

### 3<sup>rd</sup> International Seminar on Information Law 2010

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## Freedom of Expression in Cyberspace and the Coroner's and Justice Act 2009

One half of the world cannot understand the pleasures of the other."

*(Emma, Jane Austen)*

### The panic

The focus of this paper is pornography. More specifically anti pornography law in the UK and more specifically still, law that prohibits pornographic images of children. For many people, this is a not a controversial area. Because they are convinced that the laws would never apply to them, then they are happy that prohibitions are on the statute book to deal with the paedophiles in the community and beyond.

It may be however, that sometimes the law, particularly unquestioned and unchallenged, for whatever reason, can go too far and can become not only disreputable but counterproductive in its reasoning and its practicalities. The Coroners and Justice Act 2009 is a wide ranging piece of legislation which covers duties of coroners investigating deaths and in relation to treasure trove, as well as partial defences to murder, infanticide and assisting and encouraging suicide, genocide, conspiracy, evidence and treatment of witnesses. Amongst this rag bag of a statute s62 to 69 cover the possession of a prohibited image of a child.

This act passed into law without media coverage except on the revised provocation criteria as a partial defence to murder. This is probably because much of the act is of a technical and procedural nature which would only invite comment from practitioners or the police, but s62 – 69 are of an altogether different order and will undoubtedly bring many unwise individuals within the remit of a personally disastrous offence.

### The Explosion

Before the 1970's law enforcement authorities saw few indecent images of children, although it would be plainly untrue to say that sexual interest in minors did not exist before this time. Cultures throughout history have tolerated or encouraged the

taking of adolescent boys and girls as sexual partners or brides. The age of consent for girls in the UK in the 1860s was twelve, raised to 13 in 1875 by Parliament. It wasn't until the late 19<sup>th</sup> century that the age of consent for girls was fixed at 16, where it remains today. As little as 130 years ago in the UK, many girls would have been married by the age of 16 and most of them would have been mothers. This is not to suggest that increased protection is a bad thing, simply that our concept and definition of childhood is plainly something that alters with time and cultural and religious heritage.

A British person in their late thirties can probably easily remember the British government of the day<sup>1</sup> outlawing the possession of indecent images<sup>2</sup> of children and members of the Paedophile Information Exchange – or PIE for short – demonstrating in the street at what they was as a restriction of their liberty.

What is beyond a doubt now however, is not just that there are more indecent images of children to be found, but they are probably of a much more extreme nature, involving toddlers, or even babies, and there is no doubt that people who produce or pay to view such images are – and should be – committing a serious criminal offence. These are the paedophiles of our nightmares. What has been surprising has been the number of people who have been 'caught looking' at indecent images of children. The famous 'Operation Ore' in the UK resulted in 7,000 suspects in the UK, of whom 3,500 were arrested and 1,230 convicted for possession of indecent photographs of children under s1 of the Protection of Children Act 1978. Among those convicted were teachers, doctors and members of the police force as well as previously convicted paedophiles. Several individuals committed suicide rather than face investigation and charge. These people, while undoubtedly still indulging in reprehensible criminal behaviour, are probably not what we imagine as paedophiles, and if asked to self describe, would almost certainly not put themselves into that demographic. So what makes them look at such images, when the cost is likely to be so high? Privacy and imagined anonymity cannot be overlooked, but what should be a repressive force even in those circumstances might be a sense of guilt as to what was being seen and certainly funded by an individual's decision to view such material. A person's feelings of guilt can undoubtedly be lessened by the remoteness he feels from the situation and the perceived permissiveness of the internet culture. Giddens<sup>3</sup> describes guilt as carrying

*'the connotation of moral transgression: it is anxiety deriving from a failure, or an inability, to satisfy certain forms of moral imperative in the course of a person's conduct.'*<sup>4</sup>

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<sup>1</sup> The Conservative government under Margaret Thatcher

