

LAWFUL ACTS, UNLAWFUL IMAGES: THE PROBLEMATIC DEFINITION OF ‘CHILD’ PORNOGRAPHY

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I INTRODUCTION

Few offences carry a stigma as great as that of ‘child pornography’, and rightly so. The range of images in circulation is truly shocking, from graphic images of naked children, to actual sexual acts between adults and children, to bestiality and sadism. Those who produce, distribute and possess such images deserve condemnation. Yet it is only in recent decades that child pornography has been prosecuted independently of obscenity laws,¹ and even more recently that sentences have been increased to reflect the gravity of this offending.² This increasing criminalisation has been given greater urgency by the advent of digital technology which allows offenders to produce and distribute such material with relative ease and anonymity. This has seen an extraordinary rise in the number of images in circulation and a corresponding rise in prosecutions.³

The interconnected nature of the internet means that this is a global problem, and many jurisdictions have moved to strengthen their laws to punish each link in the chain, from production and distribution to possession. Central to these offences is the definition of ‘child’. While internationally ‘child’ is generally defined as a person under the age of 18, the age of consent to sexual activity varies considerably between jurisdictions.⁴ In the past, child pornography was typically defined so that the definition of minor matched the age of consent. However, a number of jurisdictions subsequently increased the age for child pornography to be under 18, while the age of consent remained at 16.

These changes were aimed primarily at protecting children from becoming involved in prostitution and pornography.⁵ At a time when digital technology was in its relative infancy it may have been assumed that a young person involved in the production of pornography was necessarily subject to exploitation. However digital technology, particularly the convergence of computing and communication technologies, has made it easy for young people to produce, possess and distribute self-generated pornography. In the case of minors over 16, this has the consequence that while the sexual activity itself may be lawful, the

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1 See Part II below.

2 See Part VI H below.

3 See Part II below.

4 See the discussion in Part III below.

5 See Part III A.

depiction of that activity is unlawful. The problem is exacerbated by the expansion of child pornography to encompass images of a person over 18 who ‘appears to be’ a minor. Consequently, circumstances may arise whereby the possession of an image is a serious criminal offence, notwithstanding the conduct depicted in that image is lawful.

This article considers the legal consequences of defining ‘child’ for the purposes of child pornography law as being higher than the age of consent.⁶ Three distinct situations will be considered:

1. *Erotic Auto-Depictions* are where a young person takes sexually explicit images of themselves, either alone or with a partner, purely for the purpose of viewing it and with no intention of further distribution. Such conduct potentially falls within the offences of production and possession of child pornography.
2. *Self-Produced Juvenile Pornography* refers to Erotic Auto-Depictions where the young person wishes to distribute the image to others.⁷ This could be to one person, such as a boyfriend or girlfriend, or to a wider audience, such as a social networking site.⁸ This term encompasses the practice commonly known as ‘sexting’; that is, ‘the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet.’⁹ In addition to production and possession, participants are potentially liable for offences relating to the distribution of child pornography.
3. *Youthful-Adult Pornography*,¹⁰ also known as ‘barely legal’ pornography, refers to pornography which utilises youthful looking adult performers who may appear to be under 18.¹¹ In some jurisdictions such material may fall within the definition of child pornography.

6 While related issues arise in respect of images of minors under the age of consent, and in jurisdictions where the definition of minor matches the age of consent, they are beyond the scope of this article; see generally Dawn C Nunziato, ‘Romeo and Juliet Online and in Trouble: Criminalizing Depictions of Teen Sexuality (c u 18r: g2g 2 jail)’ (2012) 10 *Northwestern Journal of Technology and Intellectual Property* 57; Catherine Arcabasocio, ‘Sexting and Teenagers: OMG R U Going 2 Jail???’ (2010) 16 *Richmond Journal of Law & Technology* 1; Dan Jerker B Svantesson, ‘“Sexting” and the Law — How Australia Regulates Electronic Communication of Non-Professional Sexual Content’ (2010) 22 *Bond Law Review* 41. These issues also form, in part, the subject of an inquiry by the Law Reform Committee of the Victorian Parliament; Law Reform Committee, Parliament of Victoria, *Inquiry into Sexting* (forthcoming).

7 Mary Graw Leary, ‘Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation’ (2007) 15 *Virginia Journal of Social Policy & the Law* 1, 4 n 8.

8 For example, there have been recent allegations of minors posting naked images of themselves on the social-networking site ‘Facebook’; Karl Quinn, ‘Facebook Accused of Being Lax on Child Porn’, *The Sydney Morning Herald* (online), 20 August 2012 <<http://www.smh.com.au/technology/technology-news/facebook-accused-of-being-lax-on-child-porn-20120820-24i5v.html>>.

9 *Miller v Skumanick*, 605 F Supp 2d 634, 637 (MD Pa, 2009).

10 *Ashcroft v Free Speech Coalition*, 535 US 234, 261 (2002).

