Report of the Child Pornography Working Party

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Tel: (02) 8061 9222 Fax: (02) 8061 9370

LIST OF RECOMMENDATIONS

1. That the NSW definition of child pornography, the factors that determine whether material is offensive, and the defences that are available be amended to reflect the existing Commonwealth legislation and that the definition be renamed to refer to 'child abuse material'.

2. That an application for a guideline judgment should not be made at this stage.

3. That a legislative amendment is not required to broaden the concept of possession in child pornography matters.

4. That a legislative rebuttable presumption as to the quantity and gravity of child pornography material be created for offences under section 91H of the *Crimes Act 1900.* The application of the presumption will be dependent upon the accused and/or his or her representatives having access to the images.

5. That the NSW Police Force, Australian Federal Police, NSW Office of the Director of Public Prosecutions and the Commonwealth Director of Public Prosecutions adopt a uniform practice of using the CETs scale in child pornography prosecutions.

6. That a Local Court Practice Note and District Court Practice Note be developed addressing the occupational health and safety aspects of child pornography prosecutions.

PART 1: INTRODUCTION

In October 2007, the NSW Sentencing Council was requested by the Attorney General pursuant to section 100J of the *Crimes (Sentencing Procedure) Act 1999* to examine the penalties relating to sexual offences in New South Wales.

The Sentencing Council released an interim report in October 2008 titled "Penalties relating to Sexual Assault Offences in New South Wales" (the Report).[1] The Report examined the anomalies and gaps contained in the current framework of sexual offences and their respective penalties, and made suggestions on how to address the anomalies, including whether statutory maximum penalties and standard minimum sentences were set at appropriate levels, paying particular attention to offences involving child pornography.

Seven of the Report's recommendations related to the law surrounding child pornography and proposed that consideration be given to:

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

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

3. Amendment by way of clarification in relation to certain of the State child pornography offences by:

[1] NSW Sentencing Council, *Penalties relating to Sexual Assault Offences in New South Wales* (Volume 1), August 2008 (www.lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_publications) accessed 4 November 2009.

i. Providing an extended definition of the expression “produce” in relation to the s91H(2) offence.

ii. Making it clear that material within the definition of child pornography for the purpose of the s91H offence, includes pseudo images of children;

iii. Adopting the evidentiary enabling provision concerning the age of a person depicted in material alleged to be child pornography in similar form to that in s474.28(5) Criminal Code (Cth).

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

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

6. A working party be established (comprising the Commonwealth and State DPPs; NSW Police Force; Attorney General’s Department; and other relevant agencies) to examine the approach that should be taken in cases where an offender is found to have a significant collection of child pornography material, with a view to facilitating the framing of suitable charges, and the presentation of evidence of that material in court, so as to ensure the totality of the offenders’ conduct is sufficiently addressed by the sentence, while making proper allowance for the OH&S issues involved in relation to Police, Prosecutors and others who have to examine and process the relevant material.

7. Consideration be given to allowing the imposition of conditions requiring any offender who has committed an offence of:

- possession of child pornography; or
- serious sexual offending, and who

is released on parole or is the subject of an extended supervision order,

(a) to refrain from accessing child pornography by electronic or other means;

(b) to forthwith make available for inspection (including removal for forensic examination if so requested) any computer or other electronic equipment owned or used by the offender at any time as required by that offender's Parole Officer or other office from the Special Visitation Group or Corrective Services as the case may be; and

(c) to provide the Corrective Services Officer with details of any active electronic communication identification, and service provider, and to report any changes in such details.

The NSW Government's Response

At the same time as announcing the release of the Report, the NSW Government indicated that the recommendations of the Sentencing Council would be used as "*the gold standard for new legislation to safeguard adults and children from sexual predators*".[2]

In relation to the seven recommendations relating to the area of child pornography, legislation enacting recommendations 1 and 3 of these recommendations was introduced into Parliament in late November 2008 and passed both Houses in early December 2008. The changes, which included increasing the maximum penalty for the offence of possession of child pornography from five to ten years, commenced by way of the *Crimes Amendment (Sexual Offences) Act 2008* on 1 January 2009.

The Government also announced that it would be establishing (as recommended in recommendations 5 and 6) a high level multi-agency working party to be chaired by District Court Judge Peter Berman SC to examine further aspects of child pornography prosecutions and sentences, and in particular consider the issues raised in recommendations 4, 5 and 6.

In relation to recommendation 2, the Government indicated that it supported the Council's recommendation to remove the 'artistic purposes' defence for child pornography that depicts children as the victims of torture, cruelty or physical abuse or children engaged in sexual activity. The Government further advised that the newly established child pornography working party would examine how this recommendation could be achieved without infringing on the rights of journalists and artists to depict valid situations involving children. In addition, the Government indicated that it supported in principle the Council's recommendation to remove the artistic purposes defence in relation to material that depicts children in a sexual

[2] Attorney General, 'Major Government Crackdown on Sex Offences' (Press Release, 25 October 2009)

context, and advised that the child pornography working party would examine the removal of this aspect of the defence.

Recommendation 7 was to be considered further by the Department of Justice and Attorney General.

The Child Pornography Working Party

The first meeting of the Child Pornography Working Party (CPWP) was held in February 2009. Chaired by Judge Peter Berman SC, the working party consisted of representatives from the NSW Police Force, NSW Office of the Director of Public Prosecutions (NSW ODPP) Australian Federal Police, Commonwealth Director of Public Prosecutions (CDPP), Legal Aid Commission (NSW), Public Defenders Office (NSW), Law Enforcement Policy Branch, (Department of Premier and Cabinet (NSW)) and the Department of Justice and Attorney General (NSW).

As already mentioned, the CPWP was tasked specifically to examine and advise the Government on recommendations 2, 4, 5 and 6 contained in Chapter 4 of the Report.

All members of the CPWP were invited to raise any further issues they considered appropriate to be examined by the CPWP. As such, further issues that the CPWP considered included:

- the development of Local Court and District Court Practice Notes addressing the occupational health and safety aspects of child pornography matters;
- the potential for case management in trials for child pornography matters;
- legislative provision for the compulsion of passwords from suspects;
- the confiscation of computers and other property during or following a child pornography investigation; and
- the decision in *McEwan v Simmons & Anor* [2008] NSWSC 1292 – the "Simpson's case".

PART 2: THE DEFENCE OF GENUINE ARTISTIC PURPOSE

Initial Considerations and the views of the Sentencing Council

The ambit of the CPWP's examination of the defence of 'genuine artistic purpose' was clearly defined at the outset: the CPWP was to examine how to remove the defence without infringing on the rights of journalists and artists to depict valid situations involving children.

In recommending that the defence of 'genuine artistic purpose' be removed, the Sentencing Council referred to the observations made by Gleeson CJ (as he was then) in *R v Manson & Stamenkovic*[3] which usefully elucidate the reasoning behind the Sentencing Council's recommendation to remove the defence entirely. This was a case in which the appellants had been convicted of sex charges of committing an act of indecency with a person under the age of 16 years, in this case an 11 year old, and in which the evidence to support the charges were photographs of the girl in question. The defence case was that the photos were taken for political purposes, or, in the broadest sense artistic in that it was argued they were taken for the purpose of making a protest against the abuse of females. Gleeson CJ delivered the judgment and stated in relation to the defence case:

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

History behind the current provisions[4]

The prohibition of the possession of films, computer games and publications containing child pornography was first introduced into the *Crimes Act 1900* by the *Crimes Amendment (Child Pornography) Act 1995* which commenced on 31 December 1995. The newly proclaimed provisions defined child pornography by reference to the Commonwealth classification scheme as follows:

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[3] NSWCCA 17 Feb 1993

[4] For an excellent analysis of the current law surrounding child pornography see G.Griffith & K Simon "Child Pornography Law" NSW Parliamentary Library Research Service Briefing Paper No 9/08.