<sup>2</sup> Criminal Justice Act 1988 s 160

<sup>3</sup> Giddens, A (1991) *Modernity and Self Identity*, Oxford: Polity

<sup>4</sup> *Ibid* p 153

He goes on to suggest that the diminution of guilt in modern society is as a result of the erosion of Society itself in late modernity and because of this the experience of self becomes increasingly inwardly reflexive as the moral community which previously held it in check diminishes or fragments. If this is true of the society in which we live with its permissiveness and wider tolerance of sexual difference, it is probably fair to say that the theory is even more relevant to the online society in which many viewings or exchanges of indecent material take place. This is a new society which is feeling its way, and encourages free and frank exchange of views and makes a speciality of embracing the abnormal and disenfranchised. It is, in short, a perfect place to be accepted, and a perfect place to hide. People simply do not link their behaviour on line as transgressive, because they feel free from the pressure to conform. Much has been made of the importance of the internet as a place of escape into fantasy worlds where the impossible becomes real, and an individual can be rid of their reality, where a person can fly, or be tall, or be a member of the opposite sex. There may be more discomfort about the internet as a place where a person feels that the person they actually are can escape from the unreal persona they have to present to the real world, which would reject them if it knew of their true face. There is something to be said of the internet as a place of masks and deception. It must be realised that just as many people are taking their masks off online as are putting them on.

And some of them are people whose reality society does not approve of.

It needs to be clear that I don't for one moment think that laws protecting our children are too tough, but it also has to be accepted that there is a section of society for whom the sexual interest in younger people is a fact of their lives. Ignoring this section of society will not make children safer, nor will it make them go away. Criminalising anything that looks as though it might be attractive to one of these people is spreading the net too wide and risks sweeping many into the laws grasp that should not be there, with terrible consequences for their lives. The Coroner's and Justice Act 2009 has made it illegal to sketch a picture of a naked child which is drawn by the defendant and shown to no one else. If that still sounds a reasonable law to have, the definition of a child - discussed later in this work - may give pause for further thought.

### **The Legislation**

The protection of children from exploitation and damage within the pornography industry has rightly come a long way in the last 22 years, before which it was legal<sup>5</sup> in the UK to possess indecent photographs of children as long as a person didn't

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<sup>5</sup> S1(1) Protection of Children Act 1979 – It is an offence to take or permit to be taken any indecent photograph of a child or to distribute or show such a photograph or to have it in possession with an intention to distribute or show it.

produce them and had no intention of showing or distributing them<sup>6</sup>. From here the law has moved to keep pace with photoshop technology by making criminal the possession of pseudo-photographs<sup>7</sup> - defined by Lloyd as

“what appears to be an indecent image of a child, which is made up of a collage of images, modified by the use of computer painting packages, none of the elements of which is indecent in itself.”<sup>8</sup>

The inclusion of pseudo photographs could be seen as controversial in two ways. One was the inclusion of the word ‘make’ within section 1 of the PCA, where previously it was a prohibited act to ‘take’ an indecent image of a child. Although the word ‘make’ was intended to refer to the pseudo-photograph, it quickly became established that a person downloading an image from the internet could be convicted of ‘making’ a photograph, with the implied nexus to the abuse shown. This meant that a possession offence under s160 CJA 1988 carrying a maximum of five years imprisonment could be charged as a s1 PCA offence carrying a ten year maximum sentence if a person obtained the image from a computer system. This may be justified as the market for such images would be diminished if consumers did not keep up the demand for them, but it creates a dichotomy between an online and offline offence which is far from ideal. The second controversy rests on the notion of harm. A realistic image which is created without harm to an individual is therefore prohibited by the inclusion of pseudo photographs in the PCA 1978 and to a certain extent the role of fantasy in an individual’s private sphere of his/her sexual life has already been curtailed significantly. In the American case of Campbell, a man had superimposed young girl’s heads onto the bodies of adult women to ‘see what they would look like when they were older’. It was accepted by the prosecution that the man had not contacted the girls in any way, and one of them appeared to be the ‘Hannah Montana’ character from American television and film. The actress who plays Hannah Montana, Miley Cyrus, was nearly 17 years old at the time of the charge. The Assistant District Attorney<sup>9</sup> is quoted as saying,

*“When you have the face of a small child affixed to the body of a mature woman, it’s going to be the State’s position that this is for sexual gratification and that this is simulated sexual activity.”*<sup>10</sup>

According to UK law, an indecent pseudo-photograph will be illegal if it ‘appears to be a photograph’<sup>11</sup> and shall be treated as a child if ‘the predominant impression conveyed is that the person shown is a child, notwithstanding that some of the

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<sup>6</sup> S160 Criminal Justice Act 1988 amended s1(1) of the Protection of Children Act 1979

<sup>7</sup> S84 Criminal Justice and Public Order Act 1994

<sup>8</sup> Lloyd, I *Information Technology Law* Oxford University Press, 5<sup>th</sup> Edition (2008) page 254

<sup>9</sup> Dave Denny (Chattanooga, Tennessee)

<sup>10</sup> CNN.com

<sup>11</sup> S7(7) PCA 1978

characteristics shown are those of an adult.<sup>12</sup> An image therefore has to pass a test of some objective realism before there could be a conviction.