11 Ethel Quayle and Terry Jones, ‘Sexualized Images of Children on the Internet’ (2011) 23(1) *Sexual Abuse: A Journal of Research and Treatment* 7, 17.

In this article, young people over 16 but under 18 will be referred to as 'juveniles', with the word 'child' reserved for those under 16. Consistent with current usage, the term 'Child Pornography' will be used to describe all forms of pornography depicting minors under 18.¹² However, within that broad category 'Juvenile Pornography' will be used to refer to images which depict lawful consensual sexual activity engaged in by juveniles.¹³ The term 'Child Abuse Material' describes sexual depictions of children under 16.

While young people have the right to engage in consensual sexual activity, there is nonetheless the risk of exploitation and reputational harm when that sexual activity is recorded, either by themselves or by others. Although legislatures have made it clear that such conduct constitutes a serious criminal offence, the rationales which support such criminalisation are less clear. Whereas it might be thought that prosecutorial discretion could be relied upon to avoid the more anomalous or unjust results, it is not clear what would guide that discretion. It is hoped that this article will provoke discussion as to the appropriate balance between protecting young people from harm and legitimate sexual expression.

Although focusing primarily on the example of Australian federal and Victorian state laws,¹⁴ this article draws upon the laws of Canada, England and Wales¹⁵ and the US. It begins with a discussion of the increasing criminalisation of Child Pornography, particularly the expansion of these offences to include images of juveniles. Other elements are then considered to illustrate potential anomalies which may arise in their application to Juvenile Pornography. The rationales behind the criminalisation of Child Pornography will then be discussed, with a critical analysis of their application to Juvenile and Youthful-Adult Pornography. Two options for reform are then proposed and discussed.

II THE CRIMINALISATION OF CHILD PORNOGRAPHY

Given the prevalence of Child Pornography laws today, it is surprising to think that it was not until the 1970s that Child Pornography was regulated separately from other forms of obscene material.¹⁶ Even then, a distinction was often drawn between simple possession, which was not an offence, and production and distribution, which were.¹⁷ For example, simple possession of Child Pornography

12 The issue of appropriate terminology in this context is discussed in Part IV.

13 This term is adopted in the *Strafgesetzbuch* [Penal Code] (Germany), see below n 177.

14 Each state and territory has distinct laws relating to child pornography; see, eg, *Crimes Act 1900* (ACT) ss 64–65; *Crimes Act 1900* (NSW) pt 3 div 15A; *Criminal Code Act 1983* (NT) pt V div 2; *Criminal Law Consolidation Act 1935* (SA) pt 3 div 11A; *Criminal Code Act 1899* (Qld) ss 228A–228H; *Criminal Code Act 1924* (Tas) ss 130–130D; *Criminal Code Act Compilation Act 1913* (WA) ch XXV.

15 Both Scotland and Northern Ireland have distinct laws in this area; *Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005* (Scot) asp 9 and *Sexual Offences (Northern Ireland) Order 2008* (NI) SR 2008/1769.

16 Alisdair Gillespie, 'Legal Definitions of Child Pornography' (2010) 16(1) *Journal of Sexual Aggression* 19, 19.

17 Australian Law Reform Commission, *Film and Literature Censorship Procedure*, Report No 55 (1991) 5.16.

was not an offence in England and Wales until the enactment of s 160 of the *Criminal Justice Act 1988* (UK).¹⁸ This increase in the scope of Child Pornography laws, and the move away from relying on concepts of obscenity, reflected a changing attitude to Child Pornography and the rationales for its criminalisation.

In general terms, ‘obscene’ material is that which is ‘offensive to modesty or decency; indecent; inciting to lust or sexual depravity; [or] lewd’.¹⁹ By focusing on the impact on the viewer, and the potential to offend, disgust or corrupt, it is an inherently subjective concept, notwithstanding its appeal to ‘community values’. As Stewart J famously said: ‘I know it when I see it’.²⁰ The issue is particularly acute in countries such as Canada²¹ and the US²² where the right to free speech is constitutionally protected.²³

Although it might be thought that all Child Pornography is necessarily obscene, it came to be seen that the criminalisation of Child Pornography was not dependent on its impact on the viewer, but rather on the child abuse which was depicted. Although these depictions would often be obscene, they were not necessarily so. In any event, the obscenity standard required an assessment of the merits of material which was, in the vast majority of cases, without merit. At the same time, community values in terms of obscenity were becoming more liberal. Obscenity laws could no longer be relied upon to protect children from the sexual abuse which was the foundation of Child Pornography laws.²⁴

While many of these changes predated the advent of the internet as we know it today, it was digital technology which facilitated a staggering proliferation in the production and distribution of Child Pornography. Prior to the advent of these technologies it was the commercial production of Child Pornography which was of particular concern.²⁵ Although the potential for computer networks to be used by paedophiles had been noted as early as 1986,²⁶ even by 1995 there appeared to be ‘no firm evidence that computers [were] being used to this extent’.²⁷ The internet transformed this situation, allowing material to be distributed easily,

18 The earlier offence of possession under *Protection of Children Act 1978* (UK) c 37, s 1(c) applied only to possession with intent to distribute. This remains the case in many jurisdictions which continue to allow simple possession of child pornography; INTERPOL, *Legislation of INTERPOL Member States on Sexual Offences against Children* (31 January 2011) <<https://secure.interpol.int/Public/Children/SexualAbuse/NationalLaws/Default.asp>>.