> ***child pornography*** *means a film, publication or computer game classified RC, or an unclassified film, publication or computer game that would, if classified, be classified RC, on the basis that it describes or depicts, in a way that is likely to cause offence to a reasonable adult, a person (whether or not engaged in sexual activity) who is a child under 16 or who looks like a child under 16.*

The offence of possession of child pornography was punishable by 100 penalty units or imprisonment for two years (or both) under section 578B of the *Crimes Act 1900.*

Under section 578B(6), in order for the prosecution to prove that the film, publication or computer game in question was classified RC, a Certificate had to be issued under section 87 of the *Classification (Publication, Films and Computer Games) Act 1995*. Signed by the Director of the Classification Board, the Certificate stated that the film, publication or computer game concerned [was] classified RC as it described or depicted, in a way likely to cause offence to a reasonable adult, a person (whether or not engaged in sexual activity) who is a child under 16 or who looked like they were a child under 16.

Presently, the *Guidelines for the Classification of Publications 2005*[5] provide that publications would be classified RC if they:

- Promote or provide instruction in paedophile activity,
- Contain descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18,
- Contain gratuitous, exploitative or offensive descriptions or depictions of:
    - Sexualised nudity involving minors, or sexual activity involving minors.

At the same time as the offence for possession of child pornography was introduced, the offence of publishing indecent articles contrary to section 578C was also introduced into the *Crimes Act 1900.* Under this offence, the legislation provided that in any proceedings where indecency was in issue, the opinion of an expert as to whether or not an article has any merit in the field of literature, art medicine or science (and if so, the nature and extent of that merit) is admissible as evidence.

[5] The Guidelines are available from Classification Website at www.oflc.gov.au.

Nearly 10 years later, the situation changed with the introduction of the *Crimes Amendment (Child Pornography) Act 2004* which commenced on 1 January 2005. This Act introduced a new definition of child pornography into the *Crimes Act 1900* and substantially reworked the offence.

Under section 91H (1) **child pornography** was now defined as:

> material that depicts or describes in a manner that would in all the circumstances cause offence to reasonable persons, a person under (or apparently) under the age of 16 years:
>
> (a) engaged in sexual activity, or
>
> (b) in a sexual context, or
>
> (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).

The new offence had the effect of divorcing the definition of 'child pornography' from the classification provisions. The then Attorney General, the Hon Bob Debus, explained the new definition in the Bill's second reading speech[6] in the following terms:

> *"The new definition will remove the classification requirement. The requirement to classify material has been unnecessarily onerous in many cases where it is clear that the material is child pornography. The new definition will allow courts to make their own determination as to whether material is or is not child pornography. It is similar to the definitions already used in a number of other States and Territories."*

In addition, the Attorney provided examples of what a depiction or description of a child in a sexual context would constitute, stating that it would cover:

> *"…situations where a child is depicted in an indecent pose or watching another person engaged in sexual activity. The requirement that the material must, in all the circumstances, be offensive to reasonable persons ensures that innocent family photographs of naked children, for example, will not be covered."*

Further, he explained that the inclusion of material in which a child is a victim of torture, cruelty or physical abuse "*ensures that abuse which is not purely sexual, but is still offensive, is covered*".

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[6] NSW, *Parliamentary Debates,* Legislative Assembly, 11 November 2004 111109 (Bob Debus, Attorney General, and Minister for the Environment)

Most likely as a consequence of the Court's increased role in determining what material constitutes child pornography, rather than by reference to the Classification Board, five new defences were also included, the same defences that exist today, with the new "reworked offence". Section 91H(4) is the relevant subsection, and stipulates the following defences:

> It is a defence to any charge for an offence under subsection (2):
>
> (a) that the defendant did not know, and could not reasonably be expected to have known, that he or she produced, disseminated or possessed (as the case requires) child pornography, or
>
> (b) that the material concerned was classified (whether before or after the commission of the alleged offence) under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth, other than as refused classification (RC), or
>
> (c) that, having regard to the circumstances in which the material concerned was produced, used or intended to be used, the defendant was acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose and the defendant's conduct was reasonable for that purpose, or
>
> (d) that the defendant was a law enforcement officer acting in the course of his or her official duties, or
>
> (e) that the defendant was acting in the course of his or her official duties in connection with the classification of the material concerned under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth.

With reference to subsection (c), the then Attorney General explained its inclusion as follows:

> *"The third defence is available where the defendant was acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose, and the conduct was reasonable for that purpose. In determining whether the defence was available, regard will need to be had to the circumstances in which the material was produced, used or intended to be used. This defence would cover, for example, news or current affairs programs reporting images of children injured in a war, or medical texts, if that material has not been classified. It would also cover people who report cases of child abuse to the authorities."*

The second reading speech does not, however, mention what the reasoning was behind including the defence of genuine artistic purpose, or how it related to the defence of public

benefit. Although, offering perhaps some insight to the drafting of the reworked offences and defences, the then Attorney General explained, nearing the conclusion of his speech, that "*these amendments achieve a uniformity with other States both in terms of penalty and content of the offence*."

The current position in NSW

The definition of child pornography was recently broadened by the *Crimes Amendment (Sexual Offences) Act 2008* which commenced on 1 January 2009. Child pornography is now legislatively defined as:

Section 91H Production, dissemination or possession of child pornography

> ***child pornography*** means material that depicts or describes (or appears to depict or describe) in a manner that would in all the circumstances cause offence to reasonable persons, a person who is (or appears to be a child):
>
> (a) engaged in sexual activity, or
>
> (b) in a sexual context, or
>
> (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).

In addition, a new section 91H(6) dealing with altered images was inserted. It specifies that:

> A reference in this section to material that appears to depict or describe a person who is a child, or a person as referred to in paragraph (a), (b) or (c) of the definition of ***child pornography***, includes a reference to material that contains or displays an image of a person that has been altered or manipulated so that the person appears to be a child, or appears as referred to in any of those paragraphs, or both.

The Attorney General in the second reading speech for this latest Bill explained the reasoning behind the further broadening of the definition:

> *"The available technologies currently utilised in the production of child pornography allow for images to be manipulated, juxtaposed or pixillated. One of the reasons offenders do this is to make it more difficult to identify the children and the perpetrators, and therefore more difficult to apprehend the perpetrators and rescue the victims. This allows the abuse to continue. Images can also be manipulated to*

make 'innocent' photographs of children appear in a pornographic context, or to make a person in a sexual context appear to be a child. Some may argue that such images do not include a "real victim" and therefore should not be captured by this legislation. However, the Government makes no apologies in ensuring that all child pornographic images, whether "real" or "pseudo" are covered by this legislation. These tough child pornography laws serve not only to protect children from abuse, but also act as a denunciation and a general deterrent. Furthermore, it is important to reduce the amount of this abhorrent material available to anyone with access to a computer. The community expects the Government to do everything within its power to prevent proliferation of these images, and that is what this Bill serves to do."[7]

Other Australian jurisdictions

There is a measure of consistency between each of the Australian jurisdictions regarding the breadth of material that can constitute child pornography, as well as (in the majority) providing numerous statutory defences, including acting for a genuine artistic or other public benefit purpose. The following provides a snapshot of the current regimes with a focus on the definition of child pornography, and whether or not there is a general public benefit defence or defence of artistic merit to the offence of possession.

Victoria

In Victoria, section 67A of the *Crimes Act 1958 (VIC)* defines child pornography as:

> … a film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context.

Under section 70(2)(b) it is a defence to a charge of possession of child pornography if:

> … the film, photograph, publication or computer game possesses artistic merit or is for a genuine medical, legal, scientific or educational purpose

However, the defence of artistic merit cannot be relied on in a case where the prosecution proves that the minor was actually under the age of 18 years (section 70(3)).

[7] NSW, *Parliamentary Debates,* Legislative Council, 26 November 2008,11705 (John Hazistergos, Attorney General, Minister for Justice and Minister for Industrial Relations)

Queensland

The Queensland legislation defines the relevant material as "child exploitation material" rather then "child pornography". Under section 207A of the *Criminal Code Act 1899 (QLD)* child exploitation material means:

> … material that, in a way likely to cause offence to a reasonable adult, describes or depicts someone who is, or apparently is, a child under 16 years –
>
> (a) in a sexual context, including for example, engaging in a sexual activity; or
>
> (b) in an offensive or demeaning context; or
>
> (c) being subjected to abuse, cruelty or torture.

