Sentencing offenders convicted of child pornography and child abuse material offences

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1. Introduction

One of the more difficult sentencing tasks is to sentence an offender convicted of a child pornography offence.† This applies whether the offence is a Commonwealth or State offence, or the offender is dealt with summarily or on indictment. This monograph examines the practical difficulties faced by judicial officers at sentence relating to the fact-finding process and the problems that can be encountered in assessing the seriousness of a given offence. Most child pornography offenders are prosecuted in the Local Court and a large proportion of these offenders are prosecuted for offences involving the possession of child pornography.[1]

The courts recognise the intrinsic harm caused by child pornography. It:

- facilitates the physical abuse of children by creating a market for child pornography[2]
- fuels the fantasies of child sexual assault offenders[3]
- may be used to "groom" potential child sexual assault victims[4]
- creates an additional layer of trauma for the child victims who must live with the knowledge that images of their abuse exist in perpetuity and may resurface at any time[5]
- is pernicious and may promote a distorted view of reality where children are seen as appropriate sexual partners for adults.[6]

Both the Commonwealth and NSW Parliaments have legislated in the area of child pornography and it is not uncommon for an offender to be prosecuted for a combination of State and Commonwealth offences.[7] NSW offences related to child pornography material can be found in Div 15A of Pt 3 of the *Crimes Act* 1900. The provisions for Commonwealth offences can be found in ss 471.16 to 471.23 and ss 474.19 to 474.25 of the *Criminal Code* (Cth) and s 233BAB of the *Customs Act* 1901 (Cth). Commonwealth offences focus on the transmission or movement of child pornography over a carriage service (such as the internet or a mobile

† The expression "child pornography", which is the current way such offences are described in NSW is used throughout this monograph. Different terminology is used in different jurisdictions. For example, Commonwealth offences can relate to either "child pornography" or "child abuse" material. The same legal principles are applied in sentencing for these offences regardless of the way in which the material is described.

1 In the period from January 2005 until June 2009, 294 offenders in the Local Court were dealt with for this offence whereas in the same period in the District Court, 33 offenders were dealt with for this offence. These figures relate to the principal child pornography offence. In fact, 314 of 352 child pornography offenders in the Local Court (89.2%) and 60 of 83 child pornography offenders in the District Court (72.3%) were dealt with in relation to at least one child pornography possession offence. The methodology used for the statistical information appearing in this monograph is set out in Appendix A.

2 *R v Booth* [2009] NSWCCA 89 at [43]; *James v R* [2009] NSWCCA 62 at [11]; *R v Cook; Ex p DPP (Cth)* [2004] QCA 469 at [21]; *R v Stroempl* (1995) 105 CCC (3d) 187 at 191; *R v Liddington* (1997) 97 A Crim R 400 at 409; *State of WA v Cunningham* (2008) 190 A Crim R 430 at [38]; *Hutchins v State of WA* [2006] WASCA 258 at [18].

3 *DPP (Tas) v Latham* [2009] TASSC 101 at [33]; *R v Sharpe* [2001] 1 SCR 45 at [88]–[89]; *R v Stroempl* (1995) 105 CCC (3d) 187; *R v Quick* (2004) 148 A Crim R 51 at [67]; *R v Liddington* (1997) 97 A Crim R 400 at 410; *Hutchins v State of WA* [2006] WASCA 258 at [7], [18].

4 *DPP (Tas) v Latham* [2009] TASSC 101 at [33]; *R v Sharpe* [2001] 1 SCR 45 at [91]; *R v Stroempl* (1995) 105 CCC (3d) 187 at 191; *R v Quick* (2004) 148 A Crim R 51 at [66].

5 *DPP (Tas) v Latham* [2009] TASSC 101 at [35]; *R v Sharpe* [2001] 1 SCR 45 at [92]; *R v LM* [2008] 2 SCR 163 at [8], [28]; see also A Gillespie, "Sentencing for offences involving child pornography" [2003] *Crim LR* 81.

6 *DPP (Tas) v Latham* [2009] TASSC 101 at [33]; *R v Sharpe* [2001] 1 SCR 45 at [87]–[88]; *R v Stroempl* (1995) 105 CCC (3d) 187 at 191; *Colbourn v R* [2009] TASSC 108 at [23]–[24]; *Hutchins v State of WA* [2008] WASCA 258 at [7].

7 In the period from January 2005 until June 2009, 32 offenders (9.1% of all offenders) in the Local Court and 23 offenders (27.7% of all offenders) in the District Court were sentenced for State and Commonwealth offences.

telephone) and through the postal system, while NSW offences focus on the possession, production and distribution of such material.

The seriousness with which both the Commonwealth and NSW Parliaments view such offences is reflected by the maximum penalties. In 2009, the penalty for the NSW offence of possession doubled from 5 years to 10 years.[8] More recently, the Commonwealth passed legislation which not only increased the maximum penalty for some of the offences related to child pornography material, but expanded the range of available offences in relation to such material.[9] Commonwealth offences with a maximum penalty of more than 10 years cannot be dealt with summarily.[10]

1.1 Outline

In addition to the maximum penalty and the specific ingredients of the crime, a number of general sentencing principles apply regardless of whether an offender is being sentenced for a Commonwealth or State offence, or the offender is being dealt with summarily in the Local Court[11] or on indictment in the District Court. The predominant issues a sentencing court must take into account or, as the High Court put it, the "relevant considerations … in forming the conclusion reached"[12] in these cases include the:

- traditional tension of reconciling the various purposes of sentencing
- complexities involved in the fact-finding process
- use of scales, such as the COPINE and *Oliver* scales, to assist in assessing the seriousness of the child pornography the subject of the charge
- relevance of the good character or lack of previous convictions of an offender
- difficulties of applying the totality principle where there are multiple offences, and
- correct application of the mitigating and aggravating factors referred to in s 21A of the *Crimes (Sentencing Procedure) Act* 1999 (NSW).

These issues are separately discussed below. There is a degree of overlap between many of them.

8 *Crimes Amendment (Sexual Offences) Act* 2008 (NSW), Sch 1, which commenced on 1 January 2009 and applies to offences committed from that date.

9 *Crimes Legislation Amendment (Sexual Offences Against Children) Act* 2010 (Cth), which commenced on 14 April 2010. The maximum penalty for certain child pornography offences was increased from 10 to 15 years. These new Commonwealth offences include possessing, producing or disseminating child pornography or child abuse material outside Australia and causing articles containing child pornography or child abuse material to be carried by post. Aggravated forms of some offences have been created which arise when an offender commits a particular offence on three or more occasions.

10 *Crimes Act* 1914 (Cth), s 4J(1).

11 *Police v Power* [2007] NSWLC 1 at [34].

12 *Markarian v The Queen* (2005) 228 CLR 357 at [27].

2. Purposes of sentencing

Section 3A of the *Crimes (Sentencing Procedure) Act* is the statutory embodiment of the purposes of sentencing which the High Court discussed in *Veen v The Queen (No 2)*.[13] The purposes are to:

- ensure an offender is adequately punished
- deter both the offender and others
- protect the community
- rehabilitate the offender
- make an offender accountable for his or her actions
- denounce the offending behaviour
- recognise the harm caused to the victim and the community.

At the Commonwealth level, s 16A(2) of the *Crimes Act* 1914 (Cth) requires a court to take into account particular matters, so far as they are relevant and known to the court, including specific deterrence and punishment, both identified as purposes of a sentence in s 3A. Although s 16A does not specifically refer to general deterrence, it is a factor a sentencing court must consider.[14]

2.1 General deterrence

Particular purposes of sentencing cannot be looked at in isolation from others.[15] However, in the case of child pornography offences, NSW courts have consistently held in respect of Commonwealth and State prosecutions alike that general deterrence and denunciation are paramount considerations. In fact, the significance of general deterrence and denunciation over other purposes of sentencing is a theme which strongly resonates throughout Australian intermediate appellate courts.[16]

Simpson J's eloquent explanation of the relationship between the exploitative nature of these offences and the significance of general deterrence is found in *R v Booth*, where her Honour said:

> "It seems to me that possession of child pornography is an offence which is particularly one to which notions of *general deterrence apply*. Possession of child pornography is a callous and predatory crime.

13 (1988) 164 CLR 465 at 476–477; *Josefski v R* [2010] NSWCCA 41 at [38].

14 *Putland v The Queen* (2004) 218 CLR 174 at [12]; *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370 at 377; *R v Paull* (1990) 20 NSWLR 427 at 434.

15 *R v MA* (2004) 145 A Crim R 434 at [23], approved in *R v MMK* (2006) 164 A Crim R 481 at [10].

16 See, for example, in NSW: *Mouscas v R* [2008] NSWCCA 181 at [37]; *R v Booth* [2009] NSWCCA 89 at [40]; *Saddler v R* [2009] NSWCCA 83 at [16], where Buddin J, after discussing the nature of the images involved, quoted the observation of the sentencing judge that "harsh sentences" were required to "reduce the demand for such appalling acts of cruelty" and "mark in a very real way the community's horror at such treatment of entirely innocent and defenceless children". In Qld see: *R v Mara* [2009] QCA 208 at [20] and *R v Carson* (2008) 187 A Crim R 435 at [32], where the court said denunciation and deterrence were "particularly powerful" and had "particular significance". In WA see: *Hutchins v State of WA* [2006] WASCA 258 at [23], where the court said general deterrence was necessary to achieve the "paramount public interest" of protecting children from sexual abuse. In Vic see: *DPP (Cth) v D'Alessandro* [2010] VSCA 60 at [36], where the court recognised there was an "imperative need for both specific and general deterrence". In Tas see: *DPP (Tas) v Latham* [2009] TASSC 101 at [33], where the court endorsed the approach taken by the intermediate appellate courts of other jurisdictions to sentencing for child pornography offences, although they did not discuss this by specific reference to general deterrence. In SA see: *R v Padberg* [2010] SASC 189 at [21], where Doyle CJ emphasised that general deterrence should be given a "high weighting" because of the prevalence of child pornography material and its availability through the internet.

> In sentencing for such a crime, it is well to bear firmly in mind that the material in question cannot come into existence without exploitation and abuse of children somewhere in the world. Often this is in underdeveloped or disadvantaged countries that lack the resources to provide adequate child protection mechanisms. The damage done to the children may be, and undoubtedly often is, profound. Those who make use of the product feed upon that exploitation and abuse and upon the poverty of the children the subject of the material.
>
> What makes the crime callous is not just that it exploits and abuses children; it is callous because, each time the material is viewed, the offender is reminded of and confronted with obvious pictorial evidence of that exploitation and abuse, and the degradation it causes.
>
> And every occasion on which an internet child pornography site is accessed (or when such material is accessed by any means at all) provides further encouragement to expand their activities to those who create and purvey the material.
>
> *It is for that reason that this is a crime in respect of which general deterrence is of particular significance*. In my opinion the sentencing judge too readily dismissed from consideration the need to convey the very serious manner in which courts view possession of child pornography."[17] [Emphasis added.]

Another basis for the imposition of strongly deterrent sentences is that they potentially reduce the market for child pornography, in turn reducing the motivation to produce it.[18] Such comments were made in the context of a Commonwealth prosecution in *R v Cook; Ex p DPP (Cth)* by McMurdo P who said:

> "The relationship between the maker of pornography and those who use it is akin to the relationship between receivers and thieves. People will not be inclined to exploit children to make child pornography if there is no market for it. The Commonwealth legislature clearly intended that significant deterrent sentences be imposed upon those who use the internet to import child pornography."[19]

Similar comments have been made in relation to State offences, in particular relating to the possession of child pornography.[20] McClellan CJ at CL, in *R v Lee*, (Simpson and Hidden JJ agreeing) said, in the context of a Crown appeal against sentence, that the court had been "careful to identify principles which are appropriate when sentencing in cases of child pornography" and went on to say that the seriousness of these offences "will in most cases require a custodial sentence".[21]

17 *R v Booth* [2009] NSWCCA 89 at [40]–[44].

18 *R v Stroempl* (1995) 105 CCC (3d) 187 per Morden ACJO.

19 [2004] QCA 469 at [21]; approved by Johnson J in *R v Gent* (2005) 162 A Crim R 29 at [36].

20 See the discussion in "Common child pornography offences" at heading 9.

21 [2010] NSWCCA 88 at [28]. See also comments to similar effect by Doyle CJ in *R v Padberg* [2010] SASC 189 at [22]–[24] made in the context of a Crown appeal against sentences imposed in respect of Commonwealth and State offences.

2.2 Deterrence and prevalence

If a court is proposing to impose a heavier than usual sentence on the basis of increased prevalence, it should only do so if proper and sufficient evidence is available to the court and after having given the parties the opportunity to address on this issue.[22] In the past, evidence of prevalence has been presented to a first instance or appeal court in the form of statistical analysis or expert evidence from a police officer concerning police experience of any increase in offending.[23] In *R v House*, the Court of Criminal Appeal held that the preferable approach was for that court to determine whether a specific offence is more prevalent perhaps by way of a guideline judgment.[24]

Intermediate appellate courts have recognised that the prevalence of child pornography offences justifies strongly deterrent sentences and that the internet accounts for the increase in offending.[25] In *Assheton v R*, the court noted that "general deterrence must be the paramount consideration, given the prevalence and availability of child pornography".[26] In *R v Gent*, Johnson J made similar comments adding that "the ready availability of the material is a further factor pointing to the significance of general deterrence on sentence".[27]

To illustrate, between 1989 and 1994, about 12,000 items of child pornography were seized in Australia[28] while in contrast, in 2010, in one case alone, police seized 729,000 child pornography images and 2,700 child pornography movie files.[29] This increase is mirrored internationally, where the Canadian Supreme Court has described it as a "tidal wave".[30]

Generally speaking, since 2005 there has been a steady increase in the number of offenders convicted of child pornography offences and the number of child pornography offences dealt with in the courts. **Figure 1** shows the number of offenders and offences dealt with in the Local Court for the period from 2002 to 2008. **Figure 2** shows the number of offenders and offences dealt with in the District Court for the same period.[31]

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22 *R v House* [2005] NSWCCA 88 at [23].

23 R Fox and A Freiberg, *Sentencing: State and federal law in Victoria*, 2nd edn, Oxford University Press, Melbourne, 1999, at 3.631.

24 *R v House* [2005] NSWCCA 88 at [24]. See also *R v Henry* (1999) 46 NSWLR 346 at [12], [13]. In that case, the Court of Criminal Appeal recognised the prevalence of armed robbery and established a guideline.

25 See, for example, *R v Jones* (1999) 108 A Crim R 50 at [2], referred to in *James v R* [2009] NSWCCA 62 at [10]; *Assheton v R* (2002) 132 A Crim R 237 at [35]; *R v Gent* (2005) 162 A Crim R 29 at [66]; *DPP (Cth) v D'Alessandro* [2010] VSCA 60 at [36], although the reference there was to "modern technology"; *R v Mara* [2009] QCA 208 at [19].

26 (2002) 132 A Crim R 237 at [35].

27 (2005) 162 A Crim R 29 at [66].

28 A Burke et al, "Child pornography and the internet: policing and treatment issues" (2002) 9(1) *Psychiatry, Psychology and Law* 79 at 83.

29 *Hitchen v R* [2010] NSWCCA 77 at [9].

30 *R v Sharpe* [2001] 1 SCR 45 at [166]. See also the discussion in G Griffith and K Simon, *Child pornography law*, NSW Parliamentary Library Research Service, 2008, Briefing paper No 9/08 at 2.3, p 4.

31 In NSW, offences involving child pornography have come before the District Court with increasing frequency since 2005, from 4 offences in 2005 (2 State and 2 Commonwealth) to 90 offences in 2008 (77 State and 13 Commonwealth). In the Local Court from 2006 until 2008, the number of such offences has also increased from 83 offences in 2006 (81 State and 2 Commonwealth) to 202 offences in 2008 (159 State and 43 Commonwealth). In the Local Court in 2005 there was an unusual spike in the number of prosecutions which may be explained by two main factors. First, in September and October 2004 an Australian police operation known as Operation Auxin was conducted which led to the arrest of a large number of offenders whose matters were finalised in 2005. It is estimated that 56 offenders were responsible for 97 offences in that year. Second, two other offenders were responsible for 53 and 24 child pornography offences respectively.

