

Children's Charities' Coalition for Internet Safety



The Rt Hon the Lord Chief Justice of England
The Royal Courts of Justice
The Strand
WC2A 2LL



27th August, 2002

Dear Lord Chief Justice,



Sentencing Advisory Panel
Offences involving Child Pornography



We are writing to urge you to disregard certain sections of the recent report on sentencing in cases involving child pornography, and accordingly to modify any advice you might pass on to judges.

1. Pseudo Child Pornography



In paragraph 31 the Panel define pseudo child pornography as being, essentially, an image which has been created artificially, for example though the use of morphing or other computer-based graphics software. The key fact about such an image is that it did not involve any “actual abuse or exploitation” of a real child.

We accept this definition but we do not accept the conclusions the Panel then draw, and we do not think the Panel can have fully thought through or grasped some of the implications of their advice. Certainly in their report they give no sign of having done so, and this adds to our sense of unease.

In effect the Panel are proposing a change in the law. Parliament allowed of no distinction between “real” child pornography and “pseudo” child pornography. In fact it did the exact opposite when they expressly created the new offences relating to pseudo pornography and put them on exactly the same footing as the pre-existing child pornography offences. Yet here the Panel are proposing to introduce just such a distinction between the two types of material.

And what are we to make of the proposed distinction?

The Panel propose a new hierarchy involving 5 different levels or types of images. We do not agree with important aspects of this new hierarchy, but we comment on those later. However, for the moment, taking the hierarchy of images as it appears in the Panel’s report, we make the following observations:

Level 1 images are regarded as being the least serious. They are defined as being “Images depicting nudity or erotic posing, with no sexual activity”. Levels 4 and 5 are the worst kind, defined respectively as “Penetrative sexual activity between child(ren) and adult(s)” or “Sadism or bestiality”.

On a first offence, where a person is found to be in possession of Level 4 or 5 type images, he could expect to go to jail for between 6 and 12 months, if the number of images involved was small, or for between 12 months and 3 years if there was a large number of such images.

By contrast, where a person is found to be in possession of Level 1 type images the Panel suggest a fine would be an appropriate sentence or, in certain cases, a discharge.

However, the Panel now propose to treat persons found to be in possession of Level 4 and 5 type material which is pseudo, as if they were only in possession of real Level 1 type material. Thus, a person found in possession of a large quantity of sadistic or bestial pseudo child pornography could simply be fined or discharged. This cannot be right.

Similarly, where a person is found to have *made* Level 4 or 5 pseudo images, it is proposed that, for sentencing purposes, their actions will be regarded as being “less serious”. The Panel are rather vague at this point about what exactly they mean by the term “less serious”. We sincerely hope they do not mean to say that *making* pseudo versions of Level 4 or 5 type images should be treated as if the person were merely in *possession* of real Level 1 images¹. The deliberateness and patience that is often required to manufacture pseudo images could betoken a very worrying mindset or attitude towards children.

One of the reasons why we make the point forcibly about how unacceptable it would be for Level 4 or 5 type pseudo material to be reduced to the status of Level 1 real material is because, once found guilty, it gives the court an option to discharge the defendant. A discharge means the defendant would not go on the Sex Offenders’ Register and would in theory therefore be free to continue working with children, or to start working with children. Potentially a person discharged in this way could be picked up by one of the other mechanisms used to filter out undesirable elements from working with children, but these other procedures can take a great many months to work through. In that connection we note also that the Panel refer to the use of disqualification orders under ss 26-34, Criminal Justice and Court Services Act, 2000, but these require the defendant to be sentenced to at least 12 months in prison and therefore could not apply to anyone found guilty in relation to Level 1, and presumably would not apply to anyone other than those convicted of more serious offences².

¹ We note also that the Panel refers to the act of “downloading pseudo child pornography”. We wonder how the person doing the downloading could ever know with any degree of certainty that the material he was about to download was pseudo rather than real? Wouldn’t everyone who posted material on to the Internet to be downloaded by others, henceforth, proclaim it to be pseudo so as to encourage people to download it without fear of being sent to jail for its possession? Wouldn’t such a policy tend to encourage the production of even more of this sort of material?