Section 228E provides that it is a defence for the person to prove that:

(a) the person engaged in the conduct that is alleged to constitute the offence for a genuine artistic, educational, legal, medical, scientific or public benefit purpose; and

(b) the person's conduct was, in the circumstances, reasonable for that purpose.

An example of a current affairs television program showing children being tortured during a civil war is given as something made for a public benefit.

Tasmania

The Tasmanian position under the *Criminal Code Act 1924* (TAS) differs only slightly from the Queensland position. Again, it uses the term "child exploitation material" rather than "child pornography". Under section 1A, child exploitation material is defined as:

> Material that describes or depicts, in a way that a reasonable person would regard as being, in all the circumstances, offensive, a person who is or who appears to be under the age of 18 years –
>
> (a) engaged in sexual activity; or
>
> (b) in a sexual context; or
>
> (c) as the subject of torture, cruelty or abuse (whether or not in a sexual context).

Section 130E provides that it is a defence for the person to prove that:

> … the accused person engaged in the conduct that is alleged to constitute the offence for a genuine child protection, scientific, medical, legal, artistic or public benefit purpose and the accused person's conduct was, in the circumstances, reasonable for that purpose.

Western Australia

The child pornography provisions in the Western Australian legislation are contained in the *Classification (Publications, Films and Computer Games) Enforcement Act 1996 (WA)*. Under section 3, child pornography is defined as:

> … an article that describes or depicts, in a manner that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 years of age (whether the person is engaged in sexual activity or not).

Under section 58 it is a defence if the article concerned is:

(a) an article of recognised literary, artistic or scientific merit; or

(b) a bona fide medical article.

And, that publishing the article is justified as being for the public good. An article includes a publication, film, computer programme, photograph, object, sound recording and any advertisement for any article.

Northern Territory

The legislature in the Northern Territory has chosen to use the term child abuse material, and defined the term, under section 125A of the *Criminal Code Act 1983* (NT) as follows:

> Material that depicts, describes or represents, in a manner that is likely to cause offence to a reasonable adult, a person who is a child or who appears to be a child:
>
> (a) engaging in sexual activity;
>
> (b) in a sexual, offensive or demeaning context; or
>
> (c) being subjected to torture, cruelty or abuse
>
> but does not include:
>
> (d) a film, publication or computer game that is classified (other than as RC) under the Commonwealth Act; or
>
> (e) a film, publication or computer game that is the subject of an exemption under Part X of the *Classification of Publications Films and Computer Games Act.*

The Northern Territory provisions do not provide for any artistic merit defence or general public benefit test.

South Australia

In South Australia, child pornography is defined under section 62 of the *Criminal Law Consolidation Act 1935* (SA) as material:

> (a) that –

i. describes or depicts a child engaging in sexual activity; or

ii. consists of, or contains, the image of a child or bodily parts of a child (or what appears to be the image of a child or bodily parts of a child) or in the production of which a child has been or appears to been involved; and

(b) that is intended or apparently intended

i. to excite or gratify sexual interest; or

ii. to excite or gratify a sadistic or other perverted interest in violence or cruelty.

In determining whether or not the material is pornographic, section 63C sets out a number of considerations which the Court can take into account. These include:

1. In determining whether material to which a charge of an offence relates is of a pornographic nature, the circumstances of its production and its use or intended use may be taken into account but no such circumstance can deprive material that is inherently pornographic of that character.
2. No offence is committed against this Division by reason of the production, dissemination or possession of material in good faith and for the advancement or dissemination of legal, medical or scientific knowledge.
3. No offence is committed against this Division by reason of the production, dissemination or possession of material that constitutes, or forms part of, a work of artistic merit if, having regard to the artistic nature and purposes of the work as a whole, there is no undue emphasis on aspects of the work that might otherwise be considered pornographic.
4. No offence is committed against this Division by reason of –
    i. The possession or dissemination of a publication, film or computer game that has been classified under the *Classification (Publications, Films and Computer Games) Act 1995* (unless it is classified as a publication for which classification is refused (RC)); or
    ii. The possession of a publication, film or computer game for the purposes of obtaining a classification under that Act.

Australian Capital Territory.

In the Australian Capital Territory, child pornography is defined for section 64 of the *Crimes Act 1900 (ACT)* as*:*

Anything that represents –

(a) the sexual parts of a child; or

(b) a child engaged in an activity of a sexual nature; or

(c) someone else engaged in an activity of a sexual nature in the presence of a child

substantially for the sexual arousal or sexual gratification of someone other than the child.

Similar to the Northern Territory, the Australian Capital Territory legislation does not provide for a defence of artistic merit or public benefit.

Commonwealth

The Commonwealth approach to the issue is somewhat different to the approach taken by each of the Australian States and Territories. Firstly, within the *Commonwealth Criminal Code Act 1995* (the Code) child pornography is divided into "child abuse material" and "child pornography".

Child abuse material is defined in 473.1 as:

(a) material that depicts a person, or a presentation of a person, who:

(i) is, or appears to be under 18 years of age; and

(ii) is, or appears to be, a victim of torture, cruelty or physical abuse;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(b) material that describes a person who:

(i) is, or is implied to be, under 18 years of age; and

(ii) is, or is implied to be, a victim of torture, cruelty or physical abuse;

and does this in a way that reasonable persons would regard as being, in all the circumstances offensive.

Child pornography is defined in 473.1 as:

a. material that depicts a person, or a representation of a person, who is, or appears to be under 18 years of age and who:

(i) is engaged in , or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or

(ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;

and does this in a way that reasonable persons would regard as being, in all the circumstances offensive; or

b. material the dominant characteristic of which is the depiction, for a sexual purpose, of:
    (i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or
    (ii) a representation of such a sexual organ or anal region; or
    (iii) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;
c. material that describes a person who is, or is implied to be, under 18 years of age and who:
    (i) is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
    (ii) is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;

    and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
d. material that describes:
    (i) a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or
    (ii) the breasts of a female person who is, or is implied to be, under 18 years of age;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.

The Commonwealth does not provide for a defence of literary or artistic merit. Rather, considerations of any literary, artistic or educational merit form part of the Court's decision-making process in determining whether reasonable persons would regard the relevant material as offensive. Thus the Code gives clear guidance as to what criteria a Court can take into account in determining whether reasonable persons would regard particular material, or a particular use of a carriage service, as being in all the circumstances offensive. The relevant section of the Code is section 473.4 which states:

> The matters to be taken into account in deciding for the purposes of this Part whether reasonable persons would regard particular material, or a particular use of a carriage service, as being, in all the circumstances, offensive, include:
>
> (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
>
> (b) the literary, artistic or educational merit (if any) of the material; and

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

The defence provisions in the Commonwealth Code are also different to those found across many of the other jurisdictions. For instance, the defences provided for in section 474.21 state that:

1. A person is not criminally responsible for an offence against section 474.19 (using a carriage service for child pornography material) or 474.20 (possessing etc. child pornography material for use through a carriage service) because of engaging in particular conduct if the conduct:
    i. is of public benefit; and
    ii. does not extend beyond what is of public benefit.
    b. In determining whether the person is, under this subsection, not criminally responsible for the offence, the question whether the conduct is of public benefit is a question of fact and the person's motives in engaging in the conduct are irrelevant.

2. For the purposes of subsection (1), conduct is of public benefit if, and only if, the conduct is necessary for or of assistance in:
    (a) Enforcing a law of the Commonwealth, a State or a Territory; or
    (b) Monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, A State or a Territory; or
    (c) The administration of justice; or
    (d) Conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.

3. A person is not criminally responsible for an offence against section 474.19 (using a carriage service for child pornography material) or 474.20 (possessing etc. child pornography material for use through a carriage service) if:
    (a) The person is, at the time of the defence, a law enforcement officer, or an intelligence or security officer, acting in the course of his or her duties; and
    (b) The conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

These defences are also available in relation to child abuse material.

The approach in the Code is somewhat similar to the approach still taken today in relation to the offence of 'Publishing indecent articles' under section 578C of the NSW Act. Subsection (6) provides:

> (6) In any proceedings for an offence under this section in which indecency is in issue, the opinion of an expert as to whether or not an article has any merit in the field of literature, art, medicine or science (and if so, the nature and extent of that merit) is admissible as evidence.

