence imposed is, but only what the maximum period legally enforceable is.

computer systems. This is an important investigative tool when dealing with OCSE, which can be transnational in nature.

Although the Budapest Convention is the only multilateral treaty on cybercrime, there are other multilateral initiatives that have attempted to shed light on and address cybercrime. The Internet Governance Forum

(IGF)<sup>61</sup> was convened on 18 July 2006 and was purposefully designed to not replicate a decision-making body. Instead, it was convened to facilitate common understanding and address ICT risks and challenges by bringing various stakeholders to the table. IGF did not specifically cover OCSE. However, one of the key messages in 2018 was the need to combat OCSE.

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## Other International Instruments on OCSE

### World Congresses on CSE

There are several international guidelines and rules covering the protection and care of online sexual exploitation of children. The First World Congress on commercial sexual exploitation of children was held in 1996 in Stockholm. The outcome document from the convening was, 'The Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography and the Declaration and Agenda for Action.' Subsequent World Congresses were held in Yokohama in 2001<sup>62</sup> and Rio in 2008.<sup>63</sup> All three resulted in similar outcome documents, on the forms of sexual exploitation of children and calling upon

states to enact legislation and raise awareness to enhance their protection regime.<sup>64</sup> Sri Lanka participated in both the Second and Third World Congress. Sri Lanka participated in the South Asia Consultation for the Second World Congress to develop a Regional Strategy that was presented at the Second World Congress.<sup>65</sup>

### Lanzarote Convention

The first international instrument that defines and calls on states to prohibit grooming, a form of OCSE, is the Lanzarote Convention, i.e. the Convention on the Protection of Children

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Child pornography is an extraditable offence and thus state parties must ensure that it is included in any extradition treaty between state parties. Council of Europe. Budapest Convention. (2001. November 23). *Convention on Cybercrime*. European Treaty Series. No 185. Article 24.

61. Sri Lanka hosted the first IGF on 25 April 2016 and it has subsequently been convened every year in other locations. Although there was a Women's IGF which was convened to ensure a gender-perspective on the IGF discussion in Sri Lanka, there was nothing specifically on OCSE. During the panel discussions, there were conversations focused heavily on the lack of access and harassment faced online by women. Retrieved from *Women and Media Collective*: <http://womenandmedia.org/test-2/>. [Accessed on: 5 February 2019].
62. UNICEF. Retrieved from <https://www.unicef.org/events/yokohama/sasia-outcome.html>. [Accessed on: 29 January 2019].
63. Sri Lanka held the South Asian Mid-Term Review of developments after the First and Second World Congress, ECPAT International. (2009). *Report of the World Congress III Against Sexual Exploitation of Children & Adolescent*. Retrieved from [https://www.ecpat.org/wp-content/uploads/legacy/ECPATWCIIIReport\\_FINAL.pdf](https://www.ecpat.org/wp-content/uploads/legacy/ECPATWCIIIReport_FINAL.pdf). [Accessed on: 29 January 2019].
64. Rio Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents. Retrieved from [https://www.unicef.org/protection/Rio\\_Declaration\\_and\\_Call\\_for\\_Action.pdf](https://www.unicef.org/protection/Rio_Declaration_and_Call_for_Action.pdf). [Accessed on: 28 January 2019].
65. UNICEF. Retrieved from <https://www.unicef.org/events/yokohama/sasia-outcome.html>. [Accessed on: 29 January 2019].

against Sexual Exploitation and Sexual Abuse, which focuses on the best interests of the child. The Lanzarote Convention defines grooming as 'preparation of a child for sexual abuse, motivated by a desire to use the child for sexual gratification.'<sup>66</sup> Sri Lanka is not a signatory to the Lanzarote Convention.<sup>67</sup>

### **International Labour Organisation (ILO) Convention on the Worst Forms of Child Labour (No. 182)**

Forms of OCSE include trafficking of children, child prostitution and child pornography. The ILO Convention on the Worst Forms of Child Labour (No. 182), includes the prohibition of the sale and trafficking of children for sexual exploitative purposes. It additionally references child prostitution and the procurement of children for the purposes of producing child pornography. It further mandates all state parties to take 'immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour, as a matter of urgency.' Recommendation No. 190 also requires that states create and compile statistical data and maintain a database on the nature and extent of child labour in their respective countries to inform national action. Sri Lanka ratified this Convention in March 2001.<sup>68</sup>

### **Palermo Protocol**

Sri Lanka ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) in June 2015. The Palermo Protocol is the primary international instrument on trafficking in persons and for the first time defines what trafficking in persons is.<sup>69</sup> Article 5 of the Palermo Protocol places an affirmative obligation on state parties to criminalise trafficking in persons. It further calls on states to adopt measures in prevention, prosecution and protection with specific focus on children.

### **WeProtect Summit & South Asian Initiative to End Violence Against Children (SAIEVAC)**

Other initiatives include the WeProtect Summit and the South Asian Initiative to End Violence Against Children (SAIEVAC). In December 2014, 64 countries attended the WeProtect Summit, and signed a Statement of Action and adopted a Model National Response to child protection. Sri Lanka is a member of WeProtect, which focuses on online sexual exploitation of children. WeProtect calls on countries to identify victims and ensure support; investigate and prosecute cases of exploitation; increase public

66. Council of Europe. Lanzarote Convention. (2007. October 25). *Explanatory Report – Protection of Children against Sexual Exploitation and Sexual Abuse*. European Treaty Series No. 201. Retrieved from: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3832>. [Accessed on: 14 February 2019]. It may involve the befriending of a child, often through the adult pretending to be another young person, drawing the child into discussing intimate matters, and gradually exposing the child to sexually explicit materials in order to reduce resistance or inhibitions about sex. The child may also be drawn into producing child pornography by sending compromising personal photos using a digital camera, web-cam or phone-cam, which provides the groomer with a means of controlling the child through threats. Where a physical meeting is arranged the child may be sexually abused or otherwise harmed.

67. *Chart of signatures and Ratifications of Treaty 201, Lanzarote Convention*. (status as of 2019. September 20). Retrieved from Council of Europe: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures>. [Accessed on: 28 January 2019].

68. International Labour Organization (No. 182. (1999). *The Worst Forms of Child Labour Convention, and Recommendation No. 190 adopted at the ILO Conference of June 1999*. Retrieved from [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312327](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312327). [Accessed on: 28 January 2019].

69. Trafficking in Persons is defined as: the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or

awareness of the risks of online activities for children and reduce the availability of child sexual abuse material online. WeProtect also created a Model National Response to child sexual exploitation and abuse which lists 21 capabilities that member countries should be emulating domestically.

The SAIEVAC focuses on commercial sexual exploitation of children through prostitution and sex tourism industries.<sup>70</sup> It also called on states to 'enforce a code of conduct' for Internet service providers, and private companies to prevent sexual exploitation of children.<sup>71</sup> Sri Lanka is a member of SAIEVAC.

**Table 2: Sri Lanka's compliance with relevant international instruments**

International Instrument	International Obligations	Sri Lanka's Compliance
<p><b>Convention on the Rights of the Child (CRC)</b></p>	<p>CRC defines a child as under 18 years of age.</p>	<ul style="list-style-type: none"> <li>• Definition of a child is inconsistent across Sri Lanka's legal system.</li> <li>• Penal Code under the following sections a child is defined as under eighteen years: Obscene Publications of a Child (Section 286A), Cruelty (Section 308A), Sexual Exploitation (Section 360B), Trafficking Section 360C), and Grave Sexual Abuse (Section 365B).</li> <li>• However, the Children and Young Persons Ordinance defines a 'child' as being under 14, and a 'young person' as being between 14 and 16 years only for the purpose of care and protection and juvenile justice.</li> <li>• The Penal Code (Amendment) Act (PCA), No. 22 of 1995, places the age of consent at sixteen years.<sup>72</sup></li> </ul>

services, slavery or practices similar to slavery, servitude or the removal of organs. See Palermo Protocol Article 3, Paragraph (a).

70. *Thematic Areas*. Retrieved from South Asian Initiative to End Violence Against Children (SAIEVAC): <http://www.saievac.org/our-work-2/thematic-areas/sexual-abuse-and-exploitation/>. [Accessed on: 5 February 2019].

71. *Thematic Areas*. Retrieved from South Asian Initiative to End Violence Against Children (SAIEVAC).

72. The age of marriage is 18 (however under Muslim Law, Muslim Marriage and Divorce Act) a person under 12 years can be married with the consent of the Quazi.

International Instrument	International Obligations	Sri Lanka's Compliance
	<p>Article 34: requires states to prohibit child sexual exploitation.<sup>73</sup> This is defined as</p> <p>(a) the inducement or coercion of a child to engage in any unlawful sexual activity;</p> <p>(b) the exploitative use of children in prostitution or other unlawful sexual practices;</p> <p>(c) the exploitative use of children in pornographic performances and materials.</p> <p>Article 16: obliges states to ensure that each child is free from unlawful interferences with their privacy or unlawful attacks on their honour and reputation</p>	<p><i>Sexual Exploitation of Children, Section 360B:</i></p> <ul style="list-style-type: none"> <li>Does not capture the concept of exchange which is an essential element of exploitation as defined in CRC.</li> </ul> <p><i>Hiring or Employing Children to Act as Procurers, Section 288A:</i></p> <ul style="list-style-type: none"> <li>Limits the criminalisation of procurers of children for sexual intercourse and not <i>any unlawful sexual activity</i> as noted in CRC.</li> </ul> <p><i>Rape, Section 363</i></p> <ul style="list-style-type: none"> <li>Uses gendered pronouns essentially codifying that males are perpetrators and thus cannot be victims of rape which is inconsistent with the CRC, which necessitates non-discrimination based on sex, and equality of the sexes.</li> </ul> <p><i>Grave Sexual Abuse, Section 365(B):</i></p> <ul style="list-style-type: none"> <li>Is broadly defined and thus meets minimum obligation under CRC to criminalise underlying sexual abuse sometimes perpetuated during OCSE.</li> </ul> <p><i>Publication of Matter relating to Certain Offences, Section 365C:</i></p> <ul style="list-style-type: none"> <li>Consistent with Sri Lanka's obligations under the CRC.</li> <li>However, in practice print media does use the names of victims in their reportage.<sup>74</sup></li> </ul>
<p><b>Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OP-SC)</b></p>	<p>Article 2: child pornography is defined as 'any representation, by whatever means, of a child engaged in real or <b>simulated</b> explicit sexual activities or <b>any representation</b> of the sexual parts of a child for primarily sexual purposes'.<sup>75</sup></p>	<p><i>Obscene Publication of a Child, Section 286A:</i></p> <ul style="list-style-type: none"> <li>Term <i>obscene</i> can be used to describe a multitude of acts, including conduct that is deemed immoral but not sexually explicit.<sup>76</sup></li> <li>Penal Code does not criminalise simulated representations or realistic images that appear to be a child.</li> </ul>

73. UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577. Article 34. Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. [Accessed on: 28 January 2019].

74. See Verité Research Pvt. Ltd., Ethics Eye Platform, retrieved from <https://www.facebook.com/ethicseye/photos/p.480472248974504/480472248974504/?type=1>. [Accessed on: 2019].

75. UN Committee on the Rights of the Child (CRC). (2000. May 25). Preamble of the Optional Protocol on the Sale of Children, Child Pornography and Prostitution. UN Doc, A/RES/54/263, Article 2.

76. This section of the Penal Code has been used to prosecute acts that are deemed immoral. For example, the image of individuals atop the Pidurangala a religious site. The conduct that was obscene was not the nude image itself, but that individuals were nude on top of a sacred rock which was considered sacrilege. See Adaderana. (2018, September 27). Youth arrested over semi-naked photos at Pidurangala. Retrieved from <http://www.adaderana.lk/news/50307/youth-arrested-over-semi-naked-photos-at-pidurangala-remanded>. [Accessed on: 14 February 2019]. Including conduct where perpetrators take photographs described as 'up-skirting.' There are websites and social media pages dedicated to these types of images in Sri Lanka. For example, various Sri Lankan School Girl pages, Lassana Podi Kello. Key Informant Interviews with Grassrooted Trust (Ltd.) et al.

International Instrument	International Obligations	Sri Lanka's Compliance
		<p><i>Procurement, Section 360A:</i></p> <ul style="list-style-type: none"> <li>Section is consistent with Sri Lanka's commitments</li> </ul>
	Article 8: protects the identity of child victims.	<p><i>Publication of Matter relating to Certain Offences, Section 365C:</i></p> <ul style="list-style-type: none"> <li>Consistent with obligations under OPSC</li> </ul>
	Preamble read with Article 8 and Article 9 places the best interest of the child as the primary consideration and requires state parties to take measures to ensure that a victims' safety is ensured. <sup>77</sup>	<p><i>Electronic Transaction Act, No. 19 of 2006:</i><sup>78</sup></p> <ul style="list-style-type: none"> <li>Consistent with obligations under OPSC</li> </ul>
	Article 9: monetary compensation for victims	National Authority for the Protection of Victims of Crimes and Witnesses is empowered under the Assistance to the Protection of Victims of Crime and Witnesses Act, No. 4 of 2015, to provide monetary compensation to child victims.
	Article 4 and Article 5: refers to extradition for the offence of child pornography	<p><i>Extradition</i></p> <p>Obscene publications is not an extraditable offence. Thus, Sri Lanka has not given effect to the OPSC on extradition in national law, thus limiting the protection regime on OCSE and compliance within the spirit of the law under the OPSC.</p>
<b>ILO Worst Forms of Child Labour Convention, 1999 (No. 182)</b>	Article 3 (b): prohibits the procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances	<p><i>Procurement, Section 360A:</i></p> <ul style="list-style-type: none"> <li>Prohibiting procurement for prostitution is consistent with Sri Lanka's commitments</li> <li>However this section does not mention production of pornography or pornographic performances which is problematic</li> </ul>
	Article 3 (a) and (c): prohibition of the sale and trafficking of children for sexual exploitative purposes.	<p><i>Hiring or Employing Children to Act as Procurers, Section 288A:</i></p> <ul style="list-style-type: none"> <li>Section 288A limits the criminalisation of procurers of children for sexual intercourse, does not include production of pornography or pornographic performances.</li> </ul> <p><i>National Plan of Action for Children in Sri Lanka</i></p> <ul style="list-style-type: none"> <li>Contains commitments to address child labour as it is defined in ILO-C182, and the protection of children from all forms of sexual exploitation in relation to trafficking, sale of children and commercial sex networks</li> </ul>

77. UN Committee on the Rights of the Child (CRC). (2000. May 25). Preamble of the Optional Protocol on the Sale of Children, Child Pornography and Prostitution. UN Doc, A/RES/54/263, Article 8 and Article 9.