Even since this stage legislation in the UK has progressed rapidly, to keep up with the alleged depravity in the digital environment. In 2008 the unloved s69 (3) of the Criminal Justice and Immigration Act made it an offence to possess an illegal image which had been 'derived from' a photograph, which presumably covers morphed Computer Generated Images (CGI's) and freehand drawings 'copied' from a photograph or pseudo photograph, but does not cover a product of the artists imagination. With the disquiet about the effectiveness of s 69(3)<sup>13</sup> Parliament moved quickly to 'plug the gap' left for internet predators by bringing in s62 of the Coroners and Justice Act 2009 which makes it illegal to be in possession of non-photographic 'prohibited images of a child ..... produced by any means.' A prohibited image is one that is

(a) pornographic<sup>14</sup>

(b) falls within subsection 6, and is

(c) grossly offensive, disgusting or otherwise of an obscene character.

At first sight s62 is an admirable piece of legislation. It closely mirrors s63 of the CJA 2008 which prohibits 'extreme pornography'<sup>15</sup>, the language of the section is straightforward in addressing what many might consider a social evil of epidemic proportions and it requires the specific consent of the DPP for a prosecution to be brought. However, s63 of the CJA 2008 contains an important codicil in that ;

*'a reasonable person looking at the image would think that any such person or animal was real.'*<sup>16</sup>

S62 carries no such limitation and therefore there is apparently no legal demand for objective realism of the prohibited image. This takes the law into entirely new territory. While there may have been an argument that pseudo photographs and genuine photographs were too alike to tell apart, with the extra burden it may have put on the prosecution to prove actual abuse, that argument cannot be made under s62 which clearly prohibits work of the artist's imagination in any medium<sup>17</sup>.

Those who have to obey the law are then faced with a crime they may not have anticipated and - thanks to the upset that the mention of child pornography often engenders - know little about. For reasons that may be obvious, and may be

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<sup>12</sup> S7(8) PCA 1978

<sup>13</sup> See 'Camera Obscura – the CJA 2008 and Virtual Pornography'

<sup>14</sup> Definition of pornographic is based on a 'reasonable assumption' and is therefore objective.

<sup>15</sup> 'It is an offence for a person to be in possession of an extreme pornographic image'

<sup>16</sup> S63(7) Criminal Justice and Immigration Act 2008

<sup>17</sup> See comments over the display of the 'Warren Cup' at the British Museum

legitimate, when a person accused of being in possession of illegal images of children is arrested or charged, the public usually know only the number of such images in the defendant's possession. Left to imagine, we imagine the worst, a young girl or boy somewhere raped or tortured for sexual kicks, perhaps repeatedly, and righteous condemnation follows. The truth in any given case may be more prosaic, may be something many of us have seen or rolled our eyes at, and may arguably even be a breach of an individual's freedom of expression or his right to privacy under Art 10 or 8 respectively of the Human Rights Act 1998<sup>18</sup>. This paper will be asking, objectively, and hopefully away from the heat of hysteria, if s62 of the Coroners and Justice Act has gone too far in proscribing the rights of an individual to admit to his own private sexual fantasies, with no corresponding consolidation of the rights of another who should be protected.<sup>19</sup>

In the case of *R v Kingston*<sup>20</sup> Lord Taylor CJ in the Court of Appeal said

*"Having paedophilic inclinations and desires is not proscribed; putting them into practise is."*

It would seem that in the face of this legislation, his first assertion is now untrue under English law. However, as s62 CJA did not come into force in the UK until 10<sup>th</sup> of April 2010 there have understandably been no prosecutions as yet under it. It might be helpful to look to other jurisdictions and the similar phraseology under s63 CJA 2008 in order to ascertain how our own legislation may be applied. Consider the following case law.

