Everything you (never) wanted to know about child pornography

Background and Introduction

Given the ever increasing infiltration of computers and the internet in our daily lives the chance that persons will come into contact with material of a pornographic nature increases.

It is estimated that more than 4.2 million pornographic Web sites now exist, about 12 percent of all total Web sites online.

With the growth of pornographic websites also comes the growth of sites containing pornographic images of young persons.

The "connectivity" we experience in modern times coupled with sophisticated file sharing systems, faster download and upload speeds allows just about everyone on our society easy means and capability to access this offending material. It is ever present in our daily lives, only the click of a mouse away.

Law enforcement authorities both in Australia and internationally are becoming increasingly sophisticated in tracking down the sources and destinations of the offending material and as a result prosecutions are becoming more and more frequent.

Particularly prevalent has become the offence of possessing child pornography *simpliciter*, that is without any *indicia* that the accused played an active role in the production or dissemination of this material.

The vast storage capacity of the personal computer means that literally tens of thousands of offending files may be stored on a personal computer and in the well documented case of former Crown Patrick Power it was alleged that over 29,000 still images and videos were found in his possession.

As offending material is nearly always found by investigating authorities located on computer hard drives, compact discs, digital video discs and other bulk storage media the traditional legal concepts of "possession" are not strictly applicable in a

digital environment where the material discovered is simply a combination of binary data, that is 0's and 1's.

The law is developing rapidly in this area as both legislatures and courts come to grips with what is a crime increasing exponentially alongside increased infiltration of the computer in our daily lives.

It is the purpose of this paper to look, in a practical fashion, at the law surrounding child pornography so that the criminal practitioner can properly take instructions and provide advice in, what is rapidly becoming a complex and highly developed are of the law.

The concept of possession as it relates to digital media and "child abuse material"

On a practical level suppose you are contacted by a client who has been charged with offences relating to child pornography or "child abuse material" as it is now referred both at a federal and state level.

There are two main ways that the police will usually have become aware of the existence of the offending material.

The first I call the *Gary Glitter* Phenomenon, for those of you old enough to remember the early 1970's pop scene and this dubious "pop star".

In 1999, *Gary Glitter* was sentenced to four months' imprisonment and listed as a sex offender in the UK following his conviction for downloading thousands of items of child pornography In November 1997, Glitter was arrested after pornographic images of children were discovered on the hard drive of a laptop that he had taken to a computer shop for repair.

The second way is by warrant obtained after intelligence has been received from police intercepting uploads and down loads of material from websites/ chat rooms known to be frequented by persons who indulge in this behaviour. They then trace back through IP addresses and ISP account holders until they locate a"real; person at a street (rather than IP) address.

The police will now have in their possession computer storage devices containing the offending material.

The law of possession itself could form the basis for a number of sessions and it is not intended in this paper to review all the authorities. It should be further noted that much of the law of possession comes from cases involving possession of drugs.

It is helpful for present purposes to restate the law as set out by Aikin J in *Williams v The Queen* (1978) 140 CLR 591

> It is necessary to bear in mind that in possession there is a necessary mental element of intention, involving a sufficient knowledge of the presence of the drug by the accused . No doubt in many cases custody of an object may supply sufficient evidence of possession, including the necessary mental element, but that is because the inference of knowledge may often be properly drawn from surrounding circumstances.

Possession of the Hardware and Software

Assuming that your client has not made full and frank admissions to the police as to knowingly possessing this material then what are the particular nuances that apply to proof of possession in relation to material of a digital nature.

The starting point in relation to an analysis of whether the material is in the client's possession should address the issue of whether the evidence collected by the police, that is the actual hardware confiscated and the surrounding circumstances, are sufficient to establish possession at law.

A very helpful discussion of this area can be found in *R v R, AM* [2011] SADC 38 (28 March 2011)

In this case the accused lived in a "shared house" comprising two storeys. The Accused acknowledged that he lived in the house. 3 other persons as well as the accused were present during the search.

Police, following a search of the premises, seized 8 digital video discs found in a bedroom, 23 video files contained in an office on the ground floor of the house.

The material contained pornographic images of children.

In her opening the prosecutor said that the Crown Case was that the accused had physical possession of the items. She said that the office was his, that it contained papers and documents relating to his business interests, the office was locked and it wasn't accessible to other persons within the house. There was no DNA or fingerprint evidence.

No attempt was made by the police to interview others in the house.

Some of the material contained on one of the discs seized had been overwritten but with specialized hardware the Crown were able to retrieve the images.

In *R v R , AM* the judge found that the all material seized was not in the possession of the accused. This is a very interesting case and a very succinct analysis of the law in this area.

There have been a number of cases in Australia and the UK that have considered whether having 'deleted' images on a computer constitutes possession of child pornography.

The issue of whether knowledge of the existence of child pornography files on a computer is required to prove the offence of possession of child pornography arose in the recent NSW case of *R v Clark* [2008] NSWCCA 122.

Clark was charged with attempting to procure a child over the age of 14 years to be used for pornographic purposes, inciting the same person to commit an act of indecency towards him and possession of child pornography.

The first two counts related to incidents when Clark invited the complainant to his house to be involved in child pornography videos. After a complaint to police, the police executed a search warrant and found two hard drives at Clark's home with many images of boys of a pornographic nature (which were the subject of the third count).

The pornographic material comprised 22 files of images on one of the hard drives and 3,154 images in the temporary directory of another hard drive. The record that had produced the images was held on a portion of the hard drives, which had been designated "deleted".

The evidence indicated that marking a file "deleted" did not remove it from the hard drive but changed its status so that it could be overwritten by the creation of another file.216 If a file was deleted it could not be retrieved and displayed on the computer screen without a special program. There was no evidence to indicate that Clark knew how to retrieve the "deleted" files.
On appeal, the Court held that intention was required to prove the offence of possession of child pornography under section 91H(3) *Crimes Act 1900* (NSW).

There was no evidence to prove intentional possession of any of the child pornography data or images because there was no evidence that indicated that Clark knew how to retrieve the 'deleted files' of child pornography.

