

Children's Charities' Coalition for Internet Safety



The Secretary
Sentencing Advisory Panel
Room 101
Clive House
Petty France
London SW1H 9HD

8th April, 2002

Dear Professor Wasik,

**SENTENCING OF OFFENCES INVOLVING
CHILD PORNOGRAPHY**

You wrote separately to each of the organizations listed at the side of this letter, seeking our views on sentencing in child pornography cases. We hope you do not mind, but we have chosen to respond collectively as this better reflects the realities of how the principal, professional child welfare charities in the UK now work together on this and related issues.

The Children's Charities' Coalition for Internet Safety (CHIS) grew out of the work we were all doing together on the National Plan for Combating the Commercial Sexual Exploitation of Children. Child pornography was always a part of that agenda, but as the Internet began to grow in importance it became apparent to us that there was a need for a more specific focus on the online world and the wider questions it raised in terms of child safety.

Yours sincerely,

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Internet Adviser to CHIS

¹ John Carr was also the author of the theme paper on child pornography presented to the 2nd World Congress Against the Commercial Sexual Exploitation of Children, Yokohama, Japan, December, 2001: www.focalpointngo.org/yokohama/themepapers/default.htm

SENTENCING OF OFFENCES INVOLVING CHILD PORNOGRAPHY

Before turning to the specific questions put by the panel, we would like to make one or two more general observations, some of which, we think, ought to influence sentencing policy and practice.

Child pornography and the Internet

1. The arrival of the Internet, more or less simultaneously with other advances in photographic, video and other digital technologies, seems to have both changed *and* expanded the traffic in child pornography substantially². From being, essentially, small-scale and localised, it has become large and global. From being a clandestine, furtive business, typically conducted by and between generally closed circles of men who were already known to each other personally, parts of it have moved out into the public and semi-public spaces of the Internet³. Anecdotally, there also seems to be some evidence that child pornographers are demanding ever more depraved or gruesome materials including, for example, images taken from live online broadcasts using web cams, where adults abuse children to order at pre-arranged times.

It also seems very likely that a number of people are becoming involved in collecting child pornography who, but for the Internet, might never have come across it at all and therefore would never have developed an interest in it. While not in any way seeking to detract from each person's responsibility for their own actions, in a sense the people who post child pornography in the public and semi-public parts of the Internet can therefore be said to be part of the cause of some others becoming involved in it in the first place, and with a range of potential consequences that cannot possibly be foreseen.

Thus, people who publish child pornography in the public and semi-public parts of the Internet, or are careless as to where their material goes in the online world, in our view compound and magnify their original offence. We think this broadly corresponds with the reasoning set out in paragraph 36 of the consultation paper, but our argument perhaps takes it a little further. Exchanging child pornographic material directly and exclusively to others who are already known to you is a crime, distributing it in or to public places, in our view, is far more serious. Malicious distribution to otherwise wholly innocent areas of the Internet is worse again.⁴

Exposure to child pornographic images can cause serious and long-lasting psychological damage to a child⁵. Thus, quite apart from any damage done to the

² See our answer to question 3, below at page 5

³ In a sense the whole of the Internet is a public space, but some spaces are more public than others e.g. a web site or a Newsgroup may be viewed by anyone and found relatively easily, whereas other spaces, e.g. online communities, or web sites or Newsgroups with misleading or coded names, are theoretically still findable and viewable by members of the general public but perhaps they require more determination, more technical knowledge or experience, or insider knowledge. And of course they can always be found by chance.

⁴ Child pornographic images occasionally turn up in completely random Newsgroups e.g. groups specialising in the exchange of information about knitting techniques. Often this is done deliberately.

⁵ And see "People Like Us" by Sir William Utting, HMSO, 1997, where he also notes that paedophiles, as part of their "grooming" process, are known to use child pornography to convince potential victims that sexual activity between a child and an adult is "normal" and "fun".

children depicted in the images, child pornography posted in the public and semi-public spaces on the Internet can also put very large numbers of other children at risk

Consequently, where someone is convicted of distributing child pornography on the Internet, when sentencing, the court should take account of the manner in which they distributed it. If they placed the material in public or semi-public parts of the Internet, or were careless or reckless as to the places where they distributed it, this should constitute an aggravating factor. This principle could also be extended to the act of distribution in a non-Internet context, but it seems particularly compelling in relation to the Internet because of the extensive and growing use of the Web by children and young people.