### **McEwen v Simmons**<sup>21</sup>

This is a fairly recent Australian case concerning an appeal by McEwen against his conviction for possession of child pornography. S 91H(3) of the Crimes Act 1900 (NSW) reads;

*'child pornography.....material that depicts or describes, in a manner that would in all the circumstances cause offence to all reasonable persons, a person under (or apparently under) the age of 16 years (a) engaged in sexual activity, or (b) in a sexual context....'*

McEwen was in possession of spoof 'Simpsons' cartoons where the 'ten year old Bart' and 'eight year old Lisa' were portrayed as being engaged in sexual acts.<sup>22</sup>

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<sup>18</sup> 'Everyone has the right of freedom of expression. This right shall include the freedom to hold opinion and to receive and impart information without interference by public authority.....'

<sup>19</sup> For a criticism of 'neutral academic discussion on pornography' which 'lacks emotion and humanity' see *The Reality of Pornography* – Clare Phillipson – McGlynn, C., Rackley, E., and Westmarland, N.(eds)(2007) *Positions on the Politics of Porn. A debate on the government plans to criminalise the possession of extreme pornography*, Durham: Durham University. ISBN 978-0-903593-27-4

<sup>20</sup> (1994) 3 All ER 353 HL

<sup>21</sup> [2008] NSWSC 1292

This was followed by the case of Milner<sup>23</sup> who was convicted on the strength of Simpsons and Powerpuff Girls cartoons which the police managed to retrieve from his computer's recycle bin a year after the machine was seized. He claimed to have downloaded the images to show them to a friend because he 'thought they were funny'.<sup>24</sup> He was jailed for 12 months, suspended for five years, fined \$1000 and has to sign the sex offenders register. Ironically, in 2003 he received just two years probation for being found with 59 indecent images of real children on his computer.

### **US v Whorley**<sup>25</sup>

Whorley appealed against his conviction for possessing Japanese Anime cartoons which contained depictions of children engaged in sexual acts, and for sending and receiving emails containing discussions of children being involved in sexual activity. The appeal was dismissed, but there was dissenting judgement, based on the minimal – or non- existent – harm that the fantasies involved.

### **R v Holland**<sup>26</sup>

Holland was charged initially with two offences under the CJIA 2008 possession of 'extreme pornography'. One charge related to a film clip featuring bestiality, and the other to a short clip containing two women. The first charge was dropped after the 'animal' involved was revealed to be a spoof of a cartoon tiger from a breakfast cereal advert, but Holland pleaded guilty to possession of the other, saying he had been sent it as a joke but had forgotten to delete it. The clip apparently involved two women, coprophilia and vomit<sup>27</sup>. He was warned to expect a custodial sentence.

### **The Rights?**

These cases come from different jurisdictions with differing legal jurisprudence, trying essentially to grasp the same nettle. How far should the law intrude into a person's private expression of his or her sexuality where there is no harm or risk of harm to another, and has a person a defence that he should be left alone in certain areas of his life?

### **Constitutional Rights**

Jurisdictions with a written constitution to uphold the rights of the citizen against the state seem to fare better in this respect. The case of R v Sharpe<sup>28</sup> before the

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<sup>22</sup> Brian Simpson - *Controlling fantasy in cyberspace: cartoons, imagination and child pornography* ICTL Vol 18 Issue 3

<sup>23</sup> <http://www.qt.com.au/story/2010/01/26/an-ipswich-man-has-admitted-downloading-graphic-ca/>

<sup>24</sup> ibid

<sup>25</sup> United States Court of Appeals, 4<sup>th</sup> Circuit, December 18, 2008

<sup>26</sup> Unreported – Mold Crown Court – see PoliceSpecials.com – 'Man could face prison over six second porn clip' 13<sup>th</sup> April 2010'

<sup>27</sup> It isn't entirely clear how this is 'extreme pornography' as opposed to pornography. In order to be extreme, it must conform to s7 – must be life threatening, or likely to result in serious injury, or involve a human corpse or an animal – none of which are apparently present here.