² These comments highlight the existence of several different regimes which impinge upon whether or not a person might be debarred from working with children. There may thus be a case for looking again at this whole area, to rationalise and clarify the basis on which the different jurisdictions interact or overlap, and above all for looking at how the non-statutory processes might be expedited.

The Sentencing Advisory Panel expressly say that they would not wish judges to use the device of a conditional or absolute discharge merely as a way of avoiding a person being put on the Sex Offenders' Register, and it has been suggested by the Home Office that they will legislate to eliminate this anomaly in the future, but the fact remains that for now it is still a possibility and the Panel did not think to comment further on this aspect.

This brings us to our next substantive point: under the proposed new regime it would be very much in the defendant's interests to establish that any material he had made or possessed was, in fact, pseudo child pornography rather than real. Often it might be easy to distinguish between real and pseudo images, but just as often it will not. Where will the burden of proof lie?

Will it fall to the police to investigate each and every claim? To what lengths will the police, or the defendant, be expected to go to prove or disprove the contention that something is pseudo? How much new or extraneous material might be added to a real picture, or by how much might it be manipulated, before it ceases to be "real" and becomes "pseudo"? If a paedophile added a relatively minor but nonetheless still artificial feature to an otherwise genuine image, would that make it a pseudo image?

Will the police have to locate the children depicted in an image to prove that the image is real? Might the children, once located, have to be brought before the court to testify as to the "realness", or otherwise, of the image and the part they played in it? Would the fact that the police were unable to locate the children in an image mean that, *faute de mieux*, the defendant's claim that the image is pseudo will succeed? Will juries have a role in determining whether or not an image is real or pseudo? How will juries be helped to reach a decision? What if a defendant took possession of material believing it to be pseudo, but in fact it later turned out to be real? What will happen if someone is unable to prove at trial that images in his possession are pseudo, so he is sentenced as if they were real, and evidence later emerges showing that the material was pseudo? Given how much of contemporary child pornography seems to originate overseas all this could certainly stretch police and other resources considerably.

In short, by introducing a notion of difference that is based on the provenance of the image, rather than its visual impact, the Panel potentially opens up a whole new set of issues, and these are issues the Panel seem to have failed to discuss at all, let alone in any depth. If the Panel's advice were to be followed there is a severe risk that the police would have great difficulties bringing any prosecutions at all and they would therefore de-prioritise work in this area altogether.

The above notwithstanding, the Panel's reasoning seems in any event to be contradictory. On the one hand it says that possessing pseudo child pornography should always rank as a Level 1 offence, irrespective of its nature, yet, if we have understood paragraph 32 correctly, trading in it or distributing it will mean that the image is treated as if it was real. How can these two positions be reconciled?

Finally, while naturally we agree that images of actual children being abused ought to be outlawed, we do not think the fact that a real child has been abused is the *only* reason why such images should be illegal. The corrupting impact of the image itself

has to be considered, and in that respect whether it is real or not is absolutely irrelevant. We ought also to be mindful of the contingent harm associated with these images. Practitioners at the Wolvercote Clinic believe that possessing and using child pornography can fuel a desire to go on and offend against children in real life. In his report "People Like Us", HMSO, Sir William Utting noted how child pornography can be used by paedophiles to show intended victims that sex between adults and children is both "normal" and "fun".

Are the Panel really not getting dangerously close to saying that certain types of pictures which show children being sexually abused, perhaps even in horrific ways, are on the margins of acceptability, or at any rate are not very serious, providing only that they have been artificially created or manufactured out of someone's sick imaginings?

This very obvious downgrading of the importance of pseudo child pornography would send out entirely the wrong message, not only to real children, but also to society at large. We trust you will disregard the Panel's advice in this respect and maintain the view that pseudo and real child pornography are to be treated identically.

2. The Hierarchy of Pictures

Our principal criticism of the proposed new hierarchy relates to Level 1. We think it is too broad.