The appeal addressed the questions of whether the trial judge had misdirected himself regarding 'possession' and whether there was insufficient evidence to show that Clark had possessed child pornography. The NSW Court of Criminal Appeal cited *He Kaw The v R* as follows:

> where a statute makes it an offence to have possession of goods, knowledge of the accused that those goods are in his custody, in the absence of a sufficient indication of a contrary intention, will be a necessary ingredient of the offence, because the word "possession" itself necessarily imports a mental element. The fact that the appellant was charged with having possessed data, rather than goods, makes no difference in principle.

Barr J, continued to say that:

> In my opinion nothing in s91H or in s7 [*Crimes Act 1900* (NSW)] necessarily or by implication removes the requirement for the Crown to prove, when charging possession of some thing or some material, that the accused's possession is intentional. No doubt some users of computers are highly expert in the art and realise that data which have been "deleted" may remain in whole or in part upon the hard drive and may by employing suitable means, be identified and retrieved. No doubt many other users of computers believe that the word "deleted" means what it says.

> Such persons, wishing to rid themselves forever of material on their computers, believe that by following the deletion procedure they have achieved exactly that end.

Accordingly, the NSW Court of Criminal Appeal stated :

> 'although his Honour initially correctly directed himself that the Crown had to prove intentional possession, which in the present case involved proof that the appellant knew that the data were present and retrievable, those questions were never ultimately framed or answered. There was no evidence that Clark knew that the deleted files were on the computer nor that he had the knowledge of computer programs that would enable him to retrieve the child pornography data.

Accordingly, the Court of Criminal Appeal held that if Clark lacked the means to retrieve the images then he did not have the requisite intention to prove possession of child pornography under section 91H(3) *Crimes Act 1900* (NSW).

An important decision in this area, cited with approval by the Court of Criminal Appeal in *R v Clark* , and which should be carefully examined is the English case Of *R v Porter* [2007] 2 All ER 625.

In his decision Lord Justice Dyson analyses the legal concepts involved in the possession of computer images in relation to an appeal against a conviction for child pornography where the issue was whether images that were deleted)and thus only a ghost image on the hard drive were in the Appellants "possession".

> It is true that the context of possession of photographs or pseudo-photographs on the hard drive of a computer is different from the context of possession of drugs. Making allowance for those differences, however, in seeking to elucidate the meaning of "possession" in section 160(1) in the present context, we see no reason not to import the concept of having custody or control of the images. In the special case of deleted computer images, if a person cannot retrieve or gain access to an image, in our view he no longer has custody or control of it.
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> He has put it beyond his reach just as does a person who destroys or otherwise gets rid of a hard copy photograph. For this reason, it is not appropriate to say that a person who cannot retrieve an image from the hard disk drive is in possession of the image because he is in possession of the hard disk drive and the computer. It seems to us that both counsel in the present case were, in substance, adopting a test of custody or control, although they described it in terms of accessibility.
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> The only difference between the formulations advanced by counsel is that Mr Milne argues for the less stringent test of reasonable accessibility; whereas Mr Korda contends for a simple test of accessibility.

> Our starting point in resolving this conflict is that the first question for the jury is whether the defendant in a case of this kind has possession of the image at the relevant time, in the sense of custody or control of the image at that time. If at the alleged time of possession the image is beyond his control, then for the reasons given earlier he will not possess it. If, however, at that time the image is within his control, for example, because he has the ability to produce it on his screen, to make a hard copy of it, or to send it to someone else, then he will possess it.
>
> It will be a matter for the jury to decide whether images are beyond the control of the defendant having regard to all the factors in the case, including his knowledge and particular circumstances. Thus, images which have been emptied from the recycle bin may be considered to be within the control of a defendant who is skilled in the use of computers and in fact owns the software necessary to retrieve such images; whereas such images may be considered not to be within the control of a defendant who does not possess these skills and does not own such software.

Sentencing in Child Pornography Matters

Judicial Commission Statistics indicate that in 2008 over 100 offenders were prosecuted in the Local Court for Child Pornography offences and over 900 were prosecuted in the District Court.

There is no reason to suspect that these figures will do anything other than increase.

Anecdotally and statistically it is common to find offenders who appear on these charges are clear of any prior criminal record. It is also common that such offenders possess very large quantities of offending material, are prosecuted in the Local Court, plead guilty and frequently receive full time custodial sentences.

Quite often offenders are charged with both Commonwealth and state offences arising out of the same facts.

This can make sentence preparation a difficult task due to the different sentencing issues that come into play under the Crimes Sentencing Procedure Act and under Part 1B of the Commonwealth Crimes Act 1914, which governs sentencing in Commonwealth matters.

The Gent factors

The Court of Criminal Appeal in *R v Gent* [2005] NSWCCA 370 was concerned *inter alia* with an offender sentenced for importation of child pornography.

Johnson J , with whom Mc Clellan CJ and Adams J agreed, draws heavily from overseas case law and in particular the English case of R v Oliver [2003] 1 Cr App R 28 at [98]

> Reference has been made to sentencing guidelines published by the Sentencing Advisory Panel to the Court of Appeal in the United Kingdom concerning child pornography offences. The Court of Appeal has agreed to adopt these proposals subject to certain modifications: *R v Oliver*; see Gillespie *"Sentences for Offences Involving Child Pornography"* [2003] Crim LR 81. Although the attention of Williams DCJ was drawn to *Oliver* and his Honour made passing reference to aspects of those guidelines, his Honour made clear that he was not purporting to apply principles emerging from the different legislative scheme in the United Kingdom (AB175-176).

Johnson J in *Gent* sets out a number of factors, drawn from *Oliver,* which are relevant to the *objective seriousness* of offences of *possession* and of the *importation* of child pornography. These factors include:

- the nature and content of the pornographic material – including the age of the children and the gravity of the sexual activity portrayed;
- the number of images or items of material possessed by the offender;
- whether the possession or importation is for the purpose of sale or further distribution; and
- whether the offender will profit from the offence.

His honour further set out that the number of images as such may not be the real point. In a case of possession of child pornography for personal use only, the significance of quantity lies more in the number of different children who are depicted and thereby victimised.

Saddler v R [2009] NSWCCA 83 at [23]. was an appeal on from a sentence imposed by Berman DCJ in 2008 (more on that matter later).