<sup>28</sup> [2004] B.C.J. No 1565; 2004 BCSC 240; 2004 BC.C. LEXIS 1676, Judgment: February 20, 2004

Supreme Court of Canada held that a virtual or created image of a non-real child could not be prohibited by legislation when kept for the private purposes of the creator:

*‘This definition of ‘child pornography’ catches depictions of imaginary human beings privately created and kept by the creator. Thus, the prohibition extends to visual expressions of thought and imagination, even in the exceedingly private realm of solitary creation and enjoyment...’*

Similarly in the United States of America, sections of the Child Pornography Prevention Act 1996 were challenged as unconstitutional under the First Amendment as they prohibited (inter alia)

‘visual depiction is *or appears to be*, of a minor engaging in sexually explicit conduct.’ (emphasis added)

In *Ashcroft, Attorney General, et al v Free Speech Coalition et al*<sup>29</sup> the Supreme Court Justice commented that there had been a failure to show a causal link between CGI images and harm to real children, he also stated in the judgment;

*‘First Amendment freedoms are most in danger when the government seeks to control thought or justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected because it is the beginning of thought.’*

## **ECHR Rights**

In Europe the legislation most often used in an attempt to protect a perceived breach of an individual’s rights to freedom of expression and to his privacy are Articles 10 and 8 respectively of the European Convention of Human Rights, enacted into UK law as the Human Rights Act 1998. Most people are familiar with Art 10(1);

*‘Everyone has the right of freedom of expression. This right shall include freedom to hold opinions and to receive and impart information without interference by public authority....’*

Qualified by Art 10(2);

*‘The exercise of these freedoms, since it carries with it duties and responsibilities may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety for the prevention of disorder or crime, for the protection of health or morals for the protection of the reputation or rights of others....’*

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<sup>29</sup> 535 U.S. 234 (US Supreme Court 2002)



As 'expression' has been held not to apply to just speech but to many forms of self expression<sup>30</sup> a complaint of a breach of this right has been a classic defence to pornography possession or production. It has also been held to encompass the right of a person to receive information, not just to express it. The European Court of Human Rights has held that freedom of expression is;

*'Necessary for individual self fulfilment and an essential foundation of a democratic society. A democratic society, characterised by pluralism, tolerance, and broadmindedness, is a necessary condition in which human rights can be protected and justice and peace can flourish.'*<sup>31</sup>

In return, the protection of morals is cited as a justification for a prosecution, and States have traditionally been allowed a wide margin of appreciation by the European Court of Human Rights and been held to have acted within their discretion viz-a -viz the protection of morals<sup>32</sup> under their jurisdiction. However, in the case of Muller<sup>33</sup> the court found that this margin was not at odds with an individual's right to express himself in a way that may 'shock, disturb and offend the state or any section of the population'.<sup>34</sup>

In order for the protection of morals to prohibit the freedom of a person's expression, the prohibition must be proscribed by law and be necessary in a democratic society. With the advent of s62 of the CJA 2009 the drawing of a naked child can be said to be proscribed by law, but is such a prohibition necessary? The necessity of a prohibition will rest upon whether or not it is a proportionate way of meeting a pressing social need. There is – of course – a pressing social need to protect living children from abuse, but whether s62 is a way of meeting that need could be debated. It is worth remembering again that there are no children involved in the making of the material in question and the CJA recognises the distinction between harm to real children and this new offence by restricting the maximum sentence for s69 to three years as against 10 years for a PCA offence. In a recent Home Office consultation paper it is stated;

*'We are not aware of any specific research carried out to ascertain whether there is a direct link between possession of these (cartoon) images and increased risk of sexual offending against children.'*<sup>35</sup>

It has been argued extensively that images such as these can be used to lure children into abuse by presenting a normalised view of sexualised behaviour and therefore the legislation is necessary to prevent an indirect 'harm' to these children.

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<sup>30</sup> For instance music, dancing or choice of clothing.

<sup>31</sup> Handyside v United Kingdom (1979 – 1980) 1 EHRR 737 (para 49)

<sup>32</sup> See for instance R v Perrin [2002] EWCA Crim 747

<sup>33</sup> Muller v Switzerland (1988) 13 EHRR 212

<sup>34</sup> Although in this case the circumstances of the exhibition made the offences within the state's margin of appreciation.

<sup>35</sup> Home office consultation paper on the possession of non-photographic depictions of child sexual abuse p6