Figure 1: Number of child pornography offenders and child pornography offences in the NSW Local Court 2002–2008

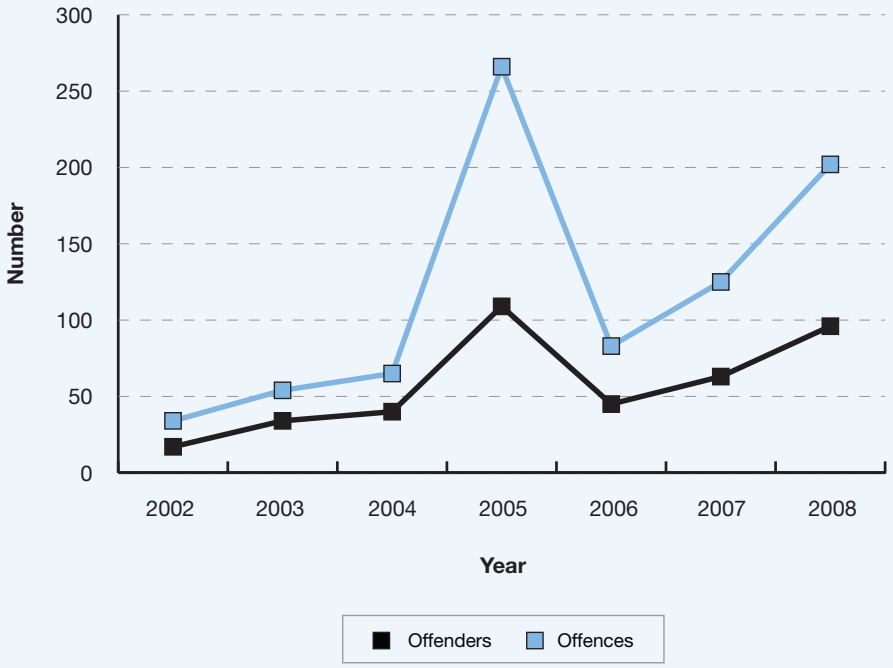
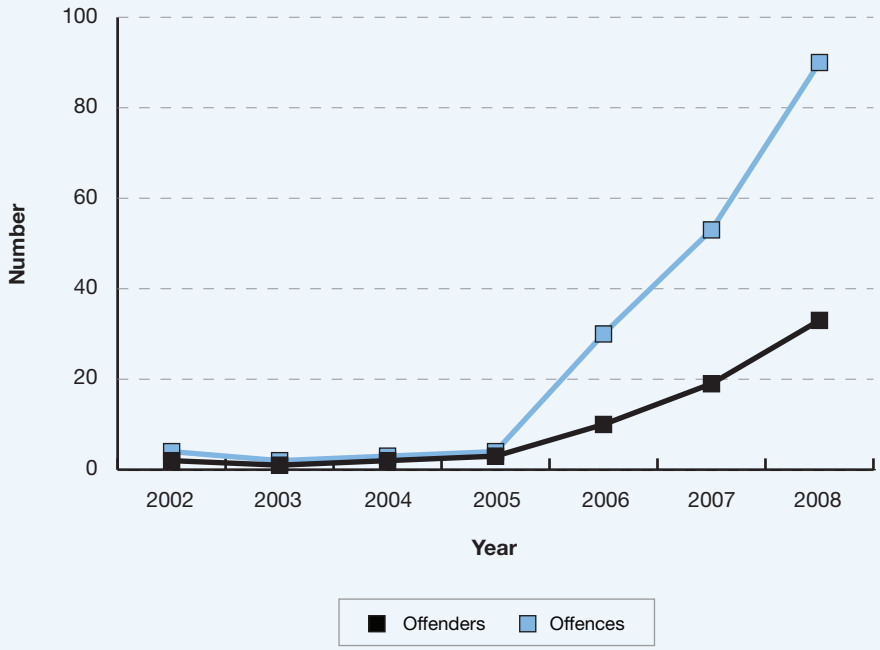


Figure 2: Number of child pornography offenders and child pornography offences in the NSW District Court 2002–2008



2.3 Specific deterrence

The relevance of specific deterrence varies depending on the circumstances of the particular case. The courts have held that it is an important consideration in the following circumstances:

- the offender has a record of child pornography offences[32]
- the offender gives an implausible explanation for his or her conduct and there is evidence of a lack of insight into the offence[33]
- there is a real prospect of re-offending.

The evidence before the court is especially critical when determining these last two issues. The sentencing judge in *Mouscas v R* concluded that there was a prospect of re-offending because of evidence contained in psychiatric and psychological reports.[34] The author of the psychiatric report found that the offender had a "deviant sexual interest" and both reports suggested that the offender had traits usually found in people with obsessive compulsive disorders. The authors of both reports concluded there was little risk of contact offending, but neither was willing to express a confident opinion that the offender would not commit further possession offences again.[35] The court held the case was an appropriate vehicle for specific deterrence.[36]

In *DPP (Cth) v D'Alessandro*, the court held that there was a strong need for specific deterrence in the particular circumstances of that case because the respondent's lack of remorse and "little regard to matters of conscience" indicated that he was "unable to generate … empathy without which he will remain incapable of appreciating the evil to which he is a party".[37]

2.4 Rehabilitation

Given the predominance of general deterrence and denunciation in the sentencing process, rehabilitation may have reduced significance. The weight which is attributed to rehabilitation will always depend on the seriousness of the particular offence. Simpson J in *R v Booth* explained that undue focus should not be placed upon a respondent's need for rehabilitation at the expense of other legitimate and important sentencing considerations saying:

> "While I do not dissent from the importance of achieving prevention of further offences by such means, it is not the only matter to be considered. As I have made clear, the need to deter others from involving themselves in child pornography by signalling that such behaviour will be met by significant penalties is an important consideration. So also is denunciation of those who engage in this callous and predatory crime."[38]

32 *R v Booth* [2009] NSWCCA 89 at [45].

33 This was the Crown's argument in *R v Gent* (2005) 162 A Crim R 29, summarised by Johnson J at [96], which his Honour appears to accept at [100].

34 [2008] NSWCCA 181 at [28].

35 ibid at [23], [25].

36 ibid at [29].

37 [2010] VSCA 60 at [34] and [36]. Considering the offender's youth and the early age at which he became interested in child pornography, Harper JA noted "[a]n early beginning is a discomforting portent": at [34].

38 *R v Booth* [2009] NSWCCA 89 at [47]. Rehabilitation was an important factor in *R v Wheatley* [2007] ACTCA 15 at [12], where the respondent had been in therapy for three years and there was evidence that he had made significant changes in his personal, emotional and intellectual life.

Motivation and rehabilitation are closely connected. The motivation to commit these offences can arise from some degree of sexual deviance. Successful rehabilitation depends on the degree of recognition an offender has of that disorder and the steps, if any, taken to overcome it.[39] For example, the offender in *Puhakka v R* started accessing child pornography on the internet from the time he was 10 years old. However, the psychiatrist concluded that he had "possibly learned inappropriate sexual behaviour from his access to the internet" and it could be "unlearned".[40] He went on to say there was some cause for optimism in terms of a lower risk of re-offending provided the offender continued counselling especially if "therapy reveals that his primary or basic sexual drive is not of a paedophile type".[41]

Mouscas v R is an example of a case where there was evidence that the offender demonstrated obsessive compulsive personality traits and this coupled with his deviant sexual interests meant there was a possibility of re-offending in the future.[42]

39 See the separate discussion in "Motivation" at heading 3.6.

40 *Puhakka v R* [2009] NSWCCA 290 at [8], although the author of the pre-sentence report recorded that the offender "displayed little insight and little affect regarding the charges": at [7]. It is clear from the judgment that the offender was given every benefit because of his favourable subjective case, which included his youth.

41 ibid at [16], quoting from the report of Dr Bruce Westmore. See also *James v R* [2009] NSWCCA 62 at [9] where, although the discussion is brief, it is apparent that there was some evidence that the offender had developed some insight into his behaviour and was taking steps to address it; and *Police v Power* [2007] NSWLC 1 at [63]–[65], where the psychiatric report positively stated that the offender in that case was not a paedophile and had come to offend in the way he did because of an addiction to the internet.

42 *Mouscas v R* [2008] NSWCCA 181 at [23], [25] and [28], although the conclusions of the specialists acknowledge the absence of research in determining the risk of future sexual recidivism for offenders charged with the possession of child pornography: at [26].

3. Assessing objective seriousness

Child pornography offences dealt with on indictment are currently not subject to standard non-parole periods. Therefore it is not necessary to make a specific finding about whether a particular offence falls in the middle range of objective seriousness to assess the objective criminality.[43] What is significant in determining the sentence appropriate to a particular crime is for the court:

> "… to have regard to the gravity of the offence viewed objectively, for without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place … Each crime, as *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472; 33 A Crim R 230 at 234 stresses, has its own objective gravity … the maximum sentence fixed by the legislature defining the limits of sentence for cases in the most grave category. The relative importance of the objective facts and subjective features of a case will vary".[44]

To achieve this assessment, the court must find the relevant facts so the appropriate sentence can be imposed.[45] In short, decisions concerning the penalty are affected by the factual basis from which the court proceeds.[46] When a decision is made that a matter be finalised in the Local Court, this might reflect a "concession" that the objective seriousness of the offence "does not approach that of the gravest of cases".[47]

3.1 Agreed facts — the need for specificity

The statistics show that most offences involving child pornography proceed by way of a plea of guilty.[48] The factual basis upon which the parties ask the court to proceed should therefore be set out in an "agreed statement of facts" which is comprehensive. It should include all of the relevant facts and circumstances upon which the court is to sentence the offender.[49] A court can only make findings based on the agreed facts and the evidence before it. Where multiple offences are before the court, the child pornography relevant to each charge must be properly identified in the statement of facts.[50] The court should be able to rely on the identification of child pornography the subject of the offences which is contained in the agreed statement of facts.[51] Particular care is needed in cases involving voluminous material.

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43 *Sivell v R* [2009] NSWCCA 286 at [32]. This exclusion also permits the court to impose fixed term sentences: *Crimes (Sentencing Procedure) Act*, s 45(1).

44 *R v Dodd* (1991) 57 A Crim R 349 at 354.

45 *GAS v The Queen* (2004) 217 CLR 198 at [30].

46 *The Queen v Olbrich* (1999) 199 CLR 270 per Gleeson CJ, Gaudron, Hayne and Callinan JJ at [1].

47 *Police v Power* [2007] NSWLC 1 at [31].

48 Of 83 offenders dealt with in the District Court from 1 January 2005 until 30 June 2009, 78 (94.0%) pleaded guilty. In the Local Court during the same period, 315 of 352 offenders (89.5%) pleaded guilty.

49 *Della-Vedova v R* [2009] NSWCCA 107 at [14]. The offender should be given an opportunity to carefully read the statement of facts and sign it: *Korgbara v R* [2010] NSWCCA 176 at [34]–[36].

50 This was an issue in *R v Carson* (2008) 187 A Crim R 435 at [25], where the sentencing judge erroneously sentenced the offender for one offence on the basis of child pornography material which related to another offence before the court at the same time.

51 Problems in relation to identification can occur in sentence matters, as occurred in *Colbourn v R* [2009] TASSC 108 at [16], where there was a significant overestimation of the number of images related to the charges that was not identified until after the conclusion of the sentence proceedings.

3.2 The Gent factors

In *R v Gent*,[52] Johnson J identified factors to assist a court to determine the objective seriousness of an offence involving the possession or importation of child pornography:

- 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
- whether the offender will profit from the offence.[53]

These factors are also relevant when determining the objective seriousness of offences where such material is produced,[54] accessed, or transmitted using the internet.[55] The significance of any one of these factors varies, depending on the facts of the particular case, but a court must always consider the evidence in light of the elements of the offence. This is particularly significant in relation to the factor concerning distribution because there are both Commonwealth and State offences related to the distribution of child pornography.[56] Assuming such evidence is available in respect of, for example, a possession offence, using it as a circumstance of aggravation would lead to an improper application of the *De Simoni* principle.[57] When Gent was charged in 2004 there were no Commonwealth offences concerning the use of a carriage service to access or transmit child pornography material.[58]

Most recently in *Minehan v R*,[59] RA 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. His Honour referred particularly to the English Court of Appeal decision of *R v Oliver* where Rose LJ, who delivered judgment for the court, identified a number of factors capable of aggravating the seriousness of a number of different child pornography offences.[60] In *Saddler v R*,[61] Buddin J, while acknowledging the usefulness of the guidelines in *R v Oliver* and the factors identified by Johnson J in *R v Gent*, was cautious about applying all of those factors to offences involving the possession of child pornography. Minehan was

52 (2005) 162 A Crim R 29 at [99].

53 See further discussion of the impact these last two factors have in the particular context of possession offences: "Possession of child pornography — Crimes Act 1900 (NSW), s 91H(2)" at heading 9.1.

54 *Whiley v R* [2010] NSWCCA 53 at [56]–[57].

55 *R v Mara* [2009] QCA 208 at [21].

56 See *Criminal Code* (Cth), ss 474.19(1)(a)(iii) and (1)(aa), which makes it an offence to use a carriage service to transmit, make available or publish or otherwise distribute child pornography material (and *Criminal Code* (Cth), ss 474.22(1)(a)(iii) and (1)(aa) which is the same offence but in relation to child abuse material) and *Crimes Act* 1900, s 91H(2), which prohibits the dissemination of such material. The maximum penalty differs between jurisdictions. The maximum penalty for the Commonwealth offences is now 15 years whereas the maximum penalty for the State offence is 10 years.

57 This was referred to by RA Hulme J, with whom Macfarlan JA and Johnson J agreed, in *Minehan v R* [2010] NSWCCA 140 at [94].

58 Those offences were introduced in the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2)* 2004 (Cth) and commenced on 1 March 2005. These then new offences were referred to by Johnson J in *R v Gent* (2005) 162 A Crim R 29 as reflecting "the increasing application of the criminal law to pornographic material accessed via the internet": at [32].

59 [2010] NSWCCA 140 at [82]–[92].

60 [2003] 1 Cr App R 28 at [20].

61 [2009] NSWCCA 83 at [23].

charged with a range of offences, including possessing, disseminating and transmitting child pornography and RA Hulme J 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."[62]

The weight to be given to those factors relevant to the particular offence with which an offender has been charged will depend on the available evidence.

62 *Minehan v R* [2010] NSWCCA 140 at [94].

3.3 Assessing the nature and content of the material involved

Consideration of the nature and content of the material involved in any child pornography offence is the most significant factor in determining the objective seriousness of that offence. "Child pornography" and "child abuse material" are both defined by statute.[63] The definitions include the age of the children depicted in the material, although it differs between NSW (16 years) and the Commonwealth (18 years).[64] As already noted, Johnson J in *R v Gent* identified the age of the children as a relevant factor when assessing the objective seriousness of the offence.[65]

At present, investigators use two recognised scales to classify child pornography material — the COPINE scale[66] and the *Oliver* scale.[67] These are reproduced at "Appendix B" as both are used to classify material which is the subject of charges.[68] While such scales may be a means of achieving a degree of consistency of approach in sentencing, neither addresses all the relevant issues.[69]

Depending on how comprehensively the nature of the material is addressed in the statement of facts, it may be necessary for the court to view the material to make a determination about its nature. This is a matter about which there are many views, but it is not unusual for a court to view the material the subject of charges. In *R v Oliver*, the English Court of Appeal expressed the view that such an approach was "desirable".[70] The Victorian Court of Appeal has endorsed this approach, noting in one case that it assists the court "to form an overall impression of the material and in particular its degree of depravity".[71] That is not necessarily the position in NSW where in *Hitchen v R*, the Court of Criminal Appeal was content to rely on the findings of the sentencing judge who had viewed the material.[72]

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63 *Crimes Act* 1900 (NSW), ss 91FA and 91H(1); *Criminal Code* (Cth), s 473.1 and *Customs Act* 1901 (Cth), s 233BAB(3) and (4) which include definitions of "child pornography" and "child abuse" material. The *Crimes Amendment (Child Pornography and Abuse Material) Act* 2010 (NSW), which commenced on 17 September 2010, expands the definition of material which amounts to child pornography but also changes the nomenclature to "child abuse material". This and other amendments are being introduced so that the approach to such offences at the State level is generally consistent with the approach taken by the Commonwealth.