78. *Electronic Transactions Act No. 19 of 2006*, S.21.

International Instrument	International Obligations	Sri Lanka's Compliance
<b>Budapest Convention – Convention on Cyber-crime (Council of Europe)</b>	Article 9: defines child pornography to include both real and images that <b>appear to be a minor</b> and <b>realistic images representing minors</b> .	<p><i>Obscene Publication of a Child, Section 286A</i></p> <ul style="list-style-type: none"> <li>Sri Lanka took advantage of the reservations provided for in Article 9. Thus, it does not criminalise images that <b>appear to be a minor</b> and <b>realistic images representing minors</b>.</li> <li>This section does cover distribution of child pornography</li> <li>But does not criminalise <b>producing</b> child pornography for distribution as required under Article 9.</li> </ul> <p><i>Computer Crimes Act, No.24 of 2007</i></p> <ul style="list-style-type: none"> <li>Notably does not include child pornography as an enumerated offense. This is problematic as the Act does give broad investigatory powers for the crimes that are enumerated in the Act. Thus, by excluding child pornography it weakens the protection system on OCSE.</li> </ul>
	Article 24: obligates state parties to ensure that child pornography as defined in Article 9 is an extraditable offense	<p><i>Extradition:</i></p> <ul style="list-style-type: none"> <li>Obscene publications/child pornography is not an extraditable offence. Thus, Sri Lanka has not given effect to the Budapest Convention on extradition in national law, thus limiting the protection regime on OCSE and compliance within the spirit of the law in the Convention.</li> </ul>
<b>Palermo Protocol - Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children</b>	Article 5: places an affirmative obligation on state parties to criminalise trafficking in persons.	<p><i>Trafficking, Section 360C</i></p> <ul style="list-style-type: none"> <li>Mimics the definition of the Palermo Protocol.</li> <li>However, enforcement under this section is weak.</li> </ul>
<b>Rio Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents – World Congress 2008</b>	Section 7: calls on states to implement legislation that requires ISPs to voluntarily provide information on child sexual abuse images Section 10: update the Interpol list of websites that host child sexual abuse images	<p><i>Duty of a Person Providing Services by Computer to Prevent Sexual Abuse of a Child, Section 286B and Duty to inform of use of premises for Child Abuse, Section 286C</i></p> <ul style="list-style-type: none"> <li>Consistent with commitments under the Rio Declaration to involve ISPs in the protection regime</li> <li>According to various KII's Sri Lanka is working with Interpol to provide information on these websites.</li> </ul>
	Section 9: calls on financial institutions to trace and stop the flow of financial transactions that facilitate child pornography	<p><i>Clause 33 of the Financial Transactions Reporting Act No. 6 of 2006 and Central Bank Circular: Light a Million Candles Campaign reminds financial institutions that under clause 33 child pornography is an offense against children and is an unlawful activity. Thus, financial institutions must report suspicious financial activity in this regard.</i><sup>79</sup></p>

79. Light a Million Candles Campaign to CEO's of All Commercial Banks. (2007). Retrieved from *Financial Intelligence Unit, Central Bank Circulars*: [http://fiusrilanka.gov.lk/docs/Circulars/2007/Light\\_a\\_million\\_candles\\_campaign-Offences\\_against\\_Children.pdf](http://fiusrilanka.gov.lk/docs/Circulars/2007/Light_a_million_candles_campaign-Offences_against_Children.pdf) [Accessed on: 14 February 2019].

International Instrument	International Obligations	Sri Lanka's Compliance
<b>WeProtect Global Alliance</b>	<p>Calls on countries to identify victims and ensure support; investigate and prosecute cases of exploitation; increase public awareness of the risks of online activities for children and reduce the availability of child sexual abuse material online:</p> <p>Model National Response to child sexual exploitation and abuse which lists 21 capabilities that member countries should be emulating domestically</p>	<p><i>Sexual Exploitation of Children, Section 360B:</i></p> <ul style="list-style-type: none"> <li>Inconsistent with commitments under WeProtect which calls on states to use the Luxembourg Guidelines definition of sexual exploitation as 'sexual activity in exchange for something from a third party, perpetrator or by the child.'</li> </ul> <p><i>Soliciting a Child; Section 360E</i></p> <ul style="list-style-type: none"> <li>The solicitation section in the Penal Code does not explicitly include online means of solicitation, and is thus inconsistent with Sri Lanka's commitments.</li> </ul> <p><i>NCPA 1929 Hotline:</i></p> <ul style="list-style-type: none"> <li>The child helpline is consistent with Sri Lanka's commitments under the WeProtect Alliance to establish a child abuse helpline.</li> </ul> <p><i>Technical Institutions:</i></p> <ul style="list-style-type: none"> <li>Existence of technical institutions that assist in investigations like SLCERT and Cybercrimes division of CID is consistent with commitments.</li> </ul>
<b>South Asian Initiative to End Violence Against Children (SAIEVAC)</b>	<p>Focuses on commercial sexual exploitation of children through prostitution and sex tourism industries.<sup>80</sup> It's key areas also include online child pornography.</p> <p>Calls on states to 'enforce a code of conduct' for Internet service providers, and private companies to prevent sexual exploitation of children.<sup>82</sup></p>	<p><i>National Human Rights Action Plan:</i></p> <ul style="list-style-type: none"> <li>This is inconsistent with Sri Lanka's obligations to SAIEVAC to ensure the protection of children from sexual exploitation by enacting legislation and administrative measures to that effect.</li> </ul> <p><i>National Plan of Action for Children in Sri Lanka:</i></p> <ul style="list-style-type: none"> <li>Although this Plan does not explicitly mention OCSE, it does include various programme initiatives that relate to OCSE, for example amending the prevention of Crimes Ordinance to improve the identification of child sex offenders as currently, sex offences are not finger printable; drafting and enacting the Obscene Publications Act; developing a plan of action for children living in tourist areas on the coastal belt to prevent child trafficking; and undertaking data collection and research on sexual exploitation of children.<sup>81</sup></li> </ul> <p><i>Duty of a Person Providing Services by Computer to Prevent Sexual Abuse of a Child, Section 286B and Duty to inform of use of premises for Child Abuse, Section 286C</i></p> <ul style="list-style-type: none"> <li>Consistent with commitments under SAIEVAC to involve ISPs in the protection regime</li> </ul>

80. Thematic Areas. Retrieved from South Asian Initiative to End Violence Against Children (SAIEVAC): <http://www.saievac.org/our-work-2/thematic-areas/sexual-abuse-and-exploitation/> [Accessed on: 5 February 2019].

81. National Plan of Action for Children in Sri Lanka 2016-2020. Retrieved from Sri Lanka Ministry of Women and Child Affairs: <https://www.dropbox.com/s/js9fpf9qd42lo37/Final%20-%20%20National%20Plan%20of%20Action%20for%20Children.pdf?dl=0>. [Accessed on: 25 January 2019].

82. Thematic Areas. Retrieved from South Asian Initiative to End Violence Against Children (SAIEVAC).

International Instrument	International Obligations	Sri Lanka's Compliance
<b>Luxembourg Guidelines</b>	Aims to create a cohesive protection system for child exploitation. The Luxembourg Guidelines, provide specific definitions for what constitutes OCSE, including other crimes.	<p><i>Sexual Exploitation of Children, Section 360B</i></p> <ul style="list-style-type: none"> <li>Inconsistent with the Guidelines as the Guidelines define sexual exploitation as 'sexual activity in exchange for something (gain, benefit, promise) from a third party, perpetrator or by the child [themselves].'<sup>83</sup></li> </ul> <p><i>Soliciting a Child; Section 360E</i></p> <ul style="list-style-type: none"> <li>Inconsistent with Guidelines as it does not explicitly include the online aspect.</li> <li>Further it doesn't target Online grooming an evolving form of OCSE in Sri Lanka. The Luxembourg Guidelines defines grooming as (i) contacting a child; (ii) if online, through ICTs; (iii) with the intent of luring or inciting the child; (iv) to engage in any sexual activity by any means, whether online or offline.<sup>84</sup></li> </ul>
<b>Lanzarote Convention – Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Council of Europe)</b>	The first international instrument that defines and calls on states to prohibit grooming. Note: Sri Lanka is not a state party to the convention.	Sri Lanka should thus accede to the Lanzarote Convention which would provide incentive to criminalise grooming which the Convention defines as a predecessor to sexual abuse of children.

83. Luxembourg Guidelines. (2016. January 28). Terminology *Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*.

84. The Luxembourg Guidelines on Terminology were spearheaded by ECPAT International. The Interagency Working Group included regional groups, relevant UN Agencies, and international civil society members. Retrieved from <http://luxembourgguidelines.org/partners/>. [Accessed on: 28 January 2019].

# 4

## ASSESSMENT OF THE DOMESTIC LEGAL FRAMEWORK ON OCSE

The Economist's Intelligence Unit's 'Out of the Shadows Index' assesses how 40 states are responding to the threat of child sexual abuse and exploitation.<sup>85</sup> The index determined that Sri Lanka's legal framework<sup>86</sup> score was 50.4 in comparison to the average of all 40 countries which was 63.0 out of 100. Additionally, Sri Lanka scored 21.4 out of 100 for its contextual legal framework.<sup>87</sup> Sri Lanka's overall score on the index was 50.8 out of 100, with the median country scoring 55.4. Thus, the evaluation of Sri Lanka's domestic legal framework is essential to understanding how it responds to OCSE and identify what the protection system looks like.

This section first provides an assessment of the substantive law, and then evaluates the procedural law relevant to OCSE in Sri Lanka. The assessment of the substantive law will identify the relevant provisions in the Penal Code that can be used to prosecute OCSE, and assess whether this framework is consistent with international standards, with particular focus on the standards that are legally binding on Sri Lanka. The evaluation of the procedural law will identify the relevant provisions relating to the prosecution of OCSE. It will then analyse whether these provisions are consistent with international standards.

### 4.1. Substantive Law

The two key substantive laws relevant to OCSE in Sri Lanka are the Penal Code and the Computer Crimes Act, No. 24 of 2007. Under the Sri Lankan Constitution, the state

is entrusted with the special care of children under Article 27(13). This includes protection from exploitation.

85. The Economist Intelligence Unit, Sri Lanka Country Profile. (2019). *Out of the Shadows: Shining light on the responses to child sexual abuse and exploitation- a 40 country benchmark index*. Retrieved from [https://outoftheshadows.eiu.com/wp-content/uploads/2019/01/LK\\_SRI-LANKA\\_PROFILE.pdf](https://outoftheshadows.eiu.com/wp-content/uploads/2019/01/LK_SRI-LANKA_PROFILE.pdf). [Accessed on February 20, 2019].

86. The Index evaluates the degree to which a country provides legal or regulatory protections for children from sexual exploitation or abuse. See also the Economist Intelligence Unit, Sri Lanka Country Profile. (2019). *Out of the Shadows: Shining light on the responses to child sexual abuse and exploitation- a 40 country benchmark index*.

87. The index assessed the following categories: a) enabling legislation for child rights; b) constitutional protections; c) mandatory reporting; d) sub-national jurisdiction; e) statute of limitations; f) national sex offender registry; g) persons in a position of trust. See also *Methodology Paper-Out of the Shadows: Shining light on the response to child sexual abuse and exploitation – a 40 country benchmark index*. (2018, January). Retrieved from The Economist Intelligence Unit <https://outoftheshadows.eiu.com/about/>. p.9 [Accessed on: 11 February 2019].

Assessing the letter of the law, the current Penal Code and the Computer Crimes Act in Sri Lanka, does not explicitly criminalise OCSE. There is no specific section of the Penal Code that explicitly defines OCSE. Although there is a provision for CSE, it does not sufficiently proscribe the variations of OCSE identified in the international framework. Additionally, the Penal Code itself does not specifically identify ICT as a means of facilitating sexual exploitation of children. The Computer Crimes Act, No. 24 of 2007 proscribes cybercrime but fails to criminalise OCSE. It makes no mention of the possibility of using ICT to enable sexual exploitation of children.

Therefore, it is useful to evaluate the current provisions on sexual exploitation of children to essentially determine in terms of the spirit of the law: 1) does Sri Lanka adequately criminalise the variations of sexual exploitation of children; 2) can these provisions be read broadly to encompass OCSE.

The assessment of the substantive law below will first evaluate the definition of a child in Sri Lanka. It will then evaluate Sri Lanka's explicit provision in Section 360B of the Penal Code, which concerns sexual exploitation of children. This provision will be assessed to determine whether it is sufficiently expansive to prosecute OCSE. The next section will evaluate the other provisions in the Penal Code, which proscribe the other variations of OCSE that are not covered under Section 360B. Since OCSE has both 'contact' and 'non-contact' components, it is important to also identify the provisions in the Penal Code that proscribe the underlying physical conduct of OCSE. This section will identify and analyse these provisions.

### **Definition of a child in Sri Lanka**

The definition of a child is inconsistent across Sri Lanka's legal system. The Age of Majority (Amendment) Act, No. 17 of 1989 places the age of majority at 18. The Penal Code and its Amendments of 1995, 1998, 2006 have all defined a child as under eighteen years in relation to the following offences: Obscene Publications of a Child (Section 286A), Cruelty (Section 308A), Sexual Exploitation (Section 360B), Trafficking (Section 360C), and Grave Sexual Abuse (Section 365B).