2. It should be noted that the Internet has created a new array of opportunities for paedophiles to make contact with and ensnare children, particularly within chat rooms. In a number of instances such initial contacts have led to real world meetings where the child has been raped or become the subject of child pornographic images, or both.

Once an image has been digitised and transferred on to the Internet it becomes, in effect, a permanent, ineradicable record of abuse. Theoretically that image could then turn up at any time on the computer screen of the child's next-door neighbours or classmates, or at their relations' places of work. It could fall into the hands of other people who recognize and know the child, and they could then use it maliciously against the child, to humiliate or abuse them further. However unlikely these scenarios might be in reality, the mere knowledge that this is possible could make it very much harder for the child to recover from the consequences of the initial abuse that the image portrays. Thus this too ought to be an aggravating factor when considering sentencing. Put another way: to make child pornography is itself a serious crime. Digitising an image and posting it to a child pornography Newsgroup on the Internet, or exchanging it over the Internet in some other way that makes its wider publication more likely, makes the substantive offence even worse.

3. Public policy, most notably in the field of education, is encouraging more and more children and young people to use the Internet, where its potential as an aid to learning, homework and research is immense. It has also established new cultural norms as larger and larger numbers of children use the Internet to play games and communicate with each other via email, chat rooms and the web. Thus the Internet, a highly innovative and extremely valuable technological advance, is at once becoming both essential to many children's lives, and also a source of danger to them.

While we do not wish to exaggerate the dangers to children which the Internet presents, the way the technology has been polluted by the activities of child pornographers and paedophiles seems to us to be particularly cynical. It should be a major aim of public policy to convince these criminals that the Internet is not a safe place for them, and should they be caught abusing it to spread child pornography or do other harm to children, they will be dealt with harshly.

4. We regret that young people themselves are beginning to be arrested and charged with child pornography offences. While we appreciate the potential difficulties of redrafting existing laws, it seems to us strange that the law appears to be incapable of distinguishing between an adult becoming involved in making or possessing sexual

images of, say, a 13 year old girl, and a 13 year old boy doing the same or similar things. Much will depend on the specific facts but, in general, in cases such as these we are not sure that an immediate resort to criminal justice is always going to be the most appropriate way forward or be in the best interests of the child.

5. An additional factor that ought to be taken into account in sentencing is the degree of organization and technical sophistication deployed by the offender. The Internet is well known for its co-operative approach to sharing, in particular, technical knowledge about how it all works. Strong evidence suggesting that the defendant might have been involved in helping or advising others to evade detection or carry on the business of making, possessing or distributing child pornography should influence the sentence.

6. In a similar vein, where, for example, a person is found guilty of making or possessing child pornography and on his PC there was both clear and encrypted material, if that encrypted material was never seen by the court because the defendant claimed to have lost or forgotten the encryption key, the court ought to be empowered to take a dimmer view of the substantive, proven offences.

7. We note the point you make about the anomaly in relation to the sex offenders register and the different consequences that flow from being cautioned, as opposed to being found guilty and then being given a discharge by the court. This is not the only anomaly at work in this area. It also seems anomalous to us that, under the new legislation, the potential sentences available to the court for making, distributing or possessing child pornography are greater than those that may be available for certain substantive offences being shown in the illegal image.

Turning to the panel's specific questions:

Question 1: The sentencing profile

Without knowing more of the circumstances of the cases it is hard to make more specific comments. However, the average custodial sentences and the fines seemed low and we were surprised at the high proportion of 1978 offences that resulted in only a caution. When you add together the numbers who were given an absolute or conditional discharge to those who were only cautioned, it suggests that roughly one-fifth of those involved in the more serious offences were getting-off very lightly indeed. This implies a possible lack of understanding of the seriousness of these offences on part of some prosecuting or judicial authorities.

Parliament has now substantially increased the tariff for all of these offences, and therefore has sent out a clear signal about modern society's attitudes to these crimes. We trust we will see the prosecuting authorities and the courts reflecting this in future.

Question 2: The nature of the offences

We entirely concur with the reasoning and the approach of this section. In particular we endorse Lord Woolf's dicta in *R v Smethurst* (para 27), and that of the Court of Appeal in *R v Wild (No1)* (para 28).

In relation to the argument around pseudo-photographs, we note that in some jurisdictions it is impossible to secure a conviction if it can be shown that no actual child was sexually abused in the making of the picture. The fact that a child might have been sexually abused in the making of a picture is, of course, a good reason for declaring it to be illegal, but it ought not to be the only valid reason. The impact or wider effect of the picture is also an important consideration, and in that context whether or not it is "real" is completely irrelevant. The picture should be taken at face value, for what it appears to be, and judged accordingly. If there was any serious possibility of such a distinction becoming accepted within the courts there are several other representations we would want to make before a final decision was made.