64 Issues associated with the discrepancies in age between particular offences were identified in *Child pornography law*, above n 30 at 3.1.2 and 3.1.4.

65 (2005) 162 A Crim R 29 at [99]. See also *R v Wheatley* [2007] ACTCA 15 at [15].

66 This was developed for the Combating Paedophile Information Networks in Europe (COPINE) Centre. M Taylor, G Holland and E Quayle, "Typology of paedophile picture collections" (2001) 74(2) *The Police Journal* 97; also available from the COPINE website at <www.ucc.ie/en/equayle/Publishedmaterials/Papers/>, p 5, accessed 30 June 2010. This scale was used in *Police v Power* [2007] NSWLC 1; *Saddler v R* [2009] NSWCCA 83; *Sivell v R* [2009] NSWCCA 286; *Puhakka v R* [2009] NSWCCA 290 and *R v Jarrold* [2010] NSWCCA 69.

67 In *R v Oliver* [2003] 1 Cr App R 28, Rose LJ, delivering the judgment of the court, set out five different levels of activity ranging from images depicting erotic posing with no sexual activity to images depicting sadism or bestiality to reflect the increasing seriousness of the material.

68 Child Pornography Working Party, *Report of the Child Pornography Working Party*, NSW Department of Justice and Attorney General, January 2010, p 35. See also *R v Silva* [2009] ACTSC 108 at [6], where Penfold J noted that the Australian Federal Police commonly used the *Oliver* scale to classify child pornography material.

69 For example, the age of the children depicted in the images is not referred to in either scale.

70 *R v Oliver* [2003] 1 Cr App R 28 at [10].

71 *R v Jongsma* (2004) 150 A Crim R 386 at [35]. Similar views were expressed by Dare LCM in *Police v Winter* [2008] NSWLC 15, who said that the only way for a court to make an assessment of the nature and content of the material was by viewing at least a sample of it.

72 [2010] NSWCCA 77 at [24]. See also *R v Ross* [2009] NSWDC 104 at [3] where Berman DCJ said that publication of the material to the court perpetuates publication of the images, one of the harms involved in these offences.

It is difficult to see how a court can have a proper appreciation of issues such as the "physical harm or fear or distress in the victim",[73] or whether because of his or her age, a child victim was likely to be physically injured by the sexual abuse inflicted upon them, without at least viewing a sample of the material.[74] At present, where an offender pleads not guilty and is convicted following a trial, the nature and content of the material could be a matter ventilated before a jury. In 2004, when NSW child pornography offences were amended, the definition of "child pornography" was amended to remove reliance on the classification of material. The then Attorney General (NSW), the Hon RJ Debus, said the amendment "will allow courts to make their own determination as to whether material is or is not child pornography".[75] More recently, the Child Pornography Working Party (CPWP)[76] acknowledged that viewing the material may "properly demonstrate criminality," but also said that such an approach creates "significant occupational health and safety risks" for participants in the criminal justice process, including sentencers. The CPWP recommended steps that could be taken to reduce the exposure of juries and court staff, including judges and magistrates, to the material. These recommendations have been adopted by the NSW government and amendments to the *Criminal Procedure Act* 1986, as a consequence of the *Crimes Amendment (Child Pornography and Abuse Material) Act* 2010, will see the introduction of s 289B to the Act. The section provides that:

(a) An authorised analyst (the analyst) may conduct an examination of a random sample of child abuse material the subject of proceedings for a child abuse material offence.[77]

(b) In such proceedings, evidence of the analyst as to the nature and content of the random sample is admissible as evidence of the nature and content of the whole of the material from which the random sample was taken.

(c) It is open to a court to find that any type of child abuse material found by the analyst to be present in a particular proportion in the random sample is present in the same proportion in the material from which the random sample was taken.

(d) A certificate containing the findings of the analyst as to the nature and content of the random sample is admissible as evidence of the matters certified which includes the findings of the analyst as to the nature and content of the random sample.[78]

At the time of writing, there were no regulations providing details of the content of a "random sample" certificate. Such a certificate would have to contain a sufficient level of detail of the contents of the sample so that the court is in a position to make a proper determination of the

73 This expression was used in *DPP (Tas) v Latham* [2009] TASSC 101 at [34].

74 The sentencing judge in *Hitchen v R* [2010] NSWCCA 77 had viewed the material although in both *R v Saddler* [2008] NSWDC 48 and *DPP (Tas) v Latham* [2009] TASSC 101 (a Tasmanian case involving a State possession offence), detailed statements of facts were tendered which comprehensively addressed the nature of the material the subject of the charges.

75 Second Reading Speech, Crimes Amendment (Child Pornography) Bill 2004, NSW Legislative Assembly, *Debates*, 11 November 2004, p 12,738.

76 The CPWP was established following recommendations made by the NSW Sentencing Council in their interim report, *Penalties Relating to Sexual Assault Offences in New South Wales,* Vol 1, August 2008. The CPWP first met in February 2009 and their report, *Report of the Child Pornography Working Party*, was published in January 2010. See the Report at p 31.

77 A "child abuse material offence" is defined in new s 289A as one under Div 15A of Pt 3 of the *Crimes Act* 1900. It does not appear to apply to Commonwealth prosecutions where it will not be possible to prove similar evidence in the same way.

78 These amendments commenced on 17 September 2010.

nature of the material. It is likely that statements of facts will still contain some descriptions of the material the subject of the charges. These are prepared either by the police officer or prosecuting lawyer who must carefully consider and describe in a detailed narrative form what is depicted in a particular image or video. This new procedural development is not replicated at the Commonwealth level and the fact-finding process for those offences will be different. The CPWP encouraged a consistency of approach between the State and Commonwealth at least in relation to the use of common scales to classify child pornography images seized. In addition the CPWP, while acknowledging the "legitimate differing views" concerning the need for sentencing courts to view the images or videos concerned, recommended the development of Practice Notes which "should limit the republication as much as possible of child pornography images" as another means of addressing "the concern over the occupational health and safety issues".[79]

The CPWP also noted the development by police of a computer system which can compare images seized on electronic storage devices with images stored in a database and classify them according to a seriousness scale which it is intended would be based on guidelines established by the UK Sentencing Guidelines Council in April 2007.[80]

There are justifiable concerns associated with viewing these images and videos which are universally acknowledged to be appalling. The advantage of viewing the material is that as a fact-finder the sentencer can directly assess the crime(s) before the court as is the case with injuries for assault and wounding offences. For example, in *Police v Power*,[81] Chief Magistrate Henson, after viewing the images, said that he could "see the pale death of innocence and trust in the eyes of so many young children [and] bemoan the capacity for some members of the human race to descend into the dark and depraved side of the human condition". This is especially the case where the offence is either the possession or accessing of child pornography material. Such offences are usually not connected to the production of the material and therefore it is rare for a victim impact statement to be used as a means of informing the court of the effect of the crime on the victims.

The nature and content of the material of itself can be a factor justifying a conclusion that a particular offence falls within the worst category. For example, in *Saddler v R* where a large number of the images and movies were at the higher levels nominated in the COPINE scale (from 5 to 10), the sentencing judge 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. His Honour 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.[82]

79 *Report of the Child Pornography Working Party*, above n 68, pp 38–39.

80 ibid pp 30–34, 37.

81 *Police v Power* [2007] NSWLC 1 at [36].

82 *Saddler v R* [2009] NSWCCA 83 at [50].

Similar findings were made by Price J in *Mouscas v R* and by Howie J in *Hitchen v R* where, in both, the sentencing judges viewed the images the subject of the charges and drew their own conclusions about the nature of the material.[83]

In addition to images of real children, the various statutory definitions of child pornography or child abuse material include other forms of image such as pseudo-images, cartoons, comics, books and "chat room" dialogue.[84] The type of images involved may also be relevant to the consideration of the objective seriousness of the offence. For example, in *Whiley v R*, the images the subject of the charge were drawn by the appellant and did not involve the actual abuse of children. This justified a finding that the offence was objectively less serious although this was also because there was a very small number of images and the offender did not propose to distribute or sell them but had produced them for his own gratification.[85]

3.4 The number of images

It is inappropriate to conclude that simply because a large number of items of child pornography were involved in the commission of a particular offence, that of itself will lead to a lengthy sentence. The relationship between the number of images involved and the nature of the content is more significant. If, for example, the number of images relevant to a particular offence was quite small, but the images were at the higher end of either the COPINE or *Oliver* scales (see Appendix B), then that may suggest a higher penalty was appropriate, whereas a large number of images depicting a lower level of content may not be as objectively serious.

In *R v Gent*, Johnson J said that in a case involving the 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".[86] This principle applies to those Commonwealth offences concerning the access and transmission of child pornography material as it is well recognised that the use of the internet makes "an unprecedented volume of pornography available" to offenders in many forms.[87]

In *Saddler v R*, the fact that many of the images were at a higher level of depravity was, together with the very high number of images involved, part of the reason the offence was found to be in the worst category.[88] A positive finding that the case was in the worst category was made in *Hitchen v R* which involved more than 729,000 images and 2,700 video files of child pornography.[89]

83 These findings were not challenged on appeal. *Mouscas v R* [2008] NSWCCA 181 at [13], [19]; *Hitchen v R* [2010] NSWCCA 77 at [11], [24].

84 *Crimes Act* 1900, s 91FA; *Criminal Code* (Cth), s 473.1; *Customs Act* 1901 (Cth), s 233BAB(3) and (4). Different examples were the subject of charges in *Saddler v R* [2009] NSWCCA 83; *McEwen v Simmons* (2008) 73 NSWLR 10; *Whiley v R* [2010] NSWCCA 53; *R v Sharpe* [2001] 1 SCR 45; *R v NK* (2008) 191 A Crim R 483; *R v Carson* (2008) 187 A Crim R 435 at [14] and *DPP (Tas) v Latham* [2009] TASSC 101.

85 *Whiley v R* [2010] NSWCCA 53 at [55]–[71]. This approach has more recently been endorsed by the Court of Criminal Appeal in *Hitchen v R* [2010] NSWCCA 140 at [90].

86 *R v Gent* (2005) 162 A Crim R 29 at [99]. See also *Minehan v R* [2010] NSWCCA 140 at [94].

87 See, for example, *R v Mara* [2009] QCA 208 at [19], [21].

88 *Saddler v R* [2009] NSWCCA 83 at [49]–[50].

89 [2010] NSWCCA 77 at [11], [16], [24].

3.5 Organisation of material

The manner in which child pornography material is organised and stored can be relevant to objective seriousness where it demonstrates a more or less sophisticated approach on the part of the offender to trading, or a higher level of personal interest in the material.[90]

In *Colbourn v R*,[91] the offender had created a 353 page catalogue of his child pornography files including details of what each image depicted and the offender's rating of their quality as child pornography. The court concluded that but for the diagnosis that the offender had an obsessive personality disorder, the extensive catalogue he created, and the great amount of time he spent preparing it, would have indicated such an intense level of personal interest in child pornography as to constitute a "very serious" aggravating factor.[92]

3.6 Motivation

Evidence of an offender's motivation to commit child pornography offences may be relevant to a determination of the objective seriousness of an offence, but if there is no such evidence it does not operate as either a mitigating or aggravating factor.[93]

Typically in child pornography prosecutions, evidence concerning motivation is contained in psychiatric or psychological reports. Motivation can range from learned deviant behaviour,[94] confusion about an offender's sexual identity,[95] to something more sinister.[96] In *Hitchen v R*, the offender had led an entirely blame-free life until the age of 41. He gave evidence that he came to have an "obsession" with child pornography which led to him taking pornographic images of his step-daughter from the ages of 7 to 10 years, many of which he transmitted to persons overseas, although he blamed the child for "the conduct" and attempted to minimise his involvement in the preparation of the pornographic images.[97] This offence, together with others committed, was accepted to be in the worst category of case.[98]

Some evidence of motive can be inferred from the circumstances involved in the commission of the particular offence. For example, where an offender accesses or possesses a large amount of child pornography material over a lengthy period of time, that can support the conclusion that the offender obtained sexual gratification from the accessing of material and that was the reason for

90 *R v Oliver* [2003] 1 Crim App R 28 at [20]; *R v Mara* [2009] QCA 208 at [37]; *DPP (Tas) v Latham* [2009] TASSC 101 at [34]; *Minehan v R* [2010] NSWCCA 140 at [94].

91 [2009] TASSC 108.

92 ibid at [27].

93 *Louizos v R* [2009] NSWCCA 71 at [102].

94 As was found in *Puhakka v R* [2009] NSWCCA 290 at [8].

95 An explanation for the offences in *R v Booth* [2009] NSWCCA 89 at [16].

96 Demonstrated by cases such as *Mouscas v R* [2008] NSWCCA 181, where the offender was described as having "deviant sexual interests" and personality traits usually found in obsessive compulsive disorders: at [23], [24]; *DPP (Cth) v D'Alessandro* [2010] VSCA 60, where the offender was described as having so little insight into the offences that he demonstrated a "lack of concern for the children whose degradation gave him pleasure" and that the wrongfulness of what he was doing was one of its attractions having told the psychiatrist that he wanted to "do something taboo because I had always been a good kid": at [28]; and *Sivell v R* [2009] NSWCCA 286, where the offender had a history of offences involving children and denied throughout the proceedings that he had possessed child pornography.

97 *Hitchen v R* [2010] NSWCCA 77 at [17], [18].

98 ibid at [24].

the commission of the offence. This was the case in *DPP (Cth) v D'Alessandro*, although in that case the offender also made frank admissions about this.[99] A similar conclusion is inherent in *R v Gent* although the issue was not directly addressed during the appeal.[100]

3.7 Representative charges

When charges are representative, a court can consider evidence of relevant events which will assist in determining the nature of the offence, but there must be a connection between the charge and those events. Before evidence of the surrounding circumstances can be taken into account, the Crown must prove beyond reasonable doubt the commission of other offences. This could be by way of admission of those other offences.[101] Such evidence precludes a defence submission that the offences are isolated incidents. The evidence cannot be used to further aggravate the offence resulting in an increase in the sentence ultimately imposed.[102]

3.8 Surrounding circumstances and De Simoni

Evidence of surrounding circumstances is relevant to a determination of the objective seriousness of an offence. However, while the court can consider all of an offender's conduct, including conduct that may aggravate the offence, those circumstances which found a conviction for a more serious offence must not be taken into account.[103] Particular care needs to be given to this issue because of the broad range of available offences in this area. In *Minehan v R*, RA Hulme J said that while the purpose for which an offender possessed child pornography, whether it be for personal use or for sale or dissemination, may be relevant to an assessment of the seriousness of an offence, care was needed not to infringe the principle in *De Simoni*.[104] A proper determination of this issue will depend on the evidence before the court.

However, a court is not prevented from assessing an offender's culpability by reference to the overall context in which an offence has been committed.[105] In *El-Ghourani v R*, a case involving the possession of drugs, Spigelman CJ explained that the circumstances in which a person came into possession of "the offending matter" and what they proposed to do with it could "all be relevant to determining the degree of moral culpability attached to the act of possession itself".[106] If a court determines such evidence adversely to the offender then it must be proved beyond reasonable doubt.[107]

99 *DPP (Cth) v D'Alessandro* [2010] VSCA 60 at [12]. See also *R v Mara* [2009] QCA 208; *Hill v State of WA* [2009] WASCA 4 at [9]–[10], [20].