19 Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2009).

20 *Jacobellis v Ohio*, 378 US 184, 197 (1964).

21 *Canada Act 1982* (UK) c 11, sch B pt I s 2(b) (‘*Canadian Charter of Rights and Freedoms*’).

22 *United States Constitution* amend I.

23 Australia has no constitutionally protected freedom of expression, although note *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15. In the UK, the *Human Rights Act 1998* (UK) c 42, s 12 incorporates the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 10.

24 This issue is discussed in more detail below in Part IV A.

25 See, eg, *New York v Ferber*, 458 US 747, 757 (1982) (‘*Ferber*’).

26 US Department of Justice, *Attorney General’s Commission on Pornography: Final Report* (1986), recommendation 39.

27 Parliamentary Joint Committee on the National Crime Authority, Parliament of Australia, *Organised Criminal Paedophile Activity* (1995) 3.69. See also New South Wales, Royal Commission into the New South Wales Police Service, *Final Report: The Paedophile Inquiry* (1997) vol 5, 1102 [16.11].

in large volumes, with minimal cost and relative anonymity. Between 1996 and 2005 there was a 2026 per cent increase in the number of cases opened throughout the FBI as part of the 'Innocent Images National Initiative'.²⁸ The number of prosecutions in the UK involving indecent photographs of children increased from 93 in 1994 to 1890 in 2003.²⁹ The trend continues, with Child Pornography cases in the NSW District Court increasing from 4 in 2005 to 90 in 2008.³⁰

The global nature of the internet means this is a global problem,³¹ with countries encouraged to punish all aspects of Child Pornography from production and distribution to possession. For example, the Council of Europe *Convention on Cybercrime* requires parties to punish, inter alia, the production, offering/making available, distributing or transmitting, procuring and possessing of Child Pornography in a computer system or on a computer-data storage medium.³² A related change, and the focus of this article, has been to decouple the definition of 'child' for the purpose of Child Pornography laws from the age of consent.

III THE DEFINITION OF 'CHILD'

In broad terms, Child Pornography offences are aimed at preventing the abuse of children³³ and few would argue with the need to protect vulnerable members of society from the predation of others or from their own immaturity. Yet the concept of childhood, and the autonomy to make decisions for oneself, varies considerably both between and within jurisdictions. The age at which a child may work, vote, drive, drink alcohol, consent to medical treatment, all reflect differing and evolving views on what it means to be a child. Sexual activity is no exception.

- 28 Federal Bureau of Investigation, *Innocent Images National Initiative* (February 2006) <<http://www.fbi.gov/news/stories/2006/february/innocent-images-statistics>>.
- 29 National Offender Management Service and Scottish Executive, Home Office of Great Britain, *Consultation: On the Possession of Extreme Pornographic Material* (August 2005) 7 [15] <<http://www.homeoffice.gov.uk/documents/cons-extreme-porn-3008051/Gvt-response-extreme-porn2.pdf?view=Binary>>.
- 30 Judicial Commission, New South Wales, *Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences: Research Monograph 34* (2010) 5 n 31.
- 31 See, eg, the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002); *Council Decision of 29 May 2000 to Combat Child Pornography on the Internet* [2000] OJ L 138/1; *Council Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and replacing Council Framework Decision 2004/68/JHA* [2011] OJ L 335/1.
- 32 *Convention on Cybercrime*, opened for signature 23 November 2001, 2296 UNTS 167 (entered into force 1 July 2004) art 9 ('*Cybercrime Convention*').
- 33 This issue is discussed in more detail below in Part IV A.

A Age of Consent

The age of consent to sexual activity (sometimes referred to as the ‘age of protection’³⁴) varies considerably throughout the world, ranging between 12 and 21, with the typical range for heterosexual sex in Western countries being between 16 and 18 years of age.³⁵ The issue is an evolving one, with Canada having only recently raised the age of consent from 14 to 16.³⁶ In some jurisdictions the age of consent differs for anal³⁷ and homosexual sex (if it is legal at all), while in others sex is only lawful within marriage.³⁸ Other relevant factors include the relative ages and status of the people involved and the context in which the sexual activity takes place, with many jurisdictions allowing for a ‘close in age’ or ‘peer’ defence.

Strictly speaking, the ‘age of consent’ refers to the age at which a young person is able to consent to sexual activity at all. Below that age, any sexual activity with the young person is illegal, regardless of consent or circumstances.³⁹ Above that age, the law allows a young person increasing freedom to consent to sexual activities until they reach full sexual autonomy, typically at 18.

