

SENTENCING CHILD PORNOGRAPHY¹ OFFENDERS

Introduction

1 The substantial increase in the penalties for section 27(1)² offences suggests a need for new sentencing guidelines. South African courts have, generally, been reluctant to follow the examples of courts in the United States³, for instance, where sentences handed down in child pornography cases reflect the seriousness with which offences involving the abuse of children should be treated. Sentencing patterns in South Africa reflect the dangerously erroneous view that possessors and distributors of child pornography are harmless and custodial sentences are rare, except in those cases where such persons were also found guilty of the actual sexual abuse of children.

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¹ Most child protection practitioners, including law enforcement agencies, agree that the term "child pornography" does not adequately or accurately describe this disturbingly horrific crime against children. "Child abuse images" is considered a more accurate description, although that term would seem to suggest that the offence is limited only to *visual* depictions and does not include descriptions. The definition of "child pornography" in the *Films and Publications Act* includes descriptions

² *Films and Publications Amendment Act, No 18 of 2004*

³ See, for instance, the case of Terry Adkins, who, according to the court, "posed enough of a danger" to be sentenced to 76 years in prison on 99 counts of receiving, and one count of possession, of child pornography. His wife was sentenced to 30 years in prison as an accomplice. (See www.courtstv.com/news/2004/0525/couple_ap.html).

In another case, reported at www.teamamberalert.net/news/modules.php?name=news&file=article&sid=1579, a Mr McKinney was sentenced to 100 years in prison for child pornography offences. "It is a century prison sentence that sends a strong message: if you are downloading child pornography, be prepared to go to jail...", the court stated.

⁴ See Susan Edwards, *Prosecuting child pornography: possession and taking of indecent photographs*, *Journal of Social Welfare and Family Law* 22(1) 2000

In the words of the UK Sentencing Advisory Panel⁵, "*.....it is fundamentalthat sentencing for these offences should reflect the harm suffered by children who are abused and exploited by the production and distribution of indecent photographs. An offender sentenced for possession of child pornography should be treated as being in some degree complicit in the original abuse which was involved in the making of the images*⁶. Sentences for possession should also reflect the continuing damage done to the victim or victims, through copying and dissemination of the pornographic images. Those who make or distribute the images bear a more direct responsibility for their eventual use, as well as for encouraging further production."

In increasing the punishment for child pornography offences, Parliament had identified four main concerns :

- the increase in the dissemination and instantaneous transmission in computer-assisted trade in child pornography
- the difficulties in the investigation and prosecution of child pornography offenders, given the nature of the Internet
- the increased likelihood that, as access to computers and the Internet increases, especially among schoolchildren, the threat to the well-being and security of children increases, and

⁵ The Panel's Advice to the Court of Appeal on Offences Involving Child Pornography, chaired by Prof Martin Wasik, August 2002

⁶ Child pornography is, in fact, the non-contact abuse of a child by the possessor

- the potential for paedophiles and child abusers to use the new technology to groom and seduce children into sexual relationships.

The Offences

2 Child pornography – images or descriptions of the systematic rape, abuse, torture and even murder of children - is not, as some may believe, a victimless offence. Every child abuse image is an image of child having been maimed, tortured, sexually abused and, sometimes, murdered.⁷ *"In fact, it is not pornography in any real sense: simply the evidence – recorded on film or video tape – of serious sexual assaults on young children."*⁸ As has been said so often by law enforcement agents, every child abuse image is a crime scene. Child pornography creates more than one victim – there is, obviously, the child-victims, who, apart from the trauma endured during the making of the images, will suffer continuing shame and distress from the knowledge that indecent images of themselves will be in circulation almost for ever. But parents, as well as guardians and relatives, are also victims of child pornography and have to live with the pain of the trauma and suffering inflicted on their children, as well as the knowledge that that image will always be there, and will be exchanged and traded in for years, even long after their children have reached adulthood. To the extent that the victims are children, their

⁷ A few years ago, there was the arrest of an Italian pederast ring that was taking orders to kidnap Russian orphans according to pre-specified characteristics, like hair colour, and then torture and kill them on camera for posting on the Web. *Michael S Malone*, ABC News. See, also, the tragic case of Thea Pumbroke, a 6-year old child who died as a result of drug overdose while being filmed during the making of a pornographic movie.