100 *R v Gent* (2005) 162 A Crim R 29. See the discussion at [20]–[23] which records some of the findings of the sentencing judge (which were not disturbed on appeal) and [26], where the sentencing judge refers to the relevant principles, including that the length of time involved in the offending might be relevant to an offender's state of mind. This aspect of *R v Gent* was referred to with approval in the Commonwealth case of *DPP (Cth) v D'Alessandro* [2010] VSCA 69 at [3].

101 *R v JCW* (2000) 112 A Crim R 466 per Spigelman CJ at [55]–[56].

102 *R v Mailes* (2003) 142 A Crim R 353 at [51]; *Fisher v R* [2008] NSWCCA 129 at [19]*; R v EMC* (unrep, 21/11/96, NSWCCA) per Gleeson CJ.

103 *The Queen v De Simoni* (1981) 147 CLR 383 per Gibbs CJ at 389.

104 [2010] NSWCCA 140 at [94].

105 *El-Ghourani v R* [2009] NSWCCA 140 at [30].

106 ibid at [33].

107 *The Queen v Olbrich* (1999) 199 CLR 270 at [27].

4. Structuring sentences and totality

The principal factor affecting the type and length of any sentence is always the maximum penalty. In *Markarian v The Queen*, the High Court said that careful attention to maximum penalties will almost always be required because "the legislature has legislated for them … they invite comparison between the worst possible case and the case before the court at the time [and] … provide … a yardstick".[108]

When an offender is sentenced for multiple offences involving child pornography, the principle of totality is also an important consideration — whether the offences are being dealt with in the Local Court or District Court and irrespective of whether sentences of imprisonment are imposed.[109] There are a number of specific statutory provisions to consider, including ss 53, 55(2), 58[110] and 59 of the *Crimes (Sentencing Procedure) Act,* and for Commonwealth offences, ss 16B[111] and 19 of the *Crimes Act* 1914 (Cth).

The effect of the totality principle is that a court is required to pass "a series of sentences, each properly calculated in relation to the offence for which it is imposed … [and] to review the aggregate sentence" to determine whether it is "just and appropriate".[112]

Where the court selects imprisonment, the question whether a series of sentences should be served concurrently or cumulatively is only considered *after* determining the appropriate sentence for each offence.[113] While that question is a discretionary one, proper application of the totality principle will generally determine the extent to which a sentence is to be served concurrently or cumulatively.[114] In *Mill v The Queen*, the High Court suggested that there were two ways to approach this:

> "Where the [totality] principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by *making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate* in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."[115] [Emphasis added.]

There is no general rule as to when an order should be made for a sentence to be served concurrently or cumulatively but in *Cahyadi v R*, Howie J said that the principal issue was whether the sentence for one offence could "comprehend and reflect the criminality for the other offence".[116] His Honour concluded that if it could not, then the sentences should at least be:

> "… partly cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two

108 (2005) 228 CLR 357 at [31].

109 See the cases discussed in Judicial Commission of New South Wales, *Sentencing Bench Book*, 2006–, "Concurrent and consecutive sentences" at [8-210].

110 This limits the sentence that can be imposed by the Local Court where there are multiple sentences.

111 Although s 16B is not limited to sentences of imprisonment.

112 *Mill v The Queen* (1988) 166 CLR 59 at 63 quoting from DA Thomas, *Principles of sentencing*, 2nd edn, Heinemann, London, 1979, pp 56–57. See also the discussion in the *Sentencing Bench Book*, above n 109, "Concurrent and consecutive sentences" at [8-200]ff.

113 *Mill v The Queen* (1988) 166 CLR 59 at 63.

114 *R v MMK* (2006) 164 A Crim R 481 at [11] quoting *Mill v The Queen* (1988) 166 CLR 59; *Pearce v The Queen* (1998) 194 CLR 610 and *Johnson v The Queen* (2004) 78 ALJR 616.

115 (1988) 166 CLR 59 at 63.

116 (2007) 168 A Crim R 41 at [27].

offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality".[117]

Particular care needs to be taken where multiple offences involve discrete offending and multiple victims. The Court of Criminal Appeal has consistently held this must be taken into account separately in determining the sentence for each offence in accordance with the principle of totality.[118]

A degree of accumulation may be appropriate where there are multiple offences which either completely or partly involve child pornography. *Hitchen v R* and *R v Jarrold* are recent examples of this and the errors that can be made in the application of the totality principle.[119]

Hitchen v R was an extreme case. The offender was charged with various Commonwealth and State offences including the access, transmission, possession and production of child pornography, the use of a child for pornographic purposes and the persistent abuse of a child. He was sentenced to an overall sentence of 24 years with an overall non-parole period of 18 years.[120] The possession charge related to 729,000 child pornography images and 2,700 video files depicting child pornography which the sentencing judge, who viewed the material, described as "revolting". The offence was at the top of the range because of the nature and quantity of the material involved.[121] The remaining offences included the offender's sexual abuse of his step-daughter (over a three-year period) and his use of her to produce images of child pornography, some of which he transmitted to people overseas.[122]

The Court of Criminal Appeal[123] concluded that the overall sentence was manifestly excessive because the totality principle was incorrectly applied. Howie J discussed the application of the totality principle where, as here, a number of offences were in the worst category. His Honour emphasised that this fact alone did not mean the sentences ultimately imposed had to "reflect the criminality of each [offence] if viewed in isolation" because the principle operated "to limit punishment to an overall assessment of the offender's criminality in its entirety" and the

117 ibid at [27].

118 *Sentencing Bench Book*, above n 109, "Section 21 factors" at [11-180]; *R v Tadrosse* (2005) 65 NSWLR 740; *R v Janceski* [2005] NSWCCA 288; *Hawkins v R* [2006] NSWCCA 91. See further "Charging practice" at heading 4.1.

119 *Hitchen v R* [2010] NSWCCA 777; *R v Jarrold* [2010] NSWCCA 69. See also: *Assheton v R* (2002) 132 A Crim R 237 at [33], [38], where the offender was charged with various Commonwealth and State offences, some made cumulative because of separate criminality, although this was not specifically stated; *R v Mara* [2009] QCA 208 at [36], where although concurrent sentences were imposed at first instance for three Commonwealth and one State offence, the court accepted the Crown submission that it had been open to the court to impose cumulative sentences; *James v R* [2009] NSWCCA 62 at [16], where the offender was sentenced at first instance to cumulative sentences for one Commonwealth and one State offence, the Court of Criminal Appeal accepting that this was correct because the offences were different; *R v Saddler* [2008] NSWDC 48 at [64], where each charge was based on the location of material on separate electronic devices and cumulative sentences were imposed to reflect this and "the sheer number of child pornography items" (although the offender's appeal was allowed on other grounds, the fact of accumulation was referred to without criticism and maintained); *Colbourn v R* [2009] TASSC 108 at [18], [20], where the offender was sentenced to partially cumulative sentences for one Commonwealth offence of accessing child pornography and a State offence of possessing it because each charge related to different collections of files or images although concurrent sentences were imposed on appeal.

120 *Hitchen v R* [2010] NSWCCA 77. This was reduced to 18 years with an overall non-parole period of 14 years.

121 ibid at [11]. He also expressed the view that the 5-year maximum which then applied was inadequate.

122 ibid. Details of the facts appear at [8], [12]–[16], although it is unclear from the judgment as to which of those facts gave rise to the accessing charge. The maximum penalty ranged from 5 years (for the possession charge) to 25 years (for the charge related to the persistent abuse of the child).

123 Howie J, McClellan CJ at CL and Rothman J agreeing.

imposition of an appropriate punishment for each offence could result in an unduly "crushing" sentence.[124] This is a discussion of the second approach in *Mill v The Queen* referred to above.

The overall context of the offences was significant in determining the question of totality because, although they were clearly of the most serious kind and justified a severe sentence, the offences were a three-year "chapter" in the offender's otherwise "crime-free" 41-year life.[125] There was no earlier evidence of this type of behaviour and the offences arose from a single course of conduct commencing with the offender's obsession with the child, with pornography and with the internet.[126]

In *R v Jarrold*,[127] the offender was charged with numerous offences, including one Commonwealth offence of transmitting child pornography and State offences, including the possession and production of child pornography and exposing a child to indecent material intending to make it easier to procure the child for unlawful sexual activity.[128] The three production offences related to separate internet chat conversations the offender had between 2006 and 2008. Two of those offences continued over a considerable period of time. He was sentenced to an overall sentence of 5 years with a 3-year non-parole period. The sentences for the three production offences were wholly concurrent and this was one aspect of the Crown's challenge to the adequacy of the sentence. The Court of Criminal Appeal[129] upheld this ground of appeal.

Howie J concluded that even though the offences were "at the lower end of the range of activity", wholly concurrent sentences were not justified because not only was each offence entirely separate, but two were committed over lengthy periods of time.[130] Although the offences involved similarity of conduct or might be seen as part of one course of criminal conduct, this did not mean the sentences should be served concurrently. His Honour repeated the test he posited in *Cahyadi v R*:

> "The question to be asked is, can the sentence for one offence encompass the criminality of all the offences? Asking that question of these three offences could only result in the answer 'No'."[131]

4.1 Charging practice

The manner in which the prosecution frames the charges in a given case provides some insight into the offender's criminality. The prosecutor decides the charge or charges which proceed and a court has almost "no role to play" in this regard.[132] While initial charges are laid by the police,[133] the Prosecution Guidelines of both the New South Wales and Commonwealth

124 *Hitchen v R* [2010] NSWCCA 77 at [26].

125 ibid at [27].

126 ibid at [27].

127 [2010] NSWCCA 69.

128 This last offence was against the *Crimes Act* 1900, s 66EB(3). He was also sentenced in relation to two offences, committed in the 1970s, of indecent assault involving two boys.

129 Howie J, with whom McClellan CJ at CL and Harrison J agreed.

130 *R v Jarrold* [2010] NSWCCA 69 at [55].

131 ibid at [56]; *R v Read* [2010] NSWCCA 78 at [38].

132 *GAS v The Queen* (2004) 217 CLR 198 at [28].

133 A number of issues confront the police in determining whether or not to lay charges. One such issue arises from the practice, widespread among young people, of "sexting", which is where intimate images or explicit text messages are sent by mobile telephone or over the internet. A number of criminal charges might be possible arising from this type of conduct. Some of the issues are discussed by Inspector C Kennedy in "Sexting: a case study" May 2010 *Police Monthly*, p 39.

Directors of Public Prosecutions require that the charges which do proceed appropriately reflect the criminality involved.[134] The prosecutor generally decides whether a matter should be finalised in the Local or District Court.[135]

Decisions about how charges should be framed and the number of charges which should be laid for particular offending will depend upon the different types of material involved and the way in which the material is stored (most material is sourced from the internet, saved on computers and on other electronic storage devices). The most recent amendments to the *Criminal Code* (Cth) extend the range of child pornography offences available at the Commonwealth level. The extent of State and Commonwealth offences means an offender can be charged with the most appropriate offence for the available evidence.

The CPWP, which included senior NSW police officers, reported that current NSW police practice is to charge an offender based on the method of storage of the child pornography.[136] Charging in that way can better reflect the level of criminality involved, a conclusion reached by the sentencing judge in *Saddler v R.* Buddin J's comment on appeal however, that the charges for the second and third counts "could just as easily have given rise to only the one charge", [137] suggests there is scope for different views on this issue.

Other possible bases upon which charges may be framed include:

- the date of download. However, the finalisation of such charges will depend on obtaining detailed computer forensic evidence which can take some time. Such evidence may establish the period of offending or show whether the conduct is aberrant behaviour (provided of course it is possible to establish the offender used the relevant computer)
- the nature of the sexual activity depicted[138] by reference to accepted measurements of seriousness. For example, distinguishing between images that are classified as Level 4 in the COPINE scale as opposed to Level 10.[139] This was recognised as an appropriate method of framing charges by the CPWP.[140] However, before such charges could be laid, a police officer or prosecutor would need to consider the material seized to see where such material fell within the scale unless it was intended that such charges could be laid using the conclusions drawn in a "random sample" certificate.[141]

134 See DPP (NSW), Prosecution Guidelines, Guideline 4 "The decision to prosecute" and Guideline 6 "Settling charges"; DPP (Cth), Prosecution policy of the Commonwealth, Guidelines 2.1–2.10, "The decision to prosecute" and Guideline 2.19 "Choice of charges".

135 In Commonwealth prosecutions, if there is a choice as to whether a prosecution can proceed summarily, it cannot unless the prosecution *and* offender consent: *Crimes Act* 1914 (Cth), s 4J(1).

136 *Report of the Child Pornography Working Party*, above n 68, p 30.

137 *Saddler v R* [2009] NSWCCA 83 at [48]. See also *Puhakka v R* [2009] NSWCCA 290, where there were two charges based on the separate location of material but it was concluded that concurrent sentences were appropriate because the nature of the material was identical: at [17].

138 *R v Saddler* [2008] NSWDC 48 at [90].

139 See the COPINE scale reproduced at Appendix B.

140 *Report of the Child Pornography Working Party*, above n 68, p 30.

141 See the discussion concerning the proposed use of such certificates in "Assessing the nature and content of the material involved" at heading 3.3 above.

4.2 Taking additional offences into account

There are two mechanisms available for taking additional offences into account when an offender is sentenced.

Sections 31 and 32 of the *Crimes (Sentencing Procedure) Act* and s 16BA of the *Crimes Act* 1914 (Cth) permit a court to take additional offences into account when imposing a sentence for a particular offence. At the State level, this procedure is commonly referred to as using a "Form 1".

It is common for Form 1 documents to be utilised at sentence because this ensures that a court can dispose of all the offences in an efficient fashion and also impose a sentence which reflects the totality of the criminality involved.[142] No separate sentence is imposed in respect of these offences. The focus of the sentence proceedings remains the offence to which the plea was entered, but the taking into account of the other offences means that greater weight can be given to specific deterrence where it is necessary.[143] It is an error to conclude that the objective seriousness of an offence is "aggravated" by the existence of charges on a Form 1.[144] While the prosecution is not generally restricted in the offences that can be included on a Form 1, a court retains a discretion to reject it under s 33(2)(b) of the *Crimes (Sentencing Procedure) Act* or under s 16BA(1)(e) of the *Crimes Act* 1914 (Cth), if it is of the view that it includes particular offences which prevent the imposition of a proper sentence.[145]

A certificate issued pursuant to s 166 of the *Criminal Procedure Act* permits the transfer of "back up" or "related" offences to the District Court upon committal (which require a connection between the "back up" or "related" offence and the main offence). The court must consider the action to be taken in respect of offences on a s 166 certificate,[146] but that action may depend on the nature of the substantive offence. If the offence is a true "back up" offence, that is, one which it was intended would only proceed if the principal charges did not, then the terms of s 167(1)(a) of the *Criminal Procedure Act* suggest the court would dismiss the charge. If, however, the offence is one that represents a different aspect of the offender's criminality, then s 167(1)(b) of the Act states the court must deal with the offence or remit the matter if the interests of justice require it. This procedure requires the court to either dismiss the charge or impose a separate penalty for the offences appearing on the s 166 certificate. The maximum penalty the court can impose is that which would apply if the matter were dealt with in the Local Court.[147]

142 *R v Bavadra* (2000) 115 A Crim R 152 at [31].

143 *Attorney-General's Application under s 37 Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002)* (2002) 56 NSWLR 146.

144 As occurred in *Stephens v R* [2010] NSWCCA 93 at [69].

145 *C-P v R* [2009] NSWCCA 291 at [8] and *El-Youssef v R* [2010] NSWCCA 4 at [15].

146 *Criminal Procedure Act*, s 167.