Response of the arts community

In recognition of concern in the community about the use of children in art, and the legislative developments that have taken place in the area of child pornography, the Australia Council for the Arts has developed a set of Protocols for working with children in art.[8] The Australia Council advises that the standards they set through these protocols are minimum contractual obligations for those applying for and receiving Australia Council support and adherence to the relevant laws and to these protocols will be a condition of funding for projects supported by the Australia Council.

The Statement of Purpose and Principle to the protocols states:

> *The following protocols have been developed through consultation with the arts sector, government partners and members of the general community. They support the Australia Council's longstanding commitment to encouraging young people's and children's involvement in the arts, both as participants in the creative process and as members of an audience. They are designed to help artists and arts organisations understand their legal obligations and to establish responsible steps for artists when they are involving children in the creation, exhibition or distribution of creative works.*

The Arts Council has identified three critical issues that they considered in the development of these protocols. They are:

[8] Australia Council for the Arts, "Protocols for Working with children in art", December 2008, (http://www.australiacouncil.gov.au/__data/assets/pdf_file/0016/44314/Children_in_art_protocols.pdf accessed 23 March 2009).

1. **Creation**: Ensuring that the rights of children are protected throughout the artistic process, based on informed consent about the process and the intended outcome of the artwork;
2. **Exhibition and performance**: Ensuring that artworks involving images of children have been produced and will be presented with due care and sensitivity; and
3. **Distribution**: Protecting images of children from being exploited, including use of the images beyond the original context of the creative work.

Specifically, In relation to the issue of nudity and children in art, the protocols state:

> *Where there is no state or territory law prohibiting the child from being employed fully or partly naked*[9] *for an arts project, the Australia Council requires written confirmation from the parent(s) or guardian(s) of any child under the age of 15 that the artist has explained the context for the work to the parent(s) or guardian(s) and to the child, and:*
>
> *(a) they understand the nature and intended outcome of the work;*
> *(b) they commit to direct supervision of the child where the child is naked; and*
> (c) *they agree it is not a 'sexual, exploitative or abusive context'.*

Additionally, the Arts Law Centre of Australia has developed a set of facts sheets covering the relevant laws in each state and territory. The NSW specific situation provides guidance to artists on issues such as: working with children; criminal offences; classification and censorship; and privacy.

It is also open to artists to have their work classified by the Classification Board.

The recommended model for NSW

The CPWP is of the view that the inclusion of the defence of artistic merit amongst the child pornography offences may, somewhat unhelpfully, lead to the impression that material that would otherwise constitute child pornography is acceptable if the material was produced, used, or intended to be used whilst acting for a genuine artistic purpose. The CPWP is not of the view that this should be the case. Material that is otherwise offensive because of the way in which it depicts children should not be protected because its creator claims an overriding artistic purpose for it. If having considered the artistic merit of an image it is

[9] The Protocols define "partly naked" as including images of bare genitals, buttocks or female breasts.

considered offensive then it should only be legitimate if there is an overriding, definable and clear public purpose.

Artists found to legitimately exercise artistic purpose should not have their work legally defined in the same way as the horrific images that pervade the internet of child sexual abuse. To do otherwise is to undermine the gravamen of the exploitation and abuse of children that does occur in the creation, possession and dissemination of child pornography, both in Australia and overseas.

Ostensibly due to its origin, the defence of 'genuine artistic purpose' provides guidance to the police, the prosecution, the defence, the courts and the community at large as to the different types of circumstances in which Parliament has legislated that it may be appropriate to create or produce work that does depict children in, for instance, a sexual context, and may also cause offence to reasonable persons, in contrast to material that is purely exploitative and truly constitutes child pornography. To support this conclusion, the CPWP were informed by the NSW ODPP that in its experience, the "defence is hardly ever used" and were aware "of only one instance where the defence was argued and this was unsuccessful".[10]

The inclusion of the defence acknowledges that artistic merit is subjective, and that whilst it may in certain circumstances cause offence to reasonable persons, it may also have genuine artistic merit. The defence recognises that but for the artistic purpose it was created, the material may fall foul of the child pornography provisions. However, these considerations should operate in determining whether or not a piece of work is child pornography, rather than as a defence. The circumstances in which a work was produced are important in determining whether a piece of work is exploitative in nature, or more rightly considered a piece of art.

As part of its deliberations, the CPWP considered the approach taken by other Australian jurisdictions, as previously discussed, and the approach taken in international jurisdictions such as New Zealand, Canada and England. The development of the law in Canada is particularly apposite. Following a high profile case examining the constitutionality of certain child pornography provisions, and whether they unjustifiably intruded on the constitutional rights of Canadians and their "freedom of expression", the Canadian Government altered the

[10] Preliminary submissions to CPWP: Office of the Director of Public Prosecutions (State) (2.2.09) at p. 7.

defence of artistic merit and public good to one of legitimate purpose.[11] However, the new test has been criticised as being "extremely vague" and lacking "sufficient clarity".[12] The wording used in subsections 163.1(6) and (7) of the Canadian Criminal Code now provides for a defence "if the act that is alleged to constitute the offence has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and does not pose an undue risk of harm to persons under the age of eighteen years".

The CPWP does not favour this approach as it retains the problems associated with defining all work as child pornography, but excusing some material if it was conducted with a legitimate artistic purpose; work conducted with a legitimate artistic purpose should not be classified as child pornography in the first place.

The CPWP recommends that NSW follow the Commonwealth model in relation to determining whether or not material is child pornography. This model has the benefit of ensuring the Court specifically considers considerations of artistic merit when determining whether or not reasonable persons would regard particular material, as being in all the circumstances offensive. The Court would therefore have the benefit of clear legislative guidance as to what factors it should consider when determining these matters including (as for section 473.4 of the Code):

(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
(b) the literary, artistic or educational merit (if any) of the material; and
(c) the general character of the material (including whether it is of a medical, legal or scientific character).

The Commonwealth model also has the advantage that it can apply to all three limbs of the current definition of child pornography as recognised by the NSW Parliamentary Library Research Service in a "Child Pornography Law Update".[13] The Commonwealth model would allow the admission of expert evidence to determine whether "the material has any merit in the relevant fields and, if so, the nature and extent thereof."[14] This was a possibility contemplated by the Sentencing Council.

[11] See R v Sharpe (1999, 22 C.R. (5th) 129 British Colombia Supreme Court); R v Sharpe (1999, 136 C.C.C (3d) 97); R v Sharpe [2001] S.C.R.45, 2001 SCC2.
[12] According to Yaman Akdeniz, *Internet Child Pornography and the Law, National and International Responses* (2008) , 155.
[13] G Griffith, Child Pornography Law Update, NSW Parliamentary Library Research Service E-Brief No 2/08.
[14] Sentencing Council Report, pp. 94 – 95.

The CPWP notes that this approach also has the benefit of harmonising the law with the Commonwealth. Offenders who obtain their child pornography via the internet are simultaneously committing offences against State law, such as possession of child pornography, and Commonwealth law, such as obtaining child pornography material for use through a carriage service. It is frequently the case that both offences are charged against the one offender. It is also the case that offenders caught downloading child pornography will often, upon execution of a search warrant, be found in possession of an extensive existing collection of child pornography resulting in Commonwealth and State charges for the different bundles of pornography. Difficulties will be encountered by police officers and practitioners if the tests as to what constitutes child pornography vary according to whether the State charge is being considered or whether the Commonwealth charge is being considered. There is also the potential for a jury which is hearing a trial involving both charges to be confused by having to apply two different tests to the two charges.

By requiring that the literary, artistic or educational merit of the material is determined prior to the work being defined as child pornography, it ensures that works with genuine artistic merit are not confused with child pornography. It also ensures that a defence is not available for the creators of material without any artistic merit, but produced under the guise of an artistic purpose.