For example, in Victoria the age of consent is generally 16,⁴⁰ but may be as low as 12 if the people are married to each other.⁴¹ Further, consent is a defence to sex with a child aged 12 or above so long as the accused was not more than two years older than the child.⁴² Even where a young person is over 16 but has not reached the age of 18, it is an offence for any person who is in a position of ‘care, supervision or authority’ to have sex with them; for example, teacher, guardian, employer, sports coach or counsellor.⁴³ For the purposes of prostitution and pornography, a minor is defined to be a person under the age of 18.⁴⁴

This variability in the age of consent is reflected in international conventions. Under the UN *Convention on the Rights of the Child*, ‘child’ is defined to be a person under 18 years of age ‘unless, under the law applicable to the child,

34 *An Act to Amend the Criminal Code (Age of Protection) and to Make Consequential Amendments to the Criminal Records Act*, RSC 2007, c C-22.

35 INTERPOL, above n 18. In some jurisdictions the age of consent may also be varied by federal/regional laws; see AVERT, *Worldwide Ages of Consent* (2012) <www.avert.org/age-of-consent.htm>.

36 *Tackling Violent Crime Act*, SC 2008, c 6, s 13.

37 For example, in Canada and Queensland the age of consent for anal intercourse is 18; *Criminal Code*, RSC 1985, c C-46, s 159 and *Criminal Code Act 1899* (Qld) s 208.

38 AVERT, above n 35.

39 Robin MacKay, ‘Bill C-22: An Act to Amend the Criminal Code (Age of Protection) and to Make Consequential Amendments to the Criminal Records Act’ (Legislative Summary LS-550E, Parliamentary Library, Canada, 2007) 1.

40 *Crimes Act 1958* (Vic) ss 45, 47.

41 *Ibid* ss 45(3)(b), 47(1).

42 *Ibid* ss 45(4)(b), 47(2)(b).

43 *Ibid* s 48.

44 *Sex Work Act 1994* (Vic) s 3; *Crimes Act 1958* (Vic) s 67A.

majority is attained earlier'.⁴⁵ While clearly accepting that countries may define the age of majority for some purposes to be less than 18, it also differentiates certain forms of sexual conduct from which children must be protected; such as inducing or coercing a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices, or the exploitative use of children in pornographic performances and materials.⁴⁶

This recognition that a child's ability to consent to sexual activity does not necessarily encompass consent to engage in prostitution or pornography is recognised in other international instruments. The International Labour Organization ('ILO') includes within the definition of 'worst forms of child labour' 'the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances'.⁴⁷ It is also recognised under the *Cybercrime Convention* where 'minor' for the purpose of Child Pornography is defined as a person under the age of 18 years.⁴⁸ However, Parties may adopt a lower age limit so long as it is no less than 16 years.⁴⁹ This creates the potentially anomalous situation that while consensual sexual activity with a young person may be lawful, recording of that activity may constitute a serious criminal offence.

This situation arises in both Canada and England and Wales where the age of consent and the definition of 'minor' for the purposes of Child Pornography are 16 and 18 respectively.⁵⁰ The problem is compounded in federal systems where both state and federal laws operate.⁵¹ In both Australia and the US, criminal law is primarily a state matter, with the federal government having legislative power over areas of federal responsibility. In the context of cybercrime, federal power over telecommunications provides a significant expansion of federal criminal responsibility.⁵² However, the age of consent is primarily a matter of state responsibility and states retain the power to enact their own Child Pornography laws, creating a patchwork of overlapping and potentially inconsistent laws.

45 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 1. See also the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).

46 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 34.

47 *Convention (No 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000) art 3(b).

48 *Cybercrime Convention* art 9(3).

49 Explanatory Report, *Convention on Cybercrime*, opened for signature 23 November 2001, 2296 UNTS 167 (entered into force 1 July 2004) s 104 ('*Explanatory Report*').

50 *Criminal Code*, RSC 1985, c C-46, ss 151, 163.1; *Sexual Offences Act 2003* (UK) c 42, s 45; *Protection of Children Act 1978* (UK) c 37, s 1.

51 This is in contrast to Canada where criminal law is primarily a federal rather than provincial responsibility.

52 In Australia, the power is over 'postal, telegraphic, telephonic, and other like services' (*Australian Constitution* s 51(v)), while in the US the foreign and interstate commerce power is generally used (*United States Constitution* art I § 8 cl 3), the internet being an 'instrument of interstate commerce'; *United States v Runyan*, 290 F 3d 223, 239 (5th Cir, 2002); petition for writ of certiorari denied, *Runyan v United States*, 537 US 888 (2002).