147 *Criminal Procedure Act*, s 168(3); *Collins v R* [2010] NSWCCA 13 at [22]–[24].

5. Local Court jurisdictional limit

When passing sentence in the Local Court, the court's jurisdictional limit should not be regarded as the maximum penalty or the penalty reserved for the worst case.[148] A magistrate must impose a sentence which reflects the seriousness of the offence "tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit".[149]

In the District Court, the fact a matter may have been dealt with in the Local Court where a lower maximum penalty applied may be a relevant matter to consider in passing sentence.[150] However, whether such a consideration is relevant will depend very much on the circumstances of the particular case and the characterisation of the particular charge. For Commonwealth offences, this may become less significant over time. A number of the Commonwealth offences involving child pornography or child abuse material are strictly indictable because the maximum penalty now exceeds 10 years. Section 4J of the *Crimes Act* 1914 (Cth) only permits summary disposal of an indictable offence when the maximum penalty does not exceed 10 years.

148 *R v El Masri* [2005] NSWCCA 167 at [30].

149 *R v Doan* (2000) 50 NSWLR 115 per Grove J at [35].

150 See *R v El Masri* [2005] NSWCCA 167 at [29] and the cases cited in *R v Gent* (2005) 162 A Crim R 29 at [80].

6. The discount for a guilty plea

There is a distinction in Commonwealth and NSW prosecutions as to what a plea of guilty reflects. In State matters it is said to have a utilitarian benefit[151] whereas in Commonwealth matters it is said to demonstrate a willingness to facilitate the course of justice.[152] In both cases, it is accepted that the plea may be some evidence of remorse.[153]

In State prosecutions, the discount should be quantified or, as put by Spigelman CJ in *R v Thomson and Houlton*,[154] "[s]entencing judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so". In Commonwealth matters, although this approach is preferable, it is not mandatory.[155] In the case of *R v Borkowski*, which only applies to State offences, the factors relevant to the proper application of the discount for the utilitarian value of the plea were identified and the court repeated that a discount of 25% should usually be reserved for the case where an offender pleaded guilty in the Local Court.[156]

151 (2000) 49 NSWLR 383 at 415–416.

152 *Cameron v The Queen* (2002) 209 CLR 339.

153 *Siganto v R* (1998) 194 CLR 656.

154 *R v Thomson and Houlton* (2000) 49 NSWLR 383 at 419.

155 *Tyler v R* (2007) 173 A Crim R 458 at [114]. The range of discount applied in State matters may be applied to Commonwealth matters: *R v Bugeja* [2001] NSWCCA 196 at [28].

156 (2009) 195 A Crim R 1 at [31]. The list of principles which should be applied when determining the discount for a plea is set out at [32].

7. Prior good character and the absence of a criminal history

Both State and Commonwealth sentencing legislation require that consideration be given to evidence of an offender's prior record (if any) and his or her prior good character.[157] It is common that an offender being sentenced for a child pornography offence is a person of some standing in their community with no prior criminal history.[158] Appellate courts have held that both these factors are to be given less weight when a court is sentencing for either a State or a Commonwealth offence.[159]

In *R v Gent*, counsel argued that the sentencing judge had only given limited weight to the applicant's good character and, while it was acknowledged that good character did carry less weight in relation to some offences, it was argued that this did not extend to offences involving child pornography. The Crown's argument that there was no closed category of such offences was ultimately accepted by the court.[160] When considering this submission, Johnson J reviewed a number of decisions including statements concerning the correct approach to this issue by McHugh J in *Ryan v The Queen.*[161] In that case, McHugh J said there were two stages concerning the use of character during sentence proceedings. First, to identify *without* reference to the offences, whether the offender is otherwise of good character. Second, if the offender *is* otherwise of good character, to determine the weight to be given to that fact. His Honour said, it "will vary according to all of the circumstances".[162] So far as the relevant circumstances in that case were concerned, McHugh J said the multiplicity of offences, the fact the appellant (who was a priest) was leading a double life, the commission of the offences during the course of the appellant's "priestly duties" and the breach of trust involved reduced the weight to be given to the appellant's otherwise good character.[163]

Johnson J in *R v Gent* accepted that there was authority to support the conclusion that less weight should be given to the good character of an offender when sentencing for child pornography offences. His Honour noted the statement of Rose LJ in *R v Oliver* that "so far as mitigation is concerned, we agree … that some, but not much, weight should be attached to good character".[164] His Honour also noted that this was an apparent common feature of

157 Under the *Crimes (Sentencing Procedure) Act*, s 21A(2)(d), a person's criminal history is an aggravating factor while under ss 21A(3)(e) and 21A(3)(f) the fact a person does not have a prior record and is of good character may be taken into account as mitigating factors. However, compare "Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(5A)" at heading 7.1. The *Crimes Act* 1914 (Cth), s 16A(2)(m), requires the court to consider, inter alia, the offender's "character [and] antecedents".

158 This was referred to by Johnson J in *R v Gent* (2005) 162 A Crim R 29 at [63], citing examples. In the period from January 2005 until June 2009, 51 of 83 offenders (61.4%) in the District Court and 269 of 352 offenders (76.4%) in the Local Court had no prior criminal record. The statistics also show that during the same period in the District Court, 3 offenders (3.6%) and in the Local Court, 11 offenders (3.1%) had a prior child pornography offence.

159 See, for example, *R v Gent* (2005) 162 A Crim R 29 at [64]; *Mouscas v R* [2008] NSWCCA 181 at [37] and, more recently in the context of a Commonwealth prosecution, *DPP (Cth) v D'Alessandro* [2010] VSCA 60 at [27] which applied *Mouscas v R*.

160 *R v Gent* (2005) 162 A Crim R 29 at [47] and [61] (following a discussion of the relevant cases at [48]–[60]).

161 (2001) 206 CLR 267.

162 ibid at [23], [25] and [33]. See also [67]–[68] per Gummow J, [102] per Kirby J, [143] per Hayne J and [174] per Callinan J.

163 ibid at [34].

164 *R v Gent* (2005) 162 A Crim R 29 at [62]. On 15 August 2002, the United Kingdom Sentencing Advisory Panel published sentencing guidelines for the English Court of Appeal suggesting that reduced weight should be given to good character and that where the offender's relationship with a victim or their family amounted to a breach of trust that would be an aggravating factor.

offences involving the importation of child pornography pursuant to s 233BAB of the *Customs Act* and State offences of possessing child pornography,[165] concluding that there was "foundation for the approach that less weight should be attached to evidence of prior good character on sentence for offences of importing child pornography".[166]

This issue was addressed again and more directly by Price J in *Mouscas v R.*[167] Mouscas was sentenced for a State offence of possessing child pornography.[168] It was argued on appeal that the sentencing judge had not given sufficient weight to the applicant's prior good character and reliance was placed on *R v Fowler*,[169] a decision of the ACT Court of Appeal, in support of that proposition. In that case, it had been decided that while there were particular offences where good character was of limited relevance, child pornography offences were not part of that group. However, Price J distinguished *R v Fowler* and concluded that:

> "For the offence of possession of child pornography where general deterrence is necessarily of importance and is frequently committed by persons of prior good character, it is legitimate for a court to give less weight to prior good character as a mitigating factor."[170]

This aspect of Price J's judgment was unequivocally approved by the Victorian Court of Appeal in *DPP (Cth) v D'Alessandro* where the offences were Commonwealth offences of accessing, transmitting and possessing child pornography.[171]

7.1 Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(5A)

Section 21A(5A) of the *Crimes (Sentencing Procedure) Act* applies when an offender is convicted of a "child sexual offence" and the definition of that term includes all NSW child pornography offences.[172] That section prohibits a court from taking good character or the absence of a criminal history into account as a mitigating factor if that factor "was of assistance to the offender in the commission of the offence".

At the time of publication, there were no appellate decisions in NSW dealing with this provision.[173] However, *Assheton v R*[174] is the type of case where it might apply. In that case, the offender had committed acts of indecency on the two sons of his best friend when the three

165 ibid at [63], citing as examples *R v Liddington* (1997) 97 A Crim R 400; *R v Jones* (1999) 108 A Crim R 50; *Assheton v R* (2002) 132 A Crim R 237 and *R v Cook; Ex p DPP (Cth)* [2004] QCA 469.

166 *R v Gent* (2005) 162 A Crim R 29 at [64].

167 [2008] NSWCCA 181 at [32]–[37]. Allsop P and James J agreed with his conclusions.

168 A Commonwealth offence of using a carriage service to access child pornography was also before the court on a s 166 certificate, but it is unclear whether a separate sentence was imposed for it.

169 [2007] ACTCA 4.

170 *Mouscas v R* [2008] NSWCCA 181 at [37].

171 [2010] VSCA 60 at [26], [27].

172 This section was inserted into the Act by the *Crimes Amendment (Sexual Offences) Act* 2008. It commenced on 1 January 2009.

173 The section might also have applied in *SAT v R* [2009] NSWCCA 172, where the child pornography offences involved the offender's children, and in *Hitchen v R* [2010] NSWCCA 77, where the production of child pornography offences involved the offender's step-daughter.

174 (2002) 132 A Crim R 237. The offences involving the acts of indecency were offences against the *Crimes Act* 1914 (Cth), s 50BC(a), and were Commonwealth offences because they were committed in Bali.

shared a hotel room in Bali. The offender had videoed this and his possession of the video gave rise to an offence of the possession of child pornography. The offender was able to share a room with the boys because his friend trusted him and because at the time of the offences the boys were under the offender's care and supervision. The offences of acts of indecency were regarded by the court as a serious breach of trust. That breach of trust was compounded by video-taping the incident which created a permanent record of it. Those same factors in a case involving child pornography would give rise to the operation of s 21A(5A).

Another example of the circumstances in which s 21A(5A) might apply is the Canadian case of *R v LM*.[175] The offender in that case made money distributing child pornography on the internet and had 5,300 photographs and 540 videos in his child pornography collection, much of which related to his 4-year-old daughter and her friend of the same age.

175 2008 SCC 31 (CanLii).

8. Crimes (Sentencing Procedure) Act 1999 (NSW) — s 21A factors

In addition to s 21A(5A), there are other matters in s 21A that warrant consideration. Section 21A of the *Crimes (Sentencing Procedure) Act* provides a non-exhaustive list of aggravating and mitigating factors to be taken into account in determining the appropriate sentence for an offence.[176] This list reflects established common law sentencing principles.[177] The operation of the section is limited by ss 21A(1) and 21A(4). Section 21A(1) prevents a court from relying on an aggravating factor if that factor is an element or inherent characteristic of the offence;[178] or from taking an aggravating factor into account in a way that breaches the *De Simoni* principle.[179] Section 21A(4) ensures that a factor is not taken into account in a way inconsistent with general sentencing principles and policy.[180]

Section 21A should be approached as an integrated, rather than separate, part of the sentencing process. Howie J has explained that judges increase the risk of falling into error if they approach the aggravating and mitigating factors in s 21A independently from the general sentencing exercise of identifying objective and subjective features relevant to the exercise of the sentencing discretion.[181] If judges simply take into account the relevant sentencing factors that were taken into account before the introduction of s 21A, they will inevitably comply with the demands of the section.[182] However, as was the case before s 21A was enacted, clear reasons and findings are required about any particular factor which is taken into account.[183]

When an offender is sentenced for a State child pornography offence, careful consideration must be given to whether, and if so what, aspects of s 21A apply to the sentence proceedings. The section does not apply to Commonwealth offences.[184]

8.1 Gratuitous cruelty — s 21A(2)(f)

The sentencing judge in *Saddler v R* considered the possession of child pornography offences to be aggravated because they involved gratuitous cruelty contrary to s 21A(2)(f) as many of the children depicted were subject to physical abuse and torture. However, because there was no evidence the offender engaged in any activity which contributed to the creation of the images in his possession, the Court of Criminal Appeal concluded that this particular offence did not involve gratuitous cruelty and that s 21A(2)(f) did not apply.[185] The sentencing judge had already taken account of the gratuitous cruelty depicted in the images when he determined the objective seriousness of the offence so that if s 21(2)(f) did apply, impermissible double counting would have occurred.[186]

176 *Sentencing Bench Book,* above n 109, "Sexual offences against children" at [17-440].

177 *R v Way* (2004) 60 NSWLR 168 at [56], [57]; *R v Wickham* [2004] NSWCCA 193 at [23]; *Cvitan v R* [2009] NSWCCA 156 at [60].

178 *Elyard v R* [2006] NSWCCA 43, as discussed in *Saddler v R* [2009] NSWCCA 83 at [31].

179 *R v Wickham* [2004] NSWCCA 193 at [26]. For a discussion of the De Simoni principle, see "The Gent factors", at heading 3.2 and "Surrounding circumstances and De Simoni", at heading 3.8.

180 *R v Wickham* [2004] NSWCCA 193 at [23].

181 R Howie, "Section 21A and the Sentencing Exercise" (2005) 17(6) *JOB* 43 at 43.

182 *Elyard v R* [2006] NSWCCA 43 at [39].

183 *DBW v R* [2007] NSWCCA 236 at [33]; *Van Can Ha v R* [2008] NSWCCA 141 at [4]; *R v Mills* (2005) 154 A Crim R 40 at [49]. See also *Sentencing Bench Book*, above n 109, "Section 21A factors" at [11-030].

184 See instead the factors listed in the *Crimes Act* 1914 (Cth), s 16A(2).

185 *Saddler v R* [2009] NSWCCA 83 at [43], applying *R v King* (2004) 150 A Crim R 409 and *R v Hoerler* (2004) 147 A Crim R 520.

186 *Saddler v R* [2009] NSWCCA 83 at [37], [41].

8.2 Further offences committed while on conditional liberty — s 21A(2)(j)

An offence is aggravated if it was committed while the offender was on conditional liberty in relation to an offence or alleged offence. In *Sivell v R*,[187] the offender breached an interim prohibition order under s 7 of the *Child Protection (Offenders Prohibition Orders)* 2004 by being in the company of two children when he was arrested for the possession of child pornography. This aggravated the offence, either by operation of s 21A of the *Crimes (Sentencing Procedure) Act* or at common law.[188] There is no justification for treating a breach of an order under the *Child Protection (Offenders Prohibition Orders) Act* 2004 any differently from a breach of a bond, suspended sentence or parole order for the purposes of s 21A(2)(j).[189]

8.3 Planned or organised criminal activity — s 21A(2)(n)

An offence is also aggravated if it was part of a planned or organised criminal activity: s 21A(2)(n). The offender in *Saddler v R* successfully argued that the sentencing judge double counted this factor after finding that the offence was planned "in the sense that the offender set about to obtain child pornography over the internet and did so".[190] Despite the offender spending a great deal of time downloading his extensive child pornography collection and storing it on a variety of devices, the Court of Criminal Appeal concluded that the offence was not "part of a planned or organised activity" as that expression is normally understood.[191] There was no evidence of any planning beyond that which is inherent in the offence.[192] In *Minehan v R*, the court concluded that the matters referred to in the Queensland case of *R v Mara*[193] were examples of the types of matters that could be relevant to this statutory aggravating feature.[194] In *R v Mara*, the offender was involved with a group which traded in a large quantity of child exploitation material which included purchasing and commissioning its production. The group had advanced computer technical skills and used sophisticated techniques to both facilitate the commission of the offences and avoid detection.[195] On appeal it was held that the sentencing judge was correct to take into account "the degree of sophistication and level of skill in the use of the internet and the attendant limited risk of detection in assessing the seriousness of the offending".[196]

187 [2009] NSWCCA 286 at [8].

188 ibid at [29]–[30].

189 ibid at [29]–[30], applying *Porter v R* [2008] NSWCCA 145. At common law if an offence is committed while a person is subject to a court order to be of good behaviour that is a circumstance of aggravation.

190 *Saddler v R* [2009] NSWCCA 83 at [31].