The Sexual Offences Act 2003 covers specific scenarios, such as S10,<sup>36</sup> A person found showing pornographic pictures to a minor could arguably be charged with this offence, or s12,<sup>37</sup> which covers 'looking at an image of any person engaged in ...sexual activity'.<sup>38</sup> The maximum term of imprisonment for the incitement offence is 14 years, so the potential problem of an individual using non photographic images to normalise aberrant sexual behaviour appears already to be taken account of in criminal statute, further bringing into question the 'necessity' of s62 as a protective measure for children in society, as well as the proportionality of the measure of the restriction to the rights of individuals as against the harm prevented. The illegality of non photographic images of children, if deemed to be in the prohibited category, is subject only to the defences of 'legitimate reason for possession', 'did not know or have cause to know it was a prohibited image of a child' or 'was sent the image without prior request and did not keep it for an unreasonable period of time'.<sup>39</sup> These defences closely mirror the PCA 1978 defences, and raise the issue of the meaning of 'legitimate reason for possession', which has not been defined in either act. The CPS on its website states that the defences cover those who have a 'legitimate work reason for being in possession of the images'.<sup>40</sup> This might cover doctors or the police or a barrister preparing a case. The courts seem to have been dismissive of individuals claiming academic research as a legitimate reason, possibly with good reason, but this defence is based on the reverse burden of proof where it is for the defendant to prove he had a legitimate reason for the possession. It seems unlikely that a person who has produced non photographic images for their own private use, or has a downloaded cartoon or Anime in their possession would be able to prove legitimate use to a jury's objective satisfaction under s64.

It would seem that a person pleading a breach of his Art 10 rights because of a charge under s62 has little chance of success. Pornography *per se* has traditionally been viewed by the judiciary within the UK as having few redeeming features worthy of protection under Art 10 that are not trumped by the margin of appreciation allowed to states under the protection of morals. However, cases such as *Handyside* and *Muller* were decided partially upon the rights of others not to be unwittingly exposed to expression they might find disgusting and the protection of children from the material that was freely and publicly available. If those rights are not engaged, perhaps because an offence under s62 prohibits the mere possession of privately created and held material which causes (certainly) no individual or (arguably) societal harm, then the protective mechanism of the law must be focussed upon the creator and possessor of the item himself. This is nothing new in English law, in *DPP v Whyte*<sup>41</sup> the Court of Appeal held that the Obscene Publications Act 1959 is not intended to focus on the harm that might be inflicted on another but is

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<sup>36</sup> Causing or inciting a child to engage in sexual activity

<sup>37</sup> Causing a child to watch a sexual act

<sup>38</sup> S12(1)a SOA 2003

<sup>39</sup> S64 (1) CJA 2009

<sup>40</sup> [https://www.cps.gov.uk/legal/p\\_to\\_r/prohibited\\_images\\_of\\_children/#a15](https://www.cps.gov.uk/legal/p_to_r/prohibited_images_of_children/#a15)

<sup>41</sup> [1972] AC 849

intended to protect the minds of those who are likely to encounter the obscene work in question:

*'Influence on the mind is not merely within the law, but is its primary target.'*

It must be questioned how far a democratic society should go in an attempt to impose a paternalistic norm on a minority interest within it and how a denial of an expression of self - which a person's sexuality undoubtedly is - will affect that individual's notion of selfhood.

Given that the expression of a sexual identity is part of the concept of an intimate self knowledge, perhaps the prohibition of non-photographic images is better approached under Article 8 ECHR;

*'Everyone has the right to respect for his private and family life, his home and his correspondence.'*

Subject to article 8(2)

*'There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'*

In the case of *Bruggerman*<sup>42</sup> the Court of HR said

*(Art 8) 'Also secures to the individual a sphere in which he or she can freely pursue the development and fulfilment of his or her personality.'*

Here again, the UK courts have been undecided on the relevant sphere in which an individual can flourish unmolested and their conclusions have been far from consistent. In the famous case concerning sado-masochistic homosexuals<sup>43</sup> it was held that consent to the bodily harm suffered by one of the individuals was not a defence to a charge under s47 of the Offences Against the Person Act 1861 as such a defence

*'for the purpose of satisfying a sado-masochistic libido were not in the public interest.'*

This contrasts with the case of *Wilson*<sup>44</sup> where the court decided that there were no public policy or public interest reasons why the appellant's branding of his wife's buttocks with a hot knife - apparently at her insistence - should be subject to criminal law.

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<sup>42</sup> *Bruggerman and Scheuten v Germany* [1977] D + R 10 para 55

<sup>43</sup> *Brown* [1993] 2 All ER 75, [2003] Crim LR 583

<sup>44</sup> [1996] Crim LR 573, CA

These cases were decided before the Human Rights Act 1998 came into force and were heard in UK courts, but the case of Dudgeon<sup>45</sup> may be of relevance here.