For example, the Commonwealth has enacted a range of Child Pornography offences carried out by means of a carriage service.⁵³ For the purpose of these offences, the definition of minor is under 18.⁵⁴ This is also the case in some states,⁵⁵ while others define minor for these purposes as being under 16⁵⁶ or 17.⁵⁷ However, other than in the case of ‘special relationships’, the age of consent in each state and territory is 16⁵⁸ or 17.⁵⁹ The situation in the US is similar, with the age of consent in the majority of states being 16⁶⁰ while federal Child Pornography statutes define a ‘child’ as being under 18.⁶¹ The definition of ‘child’ for the purpose of state Child Pornography laws also varies, with the majority defining ‘child’ to be under 18.⁶²

In some jurisdictions, such as New South Wales, South Australia and Western Australia, the definition of Child Pornography matches the age of consent. Nonetheless, so long as the offence was committed by means of a carriage service, a person in possession of Juvenile Pornography could be prosecuted under federal law.⁶³ In Tasmania and Victoria, this situation arises regardless of federal jurisdiction as state law defines minor for the purposes of Child Pornography to be higher than the age of consent. A person in Victoria, for instance, could lawfully have sex with a 16 year old but could not lawfully possess a sexual image of that same 16 year old. The borderless nature of the internet compounds the problem, with images which are lawful in one jurisdiction accessible in another where they are prohibited.

B ‘Appears to be’

For reasons which will be discussed below,⁶⁴ the definition of ‘Child Pornography’ in many jurisdictions includes depictions that do not involve actual children. Article 9(2) of the *Cybercrime Convention* defines two such categories of material. The first, which falls outside the scope of this article, is ‘realistic images

53 *Criminal Code Act 1995* (Cth) div 474 sub-div D.

54 *Ibid* s 473.1.

55 *Criminal Code Act 1924* (Tas) s 1A; *Crimes Act 1958* (Vic) s 67A.

56 *Crimes Act 1900* (NSW) s 91FA; *Criminal Code Act 1899* (Qld) s 207A; *Criminal Code Act Compilation Act 1913* (WA) s 217A.

57 *Criminal Law Consolidation Act 1935* (SA) s 62.

58 *Crimes Act 1900* (ACT) ss 55, 61; *Crimes Act 1900* (NSW) s 66C; *Criminal Code Act* (NT) s 127; *Criminal Code Act 1899* (Qld) ss 210, 215 (other than anal intercourse where the age of consent is 18: s 208); *Crimes Act 1958* (Vic) ss 45, 47; *Criminal Code Act Compilation Act 1913* (WA) s 321.

59 *Criminal Law Consolidation Act 1935* (SA) s 49(3); *Criminal Code Act 1924* (Tas) s 124.

60 *Ashcroft v Free Speech Coalition*, 535 US 234, 247 (2002).

61 18 USC § 2256(1).

62 Nunziato, above n 6, 66–7.

63 In the US context it has been held that the fact that a state may permit certain conduct does not mean that the federal government must allow the mails or the channels of interstate or foreign commerce to be used for that purpose; *Smith v United States*, 431 US 291, 307 (1977). See also *United States v Freeman*, 808 F 2d 1290, 1293 (8th Cir, 1987).

64 See Part IV below.

representing a minor engaged in sexually explicit conduct.⁶⁵ Sometimes referred to as 'virtual child pornography',⁶⁶ this was intended to address the concern that computer-generated imagery or other forms of digital technology would allow realistic depictions of sexual activity involving children to be produced without actual abuse.⁶⁷

The second, and most relevant in this context, is 'a person appearing to be a minor engaged in sexually explicit conduct'.⁶⁸ This brings Youthful-Adult Pornography within the definition of Child Pornography. For example, in Victoria 'child pornography' is defined to include material that 'depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context'.⁶⁹ This is also the case in Canada,⁷⁰ the UK⁷¹ and the US.⁷² However, in *Ashcroft v Free Speech Coalition*,⁷³ the Supreme Court struck down the US provision as violating the First Amendment to the extent that it applied to material which was not obscene, and which did not involve the abuse of children in its production.⁷⁴ Consequently, in the US Youthful-Adult Pornography would have to be prosecuted under obscenity laws rather than as child pornography.

IV RATIONALES

There are essentially four rationales for the criminalisation of Child Pornography:⁷⁵