191 ibid at [32], applying *Fahs v R* [2007] NSWCCA 26; *R v Yildiz* (2006) 160 A Crim R 218; *Bowden v R* [2009] NSWCCA 45; *R v Hewitt* (2007) 180 A Crim R 306. Although these factors were not sufficient to bring the offence within s 21A(2)(n), they were nevertheless important considerations to be taken into account in assessing the seriousness of the offence.

192 *Saddler v R* [2009] NSWCCA 83 at [36].

193 *R v Mara* [2009] QCA 208.

194 [2010] NSWCCA 140 at [92]–[93].

195 *R v Mara* [2009] QCA 208 at [6]–[7].

196 ibid at [37].

8.4 Not planned or organised criminal activity — s 21A(3)(b)

Section 21A(3)(b) provides that if the offence was "not part of a planned or organised criminal activity" that will be a mitigating factor. Grove J in *Saddler v R* noted the difficulty rationalising the counterpoise between ss 21A(2)(n) and 21A(3)(b) and concluded that the tension between the two sections created unnecessary complication and potential confusion.[197]

8.5 Remorse — s 21A(3)(i)

Under s 21A(3)(i), remorse may be taken into account as a mitigating factor if the offender has:

- provided evidence of having accepted responsibility for their actions, *and*
- acknowledged any injury, loss or damage caused by their actions, *and/or* made reparation for such injury, loss or damage.

While the offender in *Saddler v R* accepted responsibility for his actions, he did not acknowledge that, by creating a demand for material of this kind, he contributed to the enormous suffering of many children. Consequently, remorse could not be taken into account as a favourable subjective factor.[198]

The requirement to *provide* evidence of remorse does not amount to a requirement that an offender *give* evidence of remorse.[199] Whether or not the offender gives evidence will be relevant to the weight of the evidence.[200]

197 *Saddler v R* [2009] NSWCCA 83 at [4].

198 ibid at [27]. There was no complaint made on appeal about this part of the sentencing judge's judgment, nor did the Court of Criminal Appeal express any concern about it. See also *Sentencing Bench Book,* above n 109, "Section 21 factors" at [11-290], which states that "[t]he impact of this provision (if any) on the common law … is yet to be decided".

199 *Butters v R* [2010] NSWCCA 1 at [17].

200 ibid at [18].

9. Common child pornography offences

9.1 Possession of child pornography — Crimes Act 1900 (NSW), s 91H(2)[201]

The most common offence in NSW involving child pornography is possession. In the period from January 2005 until June 2009 there were 111 possession offences accounting for 47.8% of all child pornography offences before the District Court. In the same period in the Local Court there were 630 such offences accounting for 84.5% of all the child pornography offences before that court.[202]

The earlier form of this offence was contained in s 91H(3). It was repealed on 1 January 2009 and re-enacted in s 91H(2) which now encompasses the production, dissemination or possession of child pornography. The maximum penalty doubled from 5 to 10 years.[203] It has been argued that the possession of child pornography is a less serious offence than others. However, since at least 1995 it has been recognised that the real gravamen of the offence is that it encourages the production of and market for child pornography. This is a prime reason for the importance of general deterrence in respect of such offences.

R v Stroempl[204] explained this in the following way:

> "The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense possessors such as the appellant instigate the production and distribution of child pornography — and the production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of prospective purchasers and collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place."

It is irrelevant to a determination of the objective seriousness of an offence involving the possession of child pornography that the offender did not intend to distribute or sell it[205] and the absence of such evidence does not preclude a finding that such an offence is "at the 'upper end' of objective seriousness".[206]

Until *Minehan v R*,[207] the issue of profit or benefit in the context of this offence had not been directly addressed in NSW at an appellate level. In Tasmania, it is accepted that actual profit or benefit would aggravate an offence of possession.[208] In Western Australia, it is accepted that paying for child pornography images may aggravate an offence because it can reflect on the strength of an offender's motivation to possess the material, but the absence of payment does

201 The current offence provision is referred to even though the cases discussed in this section and elsewhere in this paper were brought under the now repealed s 91H(3).

202 The majority of possession offences during this period were brought under the now repealed s 91H(3) (110 offences in the District Court and 419 offences in the Local Court) and, to a lesser extent, under the earlier provision under s 578B(2) (all 206 offences were dealt with in the Local Court). Only 6 offences (1 in the District Court and 5 in the Local Court) were brought under the current provision.

203 *Crimes Amendment (Sexual Offences) Act* 2008 with effect from 1 January 2009.

204 (1995) 105 CCC (3d) 187 at 191.

205 *R v Booth* [2009] NSWCCA 89 at [46]; *R v Lee* [2010] NSWCCA 88 at [26].

206 *Mouscas v R* [2008] NSWCCA 181 at [18]. See also *Saddler v R* [2009] NSWCCA 83 at [49], [50]; *Sivell v R* [2009] NSWCCA 286 at [17].

207 [2010] NSWCCA 140.

208 *DPP (Cth) v Latham* [2009] TASC 101 at [34].

not automatically mitigate an offence.[209] While not expressed in identical terms, in *Minehan v R*, after referring to the interstate authorities including *Hutchins v State of WA*, RA Hulme J said that one factor bearing on the objective seriousness of, inter alia, a possession offence will be whether any payment or other material benefit was made, provided or received.[210]

The offence of possessing child pornography does not require that an offender view any or all of the material the subject of the charge. However, it may be a relevant factor to consider in the sentence proceedings and it will be necessary to carefully consider the available evidence to determine the impact such evidence has on the sentence imposed. While this issue has not been directly considered at an appellate level in NSW, in the Western Australian decision of *Hill v State of WA*,[211] the Court of Appeal concluded that the mere fact an offender had viewed only part of a video of child pornography was not of itself a mitigating factor and that a court must consider the motivation for such conduct. McLure JA, who delivered the judgment of the court, accepted that such evidence might be a mitigating factor. However, he emphasised that it will depend on the circumstances. It could not be a mitigating factor if an offender ceased viewing such material to avoid the risk of detection, whereas if an offender ceased viewing because he or she was offended by the depth of depravity depicted, that could be a mitigating factor which should be taken into account.[212] The weight to be given to such evidence is a separate issue.[213]

In *Saddler v R*, Buddin J discussed the use of statistics in the context of the possession of child pornography. His Honour noted that at that time only four matters involving such offences had been before the District Court making it difficult to identify the appropriate range of sentences.[214] By December 2008, the Judicial Commission of NSW statistics showed that 18 matters involving that offence were finalised in the District Court for the period January 2005 until December 2008.[215] Given the strong views universally expressed by the courts concerning the need for general deterrence, it is interesting to note that of those cases, 14 offenders (77.8%) were sentenced to full-time imprisonment.

It should be noted that since the repeal of s 91H(3) with effect from 1 January 2009 and the re-enactment of the possession offence in s 91H(2), statistics collected by the Judicial Commission of NSW for offences under s 91H(2) do not separate the possession offence from the production and dissemination offences. Accordingly, at present it is not possible to identify sentencing patterns for each type of offence.

209 *Hutchins v State of WA* [2006] WASCA 258 at [26].

210 *Minehan v R* [2010] NSWCCA 140 at [91], [94].

211 [2009] WASCA 4.

212 ibid at [18].

213 ibid.

214 *Saddler v R* [2009] NSWCCA 83 at [51].

215 Where the possession offence was the principal offence. Judicial Information Research System (JIRS) database.

9.2 Production of child pornography — Crimes Act 1900, ss 91H(2) and 91G

In the period from January 2005 until June 2009 there were 31 offences brought under s 91H(2) representing 13.4% of all child pornography offences before the District Court. A further 16 offences (6.9%) were brought under s 91G. In the same period in the Local Court there were 26 offences brought under s 91H(2) accounting for 3.5% of all the child pornography offences before that court.

While a number of offences involving the production of child pornography have been dealt with in the District Court, appeals for such offences are rare (where this offence is the principal offence) and the breadth of criminality encompassed by the offence has not been determined, at least, in NSW. However, somewhat unusually, since 23 April 2010, the Court of Criminal Appeal has handed down three decisions involving such offences — two of those involved breaches of s 91H(2) and concerned different methods of production.[216]

Given the limited number of cases, no definitive conclusions can be drawn. However, if these cases were considered indicative of an approach adopted in NSW, one consideration in determining the objective seriousness of such an offence would be the closeness of the connection between the material produced and the direct abuse of a child.[217] It should of course be kept in mind that when a child is used for pornographic purposes that constitutes a different offence and, if the child is less than 14 years old, is subject to a higher maximum penalty.

In *Whiley v R*,[218] the offender, who was in custody, had produced images and text depicting sexual encounters involving children. Although the material was described as "grossly pornographic", a particularly significant aspect of the matter justifying the conclusion that the offence fell within the low range was that the offender created the material from his own imagination for his own sexual gratification and there was no exploitation or victimisation of an actual child.[219]

Similar considerations seem to have informed the court in *R v Jarrold*[220] which involved three separate offences of producing child pornography (together with five other offences). The production offences concerned internet conversations the offender had with others. Two of the charges related to internet conversations he had with young males (one said to be 17 years old when the conversations commenced, the other said to be 16 years old) concerning sexual activity between the offender and children where he suggested he derived pleasure from seeing children in pain. The third related to a conversation he had with another male about having intercourse with under-age males which was rated 10 on the COPINE scale. An argument

216 *Whiley v R* [2010] NSWCCA 53; *R v Jarrold* [2010] NSWCCA 69; *Hitchen v R* [2010] NSWCCA 77. Note also that there are Commonwealth production offences. See for example, *Criminal Code* (Cth), s 474.20 (l)(a)(ii).

217 This was one of the factors identified by Rose LJ in *R v Oliver* [2003] 1 Cr App R 28.

218 [2010] NSWCCA 53.

219 ibid at [63], [71]. Following a successful appeal he was sentenced to a non-parole period of 9 months for each offence with a balance of term of 3 months. In *Minehan v R* [2010] NSWCCA 140 at [90], the court endorsed this approach stating that the fact no actual children are used in the production of offending material is a relevant matter when assessing the objective seriousness of the offence. The offender in that case had been sentenced for a number of Commonwealth and State child pornography offences, although they did not include a production offence.

220 [2010] NSWCCA 69.

that the offences should be treated as less serious because they were a result of fantasy was strongly rejected.[221] However, the court did accept that, despite the fact the offences were separate and distinct, and two related to ongoing criminal activity, they otherwise fell towards the bottom of the range.[222]

The offender in *Hitchen v R*[223] pleaded guilty to a range of State and Commonwealth offences related to his sexual abuse of his step-daughter and his access and transmission of child pornography, a significant quantity of which involved her and had been produced by him. That offence was pursuant to s 91G(1) of the *Crimes Act* 1900 and occurred when the child was 7 years old. It involved photographing and videoing the child in erotic postures which the sentencing judge described as "disgusting and degrading".[224] The sentencing judge's conclusion that the case was in the worst category of offence was accepted by the Court of Criminal Appeal.[225]

9.3 Accessing child pornography — Criminal Code (Cth), s 474.19(1)(a)(i)

Accessing child pornography is the most common Commonwealth offence dealt with in NSW courts. In the period from January 2005 until June 2009 there were 17 accessing child pornography offences accounting for 33.3% of all Commonwealth child pornography offences before the District Court.[226] In the same period in the Local Court there were 65 such offences accounting for 75.6% of all Commonwealth child pornography offences.[227]

Although the same general principles apply when determining the objective seriousness of this offence, the Tasmanian Court of Criminal Appeal has drawn a clear distinction between the offence of possession and that of accessing, concluding that "all other things being equal, the possession of downloaded [child pornography] material is a more serious crime than the mere accessing of such material on the internet".[228] However, absent particular circumstances, it is difficult to justify such an approach where, as in NSW, the maximum penalty for an offence of possession is 10 years whereas the maximum penalty for accessing such material is now 15 years.

The Tasmanian approach ignores the fundamental principles of sentencing for any offence involving child pornography material. The following illustrative question highlights the point: why should a person in possession of 400 images of child pornography which he or she has downloaded to a disc receive a harsher sentence than a person who, over a period of

221 ibid at [53], Howie J noting that if the events, the subject of the discussions had actually taken place, the offender could have been charged with other offences.

222 ibid at [55]. The offender's sentence in relation to two of the three production offences was increased to a fixed term of 12 months. The issues related to totality are discussed above in "Structuring sentences and totality" at heading 4.

223 [2010] NSWCCA 77.

224 *Hitchen v R* [2010] NSWCCA 77 at [15].

225 ibid at [24].

226 This amounts to 7.3% of all Commonwealth and NSW child pornography offences.

227 This amounts to 8.7% of all Commonwealth and NSW child pornography offences.

228 *Colbourn v R* [2009] TASSC 108 at 33. See also *R v Talbot* [2009] TASSC 107 at [9] although in that case the accessing charge was one of a number of child pornography offences and represented "the least serious of his crimes" and other more serious child pornography offences were before the court, including one of making child pornography available on the internet.

approximately 18 months, has been accessing thousands of child pornography images on a regular basis? In *James v R*, the NSW Court of Criminal Appeal separately determined the seriousness of each offence in determining the appropriate penalty, noting that the access offence continued over a shorter period of time than the possession offence which had continued for a period in excess of 3 years.[229]

9.4 Transmitting child pornography and making it available — Criminal Code (Cth), ss 474.19(1)(a)(iii) and 474.19(1)(a)(iv)[230]

From January 2005 until June 2009 there were 10 offences involving the transmission of child pornography accounting for 19.6% of all Commonwealth child pornography offences before the District Court,[231] and there were 7 offences of making child pornography available accounting for 13.7% of all Commonwealth offences before the District Court. [232] The essence of both these offences is making child pornography available to a wider audience. This could also amount to the State offence of dissemination. The decision of *Minehan v R* deals with the range of factors which could bear on an assessment of the objective seriousness of these offences.[233] However, two intermediate appellate court decisions from Tasmania and Queensland are also useful because of the particular factors which arose for consideration in determining the objective seriousness of the offences in those cases.

R v Mara was considered by RA Hulme J in *Minehan v R*. In *Mara*, the offences involved a high degree of sophistication and technical skill in the use of the internet. The defence argument that it was a mitigating fact that only selected persons could access the material held by the group was rejected, the sentencing judge concluding that it was an aggravating factor.[234] Such skill, including the use of high levels of security to avoid detection, will strongly influence a determination of the objective seriousness of the offence.[235] In *R v Talbot*, in addition to the determination of the nature of the material involved and its volume, the fact that material was made available using two file sharing programs and was encrypted, thus making detection more difficult, justified a finding that the offences fell within the worst category.[236]

229 [2009] NSWCCA 62 at [16], where there was discussion about that issue in a general sense in the context of whether the sentences imposed should have been made concurrent. More recently, in the United Kingdom in the case of *R v Venables* (unrep, 23/7/10, Central Criminal Court), Bean J reminded the offender that "[a]ccessing child pornography on a computer is not a victimless crime, since people who do it encourage the exploitation of the children who are filmed or photographed" and "even downloading such images, let alone distributing them, is itself a form of child abuse".

230 The maximum penalty for these offences is now 15 years imprisonment.

231 This amounts to 4.3% of all Commonwealth and NSW child pornography offences.

232 This amounts to 3.0% of all Commonwealth and NSW child pornography offences.

233 [2010] NSWCCA 140 at [94]. See also the discussion at "Assessing the nature and content of the material involved" at heading 3.3.

234 *R v Mara* [2009] QCA 208 at [10], [36]. See also the discussion of this case in *Minehan v R* [2010] NSWCCA 140 at [92].

235 *R v Mara* [2009] QCA 208 at [37].

236 [2009] TASSC 107 at [9].