The Children and Young Persons Ordinance (CYPO) 1939 defines a 'child' as being under 14, and a 'young person' as being between 14 and 16 years only for the purpose of care and protection and juvenile justice. The Penal Code (Amendment) Act (PCA), No. 22 of 1995, places the age of consent at sixteen years.<sup>88</sup> Under section 75 and 76 of the Penal Code, the minimum age of criminal responsibility is 12 years old.<sup>89</sup> Section 364(2)(e) which deals with rape of a child, states that whoever 'commits rape on a woman under eighteen years of age', which means that rape of a male child is not specifically criminalised in Sri Lanka. Yet, the age of consent in Sri Lanka is 16 years, which means they are considered legally able to consent to sexual activity.

Thus, consensual sexual activity between the ages of 16 and 18 years is not considered statutory rape. However, if children engage in consensual sexual activity below the age of 16, regardless of consent, it is still deemed statutory rape. How a child is defined in domestic law is imperative to determine the protection mechanisms in place. For example, depending on the age of the victim different

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88. The age of marriage is 18 (however under Muslim Law, *Muslim Marriage and Divorce Act*) a person under 12 years can be married with the consent of the Quazi.

89. Although judges have discretion to decide whether to hold criminally accountable a child between 12 and 14 years of age.

sections of the Penal Code will apply, thus triggering different protections. The lack of consensus on how a child is defined in the

Sri Lankan legal infrastructure can create challenges in how the substantive law will be applied.

## 4.2 The Penal Code

The Penal Code does not explicitly proscribe OCSE, nor does it specifically contemplate 'online' exploitation; however, its general provisions still appear to adequately cover OCSE. There are several offences in the Penal Code that could be used to prosecute OCSE, they include:

- Section 286A: Obscene Publication of a Child;
- Section 286B: Duty of a Person Providing Service by Computer to Prevent Sexual Abuse of a Child;
- Section 286C: Duty to inform of use of premises for Child Abuse;
- Section 288A: Hiring or Employing Children to Act as Procurers;
- Section 345: Sexual Harassment,
- Section 360A: Procurement;
- Section 360B: Sexual Exploitation of Children;
- Section 360C: Trafficking;
- Section 360E: Soliciting a Child;
- Section 363: Rape;
- Section 364A: Incest;
- Section 365: Unnatural Offences;
- Section 365A: Acts of Gross Indecency between Persons;
- Section 365B: Grave Sexual Abuse;
- Section 365C: Publication of Matter relating to Certain Offences; and
- Section 372: Extortion.

Each section will be evaluated below. Please see Annexure 2 for the sentencing on these offenses.

### ***Sexual Exploitation of Children, Section 360B***

The specific section for sexual exploitation of children in the Penal Code is limited. It is defined as:

'knowingly permit[ing] any child to remain in any premises for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show;

act[ing] as a procurer of a child for the purposes of sexual intercourse or for any form of sexual abuse;

induc[ing] a person to be a client of a child for sexual intercourse or any form of sexual abuse by means of print or other media, oral advertisement or similar means'.

The first part of the section prohibits brothel houses engaging in child sexual activity. The second part prohibits child prostitution. The third part proscribes the advertisement of children for prostitution. While the third part does not specify online means of advertisement, it can be interpreted to include online means. CSE in the Penal Code addresses specific types of exploitation: child sex tourism, and child prostitution. Although this section in the Penal Code does not include

the many variations of exploitation, it does mention procurement, which can be read to include some exploitative practices.

The Luxembourg Guidelines define sexual exploitation as 'sexual activity in exchange for something (gain, benefit, promise) from a third party, perpetrator or by the child [themselves].'<sup>90</sup> This definition is further given authority through the WeProtect Alliance, which calls on state parties to follow the Luxembourg Guidelines when drafting legislation. The CRC places an obligation on state parties to proscribe sexual exploitation of children. It specifically uses the term 'the exploitative use of children in prostitution or other unlawful sexual practices.' An essential element of CSE is the 'exchange' that occurs between a perpetrator and a child for sexual activity. This concept of exchange is not codified in the Penal Code, which is inconsistent with Sri Lanka's commitments under the CRC and the WeProtect Alliance.

Since this section on CSE does not proscribe the many variations of OCSE nor explicitly include the online aspect of CSE, it is necessary to read section 360B together with the additional provisions of the Penal Code to address the gap that exists in the former. The following sections of this study will first evaluate the Penal Code as it applies to other forms of OCSE outside the ambit of section 360B, and then assess the provisions in the Penal Code that criminalise the underlying physical conduct of OCSE.

## Other Forms of OCSE:

### ***Obscene Publication of a Child: Section 286A***

The Penal Code (Amendment) Act, No. 22 of 1995, criminalised obscene publication of a child through section 286A of the Penal Code. The terminology used in the Penal Code does not explicitly refer to child sexual abuse material or child pornography.<sup>91</sup> Additionally, this section of the Penal Code does not specifically include the Internet as a means of production, dissemination or consumption of child pornography or child sexual abuse materials. Although states may criminalise traditional production and the physical distribution of child pornography/child sexual abuse material, many states strongly felt that the Internet was becoming the primary means of facilitating the production, distribution and consumption of child pornography, thus it was important to specifically criminalise ICT facilitation of child sexual abuse material.<sup>92</sup> The Penal Code reads as follows:

any child appear[ing] or perform[ing], in any obscene or indecent exhibition or show or to pose or model for, or to appear in, any obscene or indecent photograph, or film or who sells or distributes, or otherwise publishes, or has in his possession, any such photograph or film.<sup>93</sup>

There are three key gaps between the international standards and Sri Lanka's existing law in relation to child pornography.

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90. Luxembourg Guidelines. (2016. January 28), p. 24-25.

91. According to the Luxembourg Guidelines the term child sexual abuse material instead of child pornography more accurately reflects the nature of and severity of the content as well as challenges any notion that such acts were carried out pursuant to the consent of the child. See Luxembourg Guidelines. (2016. January 28), p. 39 – 42.

92. See Council of Europe. Budapest Convention. (2001. November 23). Explanatory Report to the Convention on Cybercrime. European Treaty Series. No 185. See also International Centre for Missing & Exploited Children. (2018). *Child Sexual Abuse Material – Model Legislation and Global Review* (9th Edition. p.55) Retrieved from: <https://www.icmec.org/wp-content/uploads/2018/12/CSAM-Model-Law-9th-Ed-FINAL-12-3-18.pdf>. [Accessed on: 20 February 2019].

93. Penal Code 1883, Section 286A.

The first is that the current terminology in the Penal Code can be interpreted to include child pornography/CSAM but it is overly broad. The Budapest Convention minimum standard of child pornography is 'a minor engaging in sexually explicit conduct.' The Penal Code defines 'film' as any form of video recording. The Penal Code does not define what constitutes 'obscene' or 'indecent', and thus judges will be left to decide what amounts to obscene or indecent.<sup>94</sup> The term, obscene<sup>95</sup> or indecent can be used to describe a multitude of acts, including conduct that is deemed immoral but not sexually explicit.<sup>96</sup> The broad use of the term obscene and indecent, read together with the definition of film, could be construed to include online child pornography. However, this definition is broader than the terminology adopted in the Budapest Convention and the OPSC.<sup>97</sup>

The second is that the Penal Code does not criminalise simulated representations or realistic images that appear to be

a child. Under the OPSC, the definition of child pornography is any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes. The International Centre for Missing & Exploited Children in their Global Legislative Review, also found that Sri Lanka does not define CSAM/child pornography, which should include real or simulated images of child sexual abuse material.<sup>98</sup> The Penal Code does not specifically define pornography/CSAM as simulated explicit sexual activity, which would criminalise images or realistic representations that appear to be a child<sup>99</sup> and not images of an actual child. This type of prohibition could curb the demand that fuels OCSE by criminalising the behaviour of perpetrators and the sub-culture of using children in sex culture.<sup>100</sup> By neglecting to criminalise simulated representations and realistic images of children, Sri Lanka fails to meet its obligations under the OPSC.

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94. The Supreme Court of Sri Lanka has adopted the U.K definition of obscenity taken from the 1868 case of Regina v. Hicklin, which is 'whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.' *Cited in* Institute for Participatory Interaction in Development. (2018). *Keeping Children in Sri Lanka Safe and Empowered Online*. commissioned by UNICEF.
95. *obscene*. Retrieved from Cambridge Dictionary: <https://dictionary.cambridge.org/dictionary/english/obscene>. [Accessed on: 14 February 2019].
96. This section of the Penal Code has been used to prosecute acts that are deemed immoral. For example, the image of individuals atop the Pidurangala rock- a religious site. The conduct that was obscene was not the image itself, but that individuals were nude on top of a sacred rock which was considered sacrilege. See Adaderana. (2018, September 27). Youth arrested over semi-naked photos at Pidurangala. Retrieved from <http://www.adaderana.lk/news/50307/youth-arrested-over-semi-naked-photos-at-pidurangala-remanded>. [Accessed on: 14 February 2019]. Including conduct where perpetrators take photographs described as 'up-skirting.' There are websites and social media pages dedicated to these types of images in Sri Lanka. For example, various Sri Lankan School Girl pages, Lassana Podi Kello. Key Informant Interviews with Grassrooted Trust (Ltd.) et al.
97. Cybercrime Legislation in Sri Lanka, presentation made by Jayantha Fernando, Legal Advisor, ICTA on 16 November 2016. Retrieved from: <https://rm.coe.int/16806bdcd8%20accessed%201/25/19>. [Accessed on 25 January 2019].
98. International Centre for Missing & Exploited Children. (2018). *Child Sexual Abuse Material – Model Legislation and Global Review* (9th Edition. p.55). Retrieved from: <https://www.icmec.org/wp-content/uploads/2018/12/CSAM-Model-Law-9th-Ed-FINAL-12-3-18.pdf>. [Accessed on: 14 February 2019].
99. According to the Luxembourg Guidelines, this is usually referred to as virtual child pornography, where 'computer-generated child sexual abuse material is the production, through digital media, of child sexual abuse material and other artificially or digitally created sexualised images of children.' This can include *manga* or *anime*. Thus while there is no real child victimised, the Budapest Convention and the Lanzarote Convention has still proscribed this content as ' (i) it is known to be used in grooming children for exploitation; (ii) it fuels very real fantasies, encourages the propensity of sexual predators, and contributes to maintaining a market for child sexual abuse material; and (iii) it creates a culture of tolerance for the sexualisation of children and thereby cultivates demand.' Luxembourg Guidelines. (2016. January 28), p. 40-41.
100. Council of Europe. Budapest Convention. (2001, November 23). *Explanatory Report on the Convention if Cybercrime*. European Treaty Series. No 185.

The third issue is that the Penal Code does not incorporate the necessary mental status articulated in the Budapest Convention. The Budapest Convention places an affirmative obligation on states to ensure that their national legislation prohibits producing child pornography for the purpose of distribution through a computer system.<sup>101</sup> Under the Sri Lankan Penal Code, this is not explicitly prohibited, thus failing to meet Sri Lanka's minimum commitments under the Budapest Convention on cybercrime.<sup>102</sup> The Penal Code does prohibit distribution of obscene publications of a child, but fails to include the mental state—a consciously formed intent to distribute child pornography through a computer system. This omission weakens the protection system on distribution of child pornography.

A new Obscene Publications Bill expands the current statute to include electronic means of distribution and production.<sup>103</sup> However, it does not proscribe simulated images or images that appear to be of a child. Additionally, it does not include a provision to ensure that the image itself is criminalised regardless of the age of the actual child at the time the image is viewed. The Bill has been with the

Attorney General's Department since 2012 and was still with the Attorney General to determine its constitutionality in 2017.<sup>104</sup>

***Duty of a Person Providing Services by Computer to Prevent Sexual Abuse of a Child: Section 286B and Duty to inform of use of premises for Child Abuse: Section 286C***

The Penal Code (Amendment) Act, No. 16 of 2006, created an affirmative duty on Internet service providers (ISPs) to report instances of sexual abuse of children, through section 286B of the Penal Code. The Penal Code also requires ISPs to turn over any identifying information to law enforcement. This in theory encourages ISPs to proactively block access to content sites that display child sexual abuse images. This is consistent with standards under Section II of the Rio Declaration and SAIEVAC.<sup>105</sup> Since OCSE is facilitated by ICT, it is essential to involve ISPs in the protection regime. Therefore, criminalising the failure to report instances of abuse of a child not only encourages the coordination of private companies with local law enforcement, but also requires that ISPs block access to this type of content.<sup>106</sup>

101. Council of Europe. Budapest Convention. (2001, November 23). *Explanatory Report on the Convention if Cybercrime*. European Treaty Series. No 185.

102. The object and purpose were to criminalise electronic production, not simply traditional production and distribution methods. Thus, expanding the protection regime and meeting the challenge of criminalising the evolving facets of ICT facilitated exploitation of children. See Council of Europe. Budapest Convention. (2001. November 23). *Explanatory Report to the Convention on Cybercrime*. European Treaty Series. No 185.

103. Sri Lanka Ministry of Justice. (2011). *Parliamentary Performance Report of 2011*. Retrieved from [http://www.parliament.lk/papers\\_presented/19062013/performance\\_report\\_ministry\\_of\\_justice\\_2012.pdf](http://www.parliament.lk/papers_presented/19062013/performance_report_ministry_of_justice_2012.pdf) . See also Sri Lanka Ministry of Justice and Prison Reform. (2017). *Parliamentary Performance Report January-December 2017*. (2017). Retrieved from Sri Lanka Ministry of Justice and Prison Reforms: <http://www.parliament.lk/uploads/documents/paperspresented/performance-report-ministry-of-justice-2017.pdf>. [Accessed on: 14 February 2019].

104. Sri Lanka Ministry of Justice. (2011). *Parliamentary Performance Report of 2011*. See also Sri Lanka Ministry of Justice and Prison Reform. (2017). *Parliamentary Performance Report January-December 2017*. (2017).

105. Rio Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents.

106. For example, Dialog identifies and blocks child abuse content on mobile devices. The Economist Intelligence Unit, Sri Lanka Country Profile. (2019). *Out of the Shadows: Shining light on the responses to child sexual abuse and exploitation- a 40 country benchmark index*. Retrieved from [https://outoftheshadows.eiu.com/wp-content/uploads/2019/01/LK\\_SRI-LANKA\\_PROFILE.pdf](https://outoftheshadows.eiu.com/wp-content/uploads/2019/01/LK_SRI-LANKA_PROFILE.pdf) . [Accessed on February 20, 2019]. See also Frederick, J. (2010). *Sexual Abuse and Exploitation of Boys in South Asia: A Review of Research 41 Findings, Legislation, Policy and Programme Responses*. UNICEF Innocenti Working Papers, 21. Retrieved from [https://www.unicef-irc.org/publications/pdf/iwp\\_2010\\_02.pdf](https://www.unicef-irc.org/publications/pdf/iwp_2010_02.pdf). [Accessed on: February 5, 2019].