- 65 See also *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002) art 2(c) which refers to 'any representation, by whatever means'.
- 66 *Ashcroft v Free Speech Coalition*, 535 US 234, 241 (2002).
- 67 *Explanatory Report*, above n 49, s 102.
- 68 *Cybercrime Convention* art 9(2)(b).
- 69 *Crimes Act 1958* (Vic) s 67A (emphasis added). See also *Criminal Code Act 1995* (Cth) s 473.1; *Crimes Act 1900* (ACT) s 64; *Crimes Act 1900* (NSW) s 91FB; *Criminal Code Act* (NT) s 125A; *Criminal Law Consolidation Act 1935* (SA) s 62; *Criminal Code Act 1924* (Tas) s 1A; *Criminal Code Act 1899* (Qld) s 207A; *Criminal Code Act Compilation Act 1913* (WA) s 217A.
- 70 *Criminal Code*, RSC 1985, c C-46, s 163.1(1).
- 71 *Protection of Children Act 1978* (UK) c 37, s 7(8) provides that '[i]f the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes ... as showing a child'. However, 'pseudo-photograph' is limited to 'an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph'; s 7(7).
- 72 18 USC § 2256(8)(B) extended the definition of 'child pornography' to include material that 'is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct'.
- 73 *Ashcroft v Free Speech Coalition*, 535 US 234 (2002).
- 74 Although Congress responded with the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003* Pub L No 10–21, 117 Stat 650 (2003), it is unclear whether the amendments relating to simulated child pornography would survive First Amendment challenge; John P Feldmeier, 'Close Enough for Government Work: An Examination of Congressional Efforts to Reduce the Government's Burden of Proof in Child Pornography Cases' (2003) 30 *Northern Kentucky Law Review* 205. Although the revised pandering provision was held to be constitutionally valid, this was only to the extent that it applied to images of real children: *United States v Williams*, 553 US 285, 303 (2008).
- 75 *R v Sharpe* [2001] 1 SCR 45, 99 (McLachlin CJ); Max Taylor and Ethel Quayle, *Child Pornography: An Internet Crime* (Brunner-Routledge, 2003) 22–6.

1. the protection of children from sexual abuse;
2. preventing cognitive distortions, which may lead to contact offending;
3. facilitating prosecutions; and
4. paternalism.

We will now consider each rationale and its application to Juvenile and Youthful-Adult Pornography.

A Preventing Child Sexual Abuse

The fundamental rationale for the criminalisation of Child Pornography is to protect children from sexual abuse, and it was this justification which first saw the regulation of Child Pornography in its own right. The changing attitude of the courts and legislatures was most clearly articulated in the US context where material which is ‘obscene’ (as opposed to merely indecent) does not enjoy First Amendment protection. Obscene materials are those which ‘taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.’⁷⁶ While this could clearly be applied to Child Pornography, in the landmark decision of *Ferber*,⁷⁷ the Supreme Court held that Child Pornography which involves the use of actual children is not constitutionally protected because the ‘prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance’.⁷⁸

In *Ferber*, the Supreme Court concluded that the obscenity standard in *Miller* was not sufficient to address the state’s interest in protecting children from sexual exploitation. As the Court noted, whether a work appeals to the prurient interest of the average person or is ‘patently offensive’ ‘bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work.’⁷⁹ Further, the most effective way to dry up the market for Child Pornography is to impose severe criminal penalties on all those involved in producing, distributing or promoting it.⁸⁰ Following *Ferber*, the *Child Protection Act of 1984* removed the obscenity requirement from US Child Pornography laws.

Tackling the child abuse that lies at the heart of Child Pornography is the most widely accepted rationale for its criminalisation and was used to justify the punishment of simple possession as opposed to possession with intent to

⁷⁶ *Miller v California*, 413 US 15, 24 (1973) (‘*Miller*’).

⁷⁷ 458 US 747 (1982).

⁷⁸ *Ibid* 757.

⁷⁹ *Ibid* 761.

⁸⁰ *Ibid* 759–60.

distribute.⁸¹ Such laws do not rely on 'a paternalistic interest in regulating [the defendant's] mind', rather 'in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.'⁸² In the case of Child Abuse Material, the viewer is in a sense an accessory after the fact to an act of child abuse by providing a market for it.⁸³

An additional means by which the criminalisation of Child Pornography may prevent child abuse is to prevent its use for grooming and seducing victims.⁸⁴ This may be so even where the person depicted merely appears to be a child. Although in that sense there is no harm to the 'child' depicted, such images 'might be used to encourage or seduce children into participating in such acts, and hence form part of a subculture favouring child abuse.'⁸⁵ While there are certainly examples of Child Pornography being used by defendants to persuade victims that sexual activity with children is normal,⁸⁶ the extent to which research supports this assertion has been questioned.⁸⁷

In any event, these rationales arguably fall away when applied to Juvenile and Youthful-Adult Pornography where no child is exploited or abused in its production.⁸⁸ Nor, arguably, should such material be criminalised on the basis that it may be used for grooming as this argument could apply to any form of pornography. The evil of using Child Abuse Material for that purpose is that it suggests that sexual activity with children is permissible and normal. However, Juvenile and Youthful-Adult Pornography both depict lawful conduct. The fact that paedophiles might use such material to encourage children to engage in sexual activity is true of many things.⁸⁹ Although legislatures may punish those who provide unsuitable materials to children,⁹⁰ as is the case with grooming laws, it 'cannot ban speech fit for adults simply because it may fall into the hands of children.'⁹¹ The rationale for criminalising Juvenile and Youthful-Adult Pornography must therefore lie elsewhere.

81 *Osborne v Ohio*, 495 US 103, 109–10 (1990). See also *R v Travell* [1997] 1 Cr App R (S) 52; *R v Liddington* (1997) 18 WAR 394, 403 (Ipp J); *R v Land* [1999] QB 65, 70; *R v Jones* (1999) 108 A Crim R 50, 52 (Kennedy J); *R v Coffey* (2003) 6 VR 543, 552 [30] (Callaway JA, Buchanan and Eames JJA agreeing); *Badcock v White* [2004] TASSC 59 [18] (Crawford J).

