

E – BRIEF



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Child Pornography Law Update

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1 NSW Sentencing Council report

This e-brief updates the paper [Child Pornography Law](#) published in August 2008.¹ Specifically, it reviews the proposals for reform relating to child pornography recommended in *Penalties Relating to Sexual Assault Offences in New South Wales*, a report by the NSW Sentencing Council, chaired by Supreme Court Judge James Wood. The report is in two volumes: [Volume One](#) sets out the Sentencing Council's views and recommendations on the relevant issues; [Volume Two](#) is devoted to statistical analysis. The report was released on 25 October 2008.

2 Attorney General's Media Release

The Sentencing Council report was in response to a reference from the Attorney General, John Hatzistergos. In a [Media Release](#) the Attorney General welcomed its recommendations, saying the Rees Government will use them 'as the gold standard for new legislation to safeguard adults and children from sexual predators'.²

In particular, it was said that the Government supported the recommendation to remove the defence of genuine artistic purpose under s 91H(4)(c) of the *Crimes Act 1900* for child pornography that depicts

- children as the victim of torture, cruelty or physical abuse, or
- children engaged in sexual activity.

More qualified was the Government's support for removal of the defence of genuine artistic purpose for child pornography involving the more general category of depicting children in a 'sexual context'. The Government supported this recommendation '*in principle*'. (emphasis added)

The recommendations are to be referred to a Child Pornography Working Party, headed by District Court Judge Peter Berman. Among other things, the Working Party is to examine how the defence of genuine artistic purpose is to be removed 'without infringing on the rights of journalists and artists to depict valid situations involving children'.

3 Other recommendations

Other recommendations relevant to child pornography law supported by the Government include:

- increasing the maximum penalty for possession of child pornography from 5 to 10 years;
- clarifying that child pornography offences include 'pseudo' images which may be produced without real children, or may be

- manipulated photos or images of children; and
- providing a statutory definition of the expression 'produce' in relation to the offence of 'production or dissemination of child pornography' (s 91H(2), *Crimes Act 1900*)

4 Reaction to the Henson affair

It is, however, the proposed removal of the defence of genuine artistic purpose that is the most significant and far reaching reform to child pornography law recommended in the Sentencing Council report.

The recommendation comes in the wake of the controversy surrounding the exhibition of photographs by Bill Henson featuring a naked 13-year old girl. This controversy was outlined in the paper [Child Pornography Law](#) and is now the subject of a book-length study by David Marr.³

In a [newspaper article](#), 'Marr commented on the recommendations of the Sentencing Council, stating:

During the Bill Henson uproar, many people asked the sensible question: why should an artist be privileged to make pornography? As it turned out all the authorities who looked at Henson's controversial pictures agreed they were not remotely pornographic, but the question has lingered in the air.⁴

5 Child pornography offences

As discussed in Chapter 4 of the Sentencing Council report, the offences of the production, dissemination and possession of child pornography are set out under s 91H of the *Crimes Act 1900*. In 2004 these offences were made indictable offences, able to be dealt with in the District Court by a jury.⁵ Maximum

penalties were increased from 2 to 5 years for the possession of child pornography, and from 5 to 10 years for the production or dissemination of child pornography.

The offence of production or dissemination of child pornography is provided under s 91H(2), while the possession offence is provided for under s 91H(3). The offences state simply that a person who produces, disseminates or possesses child pornography, as the case may be, is guilty of an offence.

6 Child pornography defined

By s 91H(1) child pornography is defined as:

material⁶ 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:

- engaged in sexual activity, or
- in a sexual context, or
- as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).

There are three limbs to the definition therefore. The first limb prohibits depictions (visual images) and descriptions (textual content) of children 'engaged in sexual activity' is the principal objective of legislation of this kind. An identical or similar formulation is found in all comparable federal, State and Territory legislation.⁷

Secondly, reference to 'in a sexual context' is broader in nature. As [Grant, David and Grabosky](#) comment, one can 'imagine suggestive depictions of children entailing other than sexually explicit behaviour'.⁸ Potentially, the reference to 'in a sexual context' is broad enough to admit of a wide range

of images. It may encompass such things as pictures of naked children from legitimate nudist settings, where the actual depictions are found to dwell on these images and where, in all the circumstances, they cause offence to reasonable persons. The qualification that the material must 'in all the circumstances cause offence to reasonable persons' is a community standards test which, as explained by the Second Reading speech for the *Crimes Amendment (Child Pornography) Act 2004*, 'ensures that innocent family photographs of naked children, for example, will not be captured'.⁹ In relation to the Henson affair, Marr quotes the NSW DPP as saying:

Mere nudity is not sufficient to create a 'sexual context'. The context is the subject taken with what surrounds it and interacts with it. There is nothing in the photographs of the girl and her surroundings, in my view, that could be fairly described as providing a sexual context to her image.¹⁰

Thirdly, reference to 'torture, cruelty or physical abuse (whether or not in a sexual context)' was inserted into s 91H(1) in 2004.¹¹ This limb extends child pornography beyond the sexual context to include all forms of child abuse material.