In *Saddler* Buddin J, while acknowledging the usefulness of the guidelines in the English decision of *R v Oliver*, was cautious about applying *all of those factors* to offences involving the possession of child pornography *alone* .

in *Saddler v R* large numbers of images and movies were at the higher levels described in the COPINE scale (from 5 to 10).

Berman DCJ at sentence concluded the offences were in the worst category because of the large number of images, the age of the children (such that he had concluded many of them were likely to have been injured during the sexual acts depicted) and the level of gross depravity shown.

Judge Berman did not accept the defence submission that the offences were not in the worst category because the offender did not possess the material for dissemination or to make money from his possession of the items.

Although the NSW Court of Criminal Appeal decided to intervene on other grounds, Buddin J said that he did not detect any error of principle in the sentencing judge's approach to *this issue*.

Most recently in *Minehan v R*, [2010] NSWCCA 140 at [82]–[92]. Hulme J reviewed a number of authorities, including *R v Gent*, which addressed the factors bearing upon the assessment of the seriousness of various child pornography offences.

Minehan was charged with possessing, disseminating and transmitting child pornography and

His Honour Hulme J who referred to *Oliver* identified the following factors as having relevance to an assessment of the objective seriousness of such offences:

1. Whether actual children were used in the creation of the material.
2. The nature and content of the material, including the age of the children and the gravity of the sexual activity portrayed.
3. The extent of any cruelty or physical harm occasioned to the children that may be discernible from the material.
4. The number of images or items of material — in a case of possession, the significance lying in the number of different children depicted.
5. In a case of possession, the offender's purpose, whether for personal use or for sale or dissemination. In this regard, care is needed to avoid any infringement of

the principle in *The Queen v De Simoni* (1981) 147 CLR 383.
6. In a case of dissemination/transmission, the number of persons to whom the material was disseminated/transmitted.
7. Whether any payment or other material benefit (including the exchange of child pornography material) was made, provided or received for the acquisition or dissemination/transmission.
8. The proximity of the offender's activities to those responsible for bringing the material into existence.
9. The degree of planning, organisation or sophistication employed by the offender in acquiring, storing, disseminating or transmitting the material.
10. Whether the offender acted alone or in a collaborative network of like-minded persons.
11. Any risk of the material being seen or acquired by vulnerable persons, particularly children.
12. Any risk of the material being seen or acquired by persons susceptible to act in the manner described or depicted.
13. Any other matter in s 21A(2) or (3) of the *Crimes (Sentencing Procedure) Act* (for State offences) or s 16A of the *Crimes Act* 1914 (for Commonwealth offences) bearing upon the objective seriousness of the offence."

Minehan is further authority for the proposition that general deterrence is to be a *significant factor* in any sentence for these types of offences with less weight being given to the prior good character of the offender than would normally be the case.

In the case of *Whiley v R* [2010] NSWCCA 53 James J (with whom Mc CLellan CJ at CL and Rothman J agreed) referred to the list of factors set out by Johnson J in *Gent* and added at [57) :

> In my opinion, the factors identified by Johnson J in *Gent* are ***also applicable to offences of producing child pornography***.(my emphasis)

Whiley is an interesting factual case in so far as it relates to an inmate who while in gaol, made drawings and wrote text which was pornographic at [11]-[16] :

> <u>The drawings</u>
>
> 11 On all but two of the pages there were drawings of children, apparently under the age of 16 years. On the first page there were only the words "Dr Sado's Funhouse". On the second page there was a drawing of an adult identified as "Dr Sado". On the third page there was a drawing of a dog with an exaggerated penis identified as "Demona's dog". On a number of the following pages there were drawings of a girl in her teenage years or younger, identified as "Demona". In various drawings the girl Demona was depicted, naked or partly dressed, with

her genitalia clearly shown and an object inserted in, or about to penetrate, her vagina or anus.

12 There were also drawings of two other girls, who appeared to be younger than Demona, again with their genitalia clearly depicted and also with objects inserted in, or about to penetrate, their vagina or anus. In some of the drawings the two girls were shown together, performing sex acts on each other.

13 There were also drawings of a young boy of pre-teenage years, naked and with his genitalia clearly shown, holding a sex aid or with a sex aid penetrating his anus.

The handwritten text

14 The first page of the handwritten text identified the characters in a television program called "The Brady Bunch", which was first broadcast in Australia in the 1970s. The Brady Bunch was a family consisting of a father and a mother, three male children and three female children. Other characters were identified, including a handyman, a gardener and a housekeeper and also the family's dog.

15 The following pages of the text described sexual encounters in various combinations between these characters, including the fondling of genitalia, fellatio, digital and penile penetration of the anus and vagina and penetration of the anus and vagina with sex aids and other objects.

16 A number of the pages contained lists of numbered points about the various encounters, including who took part, the ages of the children, the dimensions of body parts and objects used in the encounters

James J further notes at [62] ff.

In the present case, although the applicant produced the child pornography, the applicant did not produce either the drawings or the text for the purpose of sale or other distribution. The sentencing judge made a finding that the applicant produced the drawings and text solely for his own gratification. There was, of course, no suggestion that the applicant intended placing any of the material in a computer or on the Internet.

63 What is particularly important in the present case is the sentencing judge's findings, which I quoted earlier in this judgment, that the images (which were drawings and not photographs)

and the handwritten text were created by the applicant from his own imagination and that there was no evidence on which the sentencing judge could find that the images were created from any photographic images of actual children or that the stories in the text were inspired by actual experiences of the applicant or other persons. The present applicant's offences did not involve the exploitation or victimisation of any actual child.

64 The present case can be contrasted with other New South Wales cases to which the Court was referred, which involved possession of large numbers of photographic images or films of many actual children being subjected to sexual activities, torture or other physical abuse.

65 I am conscious that s 91G of the *Crimes Act* creates a separate offence of using children for pornographic purposes. However, there could be many offences within s 91H which would involve, at least indirectly, the exploitation or victimisation of actual children, without amounting to an offence under s 91G of the offender using a child for pornographic purposes.

66 Both the sentencing judge and counsel in their submissions referred to the Canadian case of *Stroempl* and *Stroempl* has been referred to in other New South Wales cases.