Section 286C places an affirmative duty on owners and caretakers of premises who have knowledge of child abuse on the relevant premises. Additionally, by placing a responsibility on caretakers and owners of premises, it enforces the notion that bystanders have a responsibility to report instances of child abuse, even though the Penal Code has not codified the general duty to report.<sup>107</sup>

**Hiring or Employing Children to Act as Procurers:  
Section 288A and Procurement: Section 360A**

Commercial sexual exploitation of children is a form of OCSE.<sup>108</sup> Section 288A of the Penal Code criminalises perpetrators who persuade or coerce<sup>109</sup> children into engaging in illicit sexual intercourse. Illicit sexual intercourse is not defined in the Penal Code and could be interpreted to include commercial sexual exploitation of children.<sup>110</sup> However, this section does not criminalise conduct that is defined as sexual abuse – it only criminalises conduct that is defined as sexual intercourse.

The CRC calls on state parties to enact appropriate legislation to protect children from all

forms of sexual exploitation, and specifically sexual abuse.<sup>111</sup> It also requires that states take legislative measures to prohibit the ‘inducement or coercion of a child to engage in any unlawful sexual activity.’<sup>112</sup> Additionally, Sri Lanka has obligations under ILO C182 to proscribe the worst forms of child labour, which include forms of commercial sexual exploitation such as all forms of prostitution to produce pornography. However, section 288A limits the criminalisation of procurers of children for sexual intercourse and does not cover *any* unlawful sexual activity as required by the CRC and ILO C182.

Exploitation of children for prostitution is a form of OCSE.<sup>113</sup> Section 360A limits the purpose of procurement under the first subsection to prostitution within or outside Sri Lanka, thus, codifying the extraterritorial jurisdiction of Sri Lanka to prosecute procurement of an adult or a child. This statute explicitly criminalises the procurement or attempted procurement of individuals under sixteen years of age, regardless of consent, within or outside Sri Lanka for the purpose of prostitution. ILO C182 and OPSC call on state parties

107. Although this is the only section of the Penal Code that places a duty to report, it is specific to caretakers or owners of premises to report instances of child abuse. Section 21A of the Code of Criminal Procedure Act, No 15 of 1979 includes a list of offences that citizens have a duty to report to police officials, but this list does not include offences committed by adults against children in sections 286A, 288, 288A, 288B, 308A, 360B, 360C, 363, 364, 365, 365A, and 365B of the Penal code. See Amendment of the Code of Criminal Procedure Act, No 1 of 1979, Section 21A; See also Verité Research Pvt. Ltd. *UNICEF A Legal and Institutional Assessment of Sri Lanka's Juvenile Justice System for Children* Retrieved from <https://www.veriteresearch.org/publication/a-legal-institutional-assessment-of-sri-lankas-justice-system-for-children/>. [Accessed on: 25 January 2019].

108. Commercial sexual exploitation of children includes child sex tourism, the use of children to produce pornography and any sexual activity that is known as child prostitution See, International Labour Organization. (n.d.). *Commercial sexual exploitation of children*. Retrieved from International Labour Organization. <https://www.ilo.org/ipec/areas/CSEC/lang-en/index.htm>. [Accessed on: 20 February 2019].

109. Penal Code, Section 288A illustrates the means used to convince a child to procure any person for illicit sexual intercourse include knowingly, hiring, employing, persuading, using, inducing or coercing.

110. Penal Code, Section 363 illustrates that ‘penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape’.

111. Sexual abuse is not defined in the Penal Code. However, Section 265B defines the offence of ‘Grave Sexual Abuse’ as: Any act committed by a person for ‘sexual gratification ...by the use of his genitals or any other part of the human body or any instrument or any orifice or part of the body of any other person, being an act, which does not amount to rape under section 363’.

112. CRC, Article 19 and Article 34.

113. United Nations Office on Drugs and Crime. (2015). *Study on the Effects of new Information Technologies on the Abuse and Exploitation of Children*. Retrieved from [http://www.unodc.org/documents/Cybercrime/Study\\_on\\_the\\_Effects.pdf](http://www.unodc.org/documents/Cybercrime/Study_on_the_Effects.pdf). [Accessed on: 20 February 2019].

to proscribe procuring a child for prostitution. Therefore, the current section of procurement for prostitution is consistent with Sri Lanka's commitments under ILO C182 and OPSC.

### **Sexual harassment: Section 345**

In Sri Lanka the most common form of OCSE is via cyber sexual harassment, where young girls are intimidated and/or threatened by individuals or groups of individuals to share nude images, or procure nude images of friends or relatives.<sup>114</sup> The rhetoric used by perpetrators is usually controlling or threatening.<sup>115</sup> The Penal Code does adequately criminalise sexual harassment as 'by assault or criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment'.<sup>116</sup> Although the section does not specify the means or method of ICT to communicate the sexual harassment, there is nothing in the section to limit it either.

### **Trafficking: Section 360C**

Trafficking in children for the purpose of sexual exploitation is another form of OCSE. CSE is distinguishable from sexual abuse as there is the presence of exchange, whether for monetary or non-monetary means. Some examples of online trafficking of children include: traffickers use ICT to advertise victims in multiple locations on classified websites which facilitates the buying and selling of

children. According to Equality Now, using online mechanisms to advertise and sell victims also expands their customer base and helps avoid detection by law enforcement authorities. For instance, websites such as Backpage was involved in 73% of all child trafficking cases reported to the National Center for Missing and Exploited Children.<sup>117</sup> The Penal Code mimics the Palermo protocol in its definition of trafficking in persons for the most part. The Penal Code contains the three elements: of an act, by a specific means, for the purpose of exploitation.

However, even though the statute on trafficking in persons is broadly consistent with the Palermo Protocol, Sri Lanka's record of convictions for trafficking is weak. As of June 2019, Sri Lanka has had only one conviction for trafficking in the last five years.<sup>118</sup> Thus, even though there is a law prohibiting trafficking, there is a gap in enforcing the law. The hesitance of law enforcement to enforce provisions on traditional means of trafficking in persons, could signal even greater challenges to enforce the law against online trafficking in children.

### **Soliciting a Child: Section 360E**

The Penal Code (Amendment) Act No. 16 of 2006, expands this section to criminalise the solicitation of a child either within Sri Lanka or outside Sri Lanka for the purposes of sexual abuse. It also criminalises the mistake of belief

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114. Key Informant Interview with Grassrooted Trust (Ltd.), NCPA, et al.

115. See also United Nations Office on Drugs and Crime. (2015). *Study on the Effects of new Information Technologies on the Abuse and Exploitation of Children*. Retrieved from [http://www.unodc.org/documents/Cybercrime/Study\\_on\\_the\\_Effects.pdf](http://www.unodc.org/documents/Cybercrime/Study_on_the_Effects.pdf). [Accessed on: 19 February 2019].

116. Penal Code (as amended), Section 345.

117. See Equality Now. (n.d.). *'Interrupting the vicious cycle of online sex trafficking'*. Retrieved from Equality Now [https://www.equalitynow.org/interrupting\\_the\\_vicious\\_cycle\\_of\\_online\\_sex\\_trafficking](https://www.equalitynow.org/interrupting_the_vicious_cycle_of_online_sex_trafficking). [Accessed on: 14 February 2019].

118. U.S. State Department. (2019). *Trafficking in Persons Report*. Retrieved from: <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/sri-lanka/>. [Accessed on: 10 August 2019]. See also, of the 15 investigations during 2017 only one was for selling a child for exploitation. U.S. State Department. (2019). *Trafficking in Persons Report*. Retrieved from: <https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282751.htm>. [Accessed on: 14 February 2019].

that an individual is under eighteen years of age, regardless of whether they are over eighteen years; for example, if a perpetrator solicits an individual who he/she believes to be under eighteen for the purpose of sexual activity regardless of the individual's actual age. Although this section does not specifically mention ICT as a methodology of solicitation, the statute is broad enough to implicitly include online aspects of solicitation of children for sexual abuse.

Online grooming is an evolving form of OCSE in Sri Lanka and is closely related to solicitation. Online grooming is defined as both offline and online solicitation of children for sexual purposes. Online contact can lead to both offline and online sexual activities.<sup>119</sup> According to the Luxembourg Guidelines the following elements are necessary: (i) contacting a child; (ii) if online, through ICTs; (iii) with the intent of luring or inciting the child; and (iv) to engage in any sexual activity by any means, whether online or offline.<sup>120</sup> The WeProtect Alliance covers all forms of OCSE and uses the Luxembourg Guidelines as a base for terminology. The solicitation section in the Penal Code does not explicitly include online means of solicitation, and is thus inconsistent with Sri Lanka's commitments under the WeProtect Alliance.

## Offences under the Penal Code that criminalise the underlying conduct of OCSE

There are two different types of harm experienced by victims of OCSE. The first is offline, physical contact that creates the underlying conduct for OCSE to be perpetrated.<sup>121</sup> The second harm is through online contact. This can also include the possession, distribution, and consumption of sexual abuse images and in some cases offline physical contact the perpetrator has with the child victim.<sup>122</sup> The underlying conduct is usually a form of CSE, and the harm occurs during that sexual activity. The offline contact can be continuously perpetuated and re-victimisation occurs when the sexual abuse image is shared or viewed.<sup>123</sup> During instances of live streaming child sexual abuse, the offline and online harm overlaps. Therefore, it is essential to criminalise the underlying physical conduct and the sexual activity, to ensure a complete protection system for OCSE. The following sections of the Penal Code are relevant in this regard.

### **Rape: Section 363**

Rape can be a type of underlying offline physical contact perpetrated against the

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119. The Luxembourg Guidelines on Terminology were spearheaded by ECPAT International. The Interagency Working Group included regional groups, relevant UN Agencies, and international civil society members. Retrieved from <http://luxembourgguidelines.org/partners/>. [Accessed on: 28 January 2019]; See also *Chart of signatures and Ratifications of Treaty 201, Lanzarote Convention*. (status as of 2019. September 20). Retrieved from Council of Europe: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures>. [Accessed on: 28 January 2019].

120. The Luxembourg Guidelines on Terminology were spearheaded by ECPAT International. The Interagency Working Group included regional groups, relevant UN Agencies, and international civil society members. Retrieved from <http://luxembourgguidelines.org/partners/>. [Accessed on: 28 January 2019].

121. Key Informant Interview. This is not to suggest that in all instances of OCSE the initial point of contact is offline. Some instances in Sri Lanka the online contact can result in offline contact between the perpetrator and the child victim for sexual activity.

122. United Nations Office on Drugs and Crime. (2015). *Study on the Effects of new Information Technologies on the Abuse and Exploitation of Children*. Retrieved from [http://www.unodc.org/documents/Cybercrime/Study\\_on\\_the\\_Effects.pdf](http://www.unodc.org/documents/Cybercrime/Study_on_the_Effects.pdf). [Accessed on: 6 February 2019].

123. Key Informant Interviews.

child victim in OCSE. This sexual activity is then documented and distributed online. The Penal Code uses gendered pronouns in many sections relating to online sexual exploitation of children, essentially codifying that males are perpetrators of these types of crimes, and thus cannot be victims. The use of gendered pronouns in the Penal Code limits the ability of the prosecution to effectively protect male victims of sexual exploitation. The statute states ‘a **man** (emphasis added) is said to commit ‘rape’ who has...’. The section then goes on to describe the victim in gendered terms. For example, when highlighting consent, the Penal Code uses *her* (emphasis added) consent.<sup>124</sup> This is inconsistent with the CRC, which necessitates non-discrimination based on sex, and equality of the sexes. Article 34, which deals with protection from sexual exploitation, does not discriminate between a boy or girl child. This omission in the Sri Lankan law is extremely problematic in light of the fact that in Sri Lanka, boys are more likely to be victims of child sex tourism in coastal areas than girls.<sup>125</sup>

**Unnatural Offences: Section 365 and Acts of Gross Indecency between Persons: Section 365A;**

Under the Penal Code, the definition of unnatural offences is where individuals ‘voluntarily have carnal intercourse against the order of nature with any man, woman, or animal.’ Yet it does not define what acts are ‘against the order of nature.’ Gross Indecency has been used to prosecute and criminalise

sexual activity between same-sex partners.<sup>126</sup> In instances of child sex tourism industry in Sri Lanka, which victimises male children, this statute can be used to prosecute the victim.

**Grave Sexual Abuse: Section 365B**

Grave sexual abuse amounts to all sexual acts that do not amount to rape. Many of the images available online are described as sexual abuse images, thus having a clear definition of what constitutes sexual abuse is essential in prosecuting OCSE. This section does define what acts constitute *grave* sexual abuse. By criminalising grave sexual abuse, Sri Lanka has met its minimum obligation under the CRC. This section can be read broadly to criminalise the underlying conduct of sexual abuse perpetrated during OCSE.

**Publication of Matter relating to Certain Offences: Section 365C**

Under this section, the publication of the identity of the victim of the following crimes is prohibited unless it is with the consent of said victim or next of kin if the victim is deceased. The crimes include the following offences:

- Sexual Harassment Section: 345,
- Procuration Section: 360A,
- Sexual Exploitation of Children Section: 360B,
- Rape Section: 363,
- Incest Section: 364A,

124. This issue is further exemplified in Section 364, which defines categories of rape in an official capacity and against uses the male pronoun for the perpetrator. Under Section 365B Grave Sexual Abuse, which criminalises sexual acts other than rape, the pronouns used to define the perpetrator are male. For example: does any act by the use of *his* (emphasis added) genitals.