As previously discussed, the Commonwealth model distinguishes between material that is defined as child pornography and material that is defined as child abuse material. Although the CPWP is of the view that NSW should follow the Commonwealth model, the CPWP recommends that, in the NSW context, the definitions should be merged, and the term 'child abuse material' used to cover both child abuse material and child pornography material, as defined in the Code. The rationale behind this is that as child pornography is a form of child abuse, it may be artificial to split the two. The CPWP has also considered the term 'child exploitation material', which is also commonly used to describe such material. However, the CPWP is of the view that the term 'child abuse material' has a more settled meaning and describes conduct that is clearly criminal. Although child pornography and child abuse material is exploitative, it is foreseeable that conduct could also fall under this category that is not necessarily criminal.

The CPWP recommends that the relevant age of a child depicted in the material remains as currently defined in NSW as persons under the age of 16 years of age.

The CPWP endorses the limited defences that are provided for in the Code. However, the CPWP notes that further consideration should be given to the retention of the defence that is currently available in the NSW Act to a charge of possession under section 91H(5). This provides that it is a defence if the material concerned came into the defendant's possession unsolicited and the defendant, as soon as he or she became aware of its pornographic nature, took reasonable steps to get rid of it. Innocent possession is therefore not criminalised. Further consideration should be given in drafting as to whether the defence is required given the common law definition of possession.

Recommendation 1: That the NSW definition of child pornography, the factors that determine whether material is offensive, and the defences that are available be amended to reflect the existing Commonwealth legislation and that the definition be renamed to refer to 'child abuse material'.

PART 3: APPLYING FOR A GUIDELINE JUDGMENT

In its Report, the Sentencing Council recommended that consideration be given to making an application for a qualitative guideline judgment from the Court of Criminal Appeal which might take into account the decision in *R v Oliver*[15] and the UK Guidelines in relation to child pornography. In support of such an application, the Sentencing Council surmised that "a qualitative judgment identifying relevant gradations of seriousness could assist the courts in imposing sentences …. [and] provide guidance for prosecutorial practice in framing indictments or charges where an offender is shown to possess a significant quantity of pornographic material".[16]

The CPWP notes the Sentencing Council's important qualifying observation that "the number of persons prosecuted for this offence although significant, and although involving people holding responsible public offices, may not have reached the point at which a guideline judgment would normally be considered, particularly in the absence of any obvious failure by the courts to regard the offence as serious".

The CPWP is of the view that an application for a guideline judgment should not be made at this stage. There are essentially three reasons why the CPWP has formed this view.

Firstly, since the Report's release, the NSW Government has, as was recommended by the Sentencing Council, increased the penalty for the possession of child pornography from five years to 10 years imprisonment. This increase in penalty took effect on 1 January 2009. It would be premature to apply for a a guideline judgment until the effect of this amendment on sentences imposed by the Courts for child pornography offences can be properly evaluated, and an examination of the resulting sentences to determine whether or not a pattern of leniency emerges.

Secondly, if the NSW child pornography provisions are aligned with the Commonwealth child pornography provisions as suggested in Recommendation 1, it will be useful to reconsider the issue after the provisions have been operating together for period of time.

Thirdly, it appears to the CPWP that the Sentencing Council were essentially seeking a guideline judgment be sought on how to approach the categorisation and the gradation of seriousness depicted in the material. The CPWP acknowledges the importance of

[15] 1 CR App R 28
[16] Sentencing Council Report, p. 109.

identifying a consistent approach to these issues; however, in light of Recommendation 5 of this Report (discussed further in Part 6), the CPWP does not recommend that a guideline judgment be sought in relation to these issues at this stage. The CPWP notes that should all the recommendations in the Report be adopted, the question of applying for a guideline judgment should be revisited once Courts have had an opportunity to consider and apply a consistent categorisation of images.

Recommendation 2: That an application for a guideline judgment should not be made at this stage.

PART 4: THE CONCEPT OF POSSESSION AND DELETED IMAGES

The Sentencing Council in its Report considered the recent Court of Criminal Appeal decision in *Clark v R* [2008] NSWCCA 122 and recommended that consideration be given to possibly enlarging the concept of possession to respond to the factual circumstances of this case.

In the case of *Clark,* the appellant was charged with multiple offences, one of which was that on 27 January 2005 at Taree he had child pornography in his possession. The evidence for this charge relied on two computer hard drives seized by Police during a search warrant executed by Police at the appellant's house on 27 January 2005. Subsequent forensic examination by the Police located images of boys of a pornographic nature on both of these hard drives. The images located on one of the hard drives were located in a portion of the hard drive, which had been designated "deleted"; the images located on the other hard drive were located in a temporary file on the hard drive installed when data was transferred from a digital camera, through the computer, to a compact disc. The Court held that the Crown had to prove that the appellant had intentional possession. In the appellant's case, this involved proof that the appellant knew that the data was present and retrievable. As there was no evidence to suggest that the appellant did have the requisite knowledge to retrieve any of the images from the hard drives, the Court of Criminal Appeal acquitted him of this charge.

Thus, the Court of Criminal Appeal confirmed the ordinary principles governing possession applied to material contained on a computer, such as images or videos of child pornography: *He Kaw Teh v The Queen (1985)* 157 CLR 532 in which Gibbs CJ, Mason, Brennan and Dawson JJ held that:

> *… where a statute makes it an offence to have possession of particular goods, knowledge by the accused that those goods are in his custody will, in the absence of a sufficient indication of a contrary intention, be a necessary ingredient of the offence, because the words describing the offence ("in his possession") themselves necessarily import a mental element.*

The constitution of the CPWP included technical experts from the NSW Police Force and Australian Federal Police who assisted the CPWP in its examination of the above recommendation. The CPWP considered issues such as:

- what a "lay-user" regards as a file deletion;

- the mechanics of “file deletion”; and
- Internet caches (including hiding files in the cache and internet ‘pop-ups’).

During the CPWP’s discussions, it became clear that the Police have the technical capacity and ability to conduct forensic analysis identifying behavioural patterns in user activity, that indicate that a user understands the concept of file deletion, and whether or not they are fully recoverable. In addition, such experts can also demonstrate that a user stored and/or viewed child pornography material stored on a computer prior to deleting it. In these circumstances the offence could be appropriately prosecuted by proving possession at an earlier time by particularising the date of possession in the charge from the date of storage to the date the file was deleted. In addition, the level of a user’s knowledge of internet caches can also – subject to intensive forensic investigation – be demonstrated. In this case it may be open to the prosecution to allege that the defendant did in fact have possession of an image at the time of seizure notwithstanding the fact it had been technically deleted. Key to the success of such prosecutions, is the appropriate framing of the charge and the availability of the technical evidence.

Thus, the CPWP is not of the view that the concept of possession in child pornography case is required to be enlarged so as to respond to those cases, such as *Clark.* The problems that arise in prosecutions that contain deleted images can, at this stage, be overcome by forensic examination and appropriately framed charges, but the requirement to prove intentional knowledge will still have to be proven by the Crown. As such, no legislative amendment is recommended.

Along with the occupational health and safety risks that are attached to child pornography investigations, the type of forensic examinations that are required to be undertaken in such matters are extremely complex, resource intensive and time consuming – this is especially true for investigations which require Police to examine deleted images and the historical possession of such images. In some circumstances investigations are too resource intensive to be pursued. It is the view of the CPWP that these factors should not be underestimated and, given the seriousness of the offence, appropriate resources must be allocated to the Police and experts who are charged with investigating these offences.

Recommendation 3: That no legislative amendment is required to broaden the concept of possession in child pornography matters.

PART 5: ISSUES FACED IN PROSECUTIONS INVOLVING LARGE NUMBERS OF CHILD PORNOGRAPHY

During the execution of search warrants in matters involving child pornography it is a common occurrence for tens of thousands of images and movie files to be located on computer hard drives.[17] These numbers highlight the sheer scale of child exploitation that has, and is still occurring. They also represent a considerable challenge to the investigators, Police and Courts in addressing the timely investigation and classification of child pornography material in the prosecution of such offences, and to ensure offenders in possession of such large amounts of child pornography material are adequately punished.

The CPWP acknowledges that the increase in penalty for the offence of possession of child pornography gives the Court additional scope to sentence appropriately in matters involving large volumes of material. In addition it clearly demonstrates Parliament's intention regarding the seriousness of these types of offences.