67 The offence in *Stroempl* was possessing child pornography. The quantity of child pornography in the possession of the offender in the form of magazines, photographs, pamphlets and drawings greatly exceeded the quantity of child pornography produced by the present applicant. *Stroempl*'s subjective features were much more favourable than the applicant's. On an appeal against sentence the Court of Appeal for Ontario reduced a sentence of imprisonment from 18 month to 10 months.

68 *Stroempl* seems to have been referred to in New South Wales cases, mainly because of the quotation in it of a part of a judgment by McCombs J of the Ontario Court (General Division) in *R v Paintings, Drawings and Photographic Slides*, April 20 1995. McCombs J said:-

> "The evil of child pornography lies not only in the fact that actual children are often used in its production, but also in the use of which it is put. Although behavioural scientists disagree about the reliability of scientific studies, there is general agreement among clinicians that some paedophiles use child pornography in ways that put children at risk. It is used to "reinforce cognitive distortions" (by rationalising paedophilia as a normal sexual preference); to fuel their sexual fantasies (for example, through masturbation); and to "groom" children by showing it to them in order to promote discussion of sexual matters and thereby persuade them that such activity is normal."

69 In the present case actual children were not used in the production of the child pornography and there was no evidence that the applicant used the pornography in any of the ways described.

70 Both the sentencing judge and counsel for the Crown referred to the applicant's previous

criminal history, which included previous offences of child sexual assault and child pornography. However, as was decided by the Court of Criminal Appeal in *R v McNaughton* [2006] NSWCCA 242; (2006) 66 NSWLR 566, the upper boundary of a sentence is set by the objective circumstances of the offence, which do not include previous convictions of the offender and previous convictions are only relevant to the question of where, within the boundary set by the objective circumstances, the sentence should lie.

71 In my opinion, having regard to the matters I have mentioned and notwithstanding the caution which this Court exercises in deciding whether to interfere with a sentencing judge's assessment of the level of objective seriousness of an offence, the sentencing judge did err in finding that the objective gravity of the offences fell "somewhere below the middle range". His Honour should have found that the offences fell near the bottom of the range.

72 It follows that the sentences imposed by the sentencing judge were manifestly excessive and that this Court is required to re-sentence the applicant. Having regard to what I have found to be the level of objective criminality in the offences and after taking into account the absence, or virtual absence, of any favourable subjective features, I consider that head sentences of 12 months, to be served concurrently, would be appropriate. I would not order the sentences to commence any later than 25 May 2008, which was the date of commencement of the sentences imposed by the sentencing judge. Accordingly, the applicant will have already completed serving the head sentences.

73 In the circumstances, considerations of totality and the division of the sentences between a non-parole period and a balance of the term become academic. I would simply divide the head sentences into a non-parole period of nine months and a balance of the term of three months.

The Court of Criminal Appeal's finding that the sentences imposed were *manifestly excessive* should reiterate the need to properly and carefully assess the objective seriousness of the material in light of those factors Johnson J set out in *Gent*.

Categorising the Objective Seriousness of offending material

The Copine Scale

Evidence the Crown will rely upon in presenting the objective seriousness of the offending material to the sentencing court will be (in ODPP (NSW) prosecuted matters their assessment of the offending material in line with the COPINE scale.

(In DPP (Cth) prosecuted matters a 5 point scale referred to as the OLIVER scale is used.)

The scale now referred to as the COPINE scale was originally developed for therapeutic psychological purposes. More specifically, it is typically used in psychological research to distinguish between(child) erotica and pornography.

In the late 1990s it came to be used in judicial matters when the COPINE project ("Combating Paedophile Information Networks in Europe") at the University of Cork, in cooperation with the Paedophile Unit of the London Metropolitan Police, developed a typology to categorize child abuse images for use in law enforcement.

This ten-level typology was based on analysis of images available on websites and internet newsgroups. Other researchers have adopted similar ten-level scales.

COPINE typology of material used by persons with a sexual interest in children

LEVEL 1 **Indicative**
Non-erotic and non-sexualised pictures showing children in their underwear, swimming costumes, etc, from either commercial sources or family albums; pictures of children playing in normal settings, in which the context or organization of pictures by the collector indicates inappropriateness

LEVEL 2 **Nudist**
Pictures of naked or semi-naked children in appropriate nudist settings, and from legitimate sources

LEVEL 3 **Erotica**
Surreptitiously taken photographs of children in play areas or other safe environments showing either underwear or varying degrees of nakedness

LEVEL 4 **Posing**
Deliberately posed pictures of children fully, or partially clothed or naked (where the amount, context and organization suggest sexual interest)

LEVEL 5 **Erotic posing**
Deliberately posed pictures of fully or partially clothed or naked children in sexualized or provocative poses

LEVEL 6 **Explicit erotic posing**
Emphasising genital areas where the child is either naked, partially or fully clothed

LEVEL 7 **Explicit sexual activity**
Involves touching, mutual and self-masturbation, oral sex and intercourse by child, not involving an adult

LEVEL 8 **Assault**
Pictures of children being subject to a sexual assault, involving digital touching, involving an adult

LEVEL 9 **Gross assault**
Grossly obscene pictures of sexual assault, involving penetrative sex, masturbation or oral sex involving an adult

LEVEL 10 **Sadistic/Bestiality**
Pictures showing a child being tied, bound, beaten, whipped or otherwise subject to something that implies pain. Pictures where an animal is involved in some form of sexual behaviour with a child

Source: M Taylor, G Holland and E Quayle, 'Typology of paedophile picture collections' (2001) 74(2) *The Police Journal* 97-107.

Sentencing Options

A large percentage of these matters are dealt with to finality in the Local Court where, if custodial sentences are will be less than two years.

Many matters that proceed on indictment in the District Court will also result in custodial sentences of two years or less.

Amendments to the Crimes Sentencing Procedure Act 1999 have removed the sentencing option of imposing a custodial sentence to be served by way of Periodic Detention and instead inserted at section 7 Intensive Correction Orders.