125. Frederick, J. (2010). *Sexual Abuse and Exploitation of Boys in South Asia: A Review of Research 41 Findings, Legislation, Policy and Programme Responses*. UNICEF Innocenti Working Papers, 21. Retrieved from [https://www.unicef-irc.org/publications/pdf/iwp\\_2010\\_02.pdf](https://www.unicef-irc.org/publications/pdf/iwp_2010_02.pdf). [Accessed on: February 5, 2019].

126. Officer-in-Charge, Police Station, Maradana vs. Galabada Payagalage Sanath Wimalisiri and R. Jeganathan, No.32/11 (Supreme Court November 30, 2016) Retrieved from: [http://www.supremecourt.lk/images/documents/sc\\_appeal\\_32\\_11.pdf](http://www.supremecourt.lk/images/documents/sc_appeal_32_11.pdf) [Accessed on: 21 February 2019].

- Unnatural Offences Section: 365,
- Acts of Gross Indecency between Persons Section: 365A, and
- Grave Sexual Abuse Section: 365B.<sup>127</sup>

This is consistent with Sri Lanka's obligations under the CRC. Article 16 of the CRC obliges states to ensure that each child is free from unlawful interferences with their privacy or unlawful attacks on their honour and reputation. The Penal Code section is also consistent with Sri Lanka's obligations under Article 8 of the OPSC – to protect the identity of child victims.<sup>128</sup>

### **Extortion: Section 372**

The phenomenon of online sexual extortion has become prevalent in Sri Lanka.<sup>129</sup> The Penal Code defines extortion as a situation when someone intentionally puts another in fear of *any* injury to that person or to any other, through dishonest inducement in fear to deliver *any property or valuable security or anything signed or sealed which may be converted into a valuable security*. The term valuable security is defined as a document that creates, extends or transfers, or restricts a legal right. Nude photographs do not carry a valuable security under this definition, as

there is no legal right attached to them. The Penal Code does not distinguish between personal, movable, or immovable property. However, one could infer that this property would encompass images which are personal property. A broad reading of the section indicates that sexual extortion online can be prosecuted under this section.

### **Computer Crimes Act, No.24 of 2007**

Although Sri Lanka was the first South Asian country to sign the Budapest Convention on cybercrimes, its enabling legislation, the Computer Crimes Act, No.24 of 2007 does not prohibit child pornography. The Computer Crimes Act gives broad investigatory powers for those crimes enumerated in the Act, including accessing ICT data systems, subscriber information (IP addresses), entering premises, and serving preservation letters. Additionally, the Act codifies exigent circumstances where police officers may conduct aspects of the investigation without a warrant. Although these sections are consistent with the Budapest Convention, it fails to include child pornography as an enumerated offence, thus weakening the existing legislation on OCSE.<sup>130</sup>

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127. Penal Code (Amendment) Act. No.22 of 1995.

128. In practice the media reportage on sexual crimes has included identifying information, such as the victim's name or photograph See Verité Research Pvt. Ltd., Ethics Eye Platform, retrieved from <https://www.facebook.com/ethicseye/photos/p.480472248974504/480472248974504/?type=1>. [Accessed on: 20 February 2019].

129. Key Informant Interview. "There are reports by civil society in Sri Lanka that girls have committed suicide as a result of sexual extortion or dropped out of schools." UNICEF. (2016, November). "Victims are not Virtual" Situation assessment of online child sexual exploitation in South Asia. Retrieved from <https://www.unicef.org/rosa/media/1366/file>. [Accessed on: 20 February 2019].

130. The legislative intent was to purposefully exclude child pornography online because it was slated to be included in the New Obscene Publications Bill. However, that new bill has yet to be enacted into law. See Ministry of Justice Parliamentary Performance Report 2012.

## 4.3 Procedural Law

This next section will assess the relevant procedural law as it relates to OCSE, and compare it with Sri Lanka's existing international standards.

### **Criminal Procedure**

In Sri Lanka, offences are classified as either offences that are triable summarily (summary offences) or not-triable summarily (non-summary offences) by the Magistrate's Court.

### **Summary Offences**

If an offence committed is a summary offence, then the Magistrate can hear the matter and convict or discharge the accused. However, with respect to these summary offences, the Attorney General has the power to bypass the Magistrate's Court and forward an indictment directly to the High Court to expeditiously institute proceedings, 'having regard to the nature of the offence or any other circumstances'.<sup>131</sup> For instance, the Attorney General can directly forward an indictment relating to statutory rape (rape involving girls under the

age of sixteen years of age) as it is a summary offence.<sup>132</sup>

### **Non-Summary Offences**

Non-summary offences are specifically listed under the second schedule of the Judicature Act. For these offences the Magistrate must conduct a preliminary inquiry, to assess the sufficiency of evidence to commit the accused for trial in the High Court. For instance, the offence of rape is identified as a non-summary offence under the Sri Lankan law.<sup>133</sup> Therefore, the Magistrate must conduct a preliminary inquiry.

The Prevention of Crimes Ordinance, No. 2 of 1926 requires that certain offences be 'fingerprintable' offences, thus creating an offender database.<sup>134</sup> The database is used primarily to identify repeat offenders.<sup>135</sup> Sexual offences against children by adult perpetrators are not one of these offences.<sup>136</sup> Additionally, there is no specific requirement for a sex offender registry nor a child sex offender registry. The Code of Criminal Procedure (Amendment)

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131. Code of Criminal Procedure Act, Section 393 (7).

132. Judicature (Amendment) Act, No. 27 of 1998, Section 2(1)(b). See Verité Research Pvt. Ltd. *UNICEF A Legal and Institutional Assessment of Sri Lanka's Juvenile Justice System for Children* Retrieved from <https://www.veriteresearch.org/publication/a-legal-institutional-assessment-of-sri-lankas-justice-system-for-children/>. [Accessed on: 25 January 2019].

133. See Second Schedule of the Judicature Act, No.2 of 1978 (as amended).

134. Prevention of Crimes Ordinance, No. 2 of 1926, Section 2(1), see also Verité Research Pvt. Ltd. *UNICEF A Legal and Institutional Assessment of Sri Lanka's Juvenile Justice System for Children* Retrieved from <https://www.veriteresearch.org/publication/a-legal-institutional-assessment-of-sri-lankas-justice-system-for-children/>. [Accessed on: 25 January 2019].

135. Prevention of Crimes Ordinance, No. 2 of 1926, Section 2(1), see also Verité Research Pvt. Ltd. *UNICEF A Legal and Institutional Assessment of Sri Lanka's Juvenile Justice System for Children* Retrieved from <https://www.veriteresearch.org/publication/a-legal-institutional-assessment-of-sri-lankas-justice-system-for-children/>. [Accessed on: 25 January 2019].

136. Prevention of Crimes Ordinance, No. 2 of 1926, Section 2(1), see also Verité Research Pvt. Ltd. *UNICEF A Legal and Institutional Assessment of Sri Lanka's Juvenile Justice System for Children* Retrieved from <https://www.veriteresearch.org/publication/a-legal-institutional-assessment-of-sri-lankas-justice-system-for-children/>. [Accessed on: 25 January 2019].

Act, No. 28 of 1998<sup>137</sup> requires that courts give priority to cases of child abuse.<sup>138</sup> It further permits the court in instances of a child victim, to place that child in a place of safety for the duration of the court proceedings. Child victims are placed in institutions where there is more emphasis on correction than on counselling.<sup>139</sup> This is inconsistent with Sri Lanka's obligations under Article 39 of the CRC, to ensure the physical, and psychological recovery and social reintegration of child victims.

### **Evidence Law:**

The Evidence (Special Provisions) Act, No. 14 of 1995 details the types of evidence that are admissible during trial proceedings. It permits the admissibility of any contemporaneous recording made by electronic means and facts and information contained in a statement produced by a computer.<sup>140</sup>

Testimony is permitted via contemporaneous audio-visual linkage as a measure adopted to protect the victim. This is codified in the Evidence Act, No. 32 of 1999, which permits recorded video evidence of child victims in instances of child abuse.<sup>141</sup> However, it also requires that the child be available for

cross-examination. Sri Lanka has an adversarial system, where cross-examination is contentious. This could potentially re-victimize children, thus failing to meet the best interests of the child principle espoused in Sri Lanka's commitments under the CRC.<sup>142</sup>

The Evidence Ordinance is supplemented by the Electronic Transaction Act, No. 19 of 2006. The Act provides for the admissibility of past-recorded evidence, electronic documents or other communication if the witness is either outside Sri Lanka, or who out of fear does not wish to give oral evidence.<sup>143</sup> Since OCSE is a transnational crime, this allows for cases to be prosecuted even when the victim is not in the jurisdiction. Alternatively, it provides for instances where victims may be within the borders of Sri Lanka but have been intimidated and are fearful of reprisal if they testify. The OPSC places the best interest of the child as the primary consideration and requires state parties to take measures to ensure that those intimidated victims' safety is ensured.<sup>144</sup>

### **Victim Protection:**

The Assistance to the Protection of Victims of Crime and Witnesses Act, No. 4 of 2015,

137. Code of Criminal Procedure Act (Amendment) No. 28 of 1998. Section 451A.

138. Code of Criminal Procedure section 43A, Special provisions regarding persons arrested in respect of child abuse.

139. Prevention of Crimes Ordinance, No. 2 of 1926, Section 2(1), see also Verité Research Pvt. Ltd. *UNICEF A Legal and Institutional Assessment of Sri Lanka's Juvenile Justice System for Children* Retrieved from <https://www.veriteresearch.org/publication/a-legal-institutional-assessment-of-sri-lankas-justice-system-for-children/>. [Accessed on: 25 January 2019]. citing Jill Grime, *An Investigation into Children's Rights in Sri Lanka* (1994).

140. Evidence (Special Provisions) Act No. 14 of 1995, Section 5.

141. Under Section 163A(1) of Evidence (Special Provisions) Act No. 32 of 1999, For the purposes of this section and offence relating to child abuse means any offence under sections 286A, 308A, 360A, 360B, 360C, 363, 364A, 365, 365A or 365B of the Penal Code when committed in relation to a child. 'video recording' means any recording, on any medium, from which a moving image may by any means be produced and includes the accompanying soundtrack (if any), and cognate words shall be construed accordingly.

142. Verité Research Pvt. Ltd. *UNICEF A Legal and Institutional Assessment of Sri Lanka's Juvenile Justice System for Children* Retrieved from <https://www.veriteresearch.org/publication/a-legal-institutional-assessment-of-sri-lankas-justice-system-for-children/>. [Accessed on: 25 January 2019].

143. *Electronic Transactions Act No. 19 of 2006*, Section 21.

144. UN Committee on the Rights of the Child (CRC). (2000. May 25). Preamble of the Optional Protocol on the Sale of Children, Child Pornography and Prostitution. *UN Doc, A/RES/54/263*, Article 8 and Article 9.

codifies the concept that child victims should be treated in a manner that is in the "best interest of the child."<sup>145</sup> The Act defines a child as an individual who is under eighteen years of age. The Act further creates the National Authority for the Protection of Victims of Crimes and Witnesses, which became operational in 2016. The Authority is empowered to adopt specific and special measures for the protection of the rights of children. It also provides for monetary compensation for child victims, which is consistent with Sri Lanka's obligations under the OPSC, Article 9.<sup>146</sup>

However, in practice, the current protection system does not always guarantee that child victims are protected. According to a study conducted by Verité Research, child victims are routinely placed in remand homes with children in conflict with the law. As these institutions are intended as corrective measures, it can result in re-victimization of child victims which can result in more trauma.<sup>147</sup>

### **Extradition**

OCSE is a transnational crime, and thus it is essential to have provisions in place for extradition. The Extradition Law, No. 8 of

1977 governs extradition. Usually, there must be either: a ratified bilateral treaty between states; or a multilateral treaty that includes extradition obligations that have been given effect to through domestic legislation. Once the obligation to extradite exists, the next step is determining if the conduct is criminalised in both states and is punishable by no less than one year.

In Sri Lanka, an extraditable offence is one that falls either within the relevant extradition treaty or within the schedule of the Extradition Law. Relevant offences include rape, carnal intercourse with a female between twelve and fourteen years of age, unnatural offences, and procuring a girl or woman to become a prostitute.<sup>148</sup> The Budapest Convention calls on states to ensure that extradition applies for child pornography. However, under the current extradition law, child pornography is not an extraditable offence. Additionally, Sri Lanka has not given effect to the Budapest provision nor the OPSC on extradition in national law, thus limiting the protection regime on OCSE and compliance, within the spirit of the law in the Budapest Convention and the OPSC.

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145. *Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015*, Part II S.3. Note: the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007 was the first piece of legislation to codify this concept of the best interest of the child.

146. *Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015*, Part II Section 19(2), the Authority comes under the direction and guidance of a Senior Superintendent of the Police and works closely with the police to investigate and determine the credibility of threats against victims and witnesses. This creates concerns of independence as there is nothing in the act that insulates the Authority from the influence of the police department. See *National Authority for the Protection of Victims of Crimes and Witnesses*. (n.d.). Retrieved from [https://www.moj.gov.lk/web/index.php?option=com\\_content&view=article&id=65&Itemid=218&lang=en](https://www.moj.gov.lk/web/index.php?option=com_content&view=article&id=65&Itemid=218&lang=en). [Accessed on: 14 February 2019].

147. Verité Research Pvt. Ltd. *UNICEF A Legal and Institutional Assessment of Sri Lanka's Juvenile Justice System for Children* Retrieved from <https://www.veriteresearch.org/publication/a-legal-institutional-assessment-of-sri-lanka-justice-system-for-children/>. [Accessed on: 25 January 2019].

148. Extradition Law, No. 8 of 1977.

# 5

## INSTITUTIONAL AND POLICY FRAMEWORK ON OCSE

There are multiple institutions involved in the child protection system in Sri Lanka. This section will evaluate the institutional framework in Sri Lanka, and assess the relevant

national policies that relate to OCSE. The section on policies will also evaluate the policies in light of international standards.

### 5.1 Institutions involved in addressing OCSE

The institutional protection framework for OCSE in Sri Lanka consists of policy-making bodies, investigative bodies, technical bodies, and law enforcement. Table 3 below

categorises key institutions involved in addressing OCSE in terms of their broad functions. Table 4 describes mandates and key outputs of each institution.