⁸ Tate, *The child pornography industry: international trade in child sexual abuse*, 1992

parents and others closely connected with them, it is not an exaggeration to say that society itself is harmed by child pornography and the objectification of children.

3 While the *Films and Publications Act*⁹ (the "Act") creates a number of child pornography offences, this paper will focus only on the section 27(1) offences.¹⁰

The Act defines¹¹ "child pornography" as including any image, however created, or any description of a person, real or simulated¹², who is, or who is depicted or described as being, under the age of 18 years, engaged in sexual conduct; or participating in, or assisting another person to participate in sexual conduct; or showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purpose of sexual exploitation.

3.1 Section 27(1)(a), as amended by Act No. 18 of 2004, provides that any person shall be guilty of an offence if he or she-

(a) is in possession of;

⁹ *Films and Publications Act, No. 65 of 1996*, as amended by the *Films and Publications Amendment Act, No. 34 of 1999* and the *Films and Publications Amendment Act, No. 18 of 2004*.

¹⁰ Police and prosecutors must always remember, when dealing with child pornographers, the fact that the taking of pornographic photographs of children involves the commission of additional offences, such as sexual assault, sex with a minor, indecent assault and even murder.

¹¹ Section 1(iv) of the *Films and Publications Amendment Act, No. 18 of 2004*

¹² The person shown or described need not be a real person but includes fictitious persons, such as a computer-generated or "virtual" person. See the definition of "pseudo-photographs" in section 84 of the *Criminal Justice and Public Order Act 1994* of the United Kingdom

- (b) creates¹³ or produces or in any way contributes to, or assists in, the creation or production of;
- (c) imports or in any way takes steps to procure, obtain or access; or
- (d) knowingly exports, broadcasts or in any way distributes or causes to be exported, broadcast or distributed

a film or publication which contains child pornography or which advocate¹⁴, advertise or promotes child pornography or the sexual exploitation of children.

3.2 Section 30A increases the maximum penalty for section 27(1) offence to 10 years. The combined effect of the amendments in section 27(1) and section 30A, means that a person convicted of creation, possession and distribution, for instance, could be facing a maximum of 30 years imprisonment.

¹³ The UK Court of Appeal, in *R v Smith R v Jayson*, held that the act of voluntarily downloading an indecent image from the Internet on to a computer screen was an act of making or creating a photograph. Given the way information is transmitted via the Internet – in batches of ones and zeroes – the act of downloading decodes the information to form an image and, therefore, the act of downloading creates the image.

¹⁴ As worded, the mere advocacy, advertising or promotion of child pornography or the sexual exploitation of children, even absent any visual presentation or description of child pornography, will be sufficient to bring a film or publication within the scope of section 27(1).

Suggestions for sentencing

4 The Sentencing Advisory Panel (the "Panel") identified two primary factors which should determine the seriousness of an individual offence-

(a) *the nature of the offending material – from images depicting nudity or erotic posing to those involving gross assault of children by adults, sadism or bestiality*¹⁵, and

(b) *the extent of the offender's involvement with the material – ranging from possession for the offender's personal*¹⁶ *use to the original production of the images for distribution.*

The nature of the offending material

4.1 With very limited exceptions, the production of child abuse images, as the very expression suggests involves the abuse and/or the exploitation of children. Any image of a child involved in sexual activity is a record of the commission of a serious criminal offence. Even an

¹⁵ I would add the age of the child to this list

¹⁶ As a matter of interest, following the Supreme Court decision in the *Sharpe* case, the definition of "child pornography" in Canadian legislation excludes, from the offences of *possession* and *making or creating* child pornography, any written material or visual representation created by an accused alone and held by the accused alone, exclusively for his or her own personal use, as well as visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use. The exclusions do not extend to situations other than mere private possession.

image that may appear harmless, such as a photograph of a naked child, may still involve the exploitation or degradation of that child. The possession of child abuse images should always be treated as non-contact abuse of children and an *"offender convicted for possession of child pornography should be treated as being to some degree complicit in the original child sexual abuse which was involved in the production of the images."*¹⁷

4.2 The Panel supported, with modification, the typology used by the Combating Paedophile Information Networks in Europe project, University of Cork, Republic of Ireland, to describe the range of images of children used by paedophiles to provide an objective standard for courts for assessing the nature of the material in terms of the degree of harm done to the children involved. The Panel recommended the following 5 levels according to the degree of harm:

LEVEL	DESCRIPTION	TYOLOGY
1	Images depicting nudity or erotic posing, with no sexual activity	1 Nudity (naked or semi-naked in legitimate settings/sources) 2 Erotica (surreptitious photographs showing underwear/nakedness) 3 Posing (deliberate posing suggesting sexual content) 4 Erotic posing (deliberate sexual or provocative pose) 5 Explicit erotic posing (emphasis on genital area)
2	Sexual activity between children, or solo masturbation by a child	6 Explicit sexual activity not involving an adult
3	Non-penetrative sexual activity between adult(s) and child(ren)	7 Assault (sexual assault involving adult)
4	Penetrative sexual activity between child(ren) and adult(s)	8 Gross assault (penetrative assault involving adult)
5	Sadism or bestiality	9 Sadistic/bestiality (sexual images involving pain or animal)

4.3 The Panel's advice is, according to the Typology Table above, a "hierarchy" of child pornography offences, from the least serious Level 1 to the most serious Level 5 for purposes of imposing appropriate sentences.

¹⁷ A state law mandating consecutive minimum 10-year prison terms for each count of possessing child pornography is not constitutionally cruel and unusual, the Arizona Court of Appeals ruled Tuesday -- even if it results in a life sentence. In a divided decision, the judges said they saw nothing wrong with the Legislature deciding that those who possess child pornography are as guilty as -- and should be punished equivalent to -- those who produce it. And that, they said, made it constitutionally proper to require that Maricopa County Superior Court Judge Ruth Hilliard impose a 200-year term on Morton R. Berger, with no possibility of parole, for possessing 20 different images.

4.4 The inclusion of the age of the child-victim might be an appropriate and necessary addition to the Typology Table. A "child" is, for the purpose of the Act, any person under the age of 18 years. Without diminishing the trauma suffered by any child subjected to sexual abuse, social revulsion, arguably, is strongest when the image is that of a child of tender months. The age of the child-victim should be an additional factor when considering appropriate sentences within each Level and Typology.

4.5 It may also be necessary to draw a distinction between images of actual children and fictitious children for the purpose of sentencing,¹⁸ and between images and descriptions.

Actual and fictitious children

4.6 The high correlation¹⁹ between non-contact (child pornography) and contact abuse of children suggests that there should be no distinction, for the purpose of offences involving child pornography, between images of

actual and fictitious children. (See, for instance, the Canadian Supreme Court decision in *R v Sharpe*:

"In light of Parliament's purpose of criminalizing possession of material that poses a reasoned risk of harm to children, the word "person" in the definition of child pornography should be construed as including visual works of the imagination as well as depictions of actual people.")

Child pornography, whether visual or descriptive, is also used for the purpose of grooming and for seducing children into believing that sexual activities between children and adults are acceptable and normal behaviour. That is a compelling reason for not drawing any distinction between works of the imagination and actual children.

Texts or descriptions of child pornography

4.7 South African legislation, like Canadian jurisprudence on child pornography, also criminalises descriptions of child pornography. "The inclusion of written material in the offence of possession of child pornography does not amount to thought control. The legislation seeks to prohibit material that Parliament believed was harmful. The inclusion of written material which advocates and counsels the commission of offences against children is consistent with this aim, since, by its very nature, it is harmful,

¹⁸ In so far as the offence is concerned, the Act does not differentiate between actual and fictitious children. However, it is suggested that, for the purpose of sentence, child abuse images of actual children should attract a more severe sentence than that of fictitious or "virtual" children.

¹⁹ See, for instance, Larry Baron and Murray Strauss, *Legitimate Violence and Rape: A Test of the Cultural Spillover Theory*, in *Social Problems* 34; Joseph Scott and Loratte Schwalm, *Rape Rates and the Circulation of Adult Magazines*, in *Journal of Sex Research* 24; David A Scott, *How Pornography Changes Attitudes*, in *Pornography: The Human Tragedy*, Tyndale House Publishers; Testimony of John B Rabun, Deputy Director, National Centre for Missing and Exploited Children, before the Subcommittee on Juvenile Justice of the Senate Judiciary Committee, 1984; W Marshall, *Pornography and Sex Offenders*, in *Pornography: Research Advances and Policy Considerations*, New York Academic Press; *The Men Who Murdered*, *FBI Law Enforcement Bulletin*, 1985; Cass R Sunstein, *Pornography and the First Amendment*, *Duke Law Journal*, 1986

regardless of its authorship. Evidence suggests that the cognitive distortions of paedophiles are reinforced by such material and that written pornography also fuels the sexual fantasies of paedophiles and could incite them to offend."²⁰