In *R v Peter Francis Staham* [2011] NSWDC 128 (19 August 2011) Judge Cogswell SC was faced with the following factual scenario and at [4] sets out:

> It is important for a judge to make some reference to the material involved in a case. It disclosed that Mr Staham had forwarded via his email images of child pornography and had images of child pornography on his computer which he accessed. The computers were analysed and there were a total number of almost 2,600 images and video files which could be classified as child pornography material. They depicted children aged between six months and fifteen years.
>
> There is a scale called the Oliver Scale, by reference to which child pornography can be classified. Most of the material comprised images in the lowest category, which involved erotic posing; there were some 1,500 of those images. Over 600 of the images were in the second lowest category and involved solo masturbation or sexual activity between children. Just over 120 of the images were in the middle category and involved nonpenetrative sexual activity between children and adults. Three hundred of the images were in the second highest category, involving penetrative sexual activity between children and adults. Nearly twenty of the images were in the worst category, depicting sadism and bestiality. Examples of the images were described in the facts which were part of exhibit A. It is not necessary to cite those examples.

In my experience this case is a quite "ordinary" case involving possession and dissemination of child pornography.

The facts are quite typical of those seen in the Local and District Courts on as regular basis.

Mr Statham's subjective features are similarly not remarkable.

Cogswell J then sets out at [20] what factors constitute "exceptional" circumstances in Mr Statham's case to not warrant a full time custodial sentence :.

14. Ms Grimes (prosecutor) also emphasised the significance of general deterrence and the importance of members of the community who would be thinking of engaging in child pornography offences to know that they are at risk of going to gaol full time. The offending behaviour is obviously becoming more prevalent, with more people having access to online services. She reminded me of the age range, which commenced as low as six months for some of the children involved. She conceded that he would be entitled to some discount for his plea of guilty, but that the case against him was a strong one. She correctly reminded me that I had to reach the view that, having considered all other available sentences, no other sentence than imprisonment would be appropriate and she submitted that I could reach that conclusion. She helpfully provided a document, which became MFI 1, which indicated the range of sentences which have been imposed in cases such as this.

15. The parties also provided me with statistics from the Judicial Commission regarding these kinds of offences.

16. I would regard an appropriate sentence, initially, as two and a half years imprisonment, but I propose to discount that to two years imprisonment, given that Mr Statham has pleaded guilty. Mr Gow (defence) submits that I should direct that that prison sentence be served by way of an Intensive Correction Order in accordance with s 7 of the *Crimes (Sentencing Procedure) Act* 1999 Ms Grimes resists that, pointing out that the only appropriate sentence is one of full-time imprisonment.

17. I have determined that the sentence is appropriate for Mr Statham to serve it by way of Intensive Correction Order. My reasons for that are fourfold.

18. The first is that it appears from the statistics that not all offenders convicted of these sorts of offences serve fulltime prison sentences; just under fifty per cent are penalised in ways that do not involve fulltime sentences.

19. The second reason is that I accept Mr Gow's submission that his client has taken steps towards his rehabilitation beyond that which a Court usually sees. In particular I am impressed by Dr Seidler's reports in this regard. Mr Statham was arrested in October 2009 and commenced his rehabilitation course in January 2011. It is a substantial course. I accept Mr Gow's submission that in this case it would not be in the public interest to interfere with that rehabilitation program.

20. The third reason is that I am impressed by Mr Statham 's genuine remorse and his insight and the steps he has taken to deal with what was obviously a personal problem producing serious criminal behaviour. When he gave evidence before me in July he had completed, as I said, some twenty three sessions. I was impressed by him as a witness and by his letter to the Court.

21. Finally, I have regard to Dr Seidler's opinion about the impact which prison may have on Mr Statham . I think this is a case, exceptionally so, where a fulltime prison sentence is not warranted at this stage, but the sentence can be performed by an Intensive Correction Order.

I say " *at this stage* " in case, of course, there is any breach of the Intensive Correction Order. I propose to impose sentences of two years to be served by Intensive Correction.

The Crimes Amendment (Child Pornography and Abuse Material) Amendment Bill 2010

Police seize 'child porn' art from Sydney gallery

Is it art or pornography to exhibit photographs of naked 12- and 13- year-old girls? That perennial debate was reignited in Australia yesterday, where police swooped on a Sydney gallery displaying works by the internationally renowned artist Bill Henson.

Police confiscated 20 of the 41 images in the exhibition, hours before it was due to open on Thursday night. Well-heeled art lovers and critics arrived at the Roslyn Oxley9 gallery in the fashionable suburb of Paddington to find a police car outside and a sign saying the opening had been cancelled.

The Australian Prime Minister, Kevin Rudd, condemned the photographs as "absolutely revolting", and New South Wales police said they expected to lay charges.

But respected figures in the art world defended the moody photographs, with their dark backgrounds, claiming they were neither "sexualised" nor pornographic. Judy Annear, the senior photography curator at the Art Gallery of New South Wales, said: "They're beautiful. They're very, very still. They're very formal, they're very classical. They're a bit like looking at an Ancient Greek Attic vase."

Others noted that Henson – whose photographs are in the collections of all the major public galleries in Australia, as well as New York's Guggenheim Museum, the San Francisco Museum of Modern Art and the Bibliotheque Nationale in Paris – has been producing similar work for decades.

However, police, who were alerted by local newspapers, said they had identified "items depicting a child under the age of 16 years of age in a sexual context". A 13-year-old girl, who has not been identified, is believed to be the subject of all the images seized.

The local police commander, Allan Sicard, said: "Police are investigating this matter, and it is likely that we will proceed to prosecution on the offence of publishing an indecent article under the Crimes Act."

It was not clear whether charges might be laid against Henson, or the gallery, or both.

The gallery owners agreed to suspend the exhibition, but plan to re- open it, minus the offending images. Police are also investigating Roslyn Oxley9's website, where the photographs were on display.

Hetty Johnston, a child protection campaigner, denounced the pictures. "It's child exploitation, it's criminal activity, and it should be prosecuted," she said. "These are clearly illegal child pornography images. It's not about art at all."

In media interviews before the exhibition, Henson said that he photographed adolescents because of their humanity and vulnerability. He added: "You can't control the way individuals respond to the work."

Mr Rudd's response was unequivocal. "Kids deserve to have the innocence of their childhood protected," he said. "Whatever the artistic view of the merits of that sort of stuff – frankly I don't think there are any – just allow kids to be kids."