The Panel's proposed Level 1 embraces COPINE's categories 2-6. These range from "Nudist (naked or semi-naked in legitimate settings/sources)" to "Explicit erotic posing (emphasis on genital area)". A very large number of families in Britain will, entirely properly, possess pictures of their own children "...naked or semi-naked in legitimate settings....". The idea that such pictures should even appear on a list that seeks to categorise child pornography, or that it is bracketed with "Explicit erotic posing...", will greatly offend a good many people. Moreover the reasoning for including COPINE's 2 & 3 seems curious.

The Panel acknowledge that there may be a dispute as to whether or not COPINE's 2 or 3 images are indecent, and we can see why, but they justify their inclusion on the grounds that a defendant might have pleaded guilty or been convicted solely on the basis that he possessed them. This seems to put the cart before the horse.

Either the images are capable of being defined as being indecent, or they are not. Why would a court, or anyone, want to secure a conviction of someone for child pornography offences when the images they possess are not actually child pornographic? Moreover, the Panel allude to the "manner" in which the pictures might have been acquired ("surreptitious"). Surely this can have no bearing on whether or not the pictures are, in fact, indecent? If someone has taken pictures of children surreptitiously he may be guilty of other offences, but we fail to see how these sorts of mechanics can turn an image that was not criminally pornographic into one that is.

We suggest COPINE's categories 2 & 3 are struck out of the hierarchy altogether. The new Level 1 would therefore consist only of images within categories 4, 5 & 6 of COPINE's typology.

3. Recommended sentences

In some ways this is at the heart of the report and we find it lacking in important respects. Prior to the Criminal Justice and Court Services Act, 2000, the maximum sentence for possessing pseudo or real child pornography was 6 months, and for making or distributing pseudo or real material the maximum was 3 years. The 2000 Act increased the penalties, respectively, to 5 years and 10 years.

The effect of the Panel's report is substantially to set aside Parliament's wishes, as expressed in the provisions of the 2000 Act, and in a material way to reinstate the status quo ante. Only "more serious offences" would attract sentences greater than 3 years. Illustrations of what constitute more serious offences are given, but sentences closer to the 10 year maximum seemingly are to be reserved for "very serious examples", and no illustrations are given. This leaves a great deal to judicial discretion.

We believe Parliament created the new sentencing powers in order to show modern society's disapproval of the growing trade in child pornography, which has been largely fuelled by the recent arrival of the Internet. We believe Parliament wanted these greater sentencing powers to be reflected across the range of offences, and not be limited to what the Panel determine are the "more serious" or "very serious" offences.

We acknowledge that we are not competent to draw exact lines of demarcation between the different levels of seriousness of crimes in terms of what should, and should not, attract a particular length of custodial or other type of sentence. Similarly we understand that the Panel have a responsibility to relate sentencing in these cases to sentencing in other areas of the criminal law in order to maintain some sort of overall consistency, coherence and proportionality. Perhaps these latter considerations acted as an external pull on the Panel's final judgements. If child protection had been the Panel's first concern, they might have reached quite different conclusions.

Our primary interest is not, in a particular case, in whether or not a person goes to prison. We are concerned solely with the protection of children. In that connection we think anyone and everyone convicted of child pornography offences ought to undergo some kind of assessment to ascertain whether or not they might be an ongoing danger to children. Ultimately their sentence and/or their treatment should be determined by the outcome of that assessment.

That said, we recognise that custodial sentences can have an important deterrent effect, and they might also have a retributive element. In that connection our strongly-held feeling, very simply, is that the Panel should lower the level at which custodial sentences ought to be given. This would seem to us to be far more in tune with Parliament's wishes.

4. Aggravating Factors

We support the list of aggravating factors given in para 40 (e). Perhaps in the final advice issued a further and specific reference could be added to children drawn from vulnerable groups e.g. runaways, trafficked children, asylum seekers or children who have been ensnared in commercial sexual exploitation.

We apologise for the length of this letter. The bulk of it is taken up with our comments on pseudo pornography. In our response to the original consultation document we asked the Panel to consult us further if they were minded to pursue their original suggestions in relation to pseudo child pornography. We made it clear that there was more we would have wanted to add to the briefer comments we made in our main submission. The Panel did not take up our offer.

Yours faithfully,

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