It is convenient to consider the difficulties faced in framing charges by considering the type of factual scenarios police are increasingly finding. Whilst there are still some offenders who may only be in possession of a small amount of material, the ease with which child pornography images and video files can now be transferred by the internet has meant that both the AFP and NSW Police Force are increasingly confronted by seizures that involve 1000's of images. The images are typically in a variety of formats such as images or video files. This material will also be of varying degrees of seriousness and may range from nudity to depictions of actual sexual abuse of a child. To compound the issue of determining on what basis material should be categorised, the material is often located on a number of storage devices e.g. multiple computers, portable hard drives and storage discs.

Current police practice is to categorise material on the basis of the method of storage.[18] There is no impediment to framing changes either by way of storage device, format or nature of the material, to name only a few. The real issue is whether or not the offender's criminality is properly reflected in charges framed in this manner. The question of how charges should appropriately be framed is really a question which can only be answered after Police have evaluated the material and it is this respect, rather than any technical impediment to how charges may be framed which the CPWP sees as the real issue. The

[17] Submission to CPWP: NSW Police Force "Consideration for charge practices in cases where a large amount of material is found"

[18] See for example the charging practice that is described in *R v Saddler* 6 DCLR (NSW) 377; *Saddler v R* [2009] NSWCCA 83.

CPWP acknowledges, however, that the technical aspect has caused some concern and that Police would benefit from continued training, guidance and interaction with the NSW ODPP and CDPP in this regard.

A significant hurdle to properly demonstrating the criminality is the consequential exposure of numerous participants in the prosecution process to the images. Such persons include, but are not limited to, the investigating police officers, forensic experts, police prosecutors, prosecution solicitors, Crown Prosecutors, defence representatives, court officers, court technical staff, jury members, judges' associates, magistrates and judges. Not only are there significant occupational health and safety risks for each of these participants, but, in addition, repeated viewing arguably compounds the violation and exposure of the child victims depicted in these images by further exposure and dissemination.

The NSW ODPP informed the CPWP of a technological solution on the horizon through a project that will create an Australian National Victim Image Library (ANVIL) and the use of Microsoft software Child Exploitation Tracking System (CETS). The Australian Federal Police and Queensland Police are jointly leading development of this program. As the submission to the CPWP from the NSW ODPP explained:

> *Essentially CETS is comprised of software and a database that will enable a cloned version of a hard drive to be entered into a database and it will identify any pornographic images that are known to the database, and produce a report that will count the number of images that fall within prescribed categories. The database will ultimately be an international collection, where the same criteria have been used to classify the images.*
>
> *This will mean that over time, once there are enough images on the database an investigating officer will not have to view all the images, and the prosecutor and court will be able to rely in the most part on the report produced to quantify and scale the images. At some point the investigating officer will need to examine images that are not identified by the software, and if they turn out to be child pornography enter those images onto the database. There will be a transitional phase while the database is being created where both the software and manual analysis will need to be used to*

investigate. Ultimately it is envisioned that most collections will already be on the data base.[19]

CETS has clear benefits in that it can quantify as well as qualitatively assess any given child pornography seizure. It is noted by the CPWP that the ANVIL / CETS program is at business case stage; a time frame for delivery cannot at this stage be committed to as the business case will need to be considered at both a national level, and Senior Officer Group level, through the national Ministerial Council for Police Emergency Management – Police (MCPEMP). Theoretically however, a report will be produced which will allow the investigator, prosecutor and the court to know the exact number of images involved, as well as the scale of seriousness. This would be a significant and welcome development that will presumably require legislative amendment to enable the report to be admitted into evidence as proof of the contents of the seizure; however, the problem remains regarding prosecutions conducted in the meantime.

The NSW Police Force has advised the CPWP that in response to concerns about occupational health and safety issues, it is in the process of developing Standard Operating Procedures with regards to child pornography cases. It is proposed that investigators will examine a randomised sample of up to 10 000 images and identify the number of child pornography images and the seriousness of these images using the scale recommended by the CPWP (see Part 7).[20] There will be no limit to the number of video files examined. An examination report will then be prepared containing the results of the examination.

The NSW Police Force intend to apply these procedures to every child pornography matter they investigate. In this way, Police will significantly be able to limit the exposure by their officers to child pornography images.

In a similar vein, the CPWP is of the view that the creation of a legislative rebuttable presumption in relation to the number and gravity of the material is warranted in child pornography matters. The presumption would be based on a genuine random sample of the images seized, and the test for disproving the presumption would be on the balance of probabilities. The CPWP is of the view that a statistician's expertise should be sought in working out an appropriate sample size. For instance, it may be that the sample is based on 500 images or 10% of the collection (whatever is the lesser) and from that sample the

[19] Submission to CPWP: Office of Director of Public Prosecutions (State) "Concerning charging and prosecution where there is a large amount of material and the need for any legislative reform".

[20] The COPINE scale is commonly used to classify child pornography and ranges level one to level 10 on a grade of seriousness with 1 being the least serious

number, type and seriousness of the images could be ascertained. In circumstances where the collection is mainly movie files, the number could be 50 movie files. The uniform scale endorsed by the CPWP in Part 6 should also be used.

Key to ensuring the rights of the accused are not unduly infringed by the creation of the rebuttable presumption is to ensure that the accused, and their representative, are able to arrange for supervised access to the entire contents of the seizure. If no access is given then the rebuttable presumption is ultimately unable to be rebutted. The CPWP considers that unless appropriate access is given, the Prosecution should not be able to rely on the presumption. Special access considerations will have to apply to accused persons who are in custody and unrepresented accused.

The CPWP gave consideration as to whether or not the rebuttable presumption should apply only at sentence. The Legal Aid Commission and the Public Defender's Office were of the view that the presumption should not apply in defended hearings and trial matters. They suggested that consideration be given to establishing a system of requiring the identification of issues prior to listing a matter for trial or hearing. If the defence indicated that they disputed the relevant material as being child pornography, the prosecution would then be on notice that they will be required to prove the material in the normal way.

The majority of the CPWP is of the view that that the presumption should apply to defended matters. This is because one of the key aims of the presumption is to reduce the exposure and further dissemination of the child pornography images. A rebuttable presumption that only applies at sentence will not achieve these aims as all images would have to be viewed prior to the accused indicating whether or not he or she was to plead guilty. In addition, the quantity of child pornography, as well as the gravity of the material, will rarely be an issue that arises in defended matters. This is due to the offence being committed with the possession of just one image of child pornography – the quantity and gravity of the images is more relevant to the level of seriousness of the accused's offending behaviour, and is therefore a matter more usually considered at sentence. One of the concerns of the Legal Aid Commission and the Public Defender's Office was that the rebuttable presumption only shifted the exposure to images to defence representatives and their experts rather than eliminating it. In matters where the accused chooses to rebut the presumption as to the quantity and gravity of the images, there may be cases where the defence representatives and experts view the entire seizure of images from the accused's collection rather then just the sample that was viewed by the Police expert and Prosecution solicitor. However, it is envisioned that this situation will only occur in a minority of cases and as such does not

provide sufficient justification for the presumption not applying to both situations where the accused has pleaded guilty or not guilty.

The CPWP regards the creation of a legislative rebuttable presumption as an interim measure. In light of the possible introduction of CETS / ANVIL, it is recommended that the rebuttable presumption be reviewed in two years. Should CETS / ANVIL be introduced prior to that review the ongoing need for the rebuttable presumption should in any event, then be reviewed.

Recommendation 4: That a legislative rebuttable presumption as to the quantity and gravity of child pornography material be created for offences under section 91H of the *Crimes Act 1900.* The application of the presumption will be dependent upon the accused and/or his or her representatives having access to the images.

PART 6: THE USE OF A UNIFORM SCALE TO GRADE THE SERIOUSNESS OF IMAGES

There is currently no uniform scale used by prosecuting authorities for depicting the level of seriousness of child pornography images used in child pornography prosecutions. In its Report, the Sentencing Council were of the view that it would be appropriate in any application for a guideline judgment, for the Court to give consideration to the relevant gradations of seriousness found in child pornography prosecutions. As noted above, the CPWP is of the view that no application for a guideline judgment should be made at this stage; however, the CPWP is of the view that a consistent scale should be used in child pornography matters.