As noted, the Government's support for removing the defence of genuine artistic purpose applies to all three limbs of the definition, although it is only expressed to be 'in principle' for the second category of describing or depicting children in a 'sexual context'.

7 The offensiveness/reasonable persons tests

A similar (if not strictly analogous) test – 'likely to cause offence to a reasonable adult' – is found under the

[National Classification Code](#) for the 'X18+' classification. In respect to this Jacobson J said in [Adultshop.Com Ltd v Members of the Classification Review Board](#) that offensiveness is not:

determined by a mechanistic majoritarian approach. It calls for a judgment about the reaction of a reasonable adult in a diverse Australian society.

Jacobson J continued:

171 The "reasonable adult" test must accommodate the community standards of Toorak and Newtown as well as those of Kunnurra and Broken Hill. It must also accommodate the standards of various subgroups within a multi-racial, secular society which nonetheless includes persons of different ages, political, religious and social views.

172 Even if the question of what would be likely to cause offence to a reasonable adult calls for a judgment as to "what most people think," it is a value judgment which is not susceptible to a bright line test.¹²

Similar 'subjective' considerations are likely to arise in respect to the defence of genuine artistic purpose under the Crimes Act. 'Bright lines' can be hard to draw where the distinction between art and pornography is at issue.

8 Defence of genuine artistic purpose

By s 91H(4) of the [Crimes Act 1900](#), in total five defences apply to all production, dissemination and possession offences. Specifically, 91H(4)(c) provides that it is a defence to any child pornography charge:

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. (emphasis added)

The court is directed to consider three issues: (a) the circumstances in which the material was produced, used or intended to be used, including perhaps such issues as the primary audience for which the work was intended; (b) the motivation of the defendant, specifically whether he/she acted for a 'genuine' artistic purpose; and (c) whether the defendant's conduct was 'reasonable for that purpose'.

Speaking generally of 91H(4)(c) the then Attorney General observed in 2004:

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.¹³

9 Other jurisdictions

A genuine artistic purpose defence is provided in similar terms in other States and Territories (other than the Northern Territory it seems). For example, under s 228E of the [Queensland Criminal Code](#):

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. (emphasis added)

Somewhat different is the [Commonwealth Criminal Code](#), which provides for the prosecution of child pornography offences relating specifically to the Internet. Various defences apply to these offences, for which the defendant bears the evidential burden in all cases. These include where the defendant's conduct is of public benefit, this being a question of fact and not of the person's motives in engaging in the conduct. This can only apply in limited and defined circumstances, for instance, where the conduct is necessary for or of assistance in enforcing an Australian law, or in conducting approved scientific, medical or educational research.¹⁴

Thus the Commonwealth law does not provide a specific defence for artistic work. However, by s 473.4, 'the literary, artistic or educational merit (if any) of the material' is one of the matters to be taken into account in deciding whether reasonable persons would regard material as being, in all the circumstances, offensive. This approach would seem to avoid an inquiry into the motivation of the defendant. It is not therefore a defence of genuine artistic purpose that is provided; rather, it is an evidentiary requirement to take literary or artistic merit (if any) into account.

10 The Sentencing Council's recommendations

The report's account of the defence of 'genuine artistic purpose' begins by noting that no equivalent defence operates for s 91G of the Crimes Act, the offence of using a child for pornographic purposes.

Central to the Sentencing Council's argument was the contention that:

It is questionable, in circumstances where it is established that the relevant material depicts a child engaged in sexual activity, in a sexual context, or as the victim of torture, cruelty or physical abuse, and is such that would in all circumstances cause offence to reasonable persons, that a defence to the s91H offence should be permitted upon the grounds that the defendant was acting for a “genuine artistic purpose”.¹⁵

The report argued that the other defences – that the defendant acted for genuine child protection, scientific, medical, legal or other public benefit purposes – are ‘understandable’. In the case of the genuine artistic purpose defence, however, it commented:

The existence of a defence that turns upon this kind of purpose would seem to overlook the rationale for the offence, which is to protect children against the harm which can flow from being the subject of pornographic images particularly in circumstances where they lack the capacity to consent to being involved in any such activity. The gist of the offence is as much concerned with exploitation of children as it is with the fact that pornographic images are created.¹⁶

These were issues canvassed in relation to the Henson affair. The *Sydney Morning Herald* art critic, John McDonald, commented, ‘Any attempt to stigmatise Henson’s work as “pornographic” is doomed to end in failure. Where are the victims? What pornographer has his work in the collections of public museums around the world?’¹⁷ On the other hand, for Chris Goddard, the director of Child Abuse Research Australia at Monash University and 30 other signatories of an open letter, the main concern was

‘the exploitation of children and their inability to give consent’.¹⁸ For child psychologist Steve Biddulph, one of the signatories to the open letter, ‘It wasn’t about pornography, or even about paedophilia – it’s about children’s rights’.¹⁹