Mr Dudgeon complained that a statute prohibiting private homosexual acts between consenting adults breached his rights to privacy under the Art 8 of the European Convention. The Court held at para 41

*‘The maintenance in force of the impugned legislation constitutes a continuing interference with the applicant’s right to respect for his private life (which includes his sexual life) within the meaning of Article 8(1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life either he respects the law and refrains from engaging.... In prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.’*

Clearly there are differences here between consenting adults and an act involving a child who cannot consent, and the Court was careful to point out that legislation may be necessary to protect the vulnerable, particularly the young. In our discussion, there are no acts, there are no children, but the legislation, as has been seen, will directly and continuously affect an individual’s sexual life, with a choice either to forbear or to face prosecution. There will be those who argue that the law should enforce forbearance in such a circumstance, and that the paternalistic norm should prevail, but part of the concept of a democratic society is the care and tolerance it displays towards minority interests. In arguing that we have become less tolerant as a society, Alan Norrie<sup>46</sup> suggests that the outcome of the twentieth century’s drift into equality legislation has the effect of making society less equal as we display alarm and anger at those who are not capable of being brought ‘into the fold’ of normality, whatever that is. Equality legislation insists upon us all being equal and there is little room for transgressors.

Morals are concerned with the principles of right and wrong behaviour and with the goodness or badness of human character. This can be seen as conforming not to the physical or practical elements of humanity, but rather to the psychological aspects of a person’s life – his thoughts and feelings, indeed the very characteristics that make that person who he is. There may be a valid argument of seeking to prevent harm to actual children by allowing animated or artistic images as a necessary means for an individual to express his or her private sexuality.

## **The Coroners and Justice Act 2009**

### **Is it a ‘child’?**

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<sup>45</sup> Dudgeon v United Kingdom ECHR 23<sup>rd</sup> September 1981

<sup>46</sup> Law and the Beautiful Soul – Glasshouse Press

The Coroners and Justice Act accepts that one of the points of the legislation is that a reference to an image of a child includes reference to an image of an imaginary child<sup>47</sup>. This seems a straightforward concept, but may be open to a much wider interpretation than intended. Is imaginary the same as fictional for instance? The Whorley and McEwen cases rest on what was referred to in the judgement as a 'representation' of a person – an image that was understood, while not being an actual person, as being person-like. In his comments on the McEwen case, Adams J was troubled by defining a character in a cartoon such as this as a person, even an imaginary one. He wondered how 'realistic' such a character had to be to make it a visual representation of a person, and whether the cartoon of an animal with some human characteristics would still amount to such a representation. Would Mickey Mouse have sufficient human characteristics to be the representation of a person, or Donald Duck?

Is imaginary the same as virtual? There has been debate about the freedom of individuals on line in virtual games such as Second Life, to 'age play' so that their characters assume the physical dimensions of children who can then form 'sexual relationships' with 'adult' avatars, in spite of all the players involved being over eighteen years old in real life. Is a small avatar to be taken as a 'child'? According to legislation, if it is an imaginary child, it would appear so.

### **Image versus text**

A dichotomy in the prohibition of materials which sexualise under eighteens is the law's horror of the image, as opposed to its relatively relaxed outlook on textual description of child/adult relationships. In Whorley the dissenting judge Gregory J said

*The content of the emails can be described as 'a series of engaging in fantasies on the internet..... The economic and social justification for regulating email fantasies – even those involving activities that would be criminal if those fantasies were acted out – are minimal. Indeed, the harm, if any, involved in Whorley's conduct is not readily discernible because the emails were written and exchanged for the sole 'enjoyment' of Whorley and his counterpart..... real children were not harmed, (or even discussed) during the 'production' of these emails.*

The judge went on to mention authors, books<sup>48</sup> and films which have focussed on adult/child relationships, and to use them as examples of such works having 'redeeming social value' which the Government should not suppress as it would not aid in 'protecting the victims of child pornography' or 'the destruction of the market for the exploitative use of children.'

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<sup>47</sup> De Reuck v Director of Public Prosecutions and Others [2004] 4 LRC 72 (South African Constitutional Court)

<sup>48</sup> For example Lolita, The Color Purple and Absolom, Absolom.