4.8 The Canadian Supreme Court, in *R v Sharpe*, concluded that child pornography, whether visual or descriptive, is inherently harmful to children and to society and that the harm exists independently of dissemination, or any risk of dissemination, "and flows from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children. Although not empirically measurable, nor susceptible to proof in the traditional manner, the attitudinal harm inherent in child pornography can be inferred from degrading or dehumanizing representations or treatment. Expression that degrades or dehumanizes is harmful in and of itself as all members of society suffer when harmful attitudes are reinforced. The possibility that pornographic representations may be disseminated creates a heightened risk of attitudinal harm. The violation of the privacy rights of the persons depicted constitutes an additional risk of harm that flows from the possibility of dissemination. Child pornography is harmful whether it involves real children in its production or whether it is a product of the imagination"

The extent of the offender's involvement

- 4.9 The production of child pornography involves the abuse or exploitation of children. An image of a child or children involved in explicit sexual activity is a record of the commission of serious criminal offences. Even images that appear innocent and harmless, may still involve the objectification and degradation of children.
- 4.10 The fact that the children depicted in child abuse images may not be identified is not relevant for purposes of prosecution, conviction and sentence. The substance of the offence is the image itself. Nor is it necessary to prove that the image is that of an actual child, as opposed to a computer-generated or "morphed" photograph. The age of the child is also irrelevant where the image is, to a reasonable person, clearly representative of a person under the age of 18 years.
- 4.11 The motive of the originator may be a relevant consideration where the image does not appear to be overtly pornographic, such as a photograph of a naked child in a bathtub, taken by a parent and intended for the family album. The motivation of that parent is perfectly innocent. But not if that same photograph was taken, secretly, by someone else, like Graham-Kerr.

²⁰ *R v Sharpe*

Graham-Kerr,²¹ a swimming pool instructor, had taken photographs of a naked boy at the pool, and was charged with possession of indecent photographs. The Court of Appeal quashed his conviction on the grounds that there was nothing inherently indecent about the pictures. The court held that, even though he admitted that he derived sexual gratification from taking and looking at the pictures, his secret motive was irrelevant to the question of its indecency. *“The question...is whether the photograph itself is indecent.....In our view it is not possible to relate the question of whether or not a photograph is indecent with the original motivation of the person who took it, it may be that the original motivation was perfectly innocent subjectively regarded; but if the photograph is one which right-thinking people would regard as indecent, the motivation of the original taker....cannot be a relevant matter.”*

Implicit in the court's finding in the case of Graham-Kerr, in my view, is that motive may be a relevant consideration where a photograph is not, to any “right-thinking” person, indecent *per se* but is not only capable of being used for the purpose of sexual exploitation but where that purpose is, in fact, the motive. The context and motive may, in fact, be determinative of whether or not an apparently innocent image is child pornography.

The definition of child pornography in the *Films and Publications Amendment Act, 2004* includes the showing of the body of a child in a manner or in circumstances which, within context, amounts to sexual exploitation or in such a manner that it is capable of being used for the purpose of sexual exploitation. It seems to me that this subsection requires a consideration of not just the context but also the motive to avoid criminalizing the innocent.

5 Sentencing policies should also take into account the legal consequences of a conviction. Where a person convicted of an offence involving child pornography is not subject to any other legal consequences²² in addition to the sentence that may be imposed for that offence, the sentence should be more severe.

²¹ ([1988] 1 WLR 1098)

²² In the UK, for instance, such a person would be subject to a range of legal consequences, such as registration under the *Sex Offenders Act*, court-ordered disqualification from working with children under the *Criminal Justice and Court Services Act*, *Education (Restriction of Employment) Regulations* and provisions under the *Protection n Act*

GENERAL PRINCIPLES

6 The following general principles should be applied in determining appropriate sentences. Courts are not, with respect, required to determine whether or not child pornography is harmful. That option has already been exercised by Parliament in making child pornography illegal. Courts, however, should determine the degree of harm and seriousness for the purpose of appropriate sentencing on a case by case basis. Distribution, for instance, may be regarded as more serious, and therefore more harmful, than possession. Creating child pornography through computer-generated representations of children may be considered less harmful, but harmful nevertheless, than using actual children. Courts may also find written descriptions of child pornography lower than visuals or images of child abuse in the hierarchy of harm and seriousness for purpose of sentencing.