Police plan to speak to the parents of the 13-year-old. Hugh Macken, the president of the New South Wales Law Society, said a prosecution would only be successful if it could be proved that the photographs were designed for sexual gratification, rather than artistic purposes.

The police action was denounced as censorship in some quarters.

Michael Reid, an art dealer, said: "The naked body, whatever age, has been a subject [for artists] for thousands of years. The question is, was there consent, which I can't answer. And has the image been sexualised? In my opinion, it wasn't."

John McDonald, the art critic for the Sydney Morning Herald newspaper, said: "To me, the big shame is that the only time that we start ... talking about art in the mainstream media is when it's banned, when it's supposedly pornographic."

(Source *The Independent* (UK) 24 May 2008)

Background to the Legislation

On 21 May 2008, less than 24 hours before the police raid on Bill Henson's exhibition, former NSW Labor Minister for Aboriginal Affairs Milton Orkopoulos was sentenced to 13 years and 11 months imprisonment for child sex and drug offences after a very high profile trial in Newcastle.

Evidence came out during the trial that Orkopoulos kept child pornography under his bed.

There were constant allegations levied against the (then) Iemma Labor government that the Orkopoulos saga had been covered up.

There were further allegations levied against the Iemma government that the "whistleblower" in the Orkopoulos matter, Gillian Sneddon had been very poorly treated after she had made the matter public.

On the morning of 22 May 2008 the Sydney Morning Herald published the following in an article by columnist Miranda Devine

> "Opening tonight at the elegant Roslyn Oxley gallery in the heart of Paddington is an exhibition of photographs by Bill Henson featuring naked 12 and 13 year olds. The invitation to the exhibition features a large photo of a girl, the light shining on her hair, eyes downcast, dark shadows on her sombre, beautiful face, and the budding breasts of puberty on full display, her hand casually covering her crotch."

Premier Iemma who was at the time travelling in China, issued an almost immediate response describing the photos as "offensive and disgusting".

Hetty Johnston the CEO of Bravehearts, a partially government funded group who have as a mission statement "to stop child sexual assault in our society", told Alex Mitchell of ***Crikey .com*** that immediately on seeing the Miranda Devine article on 22 May

2008 she faxed a letter to NSW Arts Minister Frank Sartor and also to NSW Police Commissioner Andrew Scippione .

At shortly after 4.00pm on 22 May 2008 members of the NSW Police Force attended the Paddington Gallery where the owner was told "certain things" by the officers attending and postponed the opening of the exhibition indefinitely.

On the morning of 23 May 2008 Hetty Johnston appeared on the Today Show on Channel 9 to air her thoughts on the Henson exhibition:

> Its child exploitation, its criminal activity and it should be prosecuted, both the photographer Bill Henson .....but also the gallery because these are clearly images that are sexually exploiting young children. These are clearly illegal child pornography images, it's not about art at all, it's a crime and I hope they are prosecuted.

By chance on the morning of 23 May 2008 (then) Prime Minister Kevin Rudd was (for unrelated matters) at Channel 9 studios Brisbane and Hetty Johnstone just happened to show him details of Bill Henson's work.

When Mr Rudd appeared on the Today show to talk about petrol prices he was asked by the interviewer what he thought of Mr Henson's photographs.

Mr Rudd described them as "absolutely revolting". Shortly thereafter the AFP opened a nationwide enquiry and the Australian Communications and Media Authority declared that it was holding an investigation as well.

Later in the morning of 23 May 2008 distinguished art critic John McDonald told a Radio National interviewer that the Bill Henson affair made Australia look like a "nation of clowns".

Eventually the exhibition opened however entry was by "invitation only". No one was prosecuted.

Before the smoke had settled the whole issue reignited over the publication in *Arts Monthly Australia* of pictures of a naked six-year old girl, in an edition of the magazine discussing the Bill Henson controversy.

However on the cover of Arts Monthly was a photograph (taken by the girl's mother, Polixeni Papapetrou), showing the girl in front of a painted backdrop that refers to the work of Lewis Carroll.

The *Sydney Morning Herald* reported on 7 July 2008:

> In the latest row over the depiction of nude children, Morris Iemma and the State Opposition Leader, Barry O'Farrell, are so offended by the nude pictures of a young girl they want the magazine that published them stripped of federal funding. Kevin Rudd said he could not stand them.

The Premier was quoted in *The Australian*, on 7 July 2008, as saying '

> Let's be clear…This is an issue of child protection. As a community we have a responsibility to protect the innocence of children, and that protection of children should be the only consideration in this matter'.

Subsequently, it was reported in *The Daily Telegraph*, on 10 July 2008, that the NSW Government had applied to the Classification Board to determine whether or not the July 2008 issue of *Arts Monthly Australia* should be classified as an unrestricted, restricted or refused publication.

On an application from the Australian Communications and Media Authority, the home page of *Art Monthly's* website, which contained the cover page to the July 2008 issue of the magazine, was given an unrestricted 'PG' classification.

Around the same time as the *Henson* and *Arts Monthly* affairs were reports in the media about the perceived leniency of sentences for child pornography offences.

One notable example is the case of *R v Nigel Keith Saddler*, [2008] NSWDC 48 where Judge Berman SC commented on the inadequacy of the maximum penalty for child pornography offences under section 91H(3) *Crimes Act 1900* (NSW).

Saddler was a 35 year old man who pleaded guilty to three counts of possessing child pornography under section 91H (3) *Crimes Act 1900* (NSW).

Saddlers offending behaviour involved possessing 35,508 still images, 687 movie files and 77 archived photos.

The child pornography items showed the abuse of thousands of children and many were in the most serious category of the 'COPINE' scale.

On 18 April 2008, Judge Berman of the District Court of NSW sentenced Saddler to an overall sentence was six years imprisonment, with a non-parole period of four years and six months.

When sentencing Saddler, Judge Berman at paragraph [4] made a number of comments about the serious nature of child pornography offences and the need for harsh sentences for these offences:

> 'not only so that judges do what they can to reduce the demand for such appalling acts of cruelty, but also to mark in a very real way the community's horror at such treatment of entirely innocent and defenceless children'.

After discussing the nature of child pornography offences, Judge Berman commented on the ***inadequacy*** of the maximum penalty for the offence of possession of child pornography under section 91H(3) *Crimes Act 1900* (NSW).