In the UK the dichotomy between how the law views the image and the written word is as acute. Unless text is capable of being brought within the remit of the Obscene Publications Act 1959<sup>49</sup>, there appears to be no prohibition on text based descriptions of indecency with or between children, it is only the image that is forbidden. This might raise questions about the kind of behaviour the CJA 2009 is trying to prevent. If a 'virtual child' on Second Life – which are not overly realistic – is capable of being a paedophilic image, and being used to encourage offending, why isn't a sexually explicit story treated in the same way? It would be easy to argue that a written description of an event or series of events has more power to shock or delight than a pictorial representation. The picture is factual and limited to its parameters, but the text is constrained only by the individual's imagination. This further undermines the rationale for the prohibition of non-photographic images.

### **Image v Reality**

Perhaps the biggest nonsense concerning the current crop of 'anti-paedophile' legislation is the fact that in the UK it is legal in fact to have a physical relationship with a child from the age of sixteen for both males and females, but it is not legal to look at a pornographic picture of either of those classes of person until they are eighteen<sup>50</sup>. There are defences available under s1A of the PCA 1978, based on marriage, a civil partnership or 'living together as partners in an enduring family relationship' - although how enduring this has to be is unclear. These defences are not included in the CJA 2009, so while an indecent photographic image of a 17 year old bride or groom is no offence if consensual and private, a pencil sketch would be a breach of s62, unless the defendant can prove a 'legitimate reason' for possession.

### **Images v Prevention**

Images of child abuse are sadly, always going to exist and there will always be demand for them. The fight against wicked acts being perpetrated on children should continue apace, as should the fight against those that fuel the industry by buying photographs and films of the abuse. In the Milner case, the judge handed down a harsher sentence on the basis that Mr Milner had already been convicted for possession of indecent pictures of (real) children. It may be seen as telling that no further images of (real) abuse were found on the defendant's computer, only cartoon ones. A perfect example, surely, of someone who has been chastised by the law and changed his behaviour in a way that is beneficial to both himself and society – the criminal law acting as it should.

The UK's policy on indecent images may have gone too far. They purport to protect from an indirect harm that is unproven and probably unprovable and in doing so they restrict the freedom of citizens and may increase the risk of harm to living children.

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<sup>49</sup> S1 – an article is obscene if it 'tends to deprave and corrupt persons who are likely to see it.'

<sup>50</sup> Sexual Offences Act 2003 s45

In the Consultation Paper on the Possession of Non Photographic Visual Depictions of Child Sexual Abuse<sup>51</sup> the Home Office stated

*'We are aware of a case where the police were unable to prosecute because the suspect was only found in possession of drawings and cartoons: no illegal photographs or pseudo-photographs were discovered.'*<sup>52</sup>

No illegal photographs of an abused child in a suspect's possession should be a cause for relief, not disappointment that a charge is unable to proceed. In this situation at that time, the suspect had chosen not to break the law, he had not purchased or accessed images of child abuse and therefore not contributed to the market for such images with their resultant harm. Such a person now has that choice removed from them and a charge under s62 CJA 2009 would be able to be brought and would probably succeed. This would seem to reduce the incentive for a person not to go for the 'real thing' if he risks a criminal conviction in either event. Without an unprecedented and frankly unimaginable global crackdown and international cooperation, abusive images of children are going to be available on line. The CJA does not help these children, it does not work against the sites – usually based abroad – that perpetrate them, and there is no proof that the images it prohibits cause direct or indirect harm to any child at all. Morally, we may not like an individual's private fantasy world, and the world wide web enables those fantasies to be closer and more coloured than ever, but the law should pause before it makes criminal a person's private sexual landscape whether expressed through fantasy text or fantasy image. This is particularly so when there is a dichotomy between the application to the internet via emails and downloads and through hard copy books and pictures and the former hold evidential context long after the latter could be destroyed.

These cases discussed today show that images widely available on the internet and often passed between friends, particularly young men as 'a bit of a laugh' are now capable of giving those individuals a criminal record for possession of child pornography. Any criminal conviction can seriously hamper a person's future and life chances, but it must be obvious that an offence of this type will be viewed by the majority of the public as one which signals the defendant has been involved in the actual abuse of living children, with the revulsion and outrage that such an offence will engender. In some cases brought under the CJA 2009 that couldn't be further from the truth.

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<sup>51</sup> Available at; <http://www.justice.go.uk/publications/non-photographic-depictions.htm> (30<sup>th</sup> June 2008). The consultation period ran from 2<sup>nd</sup> April 2007 to 22<sup>nd</sup> June 2007.

<sup>52</sup> Ibid. Page 4