In any event, in terms of the three limbs to the definition of child pornography, as discussed above, the Sentencing Council report distinguished between the ‘in a sexual context’ limb and the other two. It stated:

At the least, the defence would seem to be inappropriate where the images depict children engaged in sexual activity or subject to torture, cruelty or physical abuse, which activities would themselves constitute serious criminal offences. It recommends that this aspect of the defence be reconsidered...²⁰

As reflected in the Attorney General’s [Media Release](#), the report’s recommendation about the ‘in a sexual context’ limb was more qualified. One suggestion is that the defence may be maintained in an amended form, along the lines of s 578C(6) of the *Crimes Act 1900*, which applies to the offence of publishing an indecent article. Section 578C(6) provides:

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.

As the Sentencing Council report explained, such an amendment would ‘expressly permit the calling of expert evidence as to whether the material has any merit in the relevant fields

and, if so, the nature and extent thereof'.²¹

11 Comment

The relationship between art and the law is invariably difficult. The general point to bear in mind is that the safety and protection of children is of utmost importance. In the context of child pornography law, a line is drawn between freedom of expression and the protection of children from harm and exploitation. Precisely where that line is to be drawn in every case may be open to dispute and debate.

Recent cases on censorship, where a similar 'offensiveness' test is applied, suggest that the courts approach community standards with a view to reflecting the broad spectrum of opinion found in the community. They do not adopt extreme positions on one side or other of the debate. Fictional TV crime shows and films show children in a brutalised state, as the victims of sexual abuse or torture, but these depictions are seen to be legitimate expressions of artistic work, in no danger of falling foul of the child pornography laws. By this argument, which seems consistent with the reasoning of the Sentencing Council, portrayals of children 'engaged in sexual activity' or 'as the victims of torture' etc will only be judged offensive in obvious cases of illegality.

On behalf of retaining the genuine artistic purpose defence, it might be argued that even if it is rarely (if ever) used, it acts nonetheless as an insurance policy for artistic freedom. Community standards do indeed change over time, as do views about what may or may not be offensive in certain contexts.

Further to this, the Attorney General has announced that a Working Party is

to examine how the defence of genuine artistic purpose is to be removed 'without infringing on the rights of journalists and artists to depict valid situations involving children'.

As discussed, the Sentencing Council report acknowledged that the 'in a sexual context' limb to the definition of child pornography raised more complex questions and, possibly, a different solution in the form of an amendment permitting the calling of expert evidence.

A possible alternative, in relation to all three limbs of the definition of child pornography, would be to follow the example of the [Commonwealth Criminal Code](#). As discussed, it is not a defence of genuine artistic purpose that is provided; rather, it is an evidentiary requirement to take literary or artistic merit (if any) into account.

¹ G Griffith and K Simon, Child Pornography Law, NSW Parliamentary Library Research Service Briefing Paper No 9/08.

² Hon J Hatzistergos, 'Major government crackdown on sex offences', Media Release, 25 October 2008.

³ D Marr, *The Henson Case*, Text Publishing, 2008.

⁴ D Marr, 'Rush to change laws after brush with Henson', *SMH*, 27 October 2008.

⁵ Criminal Procedure Act 1986 (NSW), Schedule 1.2. It was further provided that an intervention program could not be conducted in respect to these offences – Criminal Procedure Act 1986 (NSW), s 348(2)(d).

⁶ 'Material' is defined by s 91C to include 'any film, printed matter, electronic data or any other thing of any kind (including any computer image or other depiction)'.

⁷ For a comparative account of the legislative provisions see – Griffith and Simon, n 1, pp 19-41.

⁸ A Grant, F David and P Grabosky, 'Child pornography in the digital age' (1997) 3 (4) *Transnational Organised Crime* 171-188.

⁹ *NSWPD*, 11 November 2004, p 12738.

¹⁰ Marr, n 3, p 123.

¹¹ A similar formulation is found under the [Queensland](#) and Tasmanian Criminal

Codes. In both cases reference is to 'child exploitation material' and not to child pornography. Under s 474.22 of the Commonwealth Criminal Code material of this kind is treated separately as 'child abuse material'.

¹² [2007] FCA 1871.

¹³ NSWPD, 11 November 2004, p 12738.

¹⁴ Commonwealth Criminal Code Act, s 474.21.

¹⁵ NSW Sentencing Council, Penalties Relating to Sexual Assault in New South Wales, Vol 1, August 2008, para 4.45.

¹⁶ Ibid, para 4.46.

¹⁷ J McDonald, 'Snapshot of a small-minded people', SMH, 31 May 2008, p 16.

¹⁸ A Wilson, 'Henson show by invitation only as police return photographs', The Australian, 11 June 2008, p 7.

¹⁹ C Perkin, 'Henson show sparks new row', The Australian, 12 June 2008, p 5.

²⁰ NSW Sentencing Council, n 15, para 4.47.

²¹ Ibid, para 4.51.

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