

Does Thinking Make It So? Defining Online Child Pornography Possession Offences

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Investigations into the widespread possession of online child sexual abuse images reveal enormous variety in the types of images collected by adults with a sexual interest in children. While there is almost universal condemnation of the sexual exploitation of children through such images, it is not possible to define precisely what constitutes an illegal child sexual abuse image. This is because the concept is broad, changeable and, at the margins, elusive. Nonetheless, the use of criminal law to regulate any activity requires that the proscribed conduct be clearly defined. This paper reviews the ways in which child sexual abuse images can be categorised and, in particular, examines the impact of the viewer's perception on the definition of child pornography offences in Australia.

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Traditionally in Australia, anti-pornography laws have been concerned with the importation, display or distribution of obscene or offensive material, but not its possession (Fox 1967). Certain types of adult pornography are banned and cannot be produced, imported, sold or otherwise distributed. However, mere possession of any form of adult pornography is not an offence. In contrast, the possession of child pornography has been criminalised since the early 1990s. Since that time, the internet has developed into a platform for easily gaining access to images of child sexual abuse, and child pornography offences have emerged as a focus for public attention. It is often assumed that the definition of child pornography is unproblematic and that all forms of child pornography are equally harmful. In fact, the harm caused by child pornography is not well understood and there is a need for cautious application of the label 'child pornography' to avoid legislative over-reach. For example, it would be an unintended consequence for the law to be applied to the keeping, for non-sexual purposes, of family holiday snapshots of children in varying stages of undress playing on the beach. However, if those same images are kept by a person for the purpose of sexual gratification, the question arises whether that purpose can properly be taken into account, if at all, in the definition of child pornography.

Defining child pornography: sexually explicit, explicit and offensive, or overall offensive

The manufacture, distribution, possession and accessing of child pornography are each separate offences. There are three basic ways in which child pornography is defined in Australia ranging from:

- 1 a specific requirement of describing or depicting sexual body parts or sexual acts involving children or depicting children in an indecent manner or context; to



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- 2 describing or depicting sexual body parts or sexual acts involving children in a manner that is offensive; to
- 3 a general test of ‘describing or depicting a child in a manner that would offend a reasonable adult.’

In some states, the showing of sexual activity or of the genitalia of a child is not necessary for an image to be classed as child pornography. The tests of indecency and offensiveness allow for consideration of context in the way an image is made or the way in which an image is viewed. This gives rise to a complaint that the standard is difficult to define. There is a long history of contention regarding obscenity laws that rely on the imprecise standard of what may offend a reasonable adult. Trial by jury is often seen as a valuable protector from the over-reach of the law regarding what reasonable people would consider offensive. However, in relation to child pornography possession offences, where such a charge is dealt with summarily, the factual question of whether material is offensive or not is decided by a magistrate sitting alone.

1 Sexually explicit

In two jurisdictions, child pornography is narrowly defined in relation to:

- sexual activity;
- the sexual parts of a child; or
- the depiction of a child in an indecent sexual context.

ACT law bans the representation of the sexual parts of a child or sexual activity by or in the presence of a child. Victorian law bans describing or depicting a child engaged in sexual activity or depicting a child in an indecent sexual manner or context.

2 Sexually explicit and offensive

The Commonwealth law against accessing child pornography combines

the depiction of sexual activity or sexual body parts with a test of offensiveness to a reasonable adult person. Similarly, recent legislative reform such as the *Crimes Amendment (Child Pornography) Act 2004* (NSW) adopt a definition based on a combined test of the depiction of sexual acts, or sexual body parts, or depiction of a child in a sexual context, where this is done in a way that is offensive to a reasonable adult person.

3 A general test of offensiveness

In those jurisdictions that apply a general test of offensiveness, this implies an objective standard of what a reasonable adult might think. This standard has to be interpreted and applied to the facts of a particular case by the court. Given the breadth of the definition of child pornography, the courts face an enormous range of factual situations concerning the nature and amount of potentially illegal material that offenders may be charged with possessing. In relation to the problem of defining child pornography, this paper discusses three issues:

- what the image depicts;
- the context in which the image was made or is kept; and

- the way in which a particular person views the image.