82 *Osborne v Ohio*, 495 US 103, 109 (1990).

83 *R v Sharpe* [2001] 1 SCR 45, 99 (McLachlin CJ).

84 *Ibid* 96–9 (McLachlin CJ). See also Taylor and Quayle, above n 75, 24–6; *Osborne v Ohio*, 495 US 103, 111 (1990), citing the US Department of Justice, *Attorney General's Commission on Pornography: Final Report* (1986).

85 *Explanatory Report*, above n 49, s 102.

86 See, eg, *DPP v VH* (2004) 10 VR 234.

87 Gareth Griffith and Lenny Roth, 'Protecting Children from Online Sexual Predators' (Briefing Paper No 10/107, Parliamentary Library, Parliament of New South Wales, 2007) 13–4. See generally Janis Wolak, David Finkelhor and Kimberly Mitchell, 'Child Pornography Possessors: Trends in Offender and Case Characteristics' (2011) 23(1) *Sexual Abuse: A Journal of Research and Treatment* 22.

88 *R v Sharpe* [2001] 1 SCR 45, 109 (McLachlin J).

89 *Ashcroft v Free Speech Coalition*, 535 US 234, 251 (2002).

90 *Ginsberg v New York*, 390 US 629 (1968).

91 *Ashcroft v Free Speech Coalition*, 535 US 234, 252 (2002).

B Cognitive Distortions

In addition to preventing the sexual abuse of the children depicted, criminalisation of Child Pornography is arguably justified because of the impact it may have on those who view it. In *Sharpe*, the Canadian Supreme Court accepted that while not all offenders involved with Child Pornography are necessarily involved in direct sexual assaults on children, some studies suggest that Child Pornography may fuel fantasies and incite certain people to offend.⁹² Similarly, Child Pornography may promote cognitive distortions such that it may normalise sexual activity with children in the mind of the possessor, weakening inhibitions and potentially leading to actual abuse.⁹³

In contrast, such justifications were rejected by the US Supreme Court as an unjustified infringement of free speech. The fact that such material may 'whet the appetite' of paedophiles and encourage them to engage in offending behaviour is not sufficient.⁹⁴ Speech may be restricted if it is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'⁹⁵ Here the government had shown 'no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse.'⁹⁶

Whatever the merits of this argument in the case of Child Abuse Material, it seems anomalous in the context of Juvenile or Youthful-Adult Pornography. Where the material is Auto-Erotic or Self-Produced amongst peers it is self-evidently the case that this does not produce 'cognitive distortions'. Rather than inducing attitudinal effects in their possessor, they 'may be of significance to adolescent self-fulfilment, self-actualization and sexual exploration and identity.'⁹⁷ Even where the viewer is not close in age, it is difficult to see how it can be a 'cognitive distortion' to view an image of conduct which the person may lawfully engage in, whether that image is of an actual young person or a youthful looking adult. Even if such material were to loosen inhibitions and encourage the viewer to seek sexual contact with a person under 18 but over 16, depending on the circumstances he or she would be pursuing a lawful activity.

While it could be argued that a person who expresses a lawful sexual interest in juveniles might be encouraged to offend against children, to criminalise a person for viewing lawful conduct is to criminalise on the basis that he or she may be tempted to engage in unlawful conduct. The impact of viewing on the risk of contact offending is complex and unresolved.⁹⁸ Even in the case of Child

92 *R v Sharpe* [2001] 1 SCR 45, 96–9 (McLachlin CJ).

93 *Ibid*; Cf Katherine S Williams, 'Child Pornography Law: Does it Protect Children?' (2004) 26(3) *Journal of Social Welfare and Family Law* 245, 253–4.

94 *Ashcroft v Free Speech Coalition*, 535 US 234, 241–2 (2002).

95 *Brandenburg v Ohio*, 395 US 444, 447 (1969).

96 *Ashcroft v Free Speech Coalition*, 535 US 234, 253 (2002).

97 *R v Sharpe* [2001] 1 SCR 45, 109 (McLachlin CJ). See also Nunziato, above n 6, 82.

98 See, eg, Kelly M Babchishin, R Karl Hanson and Chantal A Hermann, 'The Characteristics of Online Sex Offenders: A Meta-Analysis' (2011) 23(1) *Sexual Abuse: A Journal of Research and Treatment* 92.

