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BRIEF

Child pornography sentencing in NSW

2005

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INTRODUCTION

This brief looks at sentences imposed in New South Wales for the offences of possessing child pornography under s 578B(2) *Crimes Act 1900* (NSW) and publishing child pornography under s 578C(2A) *Crimes Act 1900* (NSW). The maximum penalty for the possession offence is the equivalent of \$11,000 or two years imprisonment or both, and for the publishing offence it is \$110,000 or five years imprisonment or both.

The Judicial Commission of New South Wales provided sentencing data for the three-year period from January 2000 to December 2003 (Judicial Commission of NSW 2004). In this three-year period, on 63 separate occasions sentences were imposed for the offence of possessing child pornography. Sentences were imposed for the offence of publishing child pornography on 14 occasions. Possession of child pornography is a summary offence that ordinarily is dealt with by a magistrate in the local court, and 62 cases were disposed of in that court. One case was dealt with in the district court as would occur where a possession charge is used as a back-up charge to other more serious offences brought to the district court. The publication charge can be dealt with either summarily or on indictment and 11 were dealt with summarily, while three cases were dealt with in the district court.

Data limitations

Of the sentencing data provided by the Judicial Commission:

- it is not known how many cases involved internet-based child pornography, whether sourced from commercial sites or internet relay chat rooms;

- an offender may be sentenced more than once within the reporting period and this is not shown in the data;
- the data show sentence outcome by broad category and do not reveal the terms of various orders or the amount of fines imposed; and
- details are not given on the nature of the material for which offenders were sentenced.

Importantly, the data presented enable us to examine judicial treatment of the problem posed solely by the possession or publishing of child pornography. The data only capture those cases in which the principal charge for which the offender was dealt with was possession or publication of child pornography. It therefore does not include those cases in which the possession of child pornography was incidental to other offences such as child sexual assault. In such cases, child pornography may be used by offenders for a number of purposes, such as their own personal gratification, to arouse the sexual interest of a child, to induce a child to accept sexual contact as normal, or as a trophy of their own abuse of the child depicted (being the subject of the assault charge, or concerning that victim at other times, or other children altogether).

SENTENCING PRINCIPLES

Sentencing is an intuitive process carried out by the judge, and must be finely tuned to meet the special circumstances of each case. Wide variations are likely to occur in relation to the nature of the offence and of the background of the offender. Given the breadth of the definition of child pornography, the courts are faced with an enormous range of factual situations concerning the nature and amount of illegal

material that an offender is charged with possessing.

An underlying premise in sentencing a person for possession of child pornography is the fact that most images record the actual abuse of a child and so constitute an image of a crime and of a crime scene (Sentencing Advisory Panel 2002). Not only is the victim initially abused, but the nature of the abuse is heightened by the presence of the camera. Recording the abuse that takes place emphasises the powerlessness and degradation of the victim. It also tends to exaggerate the abuse as the child is required to perform for the camera. The process of filming is intrusive and the producer may seek to satisfy a market for increasingly more serious images. Finally, the victim must live with the consequence of their image being swapped, traded and sold, perhaps perpetually, in the child pornography trade (Taylor & Quayle 2003). The nature and number of images involved are aggravating features that will increase a sentence for possessing child pornography (see *R v Jones* [1999] WASCA 24).

Where the material is fictional, the basis of sentencing retracts from being an actual record of abuse to material that encourages or fosters the portrayal of children as an appropriate focus of sexual interest (see *Dodge v R* (2002) A Crim R 435). However, there is no clear evidence that exposure to child pornography leads to a person committing a contact offence with a child (Taylor & Quayle 2003). There is evidence to suggest that, at least for some offenders with a sexual interest in children, fantasy plays an important role in their sexual life and that various individuals report satiation with types of images and an escalating interest in more extreme forms of child pornography (Taylor & Quayle 2003).