**Table 3: OCSE institutions**

Policy-making	Investigative	Law enforcement and prosecution	Technical
Ministry of Women and Child Affairs	Cybercrime Division – CID Women and Children’s Bureau – Police Department		Sri Lanka Computer Emergency Readiness Team (SLCERT)
	National Child Protection Authority (NCPA)	Attorney General’s Department	Telecommunications Regulatory Commission of Sri Lanka (TRCSL)
			Information & Communication Telecommunication Authority (ICTA)

**Table 4: Institutional mandates and outputs related to OCSE**

Institutions	Mandate	Output/ Responses
Ministry of Women and Child Affairs (MWCA)	<ul style="list-style-type: none"> <li>Has supervisory authority over the NCPA.</li> <li>Mandated to monitor the progress of all investigations and prosecutions relating to child abuse</li> </ul>	<ul style="list-style-type: none"> <li>Supervision of NCPA</li> <li>Formulate and implement policy related to children</li> <li>Currently engaged in consultations for National Policy on OCSE.</li> </ul>
Cybercrime Division – CID	<ul style="list-style-type: none"> <li>Sri Lanka Police are governed by the Police Ordinance, No. 16 of 1865</li> </ul>	<ul style="list-style-type: none"> <li>Investigations into complaints</li> <li>Submitting the B report</li> </ul>
Women and Children's Bureau – Police Department	<ul style="list-style-type: none"> <li>Sri Lanka Police are governed by the Police Ordinance, No. 16 of 1865</li> <li>Focused on crimes perpetrated on women and children.</li> </ul>	<ul style="list-style-type: none"> <li>Receives complaints on OCSE</li> <li>Defers complaints to CID/CERT</li> </ul>
Sri Lanka Computer Emergency Readiness Team (SLCERT)	<ul style="list-style-type: none"> <li>SLCERT was created with the purpose of responding to cyber threats, creating awareness, and research and policy.</li> <li>SLCERT is not mandated as an investigative body but rather to coordinate technical assistance in resolving social media complaints.</li> <li>SLCERT does not remove accounts from social media, nor does it block websites, unlike the TRCSL.</li> </ul>	<ul style="list-style-type: none"> <li>Receives complaints on cybercrime – OCSE</li> <li>Defers Complaints to NCPA or CID</li> <li>Provides technical assistance in blocking or taking down fake social media accounts</li> </ul>
Telecommunications Regulatory Commission of Sri Lanka (TRCSL)	<ul style="list-style-type: none"> <li>TRCSL was established under the Sri Lanka Telecommunication (Amendment) Act, No. 27 of 1996 as the national regulatory agency for telecommunications in Sri Lanka.</li> <li>It was created to 'promote sustained development in the telecommunication industry by shaping the regulatory process, protecting public interest and being responsive to challenges in an increasingly competitive market.'</li> <li>It is not specifically tasked with combating OCSE.</li> </ul>	<ul style="list-style-type: none"> <li>Able to restrict access to websites</li> </ul>
Information & Communication Telecommunication Authority (ICTA)	<ul style="list-style-type: none"> <li>ICTA was formulated via a World Bank project from 2004 to 2011 to implement the e-Sri Lanka Development Project.</li> <li>In 2003, the ICTA was made a permanent body via the Information and Communication Technology Act, No.27 of 2003, which was further amended in 2008.</li> <li>The ICTA falls under the Ministry of Telecommunication and Digital Infrastructure.</li> </ul>	<ul style="list-style-type: none"> <li>Able to restrict access to websites</li> </ul>

Institutions	Mandate	Output/ Responses
National Child Protection Authority (NCPA)	<ul style="list-style-type: none"> <li>NCPA was established through the National Child Protection Act, No. 50 of 1998.</li> <li>NCPA may enter premises for exigent purposes related to child abuse.</li> <li>Not expressly mandated to investigate but permits the MWCA to monitor the investigations and criminal proceedings of child abuse.</li> </ul>	<ul style="list-style-type: none"> <li>Receives complaints on OCSE</li> <li>Investigations into complaints</li> <li>Psycho- Social Counseling for survivors of OCSE</li> <li>Submitting B reports to Magistrates Court</li> </ul>
Attorney General's Department (AG)	<ul style="list-style-type: none"> <li>AG is the chief legal officer and advisor to the state.</li> <li>AG provides advice and appears in court on behalf of the government and other government institutions on criminal and civil matters.</li> <li>The Child Protection Unit (CPU) of the AGs was established in 1999.</li> </ul>	<ul style="list-style-type: none"> <li>Prosecute OCSE</li> </ul>

## Policy-Making Institutions

### **National Child Protection Authority (NCPA)**

The NCPA only deals with complaints of individuals under eighteen years of age.

The main purpose of the National Policy for Child Protection is to provide a common vision, definitional clarity, policy goals, guiding principles and a conceptual framework to guide multi-sectoral, multi-agency child protection activities 'across government'<sup>149</sup>. It also provides a framework for monitoring and evaluation of outcomes and impact of child protection. The Policy identifies priority areas to be addressed for the protection of children in Sri Lanka. It also identifies the key stakeholders in child protection. The Policy has become the basis for articulating

a National Action Plan for Child Protection to guide the provision of child protection services and prevention efforts, and facilitate reforms towards the creation of a coherent child protection system for Sri Lanka.

The NCPA has a dedicated helpline for child abuse – the 1929 hotline. The helpline operates 24 hours a day and is available in the three languages spoken in Sri Lanka. The helpline is one of the first points of initiating a complaint on child abuse with the NCPA. The existence of a child helpline is consistent with Sri Lanka's commitments under the WeProtect Alliance to establish a child abuse helpline.

In 2015, the NCPA appointed a multi-stakeholder taskforce to combat the growing threat to children and young persons<sup>150</sup> posed by bullying and sexual harassment on social

149. The National Policy was formulated in October 2013. See National Child Protection Authority. (2013, October). *'National Child Protection Policy Final'*. Retrieved from National Child Protection Authority. <http://www.childprotection.gov.lk/documents/National%20Child%20Protection%20Policy%20-%20final%20-%202013.10.4.pdf>. [Accessed on: 15 February 2019].

150. A 'young person' is defined an individual between the ages of fourteen to sixteen. See Section 88 of Children and Young Persons Ordinance, No. 48 of 1939.

151. See OnLanka. (2015, June 17). *'Sri Lanka forms task force to combat cyber harassment'*. Retrieved from OnLanka. <https://www.onlanka.com/news/sri-lanka-forms-task-force-to-combat-cyber-harassment.html>. [Accessed on: 18 February 2019].

media.<sup>151</sup> The focus of this taskforce is on social media platforms that facilitate this conduct. NCPA's development plan for 2018 includes an Action Plan for Capital Projects that includes a project to effectively investigate cyber sexual harassment, and bullying. The NCPA has a separate investigation unit with their own police officers, who investigate complaints including those of OCSE. With regard to offline offences, the NCPA received a total of 10,315 complaints on alleged child abuse in 2014, out of which 1,777 were clearly Sexual and Gender-Based Violence (SGBV) related issues. The constraints and challenges faced by the authorities and the victims can be surmised from the fact that of the total complaints of over 10,000, only 2080 complaints were concluded by the end of the year.<sup>152</sup>

The investigations department of NCPA is a total of four to five individuals, and with one investigator designated as the 'cyber-watch assistant.'<sup>153</sup> Once a complaint is received either through their hotline (1929) or a walk-in, the complaint will either be directed to the investigations department or to a counsellor for psychosocial assistance. There is no specific timeframe for the NCPA to initiate investigations into complaints; however, it attempts to do so within 24 hours of first receiving the complaint.<sup>154</sup> Usually, if the victim is not interested in pursuing criminal charges, the NCPA honours that decision. If the perpetrator can be identified from the outset, then the images are taken down with the assistance of SLCERT. In some instances, when investigators have

reached out to social media platforms, specifically Facebook, they have faced challenges in cooperation to take down specific Facebook profiles.<sup>155</sup> If the perpetrator cannot immediately be identified, then the NCPA launches an investigation, which can include undercover surveillance work. The NCPA also identifies the applicable Penal Code sections, and most complaints fall under the obscene publications provision in the Penal Code. Although the NCPA will consult with the Cybercrimes Division of the CID, involvement from the Cybercrimes Division is limited to cases that are of a certain magnitude. However, there seems to be a lack of communication and coordination between the two units.<sup>156</sup>

The NCPA police unit submits B reports to the court to further investigate complaints of OCSE. Many victims only want OCSE images and videos removed from the Internet and are not interested in initiating criminal proceedings.<sup>157</sup> From 2014 to January 2019, there were approximately 100 investigations conducted by the NCPA investigation unit. The NCPA does not specifically categorise the data according to OCSE. Instead, it categorises the data under the Penal Code offences; thus identifying what are OCSE and CSE is challenging. According to one key informant, in 2017, there were 175,00 complaints received via the 1929 hotline, and of those approximately one in 100 relate to OCSE. According to available data, in 2017, the NCPA received the following number of complaints<sup>158</sup>:

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152. Ministry of Women & Child Affairs and Dry Zone Development. (n.d.). *Policy Framework and National Plan of Action to address Sexual and Gender-based Violence in Sri Lanka (2016-2020)*. Retrieved from <https://www.dropbox.com/s/oz1di27to59ox4m/Policy%20Framework%20and%20National%20Plan%20of%20Action%20to%20address%20SGBV%202016%20%20-2020%20Final%20Cabinet%20Approved.pdf?dl=0>. [Accessed on: 25 January 2019].

153. Key Informant Interviews with NCPA.

154. Key Informant Interview with NCPA.

155. Key Informant Interviews.

156. Key Informant Interviews.

157. Key Informant Interviews.

158. Key Informant Interview with NCPA; See also National Child Protection Authority. (2017). *Number of Cases reported to the National Child Protection Authority in Year 2017*. Retrieved from National Child Protection Authority. [http://www.childprotection.gov.lk/data\\_notice/2017%20NCPA%20Data.pdf](http://www.childprotection.gov.lk/data_notice/2017%20NCPA%20Data.pdf). [Accessed on: 29 January 2019].

- 8 obscene publication;
- 28 trafficking restricted articles;
- 501 on sexual harassment;
- 116 on trafficking; ten on soliciting a child;
- 340 on rape; one incest complaint; and
- 309 grave sexual abuse complaints.

In 2018, there was a steady increase in the number of complaints received overall.<sup>159</sup>

## Technical Institutions

OCSE is facilitated by ICT systems. Therefore, it is essential to have technical institutions that have the capacity to address the ICT aspect of OCSE. Sri Lanka's international commitments under the WeProtect Alliance, SAIEVAC, the Budapest Convention, and OPSC requires the technical assistance of ICT institutions. In Sri Lanka the following institutions are involved in the OCSE protection system due to their technical expertise. Some institutions have very specific functions, while others overlap with each other.

### **Sri Lanka Computer Emergency Readiness Team (SLCERT)**

SLCERT was created in June 2006, and is under the Ministry of Telecommunicating and Digital Infrastructure's purview. It was created

in collaboration with ICTA with the purpose of responding to cyber threats, creating awareness, and research and policy. Individuals may file complaints via their website, telephone, fax or email. Approximately 80% of social media complaints relate to fake Facebook accounts, 10% unwanted photographs and another 10% hacked social media accounts.<sup>160</sup> Complaints take one of two routes: a) complainant wants legal action and thus are directed to either the NCPA,<sup>161</sup> Women and Children's Bureau of the Police Department or the Computer Crimes division of the CID; b) complainant only wants technical assistance. If the complainant only wants technical assistance with social media platforms, SLCERT will assist them with this.

SLCERT has been inundated with social media requests, and as a result were unable to focus on other cyber security matters. Thus, five to six years ago, SLCERT began the process of training and building the capacity of the NCPA, Women and Children's Bureau, and the Computer-Crimes division of the CID to provide technical assistance for removing unwanted photos and profiles on social media.<sup>162</sup>

There have been programmes launched in conjunction with the Ministry of Education, to provide ICT training for teachers and students in each of the provinces in Sri Lanka. These programmes are focused on educating students and teachers on safe online usage.<sup>163</sup>

159. National Child Protection Authority. (2018). *Number of Cases reported to the National Child Protection Authority in Year 2018*. Retrieved from National Child Protection Authority <http://www.childprotection.gov.lk/wp-content/uploads/2018/02/1929-final-data-2018.pdf>. [Accessed on: 29 January 2019].

160. Key Informant Interview with SLCERT.

161. Key Informant Interview noted that complaints that are related to a child will be diverted to NCPA, whereas all other complainants will be informed they will need to file police reports with either the women and children's bureau or the computer crimes unit. However, complainants are hesitant to file official police reports once they realize a National Identification Card (NIC) is necessary to file such reports. Complainants either do not want to be identified or do not have a NIC.

162. Key Informant Interview with SLCERT.

163. Key Informant Interview with SLCERT. There are other programmes run by Sarvodya, Fusion 'IT Yaha Maga'. This programme also conducts trainings for students, teachers and principles to educate them on the positives of online access and to encourage safe online practices especially with social media accounts.

In the next year, SLCERT hopes to launch EDU-CERT, an online portal available for teachers as virtual technical assistance for ICT.<sup>164</sup>

### **Telecommunications Regulatory Commission of Sri Lanka (TRCSL)**

The TRCSL has taken the initiative to block certain pornography websites. In 2009, it blocked 12 websites that were adult-content sharing portals.<sup>165</sup> However, even though these websites are restricted in Sri Lanka, there are ways to circumvent the system and continue to access these sites and perpetuate images based on sexual abuse.<sup>166</sup>

## **Law Enforcement Institutions**

### **Cyber Crime Division of the Criminal Investigation Department (CID)**

The Cybercrime Division (CD) handles all investigations into cybercrime, which include OCSE. Their investigations include traditional and undercover methods to determine the identity of perpetrators. The CD will only commence investigations via complaints, however there are rare instances where the CID has investigated cases on its' own initiative. The CD receives complaints through referrals from other institutions or through

portals like 'tell IGP' or 'tell president', or by email and mail.<sup>167</sup> Once the CID has received a complaint, investigations are subject to the approval from the Director of the CID, as per the relevant CID standing order. There are approximately 23 personnel working in the Colombo office, with regional units in Matara (Southern Province) and Kandy (Central Province).<sup>168</sup> The need for regional units is essential, as after a complaint has been filed, the complainant must physically appear in the respective Cyber-crime office to meet with an officer. Thus, it is essential to have a presence all over Sri Lanka to reduce any delays due to travel restrictions of the complainant.