What the image depicts

Taylor and Quayle (2003) list ten categories of images that are used as part of the sexual repertoire of persons with a sexual interest in children. This list was developed for the Combating paedophile information networks in Europe (COPINE) centre. The COPINE taxonomy was developed principally from a psychological perspective to better understand the collecting behaviour of adults with a sexual interest in children. Given this perspective, the COPINE taxonomy is more extensive than the criminal law definition. The categories are shown in Table 1.

While the range of child sexual abuse images that may be captured under Australian anti-child pornography laws is broad, there are three distinct categories that may be involved:

- images of child sexual abuse offences;
- images of children in sexual poses; and
- images of children that are sexualised by the viewer.

Table 1: Categories of child pornography		
COPINE no.	COPINE categories of material used by persons with a sexual interest in children	UK Court of Appeal child pornography severity rating
1	Indicative	
2	Nudist	
3	Erotica	
4	Posing	1
5	Erotic posing	
6	Explicit erotic posing	
7	Explicit sexual activity	2
8	Assault	3
9	Gross assault	4
10	Sadistic/bestiality	5

Source: Taylor & Quayle 2003; *R v Oliver* (2003) Crim LR 127

Box 1: The UK approach

The UK Sentencing Advisory Panel (SAP) gave advice to the UK Court of Appeal on the definition of child pornography and reduced the COPINE classifications to create five categories of child pornography for law enforcement purposes. These categories were seen by SAP to be of increasing seriousness (Sentencing Advisory Panel 2002). However, the notion of seriousness may not be so simple, as some offline child sexual abusers may only use erotica or posing images to fuel their offline offending, rather than using images of more extreme forms of abuse. Importantly, while SAP was prepared to include items in COPINE categories two and three, this was actually opposed by a major child protection advocacy group, the Children's Charities' Coalition for Internet Safety (CCIS), which consistently argued against the inclusion of material described as 'indicative', 'nudist' or 'erotica' (CCIS 2002a, 2002b).

The status of images was resolved in the UK in the Court of Appeal decision of *R v Oliver* (2003) Crim LR 127, where it was held that images in categories one, two and three of the COPINE classification do not fit the criminal definition of child pornography for the UK, which is based on a standard of 'indecent'. The reduced categories of child pornography for law enforcement developed by the UK Court of Appeal are shown in Table 1. Images in levels two to five of the UK Court of Appeal taxonomy can be linked to specific offences involving children. Some images in UK Court of Appeal category one may also be linked to criminal acts of indecency involving a child.

Images of child sexual abuse offences

In the states where the definition of child pornography is based on the sexual explicitness of the image, offending images are likely to portray child sexual assault offences. Where offensiveness is part of the definition of child pornography, the offensiveness to a reasonable adult of images of child sexual abuse can be readily inferred.

Under state and territory law the consent of the child is simply not an issue in relation to offences that specifically criminalise sexual activity between an adult and a child less than 16 years of age. Currently, state and territory child pornography laws apply to material that describes or depicts a person under 16 years of age, or who appears to be less than 16. The use of language such as 'describing or depicting a person who is or appears to be less than 16 years of age' is capable

of including 'morphed' images (digitally altered images of real persons) and wholly simulated images, where these are made to look like children. However, morphed and simulated images are not the focus of this paper (see Krone 2004).

The maximum penalties provided for offline sexual assault offences with children are graded according to the age of the child involved and the degree of intrusiveness of the act involved. The most serious offence is sexual intercourse with a child, and this encompasses a range of sexually penetrative acts. The maximum penalty differs depending on which age band the child fits into at the time of the offence. Commonly, three age bands are used:

- less than 10 years of age;
- 10 years and above up to 14 years; and
- 14 years and above up to 16 years.

Similar age categories are commonly used to aggravate the penalty for less serious offences of indecent assault and committing an act of indecency with or towards a child. Considerations of youthfulness and degree of intrusiveness in any action depicted may be considered in defining child pornography and then rating its relative seriousness. The age of the child depicted may be important in applying a standard of offensiveness, given a greater abhorrence towards the sexualisation of the very young.