The question of what constitutes distribution of child pornography is also relevant for these types of offences. Although not a Commonwealth case, in *R v Carson,*[237] the offender used a peer-to-peer software program called Limewire on a public file sharing network to enable other users of the network to access child pornography material from a shared folder.[238] The offender argued that his criminality was at the lowest level because he did not "actively" send files to others, nor did he trade or commercially exchange files. This submission was rejected because it overlooked the reality of modern day information dissemination and because the offender knowingly allowed the system to operate as it was intended by maximising the availability of the material to users.[239]

237 (2008) 187 A Crim R 435.

238 ibid at [3]. The applicant admitted his Limewire setting was activated so as to enable other Limewire users to browse and download from his shared folder, which contained 2483 items of child pornography: at [11].

239 (2008) 187 A Crim R 435 per Philippides J, at [36] Fraser JA and Daubney J agreeing.

10. Using sentencing statistics

Generally, statistics are useful in discerning a range of sentences imposed for particular offences provided the range identified does not usurp the maximum penalty as a relevant consideration in determining the appropriate sentence.[240]

However, in the context of child pornography offences there are limitations associated with the use of either statistical information or comparative cases. In *Saddler v R*, Buddin J noted the difficulty of determining the appropriate range of sentences for the possession of child pornography because, at that early stage, only four higher court cases were recorded on the Judicial Information Research System (JIRS).[241] In the context of Commonwealth child pornography offences, in *DPP (Cth) v D'Alessandro*, the court said that exact comparisons between cases could not be made because no two cases were identical, noting that the problem was especially pronounced because "although the nature and content of the material bears directly upon the seriousness of the offence, it is generally if not invariably impossible to compare the material in one case with that in another".[242]

The following are some particular reasons why statistics should be used cautiously when sentencing an offender for a child pornography offence:

- in the case of the Local and District Courts, JIRS only records the principal offence.[243] The statistics therefore do not represent every child pornography offence prosecuted. Only the most serious offence is selected for statistical purposes.
- in NSW in the District Court, there are still relatively small numbers of prosecutions so that it is more difficult to specify with confidence the range of penalties imposed[244]
- the increased maximum penalty for the NSW offence of possession, and for many of the Commonwealth child pornography offences, further limits the usefulness of the statistics except perhaps in the most general sense
- the Local Court statistics appearing on JIRS have not been "corrected" to give effect to the results of appeals to the District Court. Note that corrected figures have been generated for the purpose of this monograph: see **Figure 3** on p 40.

The Commonwealth Sentencing Database (CSD)[245] provides some guidance as to the appropriate range of sentences where a prosecution involves Commonwealth offences because other States have dealt with some offences more frequently than has occurred in NSW.[246]

240 *McIvor v R* [2010] NSWCCA 7 at [17].

241 *Saddler v R* [2009] NSWCCA 83 at [51].

242 *DPP (Cth) v D'Alessandro* [2010] VSCA 60 at [40].

243 JIRS states that all secondary offences are excluded from the data. When two or more offences are proved against an offender, the offence with the most severe penalty is selected as the principal offence. If two or more offences attract the same sentence then the offence with the higher statutory maximum penalty is selected as the principal offence. JIRS users are provided with a document, "Explaining the statistics", which sets out the counting rules and what is displayed in the sentencing statistics. For other permutations which affect the selection of an offence as the principal offence, see n 4 in Appendix A.

244 During the study period, 352 offenders were sentenced in the Local Court whereas in the same period 83 offenders were sentenced in the District Court for child pornography offences. The numbers of offenders are even smaller for specific child pornography offences.

245 Available to judicial officers on JIRS, Useful Links, Commonwealth SIS (CSD).

246 For example, the CSD shows that a total of 110 offenders were dealt with for the offence of accessing child pornography material contrary to the *Criminal Code* (Cth), s 474.19(1)(a)(i) for the period up to 31 March 2010. Of those, 23 were dealt with in NSW and 50 were dealt with in Qld: DPP (Cth), CSD, available to judicial officers on JIRS, Useful Links, Commonwealth SIS (CSD), accessed on 9 July 2010.

10.1 Common features between jurisdictions

A total of 435 offenders were dealt with in the Local and District Courts for 978 child pornography offences from January 2005 until 30 June 2009 and overall the number of offenders and offences has increased steadily since 2005.[247] There are some common features arising from the prosecution of these offenders which apply regardless of jurisdiction. These include:

- almost every offender was male (431 or 99.1%)[248]
- the average age of offenders was 42.35 years and the median age was 42 years. The youngest offender was 18 years of age and the oldest offender was 81 years of age
- most offenders (320 or 73.6%) had no prior record of offending and almost one-quarter (101 or 23.2%) had a prior record that did not include child pornography offences. Only 14 offenders (3.2%) had prior convictions for child pornography offences
- 346 offenders (79.5%) were convicted of only NSW child pornography offences, 34 offenders (7.8%) were convicted of only Commonwealth child pornography offences and 55 offenders (12.6%) were convicted of both NSW and Commonwealth child pornography offences
- NSW offences accounted for the vast majority of child pornography offences (841 or 86.0%). There were 137 Commonwealth offences (14.0%)
- the vast majority of NSW offences related to the possession of child pornography (741 offences) accounting for 88.2% of NSW offences and 75.8% of all child pornography offences[249]
- the most common Commonwealth offence was using a carriage service to access child pornography material under s 474.19(1)(a)(i) of the *Criminal Code* (Cth) (82 offences accounting for 59.9% of Commonwealth child pornography offences and 8.4% of all child pornography offences prosecuted in NSW).

10.2 Frequency of offences in the Local Court

The majority of child pornography offenders and child pornography offences were dealt with in the Local Court (352 or 80.9% of all offenders and 746 or 76.3% of all offences) in the period from January 2005 until 30 June 2009. A child pornography offence finalised in the Local Court was more likely to be the principal offence (96.9%), compared with 69.9% of cases finalised in the District Court. The offences of possession of child pornography and using a carriage service to access child pornography were more likely to be dealt with in the Local Court than in the District Court (85.0% of the former and 79.3% of the latter).[250] **Figure 3**, in addition to showing the effect of appeals in respect of Local Court sentences, shows the pattern of sentences imposed in the Local Court at first instance.

247 The unusually high number of prosecutions in the Local Court in 2005 is dealt with above at n 31.

248 The 4 female offenders, who represent 0.9% of all offenders, were all dealt with in the District Court.

249 This is discussed further in "Sentencing patterns for the most common child pornography offence in the Local Court — possession" at heading 10.4.

250 The maximum penalty for the Commonwealth offence of using a carriage service to access child pornography is now 15 years and given the operation of the *Crimes Act* 1914 (Cth), s 4J(1), such offences are now strictly indictable — see n 9 above and "Local Court jurisdictional limit" at heading 5.

10.3 Appeals from Local Court decisions

Section 11(1) of the *Crimes (Appeal and Review) Act* 2001 provides an offender sentenced in the Local Court with a right of appeal to the District Court. On such an appeal, the District Court is empowered to set aside or vary the sentence, or dismiss the appeal.[251] Such an appeal is by way of a rehearing of the evidence given in the original Local Court proceedings.[252] However, that hearing is not limited to the evidence led in the original proceedings as s 17 of the *Crimes (Appeal and Review) Act* permits the tender of fresh evidence during the appeal. Where the judge is considering an increased sentence in a severity appeal, the principles in *Parker v DPP*[253] require the judge to indicate this fact so that the appellant can consider whether or not to apply for leave to withdraw the appeal.

There were 110 appeals against sentence,[254] an appeal rate of 31.3% of all the child pornography prosecutions finalised in the Local Court. Most appeals (106) were against the severity of sentence and 4 appeals were prosecution appeals against the inadequacy of sentence. None of the prosecution appeals were successful.

Not surprisingly, the highest rate of appeal against the severity of sentence was for offenders sentenced at first instance to full-time imprisonment. Over two-thirds of offenders appealed against the severity of their full-time prison sentence (79 out of 111 offenders or 71.2%). The rates of appeal for offenders given other penalties included:

- 10 out of 30 offenders (33.3%) appealed against a periodic detention order
- 7 out of 103 offenders (6.8%) appealed against a suspended sentence
- 2 out of 16 offenders (12.5%) appealed against a community service order.

Success rates of appeals

Overall, there was a very high success rate for severity appeals (75 out of 106 offenders or 70.8%). This means that just over 1 in 5 offenders (21.3%) dealt with in the Local Court had their sentence reduced on appeal to the District Court. The District Court reduced the overall sentence as follows:

- in 52 cases, the District Court varied the type of penalty imposed by the Local Court
- in 23 cases, the District Court varied the duration of the penalty imposed at first instance without changing the penalty type.[255]

The success rate of severity appeals depended on the sentence imposed at first instance. For example, approximately three-quarters of offenders who appealed against the severity of their full-time prison sentence were successful (60 out of 79 offenders or 75.9%). The District Court reduced the length of the full-time prison sentence for 19 offenders (31.7%)[256] and varied the type of penalty for 41 offenders (68.3%). Twenty-six offenders were given a suspended

251 *Crimes (Appeal and Review) Act* 2001, s 20(2).

252 As to the meaning of "rehearing", see the discussion in Judicial Commission of New South Wales, *Sentencing Bench Book*, 2006, "Appeals" at [70-130].

253 (1992) 28 NSWLR 282 at 285.

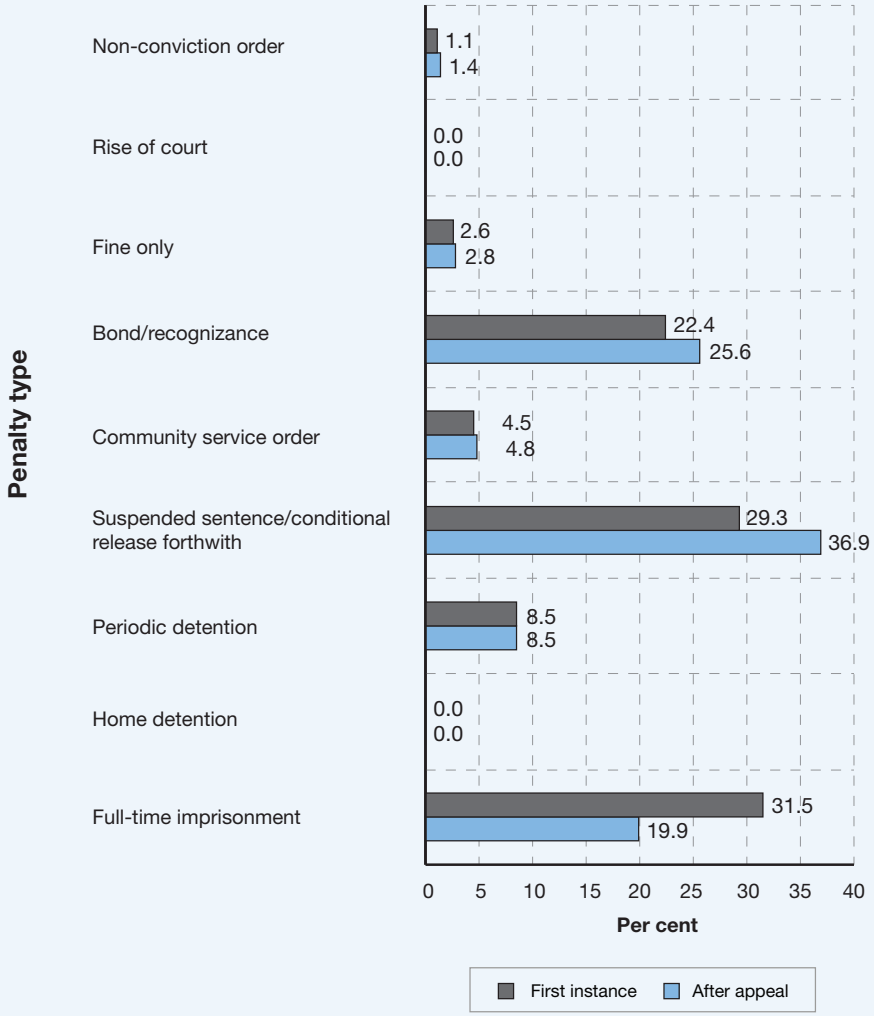
254 The number of sentence appeals does not include two severity appeals. One matter is pending and one matter where there has been a stay of proceedings.

255 Includes 9 cases where only the non-parole period was reduced.

256 Includes 8 cases where only the non-parole period was reduced.

sentence; 6 offenders were sentenced to periodic detention and 9 offenders were placed on a bond/recognizance. As a result, the use of full-time imprisonment as a sentencing option in the Local Court has decreased from 31.5% at first instance to 19.9% at resentence. **Figure 3** illustrates these conclusions and shows the effect of severity appeals on the distribution of penalties in the Local Court for child pornography offenders before and after "correcting" for appeal outcomes.

Figure 3: Effect of severity appeals to the District Court on the distribution of penalties in the Local Court for child pornography offenders before and after correcting for appeal outcomes 1 January 2005 to 30 June 2009



10.4 Sentencing patterns in the Local Court for the most common child pornography offence — possession

The most common offence dealt with in the Local Court is the offence of possessing child pornography.[257] This offence accounted for 630 of the 660 (95.5%) NSW child pornography offences dealt with in the Local Court in the period from 1 January 2005 until 30 June 2009. The majority of possession offences during this period were brought under the now repealed s 91H(3).[258] **Figure 4** shows the distribution of penalties imposed for this offence and, for comparative purposes, includes the penalties imposed in respect of this offence in the District Court.

As **Figure 4** shows, the most common penalty imposed in the Local Court for possessing child pornography pursuant to the now repealed s 91H(3) of the *Crimes Act* 1900 was full-time imprisonment where it was imposed in 31.7% of offences. By comparison, in the District Court full-time imprisonment was imposed in 79.1% of offences.

Other common penalties in the Local Court for this offence included:

- suspended sentences, which were the second most common penalty accounting for 28.9% of the sentences imposed in the Local Court[259]
- good behaviour bonds, which accounted for 14.6% of sentences imposed in the Local Court.

The range of sentences imposed reflects the fact that the Local Court routinely deals with a broader range of child pornography offences than the District Court in terms of both the nature of the images depicted and the number involved. For example, the offender in *Police v Power* possessed 31 video images and 433 still images of child pornography, a similar volume to that possessed in *R v Gent*, although the gravity of the sexual activity portrayed was said to exceed that in *R v Gent*.[260] By comparison, in *DPP v Little*, the offender was found in possession of only two images of child pornography.[261]

257 This includes those possession offences dealt with in this period under the now repealed *Crimes Act* 1900, ss 578B(2) and 91H(3), and those offences dealt with under the recently amended s 91H(2). Offences committed before 1 January 2005 were prosecuted under the *Crimes Act* 1900, s 578B(2), which was a summary offence with a maximum penalty of 2 years imprisonment and/or 100 penalty units (that is, $11,000). Offences committed between 1 January 2005 and 31 December 2008 were prosecuted under the *Crimes Act* 1900, s 91H(3), which had a maximum penalty of 5 years imprisonment. From 1 January 2009, the maximum penalty increased to 10 years imprisonment for offences committed from 1 January 2009 and these offences are now prosecuted under s 91H(2) of the *Crimes Act* 1900.