Most complaints relating to OCSE, concern what is commonly referred to as 'sextortion'. These involve blackmailing individuals with/for nude photos, sexual harassment complaints, and child pornography complaints.<sup>169</sup> The CD has not received any complaints of online child trafficking.<sup>170</sup> The CID also works with INTERPOL in child pornography investigations. INTERPOL notifies the CID of any child pornography that originates from Sri Lanka.<sup>171</sup> Investigations by the CID have led to images (pictures and videos) being taken down from social media websites, in some instances the perpetrators have been identified and arrested and court proceedings have been initiated.<sup>172</sup> However, due to the complicated nature of the crimes, it is also increasingly

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164. Key Informant Interview.

165. Daily Mirror. (2010, September 2). Sites blocked. Retrieved from <http://www.dailymirror.lk/article/porn-sites-blocked-6266.html>. [Accessed on: 24 January 2019].

166. Key Informant Interview.

167. Key Informant Interview with CD. Direct emails to [dir.cid@police.lk](mailto:dir.cid@police.lk) or by way of a letter addressed to the CID director (any high-level officer of the department) or Tell IGP (option available on their website) or Tell president (<https://tell.president.gov.lk/>).

168. Key Informant Interview with CD noted that the Cybercrime Division aims to open a new regional unit in Jaffna (Northern Province) in April 2019.

169. Key Information Interview noted that the Cybercrime Division at the time of the interview had not received any complaints concerning online child trafficking. Sexual harassment complaints, requires notifying the Attorney General's Department, while other investigations are carried out in magistrates court. Additionally, the online crime data does not account for statistics by age of complainant or age of defendant.

170. Key Informant Interviews.

171. Key Informant Interviews.

172. Key Informant Interviews.

difficult to track IP addresses in Sri Lanka to identify perpetrators of cybercrime.<sup>173</sup>

The existence of a dedicated law enforcement division for cybercrimes is consistent with Sri Lanka's commitments under the WeProtect Alliance. However, the Cybercrime Division has been described as a 'bottleneck' in relation to investigating OCSE as it is the institution most widely approached with complaints relating to OCSE.<sup>174</sup> Complaints submitted to other institutions are also re-directed to the Division.<sup>175</sup> In some instances, once a complaint has been brought to its attention, it can take an average of three months before the online content is taken down, by which time, the images on that page could have either been saved for further dissemination or accessed by others who have extorted the victim to create more images.<sup>176</sup>

#### **Women and Children's Bureau – Police Department**

In some instances, the Women and Children's Bureau (WCB) has been reported as engaging in victim-blaming.<sup>177</sup> These types of questions have the effect of re-victimising victims of image-based sexual abuse. Additionally, the WCB do not specifically investigate these complaints but instead refers them to the Cybercrime Division of the CID or to SLCERT.

There are reports to the effect that when WCBs have referred victims of OCSE to the Cybercrime Division of the CID, they have been directed to SLCERT.<sup>178</sup> This demonstrates a general lack of knowledge among the key intake institutions as to who the other players in the protection regime are. This poses problems when victims who are already embarrassed by these images have to repeatedly discuss the harm they suffered to a variety of institutions, as there is no centralised intake system.

#### **Attorney General's Department**

In 2017, the AG's Department concluded 10,511 cases; of these 3,105 were child abuse cases.<sup>179</sup> As of 31 December 2017, the Child Protection Unit had 17,582 pending cases. There were 2,488 files that were opened as of 31 December 2017, and 18,199 files from 2016.<sup>180</sup> Perpetrators of sexual abuse and exploitation of children are usually known to the victim. There are approximately 2,500 – 3000 cases reported annually.<sup>181</sup> The following sections have been used to prosecute the offence of online child sexual exploitation: section 286A obscene publication of a child and the obscene publications section. There is no specific provision under the Penal Code to prosecute online sexual exploitation of children and there is no broad interpretation of online activities.

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173. Key Informant Interviews. Interviewees also noted that in some instances complaints have been made regarding online content and it has taken three months for the unit to respond or take any action.

174. Key Informant Interviews.

175. Key Informant Interviews.

176. Key Informant Interviews.

177. Key Informant Interviews.

178. Daily Mirror. (2017, August 10). The Blackmailing Bogeyman, behind the Screen Cyber Exploitation and Violence in Sri Lanka. Retrieved from <http://www.dailymirror.lk/article/The-Blackmailing-Bogeyman-Behind-the-Screen-Cyber-Exploitation-and-Violence-in-Sri-Lanka-134473.html>. [Accessed on: 24 January 2019].

179. *Performance Report January-December 2017*. (2017). Retrieved from Ministry of Justice and Prison Reforms: <http://www.parliament.lk/uploads/documents/paperspresented/performance-report-ministry-of-justice-2017.pdf>. [Accessed on: 13 January 2019].

180. *Performance Report January-December 2017*. (2017). Retrieved from Ministry of Justice and Prison Reforms: <http://www.parliament.lk/uploads/documents/paperspresented/performance-report-ministry-of-justice-2017.pdf>. [Accessed on: 13 January 2019].

181. Key Informant Interviews.

Currently the AG's Department does not have a specific policy for online sexual exploitation of children,<sup>182</sup> however they do have a policy for how prosecutors deal with child abuse cases generally. The AG's Department works closely with the NCPA in investigating OCSE, as they are the institutions mandated to protect children in Sri Lanka.

## 5.2 Policy Framework

### ***Charter on the Rights on the Child***

Following ratification of the CRC, Sri Lanka incorporated the core values of the Convention into national policy through the Charter on the Rights on the Child (1992). The Charter replicates the CRC. Under the Charter, a child is anyone under the age of eighteen years. Article 34 of the Charter specifically focuses on 'Protection from Sexual Exploitation' and places an affirmative obligation on the state to 'take all appropriate legislative, administrative, social and educational measures,' to protect children from exploitation and sexual abuse.<sup>183</sup> The Charter represents a set of guidelines. It is not legally binding, as there is no corresponding enabling legislation.<sup>184</sup>

### ***National Human Rights Action Plan***

The National Action Plan for the Protection and Promotion of Human Rights, 2017 – 2021 does not identify or cover OCSE as a focus area. However, the plan does commit to expanding section 345 on Sexual Harassment to include cyber crimes by 2021. There are new programme initiatives for the training of healthcare professionals on sensitivity when

working with victims of sexual abuse and to provide training focused on identifying symptoms of child abuse. The plan also calls for the establishment of a sex offender registry and monitoring mechanism. The Plan does not focus specifically on the sexual exploitation or abuse of children, but instead on the overall wellbeing of children, violence against children, and children in conflict with the law. This is inconsistent with Sri Lanka's obligations under the CRC, SAIEVAC and ILO-C182 to ensure the protection of children from sexual exploitation by enacting legislation and administrative measures to that effect.

### ***National Plan of Action for Children in Sri Lanka***

The Ministry of Women and Child Affairs created the National Action Plan for Child Protection from 2016 – 2020. The Plan's key areas of focus incorporate Sri Lanka's regional commitments under the SAIEVAC and aims to address limitations in the previous National Plan of Action from 2004 – 2008. The Plan does not explicitly mention OCSE. However, areas relevant to OCSE that are featured include child labour as it is defined in ILO-C182, and the protection of children from all forms of sexual exploitation in relation to trafficking, sale of children and commercial sex networks. New programme initiatives relating to OCSE include: amending the Prevention of Crimes Ordinance to improve the identification of child sex offenders, as currently, sex offences are not finger printable; drafting and enacting the Obscene Publications Act; developing a plan of action for children living in tourist areas on the coastal belt to prevent child trafficking; and undertaking data collection and research on sexual exploitation of children.<sup>185</sup> The plan

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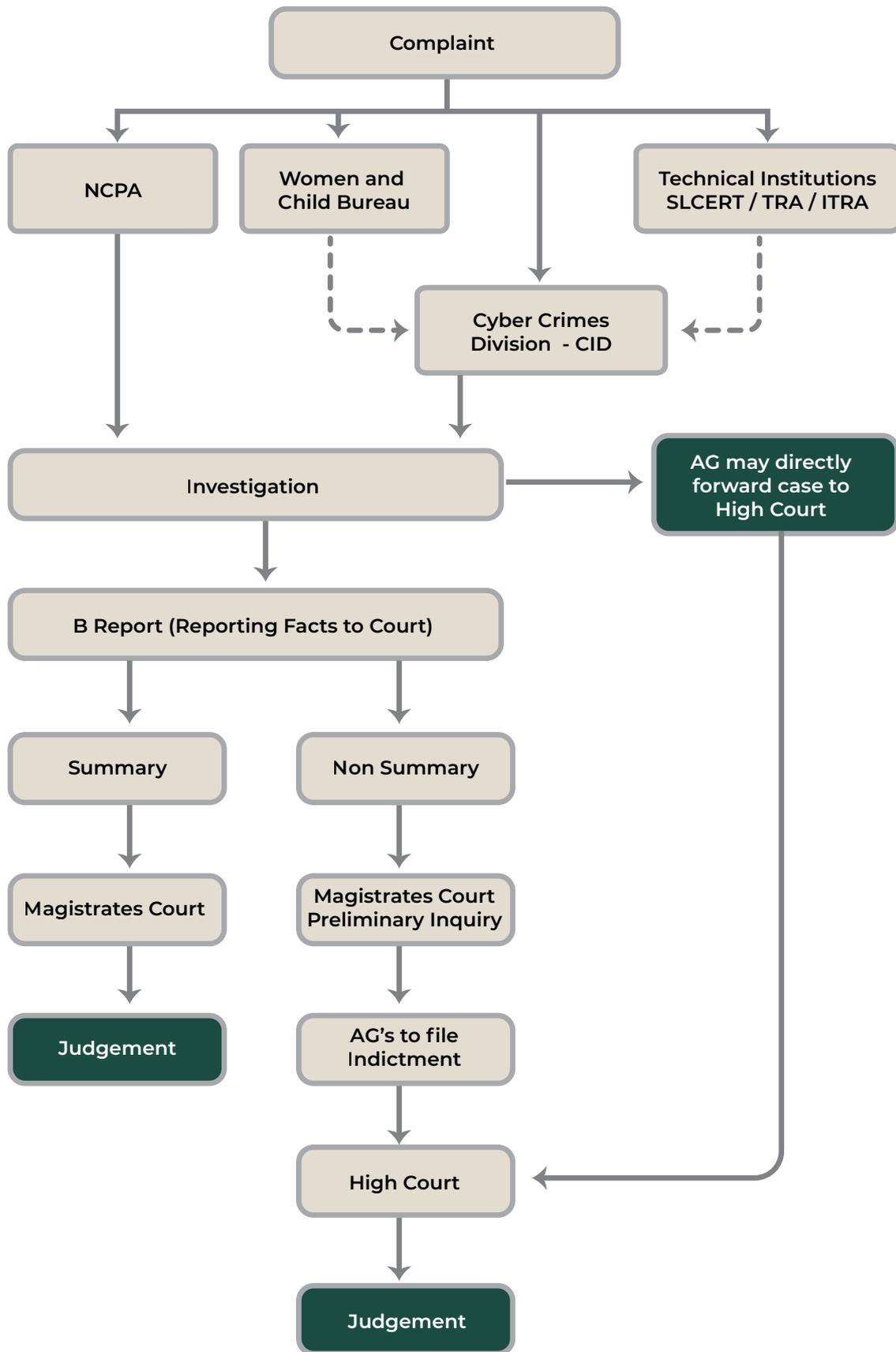
182. Key Informant Interviews.

183. UN Committee on the Rights of the Child (CRC). (2000. May 25). Preamble of the Optional Protocol on the Sale of Children, Child Pornography and Prostitution. *UN Doc, A/RES/54/263*. <https://www.ohchr.org/Documents/ProfessionalInterest/crc-sale.pdf>. [Accessed on: 28 January 2019].

184. Verité Research, *UNICEF A Legal and Institutional Assessment of Sri Lanka's Juvenile Justice System for Children*.

185. *National Plan of Action for Children in Sri Lanka 2016-2020*. Retrieved from Sri Lanka Ministry of Women and Child Affairs: <https://www.dropbox.com/s/js9fpf9qd42lo37/Final%20-%20%20National%20Plan%20of%20Action%20for%20Children.pdf?dl=0>. [Accessed on: 25 January 2019].

**Flowchart 1:** OCSE Complaint Process



does not mention the use of NCPA's cybersurveillance unit or its technical partners in the investigation of OCSE.

One of SAIEVAC's key areas of focus is sexual abuse and exploitation of children, specifically online child pornography. SAIEVAC also calls on state parties to enact comprehensive legislation to protect children from sexual abuse and exploitation. SAIEVAC also focuses on online aspects of OCSE, by calling for states to hold ISPs more accountable by enforcing a code of conduct for ISPs.<sup>186</sup> The current national plan fails to meet these commitments under SAIEVAC. The Women and Child Affairs Ministry has reportedly started consultations for the next National Action Plan for the Protection of Children, which is slated to focus on sexual exploitation and abuse of children online.<sup>187</sup> The details of the new plan are currently unavailable in the public domain.

### **National Action Plan to Address Sexual and Gender Based Violence (SGBV) in Sri Lanka 2016 – 2020**

The National Action Plan to address Sexual and Gender-based Violence (SGBV) was officially launched by the Ministry of Women and Child Affairs and the UNDP.<sup>188</sup> The National Action Plan identifies OCSE as a problem and creates activities to address challenges faced in the protection system. For example, focus area 3 is preventing commercial sexual exploitation

and trafficking of children. An activity within this focus area is training in surveillance, detection and investigation techniques on cybercrime as well as awareness campaigns via social media on OCSE. Another key activity includes exploring the possibility of regulating social media, as it relates to OCSE.