In its Report, the Sentencing Council summarised the different scales that are most commonly used. These are the COPINE scale[21] and the Oliver scale.

The COPINE scale, as noted by the Sentencing Council, is a project of the Department of Applied Psychology of the University College Cork, which, as part of its work, has developed 10 levels of severity of child pornography material, based on the degree of sexual victimisation. It is noted that not all of the levels would fall within an offence of child pornography.[22] The ten levels identified were[23]:

Level 1:	Indicative (non erotic / sexualised pictures)
Level 2:	Nudist (naked or semi naked in legitimate settings / sources)
Level 3:	Erotica (surreptitious photographs showing underwear / nakedness)
Level 4:	Posing (deliberate posing suggesting sexual content)
Level 5:	Erotic posing (deliberate sexual or provocative poses)
Level 6:	Explicit erotic posing (emphasis on genital areas)
Level 7:	Explicit sexual activity (explicit activity but not involving an adult)
Level 8:	Assault (sexual assault involving adult)
Level 9:	Gross assault (penetrative assault involving adult)
Level 10:	Sadistic / Bestiality (sexual images involving pain or animal)

In *R v Oliver and others*[24], a decision of the Court of Appeal Criminal Division of England and Wales, the Court examined the COPINE's Project description of images, but were of the

[21] *Combating Paedophile Information Networks in Europe.* A project of the Department of Applied Psychology, University College Cork.
[22] Sentencing Council Report, p.105.
[23] Taylor Quayle and Holland 2001
[24] [2003] 2 Cr App R(S) 15.

view that neither nakedness in a legitimate setting, nor the surreptitious procuring of an image, gives rise, of itself to a pornographic image. They therefore proposed an alternative categorisation of the relevant levels as:

1. images depicting 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 or bestiality. [25]

In April 2007, the UK Sentencing Guidelines Council reviewed the levels for sentencing offences involving child pornography established in the case of *R v Oliver* and found:

- Images depicting non-penetrative activity are less serious than images depicting penetrative activity.
- Images of non-penetrative activity between children are generally less serious than images depicting non-penetrative activity between adults and children.
- All acts falling within the definitions of rape and assault by penetration, which carry the maximum life penalty, should be classified as level 4. [26]

The UK Sentencing Guidelines Council settled on the following scale for levels of seriousness (in ascending order) for sentencing for offences involving pornographic images:

Level 1	Images depicting erotic posing with no sexual activity
Level 2	Non-penetrative sexual activity between children, or solo masturbation by a child
Level 3	Non-penetrative sexual activity between adults and children
Level 4	Penetrative sexual activity involving a child or children, or both children and adults
Level 5	Sadism or penetration of, or by, an animal
Offences involving any form of sexual penetration of the vagina or anus, or penile penetration of the mouth (except where they involve sadism or intercourse with an animal, which fall within level 5), should be classified as activity at level 4.	

[25] [2003] 2 Cr App R(S) 15.
[26] Sentencing Guidelines Council "*Sexual Offences Act 2003 – Definitive Guideline*" at www.sentencing-guidelines.gov.uk.

As discussed above, if CETS becomes operational, then after examining a hard drive, CETS will identify any pornographic images that are known to the data base, and produce a report that falls within prescribed categories. The current scale that is intended to be utilised by CETS is based on the UK Sentencing Guidelines Council's Guideline and is as follows:

Category	Category Representation	Guide
1	1. CEM[27] – No Sexual Activity	Depictions of Children with No Sexual Activity - Nudity, surreptitious images showing underwear nakedness, sexually suggestive posing, explicit emphasis on genital areas, solo urination
2	2. CEM – Child Non-Penetrate	Non-Penetrative Sexual Activity Between Children or Solo Masturbation By A Child
3	3. CEM – Adult Non-Penetrate	Non-Penetrative Sexual Activity between Child(ren) and Adult(s). Mutual masturbation and other non-penetrative sexual activity.
4	4. CEM – Child\Adult Penetrate	Penetrative Sexual Activity Between Child(ren) or between Child(ren) and Adult(s) - Including, but not limited to, intercourse, cunnilingus and fellatio.
5	5. CEM – Sadism\Bestiality\Child Abuse	Sadism, Bestiality or Humiliation (urination, defecation, vomit, bondage etc) or Child Abuse as per CCA 1995[28]
6	6. CEM – Animated or Virtual	Anime, cartoons, comics and drawings depicting children engaged in sexual poses or activity.
7	7. Non-illegal\Indicative	Non-illegal child material (believed to form part of a series containing CEM)
8	8. Adult-Pornography	All pornographic material not considered CEM related
9	9. Ignorable	Banners and other non-objectionable graphics useful for establishing proportionality. System files and unrelated images – holiday snaps, landscape, family photos, etc
0	Unchecked	Material not yet assigned a category

Given the strong likelihood that CETS will become operational in the next few years, both the Commonwealth and State prosecuting authorities should start using the scale that CETS will eventually adopt to grade images. This will also assist the Courts in developing a consistent pattern of sentencing in relation to each grade of seriousness.

However, the CPWP notes the apparent anomaly within the current structure of the scale. That is, on a scale of 1 to 9, categories 4 and 5 are the most serious categories, category 6

[27] Child Exploitation Material.
[28] *Comonwealth Criminal Code Act 1995.*

is arguably less serious then category 1, and categories 8 and 9 do not involve images of children at all. The CPWP is of the view that the current scale may lead to confusion, and an alternative scale may be appropriate for the last levels – such as A through to C.

The CPWP is therefore of the view that the prosecuting authorities, both Commonwealth and State, at least in prosecutions conducted in NSW, should adopt the CETS scale when grading child pornography images.

Recommendation 5: That the NSW Police Force, Australian Federal Police, the NSW Office of the Director of Public Prosecutions and the Commonwealth Director of Public Prosecutions adopt a uniform practice of using the CETs scale in child pornography prosecutions.

PART 7: DEVELOPING COURT PRACTICE NOTES

The CPWP also recommends that Local Court and District Court Practice Notes be developed addressing the occupational health and safety aspects involved in child pornography prosecutions. The Practice Notes could include reference to the following:

- that pre-trial conferences occur in all child pornography matters to facilitate the early identification of issues especially in matters where expert evidence of a technical nature is to be called;
- that in the District Court, juries are clearly warned prior to being empanelled that images of child pornography are to be shown;
- that admissions under section 192 of the *Evidence Act 1995* are used in appropriate circumstances (such as when there is no dispute about the substance of the images);
- courts are closed when the images are displayed;
- that photographic evidence be displayed on tender and only if required when evidence is given. Jury sets of photos should not be made; and
- that the photographic evidence be tendered with an envelope so as to minimise the exposure of court staff.

The CPWP also considered whether or not the Practice Notes should discuss the extent to which child pornography images and videos were required to be shown in Court for appreciating the gravity of the offender's conduct. For instance, whether or not it is necessary for the sentencing Court to view the images or videos concerned or just rely on a descriptive statement. The CPWP does not make a specific recommendation in relation to this aspect as it recognises that there are legitimate differing views in relation to this issue. However, it recommends that the Practice Notes should specify that the parties and the Courts should limit the republication as much as possible of child pornography images due to the concern over the occupational health and safety issues to those exposed to it, as well as the fact that the dissemination of such images continues the proliferation and harm to the victims involved.

Recommendation 6: That a Local Court Practice Note and District Court Practice Note be developed addressing the occupational health and safety aspects of child pornography prosecutions.

PART 8: OTHER ISSUES

Case management in Child Pornography matters

The CPWP notes that the NSW Trial Efficiency Working Group released its Report in March 2009 making significant comments on the management of the trial process.[29] Trials involving the possession of child pornography material located on electronic devices have the potential to become highly technical involving complex evidence relating to such matters as Trojans, the use of Internet caches, and the deletion and retrieval of electronic data.