Question 3: The prevalence of offences

There can be no certainty as to the amount or nature of child pornography that was being produced and circulated before the Internet became the mass consumer product it now is in many countries, including the UK. Similarly there can be no certainty as to the nature or quantity of child pornography being produced or circulated today. Anecdotally, the evidence seems to suggest that, by easing the means of supply, the arrival of the Internet is also leading to an increase in demand.⁶ There is also some

⁶ At one level it is hard to know how we could ever have anything but anecdotal evidence. The producers and distributors of child pornography do not co-operate with researchers, so the only really reliable information we ever get is that which emerges following an arrest and/or a conviction. Even then, given the increasing use of strong encryption technologies by some of the paedophiles who deal in this material, one cannot be completely certain that we will ever understand the true global scale or nature of the traffic in child pornography. Moreover, in different jurisdictions the police services attach different priorities to pursuing child pornography offences. In addition, most police forces in the world anyway still lack the technical wherewithal to crack any kind of Internet crimes, not just Internet crimes relating to child pornography. Even within the UK there is still an uneven spread of expertise in these matters within the police forces, although since the formation of the National Hi-Tech Crime Unit this has started to change.

evidence from the USA which suggests that, whereas previously much child pornography was essentially being exchanged among and between paedophiles in the form of swaps or other “amateur” type transactions, organized crime is now moving in and commercialising parts of the trade⁷.

We note that you have asked Detective Inspector Terry Jones of the Greater Manchester police for his views. Doubtless he will tell you, as he has told us, that back in 1995, in essentially pre-Internet days, in the whole 12 months his squad seized the grand total of 12 child pornographic images, all of them on paper or on video. In 1999, the same squad seized 41,000, all but 3 of them were on computers and almost all of those had come from the Internet. Elsewhere, in a single operation, Operation Cathedral, where the UK’s National Crime Squad led a global police action to break up the Wonderland Club, police seized 750,000 child pornographic images, involving 1,263 different identifiable children. One man alone possessed 180,000 images. Between them the British police and Interpol are now reputed to hold around 2,000,000 different child pornographic images, accumulated over the years and drawn from a large number of police actions in several countries. All of these numbers are a long way from Greater Manchester’s annual total for 1995. The rate at which the police have been able to add to their bank of illegal images has altered dramatically since they started arresting online offenders.

It seems to us that the arrival of the Internet, in introducing an entirely new dynamic and an entirely new quantum, has qualitatively changed the nature of the child pornography “industry”. The danger is that police resources become so overwhelmed by the amount of child pornography “out there” that it will slip into the background noise of modern life⁸. This would be a highly undesirable outcome from all sorts of perspectives. On the contrary, it behoves us all to redouble our technical and other efforts to expel the paedophiles and child pornographers from the Internet. This argues for sentencing policy to reflect society’s determination to achieve this end.

Question 4: The COPINE typology

Our understanding of the law leads us to believe that pictures of the kind mentioned in 1- 3 would not be criminally pornographic under any circumstances, therefore we are unclear what purpose they serve on a list of this type. Producing, circulating or possessing them may mean some other offences have been committed. It could be another form of abuse, and there could be issues around the lack of consent or breach of trust or privacy, but we are not sure that these could turn an otherwise non-pornographic image into a pornographic one. There has to be a sexual element to the image. If it is present then, irrespective of the intentions of the person who may have taken the original picture or who now possesses it, the image is capable of being child pornography, and if it is absent, it is not. As far as we can see that only applies with any certainty from 4 onwards. The fact that certain types of person might find particular types of images sexual in some way is not a good enough reason for the

⁷ See for example Operation Avalanche and Operation Special Delivery, and the action taken in Aquilla, Texas, all conducted by the US Postal Inspection Service (source: Inspector Ray Smith, Child Exploitation Program, Overview and Highlights, January, 2002).

⁸ It is understood that the UK police have a database of a very substantial number of people who have downloaded child pornography from the Internet and the only reason they have not yet arrested any of them is to do with resources.

originator to be prosecuted for making them or for someone else to be prosecuted for possessing them. There has to be an objective basis for agreeing the sexual nature of the depiction for purposes of establishing offences relating to child pornography.