The *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* (Cth) creates an offence of accessing child pornography and defines child pornography in terms of children under the age of 18 years, using a combined test of sexual explicitness and offensiveness. Given that the age of consent for sexual relations is generally 16 years for heterosexual and homosexual relations, there may be some difficulty in applying the same standards for child pornography in relation to a child under 16 (or more particularly under 10 years of age), to images of children between 16 and 18 years of age. It may be that a reasonable adult would consider the depiction of consensual sexual relations by a person with legal capacity to enter such relations as not being offensive when viewed in private by an adult. It may be thought to be offensive, however, if obtaining images involved a breach of privacy, or if the image depicted the commission of an offence of non-consensual sexual assault. Under existing state laws such invasive or violent images of persons over 16, but less than 18 years of age, are not captured by the definition of child pornography.

Images of children in sexual poses

Sexual poses are also likely to be offensive, particularly in relation to the involvement of younger children. In a general sense, images in COPINE categories four (posing), five (erotic posing, which involves sexualised or provocative poses) and six (explicit erotic posing, which has a deliberate emphasis on the genital region) may be considered to be child pornography and could well involve the portrayal of acts of indecency or aggravated acts of indecency. The deliberate sexual posing of children introduces an aspect of harm through the sexual exploitation of the child being photographed.

Images of children that are sexualised by the viewer

Other images of children are much less readily categorised as child pornography. Images in COPINE categories one (indicative material), two (nudist) and three (erotica) are unlikely to be

considered offensive in Australia unless an aspect of their production or the manner in which they are kept introduces an additional element of indecency or offensiveness. In some instances, consideration of the context in which an image was obtained or is kept may be used to establish offensiveness.

The importance of context in the making of images

While a photograph of a partially clothed child, when viewed singly, may cause no concern to the objective viewer, what difference does it make if the images were taken surreptitiously without consent? Context may be a factor in assessing standards of indecency or offensiveness in the definition of child pornography, particularly in relation to collections of images of pre-pubescent children and collections of images of pre-school children. Images might be found to be offensive on the basis of the manner in which they were obtained,

such as by intruding on the privacy of those photographed or by using force.

Another example where the context of the production of an image may cause it to be indecent or offensive to a reasonable adult viewer is where a child is photographed apparently in a state of unconsciousness or under the influence of a drug. This is a very menacing aspect of the manner in which some child pornography is produced and the apparently drug-affected appearance of child subjects in pornography has been noted (Taylor & Quayle 2003).

The viewer's gaze and the context in which images are kept

People may view the same image differently. The idea of the 'viewer's gaze' is that images of children that cannot be described as intrinsically offensive may become so because they are sexualised by the viewer. For example, an image of a child in underwear taken from a store catalogue may appear innocuous to one viewer and be highly sexualised for another. What then is the effect of a collection of many thousands of photographs of partially clothed children? What if those photographs are mixed in galleries with photographs of children being subjected to obvious sexual abuse or are used to illustrate written descriptions of the sexual abuse of children?

As indicated above, the criminalisation of the possession of child pornography represents a departure from previous approaches to content-related offences. Previously, tests of obscenity or offensiveness were evaluated in terms of the potential audience (Fox 1967). The essence of a possession charge is that an offender, for their own private use, keeps material without exposing it to a wider audience. Taking into account

Box 2: Case study

In *P v South Australia Police* (1994) 75 A Crim R 480, charges of possession of child pornography were laid in relation to four tapes running for 11 hours, of men and boys changing or urinating that were recorded in public toilets and change rooms. In some instances this included views of boys less than 16 years of age. The defendant had secretly recorded males at a number of venues in Adelaide and compiled the tapes. In a few instances a boy's penis could be seen, accounting for about 20 minutes of the total time on the tapes. On appeal, it was held in the Supreme Court that the then law required the court to ignore the circumstances of the making of the tape and, as a result, indecency could not be established based on the invasion of privacy inherent in compiling the tape. The court said that the section:

[S]eems to have been drawn on the footing that [there is material which is either inherently indecent or obscene. The proposition is, I think fallacious... It is not difficult to postulate that certain material might be indecent in some circumstances but not in others.

The court also held that the cumulative effect of the totality of the tape could not be relied on to establish indecency, as most images were not of children but of men. In the end, the defendant was acquitted on appeal. The law in South Australia was later changed to allow courts to take into account context when deciding whether material was indecent or not.

the way in which images are viewed by a particular person in determining indecency was affirmed in the UK in *R v Oliver*. The court held that, in deciding whether material is child pornography, regard could be had to whether the amount, context and organisation of images suggested a sexual interest. In rare instances, it may be that offensiveness can be established by considering the viewer's gaze.