The Government has indicated its support for the Trial Efficiency Working Group's recommendations and amendments are to be brought forward which will provide for the opportunity to obtain binding pre-trial directions, case conferences to define issues at trial and case management mechanisms. These initiatives would be very useful and applicable to the prosecution of child pornography matters.

The CPWP does not at this stage recommend that all child pornography matters be compulsorily case managed by the Court. It does however recommend strongly that those responsible for the prosecution of these matters approach them as matters deserving of case management and that mechanisms introduced to facilitate the early identification of issues be utilised in these matters. This will provide opportunities to resolve the technical and evidentiary issues before trial and this is reflected in the recommendation that a Practice Note issue requiring pre-trial conferences in all child pornography matters.

Compelling passwords from suspects

The CPWP examined the practice that occurs in other Australian jurisdictions in relation to the use of passwords and encryption to control access to data. Such data protection devices are readily and often freely available, and require only "modest" computer skills to operate.[30] In response to these data protection devices, some Australian jurisdictions have enacted legislation to compel production of passwords and other access devices.[31]

Some, but not all, members of the CPWP expressed the view that provisions that compel an accused to give their password raise questions regarding the privilege against self-

[29] The Report is available to be downloaded from www.lawlink.nsw.gov..au/clrd.
[30] Submission to CPWP: NSW Police "Illegal Data can be successfully protected".
[31] See for example section 3LA of the *Crimes Act 1914 (Cth);* sections 58-61 *Criminal Investigation Act 2006 (WA)* and section 154 *Police Powers and Responsibilities Act 2000* (Qld).

incrimination. In addition, they are also not universally regarded as providing significant assistance to law enforcement authorities as often multiple layers of encryption are utilised.

The CPWP notes that these provisions would have application to a wider range of criminal investigations than just child pornography, such as drug investigations, fraud or cyber crime. In those circumstances the CPWP considers that although the issue is noted, further consideration on a wider scale as to the appropriateness and effectiveness of such tools is required before they are considered in the NSW context.

Confiscation issues

A practical problem relating to the confiscation of computers and electronic devices that was identified by some members of the CPWP (NSW Police Force and the NSW ODPP) is in relation to the confiscation of computers and electronic devices. Circumstances when issues might arise include cases where:

- child pornography has been identified but (for whatever reason) no charges are laid;
- the offender seeks access from the Court to non-pornographic material from a seized hard drive; or
- the hard drive belongs to a third party who will suffer financial and/or personal loss.

The CPWP notes that these issues are significant, and, in circumstances where charges are not proceeded with, or the accused is acquitted, will not be able to rely on the property being "tainted" as required by the *Confiscation of Proceeds of Crime Act 1989.* However, the CPWP is aware that the Federal Minister for Home Affairs has recently released a consultation paper detailing proposed reforms by the Commonwealth Government to the Commonwealth child sex-related offences. The CPWP notes that one of these reforms is to introduce a new scheme to provide for the forfeiture of child pornography and child abuse material and items containing such material. The CPWP does not therefore make a formal recommendation in relation to this issue, however, it notes that the Commonwealth reforms should be closely monitored, and the NSW situation reviewed once the outcome of the Commonwealth proposals is known.

The Simpsons' Case

The CPWP examined the decision in *McEwan v Simmons & Anor* [2008] NSWSC 1292, the so called "Simpsons case", in light of the widespread public interest in the case. In this case, Justice Adams found that the possession of, and access to, material showing cartoon characters which had been drawn to look like the characters in "The Simpsons" television series performing sexual acts, was contrary to section 91H(3) of the Act and section 474.19(1)(a)(i) of the Code.[32] The appellant argued that the cartoon characters did not "depict" a "person" so as to contravene the State legislation, and further argued that the images were not representations of a person so as to contravene the Commonwealth legislation. Justice Adams held that the cartoons did depict or represent a person. The CPWP was assisted on this issue by the submission of Paul Winch, Public Defender, who wrote for the benefit of the CPWP:

> *The case involved images which were based upon "The Simpsons". That television show is about human beings and the human condition; the characters have human foibles and live in family units in what appear to be ordinary houses. The purpose of the show is to satirise and expose the contradictions, hypocrisy and challenges of the lives of human beings.*
>
> *The vice that the Acts address is the exploitation of children. It may be argued that if material depicting sexual activity with minors, such as that in this case, does not fall within the ambit of the Acts, the behaviour may be normalised and cognitive distortions reinforced. The use of humour and satire arguably makes this even more likely.*
>
> *It may be argued that the decision conforms to the policy of the Acts since there is the likelihood that the audience reach of offensive material of this kind, could be increased beyond that which would be ordinarily attracted to such images, by virtue of the popularity and drawing power of the television show. Finally, the television show targets a very wide demographic, including children and young people.*

The CPWP therefore does not believe the decision has any unintended policy consequences and does not over-reach the purpose of the legislation.

[32] Submission to CPWP: Paul Winch, Public Defender "Discussion Paper re: McEwan v Simmons & Anor [2008] NSWSC 1292".

APPENDIX A

MEMBERS OF THE CHILD PORNOGRAPHY WORKING PARTY

His Honour Judge Peter Berman SC, Chairperson

Mr Michael Allnutt, Senior Assistant Director, Commonwealth Director of Public Prosecutions

Ms Anne Corbett, Regional Program Coordinator, Criminal Law Division, Legal Aid Commission of NSW

Ms Fiona Lansdown, Senior Policy Analyst, Law Enforcement Policy Branch, Department of Premier and Cabinet

Detective Superintendent John Kerlatec, Commander, Sex Crimes Squad, NSW Police Force

Acting Inspector John McCulloch, Operations Controller, State Electronic Evidence Branch, NSW Police Force

Ms Penny Musgrave, Director, Criminal Law Review, Department of Justice and Attorney General

Ms Vivienne Pastor, Legal Officer, NSW Police Force

Ms Johanna Pheils, Assistant Solicitor (Legal), NSW Office of the Director of Public Prosecutions

Federal Agent Brad Shallies, National Coordinator Child Protection Operations, High Tech Crime Operations, Australian Federal Police

Detective Inspector Bruce Van Der Graaf, Fraud Squad, NSW Police Force

Mr Paul Winch, Public Defender, NSW Public Defender's Office

Also in attendance

Federal Agent Kel Mansfield, Team Leader, High Tech Crime Operations, Australian Federal Police

Legal Research and Writing

Ms Kiersten Perini, Policy Officer, Criminal Law Review, Department of Justice and Attorney General

APPENDIX B

SCHEDULE OF LEGISLATION & CASES

LEGISLATION

NEW SOUTH WALES

Crimes Act 1900

Summary Offences Act 1988

Crimes Amendment (Sexual Offences) Act 2008

Crimes Amendment (Child Pornography) Act 1995

Confiscation of Proceeds of Crime Act 1989

COMMONWEALTH

Classification (Publications, Films and Computer Games) Act 1995

Criminal Code Act 1995

Crimes Act 1914

VICTORIA

Crimes Act 1958

QUEENSLAND

Criminal Code Act 1899

Police Powers and Responsibilities Act 2000

TASMANIA

Criminal Code Act 1924

WESTERN AUSTRALIA

Classification (Publications, Films and Computer Games) Enforcement Act 1996

Criminal Investigation Act 2006

NORTHERN TERRITORY

Criminal Code Act 1983

SOUTH AUSTRALIA

Criminal Law Consolidation Act 1935

AUSTRALIAN CAPITAL TERRITORY

Crimes Act 1900

CANADA

Criminal Code – R.S.,1985 c. C-46

CASES

Clark v R [2008] NSWCCA 122

He Kaw Teh v The Queen (1985) 157 CLR 532

McEwan v Simmons & Anor [2008] NSWSC 1292

R v Manson & Stamenkovic NSWCCA 17 Feb 1993

R v Oliver and others [2003] 2 Cr App R(S) 15

R v Nigel Keith Saddler [2008] NSWDC 48

R v Sharpe 1999, 22 C.R. (5th) 129 British Columbia Supreme Court; *R v Sharpe* 1999, 136 C.C.C (3d) 97; *R v Sharpe* [2001] S.C.R. 45, 2001 SCC2

Saddler v R [2009] NSWCCA 83