6.1 *Section 27(1)(i): Possession*

The possession of child pornography is a form of non-contact sexual abuse of a child. Every possessor of such images should, therefore, be regarded as being complicit, to some degree, in the original sexual abuse involved in the production of the images. Unless there are compelling mitigating circumstances, the sentence should be custodial to reflect a degree of complicity in the original sexual abuse, as well as the continuing damage suffered by the victims through copying and further dissemination of the images. The nature of the images, the number of images and the age of the victims in the images are some of the factors that may influence the length of a custodial

sentence. The possession of descriptions of child pornography, without visuals, may attract a lesser sentence than the possession of images of child abuse.

6.2 *Section 27(1)(ii): Creation or production*

“Creation” and “production” are not defined in the Act. In the UK Criminal Court of Appeal, in the case of *R v Smith; Jayson*, the Court held that the ordinary meaning of the word “create” is to “bring into existence”, and that, therefore, the act of downloading child pornography will amount to creating child pornography. Downloading is an act amounting to an instruction to the computer to cause that image to appear, as an image, on the screen.

Given the nature of the transmission of information via the Internet, the finding of the court in the *Smith* case seems logical. Information on the Internet is transmitted in batches of zeroes and ones – the binary language of computers. An image is not transmitted as an “image” but in the form of a code made up of zeroes and ones. The act of downloading, usually by “pointing and clicking”, is in the nature of a command or instruction to decode the batches of zeroes and ones into an image. Without the command or instruction to decode the information, the information will remain as nothing more than batches of zeroes and ones.

In so far as “creating” and “producing” are concerned, the following should be considered:

- 6.2.1 The **use of an actual child** in the creation or production of child pornography amounts to the sexual abuse of a child, indecent assault and the creation of child abuse images and, in addition to appropriate penalties under each of the relevant child care and child protection statutes, or the common law, should attract the maximum penalty in terms of the *Films and Publications Act*, as amended.
- 6.2.2 Creating child pornography by **downloading** from the Internet, for the purpose of sentencing, may be regarded as a lesser evil than creating child abuse images by using actual children. However, as with possession, the sentence should reflect such person's complicity in the original abuse of the child, where the image is that of an actual child, and an appropriate custodial sentence should be imposed. Where the image downloaded is not of an actual child but a product of one's imagination, such as a computer-generated representation of a child, the sentence may be marginally less severe.
- 6.2.3 Creating child pornography **without using an actual child**, such as using a computer-generated representation of a child, is, if there is a hierarchy of harm, the least

harmful since no actual child has been abused. But such images can still fuel the fantasies of paedophiles and child molesters and are still demeaning and degrading of children, apart from stimulating the demand for such images and their use in the grooming and seduction of children into sexual activities. However, the sentence in such cases may be less severe than in cases involving the use of actual children.

- 6.2.4 The creation of **written descriptions** of child pornography, without visuals, may be regarded as less harmful and serious for the purpose of sentencing.

6.3 Section 27(1)(iii): Importing or taking steps to procure, obtain or access

It is suggested that "importing" in the sense used in this subsection is not concerned with child pornography actually in the possession of the "importer", which would constitute the offence of possession, but the act of importing or ordering or requesting such materials, whether or not such materials have actually been brought into the country. To the extent the person is not in actual possession but has taken steps to acquire such materials, and absent any other element of section 27(1), a custodial sentence may be out of proportion.

6.4 Section 27(1)(iv): *Exporting, broadcasting or distributing*

The level of sentence for the distribution, in any manner, should reflect the seriousness of this offence and the continuing damage victims of child pornography have to suffer and endure through the copying and dissemination of the images. Those who distribute such material are directly responsible for encouraging the abuse of children for further production, and a custodial sentence is appropriate in all cases involving the distribution of child abuse images. Distribution should always be regarded, for purpose of sentencing, as a commercial activity, whether or not it involves financial profit.