Possession of child pornography

Of the 62 cases dealt with in the local court for the offence of possessing child pornography, 30 were convicted and placed on a bond. This result represented the largest proportion (48 per cent) of cases overall, however, fewer than half of these (13 cases) were subject to supervision as a condition of the bond. Various full-time and alternative custodial options were imposed in 27 cases (43 per cent). The largest number of these were suspended sentences handed down in nine cases. Eight cases (13 per cent) received a full-time custodial sentence ranging from three months to 18 months (median nine months, mode six months). In five cases, offenders were required to perform community service. Other alternatives to full-time custodial sentences were imposed in four cases, such as periodic and home detention orders. In three cases, the offender was fined. In another three cases the charges were dismissed without recording a conviction.

Publishing child pornography

Of the 11 cases dealt with for the offence of publishing child pornography, five were placed on a bond following conviction. This result represented the largest proportion (45 per cent) of cases dealt with for this offence. However, fewer than half of these (two cases) were subject to supervision as a condition of the bond.

Suspended sentences were handed down in two cases. In another two cases offenders were required to perform community service and in one case a full-time custodial sentence of three months was imposed. One offender was fined. In this category no cases were dealt with by way of dismissal or periodic detention order or home detention order.

Offender age and outcome

Within the subgroup of those under 30 years (n=13), penalties involving supervision were imposed on 23 per cent of sentencing occasions, penalties with no supervision on 62 per cent of occasions and custodial orders on 15 per cent of occasions. Among offenders over 30 years of age (n=49), while a similar proportion of cases involved a penalty with supervision at 22 per cent, the doubling of the proportion involving a custodial penalty to 31 per cent came at the expense of unsupervised orders at 47 per cent. A chi square test was conducted in relation to these data and the variation was not found to be statistically significant, however, this is probably due to the low sample counts involved.

Nearly 80 per cent of the offenders dealt with for possession were over the age of 30 years (49 per cent were over 40 years). In relation to those over 30 years, the widest range of penalties was imposed. The number of persons over 30 who were sentenced to imprisonment may be skewed by factors such as ease of detection or the criminal histories of offenders. It accords with overseas experience of greater apparent participation in this type of activity by this age group. This could in turn be explained by sexual or social difficulties experienced by members of this group as well as their access to the means of offending such as computers and credit card facilities. The range of penalties applied in relation to offenders over 30 probably reflects the division of this group into preferential or opportunistic offenders, which would mean that some offenders were sentenced without a criminal history and others with

a criminal history for other child abuse offences. Interestingly, more than half (64 per cent) of the cases dealt with for publication of child pornography involved persons in the age group of between 21 and 30 years.

District court sentences

One possession charge was disposed of in the district court. In that case a sentence of 250 hours community service was imposed. Three publishing charges were dealt with in the district court. The sentences in these three cases were a bond, community service order and a prison sentence of 30 months. The ages of the persons involved were not indicated in the data provided.

CONCLUSION

While international studies have shown that child pornography offenders are almost exclusively male, and are often reported to be white male professionals, their patterns of offending are diverse (Taylor & Quayle 2003). Those who use child pornography can be divided into those who commit contact offences with children and those who do not. Some are situational offenders whose sexual interest is not primarily focused on children. These offenders are unlikely to have a criminal history of offences against children. Others are preferential offenders who are only sexually interested in children. These offenders are more likely than to have a criminal history involving the abuse of children. It is therefore important to consider the characteristics that give rise to the range of penalties imposed for this offence.

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Project no. 0074

ISSN 1832-3413



The Australian High Tech Crime Centre
funded this research.

Further reading

Judicial Commission of NSW 2004. Unpublished data on sentencing outcomes for offences under s 578B(2) and 578C(2A). Sydney: Judicial Commission of NSW

Sentencing Advisory Panel 2002. *The panel's advice to the court of appeal on offences involving child pornography*. London: Sentencing Advisory Panel

Taylor M & Quayle E 2003. *Child pornography: an internet crime*. Hove: Brunner-Routledge

Disclaimer: This research paper does not necessarily reflect the policy position of the Australian Government, the AIC or the AHTCC