In 2008, after the Henson and Arts Monthly affairs the Parliament established a Child Pornography Working Party (CPWP).

The first meeting of the Child Pornography Working Party (CPWP) was held in February 2009.

Chaired by ***Judge Peter Berman SC***, the working party consisted of representatives from the NSW Police Force, NSW Office of the Director of Public Prosecutions (NSW ODPP) Australian Federal Police, Commonwealth Director of Public Prosecutions (CDPP), Legal Aid Commission (NSW), Public Defenders Office (NSW), Law Enforcement Policy Branch, (Department of Premier and Cabinet (NSW)) and the Department of Justice and Attorney General (NSW).

Among the final recommendations of the CPWP were *inter alia* as follows

1. Amending the maximum penalties in relation to State offences relating to child pornography as follows:
2.
    i. By increasing the maximum sentence for a possession offence under s91H(2) *Crimes Act 1900* (NSW) to 10 years imprisonment.
    ii. By increasing the maximum sentence for the current s21G(1) and s21H *Summary Offences Act 1988* so as to allow for a maximum sentence of 5 years where the object of either offence is a child under the age of 16 years; and, in order to allow for that, to move the offences to the *Crimes Act 1900 (NSW)* while including them in the list of offences that can be triable summarily by consent where the offence is relatively trivial.

2. Deleting the artistic purposes defence from s91G *Crimes Act 1900* (NSW).

3. Amendment by way of clarification in relation to certain of the State child pornography offences by:
4.
    i. Providing an extended definition of the expression "produce" in relation to the s91H(2) offence.
    ii. Making it clear that material within the definition of child pornography for the purpose of the s91H offence, includes pseudo images of children;
    iii. Adopting the evidentiary enabling provision concerning the age of a person depicted in material alleged to be child pornography in similar form to that in s474.28(5) Criminal Code (Cth).

4. Seeking a qualitative guideline judgment from the Court of Criminal Appeal, which might take into account the decision in *R v Oliver* 1 CR App R 28 and the UK guidelines, in relation to the child pornography offence.

5. A working party be established (comprising the NSW Police Force and the DPP) to consider whether the concept of possession comprised in the s91H(2) offence can be enlarged so as to respond to those cases where by the time an offender's computer has been seized, the offender has deleted the images.

Recommendations of the CPWP

The CPWP were of the clear opinion that the defence of artistic purpose be removed at p22 of the report it is set out :

> The CPWP is of the view that the inclusion of the defence of artistic merit amongst the child pornography offences may, somewhat unhelpfully, lead to the impression that material that would otherwise constitute child pornography is acceptable if the material was produced, used, or intended to be used whilst acting for a genuine artistic purpose. The CPWP is not of the view that this should be the case. Material that is otherwise offensive because of the way

> in which it depicts children should not be protected because its creator claims an overriding artistic purpose for it.

However at page 22 it is noted:

> Ostensibly due to its origin, the defence of 'genuine artistic purpose' provides guidance to the police, the prosecution, the defence, the courts and the community at large as to the different types of circumstances in which Parliament has legislated that it may be appropriate to create or produce work that does depict children in, for instance, a sexual context, and may also cause offence to reasonable persons, in contrast to material that is purely exploitative and truly constitutes child pornography. To support this conclusion, the ***CPWP were informed by the NSW ODPP that in its experience, the "defence is hardly ever used" and were aware "of only one instance where the defence was argued and this was unsuccessful". (***my emphasis)

The result:

The Crimes Amendment (Child Pornography and Abuse Material) Bill 2010 further "toughens up" the legislature's attitude to the type of material that artist Bill Henson and the *Artists Monthly* so offended them with.

The Bill, has amended the Crimes Act and creates a new wider category of prohibited material entitled "*child abuse material*" compared with the previous more narrow concept of "child pornography".

This brings NSW into line with the Commonwealth which also refers to offending material as Child Abuse Material rather than Child Pornography.

On a practical level; what are the ramifications (if any) of replacing the concept of *child pornography* with the concept of *child abuse material* for the purposes of Division 15A of the Crimes Act.

The new concept of child abuse material now makes it an offence to possess produce or disseminate "*child abuse material*" as distinct from possessing producing or disseminating child *pornography*.

It now appears to be immaterial whether the person depicted in the alleged offending material is *in fact* a child.

It now appears sufficient to attract criminal liability if the person depicted "*appears*" or is "*implied*" to be a child.

A "*child* "" is defined by the act as a *person* under 16 years.

Could a person who is obviously not a child but is dressed in a school uniform such as worn by a person under the age of 16 be by *implication* a child for the purposes of these amendments?

The amendments remove the "artistic purpose" defence, which it should be noted was only ever raised once and was never *successfully* raised.

The artistic purpose defence has been replaced with an objective test.

That test requires a determination to be made whether a *reasonable person* would find the subject material offensive.

The factors the "reasonable person" would be required to consider would include the literary, journalistic artistic or educational merit (if any) of the material.

The CPWP in their deliberations giving reasoning for this little used defence to be removed cited Gleeson CJ in *R v Manson & Stamenkovic* NSWCCA 17 Feb 1993.

This was a case in which the appellants had been convicted of charges of committing an act of indecency with a person under the age of 16 years, by taking photographs of the young girl in question.

The defence argued that the photos were taken for the purpose of making a protest ***against the abuse of females***, in a broad artistic sense that is.

Gleeson CJ stated in relation to the defence case:

> I am of the view that the jury might well have accepted the sincerity of the appellants and the explanation they gave of their purposes in taking these photographs, whilst at the same time convicting them of the offences in question. The fact that conduct is engaged in for political or artistic purposes does not throw around such conduct a kind of *cordon sanitaire*, producing the result that it cannot be found to be illegal. ***It is entirely possible that a person might, for***

political or artistic purposes, take a photograph of an act that a jury regards as an act of indecency. (my emphasis)

Despite the concern of the CPWP the *artistic purpose* defence would not appear to have enjoyed great success.

The Amended Legislation

The new offence of possess etc *child abuse material* is set out at Section 91H of the *Crimes Act 1900*.

It essentially replicates the old Section 91H however replaces the concept of child pornography with that of child abuse material.