The sexualisation of everyday images of pre-pubescent children is referred to as the 'paedophilic gaze' by Taylor & Quayle (2003). However, the sexualisation of images of children is not confined to 'paedophiles', in the sense of persons sexually interested in pre-pubescent children, and the term paedophilic gaze is not adopted in this paper. It should also be noted that the relationship between paedophilia and online child pornography offending is not simple or direct and requires careful examination that is beyond the scope of this paper.

Strong concerns have been expressed that increasing awareness of child pornography will lead to the sexualisation of all images of children because of a general social awareness that for some, almost any image of a child may become sexually charged. One example cited is that of a Calvin Klein advertisement that appeared in the United States, which depicted two young boys in their underwear jumping on a couch. Following a public outcry, the advertisement was withdrawn (Adler 2001). Despite the fact that some persons with a sexual interest in children may sexualise otherwise innocuous images, we should stop and question whether that is a matter for the application of the criminal law and, if it is, how that might properly be captured within the definition of child pornography.

A distinctive feature among some offenders who possess child pornography is the extent to which they keep their collections in well-ordered libraries of images (Taylor & Quayle 2003). Years of experience as an FBI investigator led Lanning (1992) to observe that offenders almost never destroy a collection. The following general characteristics of collecting among preferential child pornography offenders were noted by Klain et al. (2001), drawing on the work of Lanning (1992), Tate (1992) and Armagh et al. (1999):

- the collection is important to the offender who will spend a significant amount of time and money on it;
- collections grow as offenders feel their collection is not sufficient and there is more material to collect;
- collections are kept in a neat and orderly fashion, particularly using computers (Armagh et al. 1999);
- collections are a permanent fixture in an offender's life and will be moved or hidden if the offender believes they are under investigation;
- offenders almost never destroy a collection;
- offenders hide their collections in concealed spaces so that they have ready and secure access to them;
- offenders often share their collections with like-minded persons.

Conclusions

There are questions of degree in the definition of child pornography and offender involvement with child sexual abuse images. Increasingly severe penalties are proposed for the possession of child pornography and there can be no doubting the seriousness with which this offence is viewed. This makes it all the more important to be clear about what constitutes child pornography and about the nature of child sexual abuse images being dealt with in a particular case.

Images of children less than 16 years of age in the UK Court of Appeal categories two to five clearly depict criminal sexual assaults regardless of consent of the child involved, and the classification of such images as child pornography is unlikely to be seriously contested. Material from UK Court of Appeal category one is less clearly classified as child pornography, even though it may show an abnormal sexual interest in children. It is probable, however, that community standards are less tolerant of the sexualisation of the images of pre-pubescent children and would treat sexualised images of children with increasing seriousness depending on the age of the child depicted.

The use of a scale based on the type of sexual abuse depicted and the age of any child involved is one way of differentiating between offences. There is merit in reserving prosecutions for those cases involving images of actual sexual abuse, including sexual posing and explicit sexual posing, rather than other eroticised material. Even so, there will be some offenders who use less offensive images as part of a fantasy script of their own and who may pose a risk in terms of committing child sexual assault offences offline. The risk of a particular offender being involved in the offline sexual abuse of children is not necessarily related to the type of image viewed by that person (Taylor & Quayle 2003). More research is needed into the relationship between sexual fantasies fed by these materials and instances of the actual sexual abuse of children by those who have such fantasies.

With marginal images there is also scope to argue that the context in which the image was made or the manner in which images are kept can be taken into account in assessing whether material is child pornography. The limits of such an approach have yet to be determined.

In some instances it may be difficult to discern how an image was obtained. The use of a spy camera to film children in toilets and change rooms, such as in the South Australian case of P (see Box 2), is readily identified as involving a gross invasion of privacy and this may contribute to a finding that such images are offensive. The manner in which images are kept will usually be self-evident upon investigation. In those states where the definition of child pornography requires the image to portray sexual activity or the genitalia of children so as to be offensive, the size and organisation of collections of such images may be found offensive to a reasonable adult person. Where child pornography is defined in terms of offensiveness alone there is scope to argue that a collection of everyday images, such as in clothing store catalogues, may be offensive. However, while the sexualisation by the viewer of otherwise benign images of children may be objectionable and repugnant to many, caution should be exercised before criminalising the possession of such images based on simply what the viewer thinks.

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