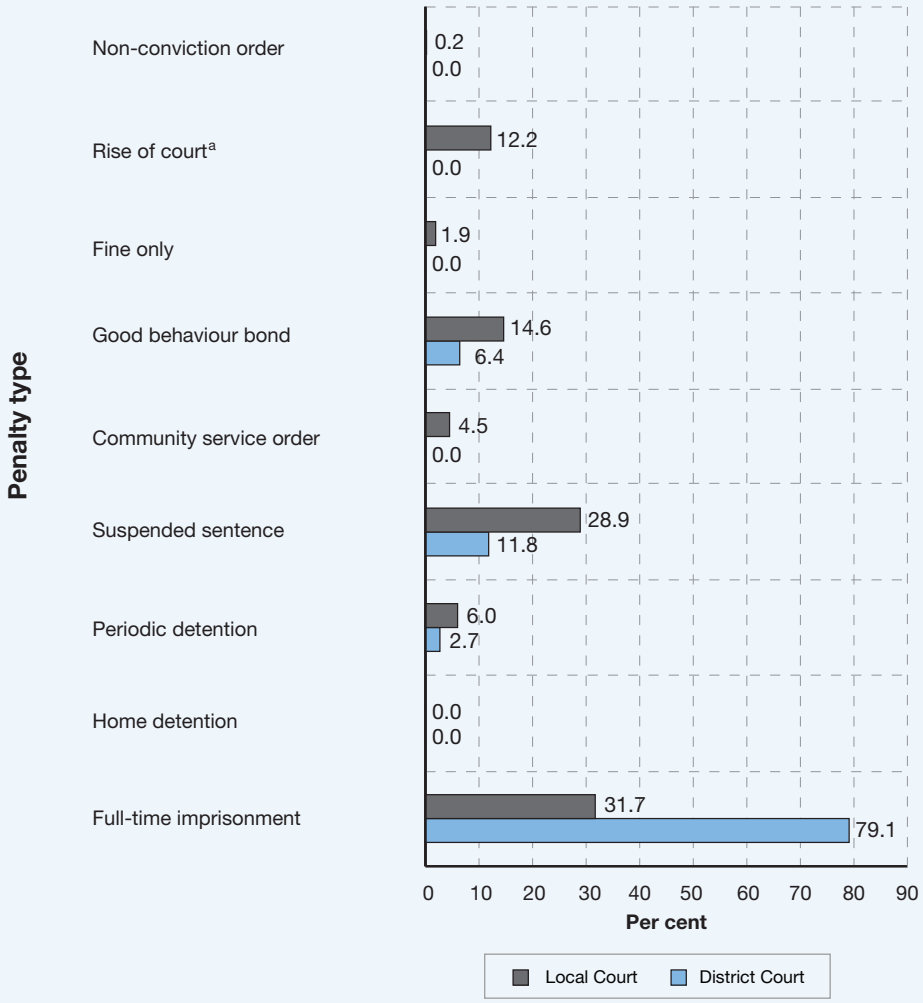
258 There were 419 possession offences in the Local Court brought under the *Crimes Act* 1900, s 91H(3). This offence was also the most common child pornography offence in the District Court with 110 offences.

259 Suspended sentences were also the second most common penalty in the District Court, accounting for 11.8% of sentences.

260 [2007] NSWLC 1. A majority of the images fell within levels 6–7 of COPINE and, of the videos 14 (or 45.2%) were within category 7, two within category 8, 14 (45.2%) within category 9 and one within category 10. The COPINE scale appears at Appendix B. The offender was sentenced at first instance to a non-parole period of 8 months and a total term of 15 months. On appeal, the non-parole period was reduced to 6 months: see *Council of the Bar Association v Power* (2008) 71 NSWLR 451 at [3].

261 [2008] NSWLC 19. The offender was convicted and ordered to enter a 2-year good behaviour bond. He was also fined $4,000.

Figure 4: Penalties for possessing child pornography under s 91H(3) (repealed) of the Crimes Act 1900 in the NSW Local Court and District Court 1 January 2005 to 30 June 2009



a Only one offender was sentenced to the rising of the court. This offender was sentenced for 53 child pornography offences, of which 52 were for possessing child pornography under s 91H(3). For one of these offences he received a s 9 good behaviour bond. The remaining 51 offences were disposed of using this sentencing option.

10.5 Sentencing patterns in the District Court for matters dealt with on indictment

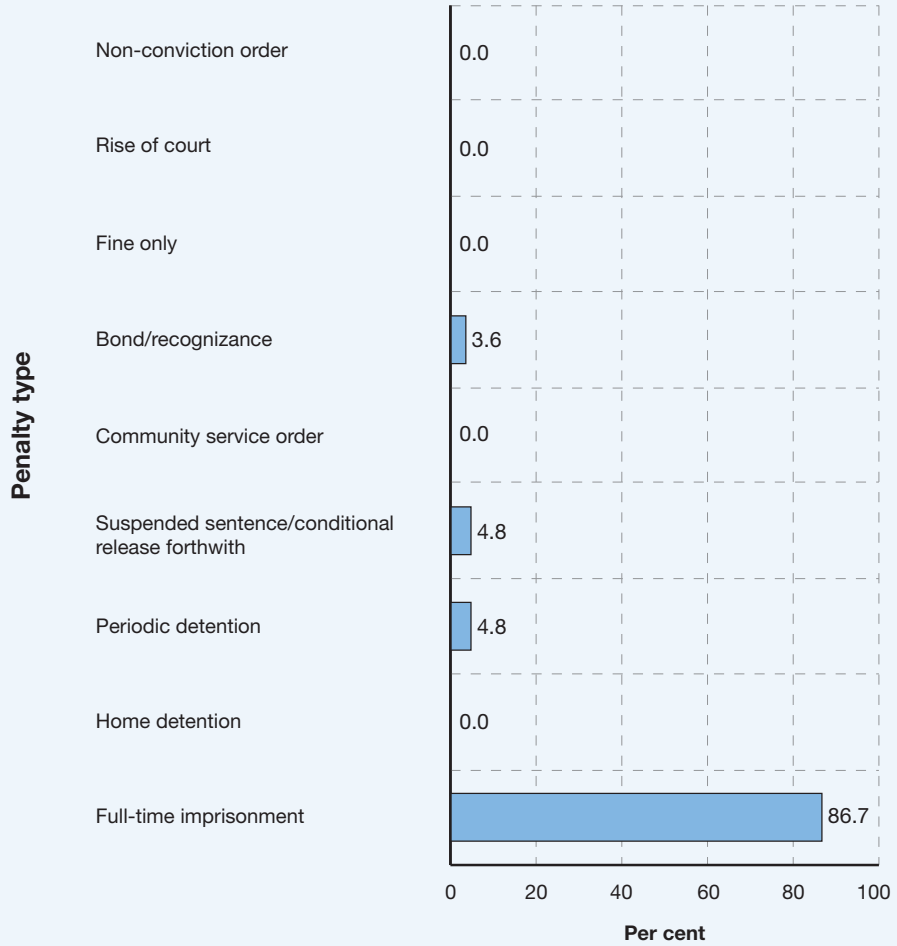
Figure 5 illustrates the pattern of sentencing in the District Court for offenders sentenced in relation to child pornography offences. The vast majority of child pornography offenders received a term of full-time imprisonment (86.7%) which is a reflection of the serious nature of the offences before that court. The median term of sentence was 24 months (range: 4 months to 8 years). Interestingly, the use of full-time imprisonment in the District Court for such offences has declined since 2005, although the median length of sentences has

increased from 18 months in 2005 to 30 months up to June 2009.[262] However, given the small number of offenders in 2005 and 2006, caution should be exercised in drawing firm conclusions about any trend.

Other penalties included:

- periodic detention (4.8%) — the median term of sentence was 16.5 months (range: 12 months to 27 months).
- suspended sentences (4.8%) — the median term of sentence was 19.5 months (range: 13 months to 24 months) and supervision by the Probation and Parole Service was a condition of the bond/recognizance in 75.0% of sentences.
- bonds/recognizances (3.6%) — the median term of sentence was 24 months (range: 12 months to 36 months) and supervision by the Probation and Parole Service was a condition of the bond/recognizance in 66.7% of sentences.

Figure 5: Penalties for child pornography offenders sentenced in the NSW District Court 1 January 2005 to 30 June 2009



262 Aggregate sentences have not been examined.

11. Future issues

It is clear from the discussion that the law surrounding child pornography offences is dynamic and that law enforcement agencies, Parliaments and the courts have grappled with the problem of child pornography both nationally and internationally. This year alone both the Commonwealth and NSW Parliaments have passed legislation which will have a dramatic impact on the prosecution of such offences in two main ways.

First, at the Commonwealth level, the increase in a number of maximum penalties as well as the range of available offences is likely to lead to a greater number of Commonwealth child pornography offences being prosecuted in the District Court. This is because those offences can no longer be dealt with summarily. As the new Commonwealth offences come before the courts in NSW (and elsewhere), the courts will be faced with the challenges inherent in interpreting any new offences.[263] This task is made more difficult in some respects because of the limited occasions upon which these matters come before appellate courts.

Second, at the State level the maximum penalty for the possession offence has recently been increased. Recent amendments also change the way evidence is led. The use of sample certificates for NSW offences may reduce the occupational health and safety concerns associated with viewing the material. However, unless the same approach is taken for Commonwealth child pornography offences, occupational health and safety issues remain with the presentation of this evidence in court. In the future, a uniform approach would be preferable. Legislatures should be mindful of the fact that NSW and Commonwealth offences are often dealt with in the same proceedings and for that reason procedurally matters should be consistent.

Fact-finding in cases where there are multiple and varied offences will continue to pose a challenge for courts and appellate courts may need to provide further guidance in relation to the application of the totality principle.

Notwithstanding these changes and challenges, the fundamental sentencing principles discussed in this monograph will continue to form the basis of efforts by the courts to determine the appropriate sentences for child pornography offences.

263 An example, at the time of publication although in connection with the older offences, is *R v Garget-Bennett* [2010] QCA 231. In that case, the offender was charged with two offences, one being the use of a carriage service to access child pornography material which was an offence against *Criminal Code* (Cth), s 474.19(1)(a)(i). A significant issue, raised by the court at the hearing, was whether that offence was capable of being a continuing offence. A majority of the Queensland Court of Appeal concluded that it could not.

Appendix A: Methodology used for statistical data

The time frame

The statistical analysis examines sentencing data from 1 January 2005 to 30 June 2009 (the latest data available at the time of writing). The year 2005 was selected as a starting date because it was at about that time that the Commonwealth government created new child pornography offences under the *Criminal Code* (Cth) and the NSW government increased maximum penalties for child pornography offences under the *Crimes Act* 1900.

The data, definitions and methodology

The sentencing data include Commonwealth and State child pornography offences finalised in the Local Court and District Court of NSW.[1] First instance sentencing data and outcomes of appeals to the District Court are sourced from data provided by the NSW Bureau of Crime Statistics and Research (BOCSAR). Data on appeals to the Court of Criminal Appeal were obtained from the Court of Criminal Appeal database maintained by the Judicial Commission of NSW.

Child pornography offences include the "production, possession, distribution or display of pornographic or abusive material of a child under the age of consent in written, photographic, film, video, digital or other format" (ASOC 2008).[2] The definition of child pornography in this study also includes offences of using or procuring a child for pornographic purposes and importing or exporting tier 2 goods which include items of child pornography or child abuse material.[3]

All proven child pornography offences have been included, whether or not they were the principal offence. The principal offence is the offence that received the most severe penalty.[4]

Child pornography offenders include adult offenders[5] with at least one proven child pornography offence. Possible combinations are:

- only offence is the child pornography offence (principal offence)
- only one child pornography offence that is not the principal offence (secondary offence)
- more than one child pornography offence of which one is the principal offence (principal and secondary offences)
- more than one child pornography offence, none of which are the principal offence (all secondary offences).

Where the child pornography offence was not the principal offence, then the child pornography offence that received the most severe penalty was selected for the analysis relating to offenders.

1 There were no cases finalised in the Supreme Court. Child pornography offences finalised in the Children's Court were not examined.

2 Australian Bureau of Statistics, *Australian Standard Offence Classification (ASOC)*, 2008, 2nd edn, cat no 1234.0, ABS, Canberra, p 33.

3 Records were checked with the office of the Commonwealth Director of Public Prosecutions (CDPP) to confirm which tier 2 goods related to child pornography or child abuse material.

4 If an offender is convicted of more than one offence, the offence receiving the highest penalty, in terms of the type and duration of sentence is selected as the principal offence. If two or more offences received the same penalty, the offence with the highest statutory maximum penalty is selected as the principal offence. If two or more offences have the same statutory maximum penalty, the offence with a Form 1 attached is selected as the principal offence. In the absence of a Form 1, the offence subject to the standard non-parole period statutory scheme is selected as the principal offence. Also, all things being equal, a completed offence is selected ahead of a "with intent" offence and a substantive offence is selected ahead of a complicit or inchoate offence.

5 As mentioned at n 1, juveniles convicted of child pornography offences finalised in the Children's Court were not included in this study. During the study period, there was only one juvenile sentenced in the District Court for a child pornography offence. In this case, the child pornography offence was not the principal offence (a sexual assault under s 66C(1) of the *Crimes Act* 1900 was the principal offence). The juvenile was not dealt with according to law but instead released on probation for 18 months under s 33(1)(e) of the *Children (Criminal Proceedings) Act* 1987. Consequently, this record was removed from the data.

Penalties imposed pursuant to the *Crimes (Sentencing Procedure) Act* for State offences (NSW Act) and pursuant to the *Crimes Act* 1914 for Commonwealth offences (Cth Act) may differ in terminology. However, for the purposes of this analysis, State and Commonwealth provisions have been grouped together. For example:

- suspended sentences include sentences pursuant to s 12 of the NSW Act and conditional releases *forthwith* pursuant to s 20(1)(b) of the Cth Act[6]
- bonds and recognizances include good behaviour bonds under s 9 of the NSW Act and recognizances to be of good behaviour pursuant to s 20(1)(a) of the Cth Act
- non-conviction orders include dismissals and discharges pursuant to s 10 of the NSW Act and s 19B of the Cth Act.

The analysis encompasses primary penalties. Penalties imposed for a particular offence in addition to other penalties for that offence are not included. Furthermore, aggregate sentences involving consecutive sentences for multiple offences have not been examined.

Finally, first instance sentencing data were "corrected" to take into account outcomes of appeals to the District Court and Court of Criminal Appeal.[7] It should be noted that there was no easy way to link data from District Court appeals with first instances matters finalised in the Local Court.[8] However, the cohort of offenders dealt with in the Local Court was manually traced to determine whether they had appealed to the District Court and the outcomes of their appeals.[9]

6 Terms imposed for State offences cannot exceed 2 years. Longer terms may be imposed for Commonwealth offences.

7 If a conviction appeal resulted in an acquittal, the record was removed from the data. New or varied penalties from successful sentence appeals (severity or inadequacy) replaced the first instance penalties.

8 The different data collection systems do not use a common identifier. On the other hand, the Court of Criminal Appeal database employs the same unique person identifier used in the District Court.

9 For many first instance cases, particularly for those finalised near the end period of the study, it was necessary to check details of appeals by accessing records on JusticeLink.

Appendix B

COPINE scale		
Level	**Content of images**	
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 organisation of pictures by the collector indicates inappropriateness
2	Nudist	Pictures of naked or semi-naked children in appropriate nudist settings and from legitimate sources
3	Erotica	Surreptitiously taken photographs of children in play areas or other safe environments showing either underwear or varying degrees of nakedness
4	Posing	Deliberately posed pictures of children fully clothed, partially clothed or naked (where the amount, context or organisation suggests sexual interest)
5	Erotic posing	Deliberately posed pictures of children fully clothed, partially clothed or naked children in sexualised or provocative poses
6	Explicit erotic posing	Emphasising genital areas where the child is either naked, partially or fully clothed
7	Explicit sexual activity	Involves touching, mutual and self-masturbation, oral sex and intercourse by child, not involving adult
8	Assault	Pictures of children being subject to a sexual assault, involving digital touching, involving an adult
9	Gross assault	Grossly obscene pictures of sexual assault, involving penetrative sex, masturbation or oral sex involving an adult
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

Oliver[1] scale	
Level	**Content of images**
1	Erotic posing with no sexual activity
2	Sexual activity between children or solo masturbation by a child
3	Non-penetrative sexual activity between adults and children
4	Penetrative sexual activity between children and adults
5	Sadism and bestiality

1 A reference to *R v Oliver* [2003] 1 Cr App R 28, where Rose LJ, after considering proposals made at the request of the court of the Sentencing Advisory Panel, identified these five categories which his Honour said demonstrated increasing seriousness by reference to five different levels of activity. These were derived from the COPINE scale.

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