CRIMES ACT 1900 - SECT 91H

Production, dissemination or possession of child abuse material

91H Production, dissemination or possession of child abuse material

(1) In this section:

"disseminate" child abuse material, includes:

(a) send, supply, exhibit, transmit or communicate it to another person, or

(b) make it available for access by another person, or

(c) enter into any agreement or arrangement to do so.

"possess" child abuse material includes, in relation to material in the form of data, being in possession or control of data (within the meaning of section 308F (2)).

"produce" child abuse material includes:

(a) film, photograph, print or otherwise make child abuse material, or

(b) alter or manipulate any image for the purpose of making child abuse material, or

(c) enter into any agreement or arrangement to do so.

(2) A person who produces, disseminates or possesses child abuse material is guilty of an offence.

Maximum penalty: imprisonment for 10 years.

What then constitutes *child abuse material* is set out at Section 91FB?

CRIMES ACT 1900 - SECT 91FB

Child abuse material-meaning

91FB Child abuse material-meaning

(1) In this Division:
"child abuse material" means material that depicts or describes, in a way that reasonable persons would regard as being, in all the circumstances, offensive:

(a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or

(b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or

(c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or

(d) the private parts of a person who is, appears to be or is implied to be, a child.

(2) The matters to be taken into account in deciding whether reasonable persons would regard particular material as being, in all the circumstances, offensive, include:

(a) the standards of morality, decency and propriety generally accepted by reasonable adults, and

(b) the literary, artistic or educational merit (if any) of the material, and

(c) the journalistic merit (if any) of the material, being the merit of the material as a record or report of a matter of public interest, and

(d) the general character of the material (including whether it is of a medical, legal or scientific character).

(3) Material that depicts a person or the private parts of a person includes material that depicts a representation of a person or the private parts of a person (including material that has been altered or manipulated to make a person appear to be a child or to otherwise create a depiction referred to in subsection (1)).

(4) The "private parts" of a person are:

(a) a person's genital area or anal area, or

(b) the breasts of a female person.

If any of the listed criteria set out at section 91FB(1) (a) , (b) , (c) or (d) are met then we have material (child abuse material) that depicts or describes in a way *that reasonable persons would regard in all the circumstances* as offensive .

However section 91FB (1) imports into the section a proviso that *reasonable persons* should take into account in deciding whether the material is *in all the circumstances* offensive.

Section 91FB (1) (a) , (b) , (c) and (d) sets out prescriptively those *matters* that in *all the circumstances* are to be taken into account by the *reasonable persons* in ascertaining as a matter of fact whether the material is *offensive.*

Section 91FB (2) (a) requires one of those matters that must be considered is the *standards of morality, decency and propriety generally accepted by reasonable adults*.

Thus one of the 91 FB(2) factors that those *reasonable persons* must take into account in determining what, in all the circumstances is *offensive* **are** the standards of morality, decency and propriety generally accepted by reasonable *adults.*

(We have a distinction drawn between reasonable *persons* and *reasonable adults).*

If sections 91FB(1) (a), (b),(c) and (d) sets out *descriptively* what subject matter reasonable persons ***would*** regard as being in all the circumstances offensive how could reasonable persons later considering *standards of morality, decency and propriety generally accepted by reasonable adults* determine in accordance with section 91 FB(2) (a)(that it was not offensive .

> It therefore remains, once the material has been deemed offensive by section 91FB (1) for those reasonable persons to determine whether such material has any literary, artistic, educational or journalistic merit.

At a Commonwealth level the Crimes Legislation Amendment (SEXUAL OFFENCES AGAINST CHILDREN) Bill 2010 was introduced and in the second reading speech the Minister for Justice set out.

> Although dealings in child pornography and child abuse material can often be intimately connected with child sex tourism, there are currently no offences applying extraterritorially to dealings in such material by Australians.
>
> Many destination countries lack effective laws against child pornography and child abuse material, or the capacity to enforce them and current Commonwealth, state and territory offences only criminalise dealings in child pornography or child abuse material within Australia.
>
> The bill will insert new offences for dealings in child pornography or child abuse material overseas, ensuring that Australians engaging in such behaviour overseas can be prosecuted in Australia.
> Child pornography and child abuse material involve the abuse of children and the amplification and broadcast of the original offence through distribution of the material.
>
> Offenders who are found to be possessing, controlling, producing, distributing, or obtaining such material outside Australia will be subject to maximum penalties of 15 years imprisonment. If the offence involves more than one person and conduct on several occasions, it will be punishable by up to 25 years imprisonment.
>
> This aggravated offence is directed at people who are involved in heinous child pornography and abuse networks and is intended to reflect the increased levels of harm to children resulting from the demand created by these networks.
>
> Recent cases have demonstrated the scale of contemporary networks. The internet has allowed the development of organised, technologically sophisticated rings of child sexual abusers.
>
> The bill also introduces a new aggravated offence directed at online child pornography networks where the perpetrator is in Australia. This offence will also be subject to the high penalty of 25 years imprisonment, reflecting the gravity of harm caused.
>
> Unfortunately, the internet is creating demand for new material of ever greater levels of depravity and corruption, and the technology provides new opportunities for abuse to take place.
>
> To combat this, the bill introduces two new internet offences. The first is directed at the use of a carriage service to transmit indecent communications to a child, carrying a maximum penalty of seven years imprisonment. The offence will prevent the use of the internet or mobile phone to expose children to pornographic or indecent material.
>
> The second will criminalise using a carriage service for sexual activity with a child. Changes in technology mean that offenders can commit sexual offences against children online without meeting in 'real life'. For example, an offender might engage in a sexual act in front

of a webcam while a child watches online. The offence carries a maximum penalty of 15 years imprisonment.

Existing carriage service offences criminalise using the internet or other carriage service, to groom or procure a child for sexual activity. They also criminalise using a carriage service for child pornography or child abuse material. The bill also raises maximum penalties for existing online child pornography and child abuse material offences, from 10 to 15 years imprisonment.

This bill will strengthen online offences, ensuring the regime is sufficient to address the contemporary nature of offending.

Interesting features of this Commonwealth legislation not only includes it harsh penalties but also its extra territorial operation.

Geoff Archer

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