In relation to category 7, it states it covers “Explicit sexual activity (...but not involving an adult) and then in 8 it states it covers “Assault (sexual activity involving an adult)”. Similarly, category 9 seems to entail an adult being involved. We assume therefore that category 7 is meant to cover pictures of children engaged in penetrative or other sexual acts either alone or with other children. It seems to us that the existence of such pictures ought to be explicitly acknowledged and that they should rank equal to the current category 8.

Question 5: The child’s age and the nature of the offences

We are not sure we accept the implied premise of this section. The age of the child will always be a material consideration and it should influence the court’s view of the seriousness of the abuse, or the level of exploitation. We do not see the need for any kind of trade off. The anal rape of a 2 year-old boy is every bit as serious as the rape of a girl of 11 or 15⁹, and any nuances of culpability between the two seem to be so vanishing small as to be irrelevant for all practical purposes. While public opinion may be more revolted by sexual offences against babies and very young children, we are not convinced that such opinion should influence sentencing policy.

Question 6: The amount of images

The quantity of illegal images in a person’s possession is of particular importance in so far as it puts that person at the centre of, or makes them part of, a greater or smaller distribution mechanism or network.

In the absence of evidence on that point, we would say that the quantity, while important, in and of itself is of less importance than the nature of the images.

Moreover, rather than having to prove the existence of every single image, the prosecuting authorities ought to focus instead on establishing that the accused had a sufficiently large quantity of material of a particular level of offensiveness. This might entail establishing various quantitative thresholds as guidance to the court.

Technological advances may soon render parts of this question obsolete. Every digital image has its own unique digital signature. Bearing in mind that a great deal of child pornography in circulation is simply recycled material, rather than being genuinely new, once a large enough digital database of child pornographic images has been established by the police, it ought to become a relatively simple matter to compare an accused person’s entire stock of images, taken from his computer, with the bank of known images. This would mean that the police or prosecuting authorities could focus largely or solely on any new material found that was not already contained in the database. This process could even be taken a step further: every image on the database could in turn be classified according to the degree of offensiveness of the image.

⁹ Save that younger children’s sexual and other organs may be less well-developed and therefore a younger child might suffer more physical damage from attempted or actual penetrative sex.

Question 7: The significance of the offender's involvement with the original offence

We agree that the mere act of downloading an image should not be treated as "making", and should instead be considered solely in the context of possession. Some greater clarity might also be welcome in relation to the significance of illegal images being found in a cache file. Whenever someone visits a web site containing graphics, those graphics will normally automatically download on to the computer's hard drive and end up in a cache file. Those images might be illegal images, and while the computer's owner might have deliberately gone to look at the images, he might not have been aware that they would download on to his machine and perhaps stay there for a protracted period of time. Equally a computer's owner might not have gone to a site deliberately but he would still end up with the images in the cache. On the other hand, some computer users who are aware of how cache files work, might deliberately put images in there in order to be able to say that they had not done so intentionally.

We agree that the greater the person's involvement in commissioning or actually making the original images, the greater their culpability. If the individual also participates in the child pornographic acts then, while we appreciate he would also be charged with other serious offences covering those acts as well, it ought also to count against him at sentencing for the child pornography matters.

Question 8: The defendant's character

In principle it would seem to us to be perverse for someone to attract a higher sentence for an offence on the grounds that they had previously been of good character or had been pillars of their community. Where the offence involves some kind of breach of trust between the person and his community, then on those grounds a higher sentence might be appropriate, but not otherwise.

We are not sufficiently familiar with the principles of sentencing policy to know exactly what weight ought to be attached to a person's previous good character but, other things being equal, we fail to see how it can be right or just, where two people are convicted of an identical offence, for both to get exactly the same sentence, when one person has a string of similar, unspent or other relevant offences on record and the other has none. We also have concerns about the range of previous offences that ought to be considered relevant when sentencing in child pornography cases e.g. violence or the threat of it is frequently part of an abuser's modus operandi.

Question 9: Starting points and other matters

As already noted in our answer to Question 2 (above), we do not accept the suggested distinction between a pseudo-photograph and a real one. The fact of its artificiality or its realness ought to be entirely irrelevant. Aside from the originator himself how, in any event, would an individual down the line know it was real or artificial? If it looks real it should be treated as being real and judged accordingly. With that one exception, we broadly agree with the remainder of the analysis in this section. We trust that appropriate means will be found to ensure the smooth transmission to all relevant arms of the judiciary, and the prosecuting authorities, of the new thinking on sentencing reflected in the panel's paper.