### **Circular from the Financial Intelligence Unit**

The Financial Intelligence Unit (FIU) is an autonomous body that is housed in the Central Bank of Sri Lanka. Its primary function is to establish the framework for Anti-Money Laundering and Countering the Finance of Terrorism in Sri Lanka. Its primary legislation is the Financial Transactions Reporting Act, which defines 'unlawful activity' as including offences against children. The Financial Intelligence Unit issued a circular in 2007, regarding offences against children, titled 'Light a Million Candles Campaign'.<sup>189</sup> The circular advises CEOs of all commercial banks that a task force of the Sri Lanka Commercial Banks has been established to eradicate the modus operandi and commercial viability of child pornography, which include electronic payments systems, internet transactions and credit card payments. All commercial banks have been called upon to monitor the nature of the business of new and existing credit card merchants and to report anything suspicious to the FIU that involve offences against children.<sup>190</sup>

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186. *Thematic Areas*. Retrieved from South Asian Initiative to End Violence Against Children (SAIEVAC).

187. Sri Lanka recently held the National Consultation on Child Sexual Abuse and Exploitation including Online Safety from 21 January 2019 – 22 January 2019. The outcome was to assist the Ministry of Women and Child Affairs to develop a five-year National Action Plan. The new Action Plan has yet to be unveiled. See *National Consultation on Child Sexual Abuse, Exploitation and Online Safety (CSAE & OS)*. (2019). Retrieved from ECPAT Sri Lanka: <http://www.ecpatrilanka.org/ministry-of-women-and-child-affairs/> [Accessed on: 14 February 2019]

188. Sri Lanka Ministry of Women and Child Affairs, *Policy Framework and National Plan of Action to address Sexual and Gender-based Violence (SGBV) in Sri Lanka 2016-2020*. (n.d.). Retrieved from: <https://www.dropbox.com/s/oz1di27to59ox4m/Policy%20Framework%20and%20National%20Plan%20of%20Action%20to%20address%20SGBV%202016%20-%202020%20Final%20Cabinet%20Approved.pdf?dl=0>. [Accessed on: 25 January 2019].

189. *Light a Million Candles Campaign to CEO's of All Commercial Banks*. (2007). Retrieved from Financial Intelligence Unit, Central Bank Circulars: [http://fiusrilanka.gov.lk/docs/Circulars/2007/Light\\_a\\_million\\_candles\\_campaign-Offences\\_against\\_Children.pdf](http://fiusrilanka.gov.lk/docs/Circulars/2007/Light_a_million_candles_campaign-Offences_against_Children.pdf) [Accessed on: 14 February 2019].

190. UNICEF. (2016, November). "Victims are not Virtual" *Situation assessment of online child sexual exploitation in South Asia*, p. 42.

# 6

## RECOMMENDATIONS

This study was limited to the assessment of the legal and policy framework of OCSE in Sri Lanka. It should be noted that although the study details what legal provisions exist in relation to OCSE, the law in practice can deviate from this. Thus, to fully understand

the justice sector responses and access to justice by OCSE victims, more comprehensive primary research is needed. However, the assessment above has identified the following weaknesses in terms of dealing with OCSE in SL:

### 6.1 Legislative Interventions

- Across the legal infrastructure in Sri Lanka the definition of a child is not consistent. Without a consensus on how a child is defined, it creates gaps in how the substantive law is applied.
- The current Penal Code, Section 360B on Sexual Exploitation of Children has many shortfalls. First, it fails to explicitly criminalise many variations of OCSE. Second, an essential element of CSE is the 'exchange' that occurs between a perpetrator and child victim. This concept of 'exchange' is not codified in the Penal Code section.
- The current legislation in Sri Lanka on child pornography or CSAM doesn't adequately cover OCSE. First, the current terminology in the Penal Code is imprecise. It uses the term 'obscene' and 'indecent' which is left undefined. These terms, 'obscene' and 'indecent' can also include immoral behaviour, not just sexually explicit conduct. Although this section can be interpreted to include child pornography, when combined with the definition of film, in comparison to the Budapest Convention's definition of child pornography, the terminology in this section is broader. Second, the Penal Code fails to criminalise simulated images of children or images that appear to be a child, which is inconsistent with Sri Lanka's obligations under OPSC. Finally, the Penal Code does not explicitly include the necessary intent of producing child pornography for ICT distribution as articulated in the Budapest Convention.
- The legal framework in Sri Lanka fails to codify grooming as a crime. The Section 360E on Soliciting a Child, does not

explicitly mention online means of solicitation which is a necessary element of grooming as defined in the Luxembourg Guidelines.

- The lack of a section prohibiting OCSE in the Computer Crimes Act, No. 24 of 2007

is problematic. The Act gives broad investigatory powers for the crimes enumerated in it. Thus, by excluding OCSE as an enumerated crime, it limits the investigatory authority of law enforcement for these types of crimes.

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## 6.2 Policy and Practice Interventions

- The use of internationally agreed upon terminology to proscribe OCSE is essential to ensure a comprehensive protection system. The current legal framework uses imprecise terminology and thus the identification of perpetrators and methods of ICT-facilitated CSE is adversely impacted.
- Male victims of OCSE are not recognized as victims of CSE in Sri Lanka. The current substantive law in Sri Lanka uses gendered pronouns within the definition of the crimes thus creating a vacuum for male child victims. This is especially

problematic in light of the prevalence of male child victims in the child sex tourism industry in Sri Lanka.

- The National Action Plan for Human Rights has committed to establishing a national sexual offender registry in Sri Lanka by 2021. A sex offender registry would provide the basis for enhanced sentencing for sex crimes.

This study suggests both legislative and policy/practice approaches to address these weaknesses:

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## 6.3 Legislative Approaches:

### 1. Broad interpretation of existing laws:

The current legislation in Sri Lanka proscribing OCSE is not explicit. Section 360B on CSE does not specifically proscribe OCSE. Therefore, it is necessary to read Section 360B together with the additional provisions enumerated above to address the gaps in the former. Using a broad interpretation of the existing laws on CSE, can in theory be creatively construed to proscribe OCSE.

### 2. Reforming existing laws to reflect international standards:

- a.** The Obscene Publications Bill has yet to be adopted by Parliament. Although it expands the current

obscene publication statute to include online methods of distribution, production and consumption, it fails to proscribe simulated images of children or images appearing to be children engaged in sexually explicit conduct. It continues to use imprecise language to define child pornography, which is necessary to criminalise the conduct of each participant in the chain from production to possession and consumption. Thus, the Bill should be amended to include the following: *any material that visually depicts a child, a person appearing to be a child, realistic images representing a child engaged in sexually explicit activity,*

*or of the sexual organs of a child for sexual purposes, including the distribution through a computer system, procuring child pornography for oneself or others, or possessing child pornography.*

- b.** Although the current offences under the Penal Code can be broadly interpreted and thus used to prosecute OCSE, there remain gaps within the law that are not accounted for. Thus, it is recommended that the Penal Code should be amended to explicitly criminalise OCSE, consistent with international standards, and ensure that all aspects of the crime are

proscribed, and thus reduce the risk of perpetrators avoiding prosecution.

- 3. Amend the Computer Crimes Act:** Include the enumerated offence of child pornography as defined in the Budapest Convention and the OPSC. This would expand the enumerated offences under the Computer Crimes Act which gives broad investigative powers to law enforcement.
- 4. Amend Section 363, Rape:** Remove the gendered pronouns from the section to ensure that male rape victims can find redress through this section.

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## 6.4 Policy and Practice Approaches

### **1. Accede to the Lanzarote Convention:**

The Lanzarote Convention is the first international instrument to call on states to prohibit grooming, a form of OCSE.

### **2. Withdraw Sri Lanka's reservations to the Budapest Convention:**

Recommend that Sri Lanka include images that *appear to be* a minor engaged in sexually explicit conduct; and *realistic images representing* minors engaged in sexually explicit conduct in the Penal Code. Thus, criminalising the behaviour of perpetrators that perpetuates the demand for child pornography.

### **3. Categorization of OCSE Data:** Data related to OCSE complaints and prosecutions must be categorised appropriately to better understand current trends.

- a.** Currently, the NCPA does not categorize their data under OCSE but only under the offences enumerated in the Penal Code. Adjusting this to include OCSE would allow investigators to better understand where their

resources should be focused on.

- b.** The Cybercrime division of the CID does not categorise their complaints by age, nor is this data available to the public. Thus, by categorising the data by age of victim, the current trends of OCSE in Sri Lanka can be ascertained.

### **4. Training for NCPA, CD, CID, Prosecutors and Judges:** There is currently a lack of knowledge on what constitutes OCSE.

- a.** Law enforcement officials who receive complaints must first be able to recognize what constitutes OCSE. There is currently limited knowledge that only child pornography constitutes OCSE, when in reality OCSE includes multiple types of offences.
- b.** Victim sensitisation of law enforcement personnel (including technical institutions that receive complaints). Based on evidence from KII's, it was stated that victims face re-victimisation when they report OCSE

incidents, especially at the WCB.

- c.** Build technical capacity of law enforcement to effectively investigate crimes that occur in the online space (issuing preservation letters to social media companies, search warrants for IP addresses, undercover investigative techniques etc).

**5. Create a centralised complaint system within the law-enforcement and technical Institutions.** There are

currently multiple institutions that receive complaints and also re-direct complaints. To reduce the confusion amongst these institutions, there should be:

- a.** Understanding and knowledge of the capacity and comparative advantage of each of the partner institutions.
- b.** Centralised complaint system to avoid re-victimisation of victims who are redirected to multiple institutions.

# Annexure 1

## SAMPLE QUESTIONNAIRE USED DURING KEY INFORMANT INTERVIEWS

- 1.** KII's Experience and Background:
  - a.** Please describe how long you've been working at [specific institution]?
  - b.** Could you briefly describe your experience/ relevant training or educational background with regards to sexual exploitation /child abuse etc ?
- 2.** Does your institution/organisation receive complaints by victims?
  - a.** What kind of complaints do you receive? If you are able to disclose, what is the approximate age range of the victims of these types of complaints?
  - b.** Approximately how many do you receive a year?
  - c.** What do you do when you receive these complaints? Does your institution process these complaints or alternatively is the complaint transferred? If the complaint is transferred, to which institution/organisation is it transferred to?
  - d.** Do you work with other partners/institutions? (who are these partners)
  - e.** Are there any international partners? Are you aware of an Interpol data base on OCSE?
- 3.** What is your understanding of what OCSE is? Does it entail Pornography? Does it include any of the following crimes/instances?
  - a.** Grooming?
  - b.** Harassment/bullying?
  - c.** Nudes – consensual /extortion?
  - d.** Trafficking?
  - e.** Sex Tourism?
- 4.** Out of these types of OCSE, approximately how many complaints have you received on each of these?
  - a.** Are there any challenges that you are aware of or that you have experienced in these types of cases? Are they different than the challenges associated with other crimes?
- 5.** What are the specific laws that are used to investigate/prosecute OCSE?

- a.** In your opinion does the obscene publications section of the penal code cover virtual pornography? What about images that appear to be children?
- 6.** Does this institution have a specific policy on OCSE? What about child abuse?
- 7.** What are the other institutions that you have worked with in the past? What was that experience like? What were some of the challenges ?
- 8.** Are you aware of any other government, non-governmental, civil society organisations that work on this type of issue?
- 9.** If there are challenges that have been mentioned and/or gaps in the law identified → based on your experience what can be done to improve the legal and policy gaps and/or address these challenges?
- 10.** What other recommendations would you give in countering OCSE?

# Annexure 2

## TABLE OF OFFENSES RELATING TO OCSE AND SENTENCES

Penal Code Section	Sentencing (minimum – maximum term of imprisonment)
Sexual Exploitation of Children, Section 360B	Minimum 5 years – maximum 20 years imprisonment and a fine.
Obscene Publication of a Child: Section 286A	Minimum 2 years – maximum 10 years imprisonment and a fine.
Duty of a Person Providing Services by Computer to Prevent Sexual Abuse of a Child: Section 286B	Maximum 2 years imprisonment, or a fine, or both imprisonment and a fine.
Duty to inform of use of premises for Child Abuse: Section 286C	Maximum 2 years imprisonment, or a fine, or both imprisonment and a fine.
Hiring or Employing Children to Act as Procurers: Section 288A	Minimum 2 years – maximum 5 years imprisonment, and a fine.
Procurement: Section 360A	Minimum 2 years – maximum 10 years imprisonment, and pay a fine
Sexual harassment: Section 345	Maximum 5 years imprisonment, or a fine, or both a fine and imprisonment. Judge may also order the defendant to pay compensation to the victim.
Trafficking: Section 360C	Minimum 2 years – maximum 20 years imprisonment and a fine.  If the victim is a child the minimum term of imprisonment is 3 years - maximum 20 years imprisonment.
Soliciting a Child: Section 360E	Maximum 10 years imprisonment, or a fine or to both imprisonment and a fine

Penal Code Section	Sentencing (minimum – maximum term of imprisonment)
Rape: Section 363	<p>Minimum 7 – maximum 20 years (rigorous imprisonment) and a fine.</p> <p>If the victim is a woman under eighteen years, the minimum prison sentence is 10 years – maximum 20 years.</p>
Unnatural Offences: Section 365	<p>Maximum 10 years imprisonment and a fine.</p> <p>If the defendant is over eighteen years, and the victim is under sixteen years: minimum 10 years – maximum 20 years imprisonment and compensation to the victim if necessary</p>
Acts of Gross Indecency between Persons: Section 365A	<p>Maximum 2 years imprisonment, or a fine or both imprisonment and a fine.</p> <p>If the defendant is over eighteen years, and the victim is under sixteen years: minimum 10 years – maximum 20 years imprisonment and compensation to the victim if necessary</p>
Grave Sexual Abuse: Section 365B	<p>Maximum 2 years imprisonment, or a fine or both imprisonment and a fine.</p> <p>If the defendant is over eighteen years, and the victim is under sixteen years: minimum 10 years – maximum 20 years imprisonment and compensation to the victim if necessary.</p>
Publication of Matter relating to Certain Offences: Section 365C	<p>Maximum 2 years imprisonment, or a fine or both imprisonment and a fine.</p>
Extortion: Section 372	<p>Maximum 3 years imprisonment, or a fine or both imprisonment and a fine.</p>