Pornography it has been acknowledged that evidence that viewing leads to contact offending was 'not strong'.⁹⁹

Although sexual deviancy, including a sexual interest in children, is a major predictor of sexual recidivism,¹⁰⁰ there is insufficient evidence to suggest that possessing images of youthful looking 18 year olds will lead to contact offending against children. One study considering the impact of 'barely legal' pornography on viewer attitudes 'found no evidence that exposure [to barely legal pornography] causes adults to be more accepting of actual child pornography or of sexual interaction between adults and minors.'¹⁰¹ Nonetheless, the same study did find some support for the 'spreading activation' cognitive model whereby once a person has been primed by exposure to a particular concept, other related concepts may be more easily accessed.¹⁰² That is, 'men and women exposed to virtual child pornography or barely legal pornography showed a stronger cognitive association between youth and sexuality than subjects exposed to materials featuring older-looking models.'¹⁰³

The cognitive distortion with which these laws are concerned is a sexual interest in children. Although the term 'paedophile' is commonly used in connection with Child Pornography it conceals a spectrum of deviance. Strictly speaking, paedophilia relates to a sexual preference for prepubescent children.¹⁰⁴ 'Hebephilia', while not recognised as a clinical condition, is generally defined as a sexual preference for pubescent children (ages 11–14).¹⁰⁵ Therefore, while Child Abuse Material clearly reflects a deviant and unlawful sexual interest in children, Juvenile Pornography does not. This is not to say that such material is necessarily appropriate. Rather, if such material is inconsistent with community standards then it should be prosecuted under obscenity laws, not as Child Pornography.

C Facilitating Prosecutions

When the US Congress changed the definition of minor from 16 to 18 in 1984 they did so for pragmatic reasons — to facilitate the prosecution of Child Pornography offences. The definition of 'minor' under federal Child Pornography laws had originally been 16, in line with the age of consent. However this presented difficulties in proving the offence unless the child was prepubescent and therefore

99 *R v Sharpe* [2001] 1 SCR 45, 88 (McLachlin CJ).

100 Karl Hanson and Kelly Morton-Bourgon, 'The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies' (2005) 73(6) *Journal of Consulting and Clinical Psychology* 1154.

101 Bryant Paul and Daniel G Linz, 'The Effects of Exposure to Virtual Child Pornography on Viewer Cognitions and Attitudes toward Deviant Sexual Behavior' (2008) 35(1) *Communication Research* 3, 35.

102 *Ibid* 3.

103 *Ibid* 31.

104 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders DSM-IV-TR*, (American Psychiatric Association, 4th ed, 2000) 571–2.

105 Allen Frances and Michael B First, 'Hebephilia is Not a Mental Disorder in DSM-IV-TR and Should Not Become One in DSM-5' (2011) 39(1) *Journal of the American Academy of Psychiatry and the Law* 78.

definitely under 16. By raising the age to 18, it allowed enforcement of these laws whenever the child depicted did not appear to be an adult.¹⁰⁶

It may be argued that this allows protected speech to be banned in order to ban unprotected speech.¹⁰⁷ However, the Supreme Court in *Ferber* held that sexual images of minors are not protected speech. Therefore, '[c]ongress may regulate pornography involving *all* minors under the age of eighteen if it has a rational basis for doing so.'¹⁰⁸

While aimed at facilitating the prosecution of images of minors under 16, it does allow images of lawful sexual conduct to be punished in order to facilitate the prosecution of images of unlawful sex. Whether limited police resources will, or should, be allocated to such marginal images may be questioned.¹⁰⁹ One US study suggests that where arrests were made the nature of the Child Pornography overwhelmingly related to much younger children, with 83 per cent of offenders possessing at least some images depicting children between 6 and 12.¹¹⁰ However, as conduct involving sexual images of juveniles may constitute serious criminal offences, there is clearly an argument for well-defined prosecutorial guidelines in relation to such images.¹¹¹

D Paternalism

We have seen that rationales which relate to the sexual abuse of children and cognitive distortions arguably have no application in relation to Juvenile and Youthful-Adult Pornography. Similarly, although facilitating Child Pornography prosecutions is an important goal, it also relates to enforcement of laws concerning unlawful sex with children. It may therefore seem 'nonsensical' to divorce the age of consent for pornography and for sexual activity.¹¹² How can it be rational to criminalise the recording of lawful sexual conduct for private, non-commercial purposes?¹¹³ The answer is to protect young people from themselves.

In understanding this rationale it is important to emphasise that being able to consent to sex does not make a person an adult. While the age of consent reflects an age below which society regards a sexual interest in young people as inappropriate, it also reflects the age at which society regards the young person as having some degree of sexual autonomy. However, that autonomy is not complete until the person reaches 18. While for legal purposes it may be assumed that the

106 *US v Freeman*, 808 F 2d 1290, 1293 (8th Cir, 1987).

107 *Ashcroft v Free Speech Coalition*, 535 US 234, 254 (2002).

108 *US v Bach*, 400 F 3d 622, 629 (8th Cir, 2005) (emphasis added). See also *US v Sherr*, 400 F Supp 2d 843, 850 (D Md, 2005).

109 Alisdair A Gillespie, 'The *Sexual Offences Act 2003*: Tinkering with "Child Pornography"' (2004) 3 *Criminal Law Review* 361, 363.

110 Janis Wolak, David Finkelhor and Kimberley Mitchell, 'Internet Sex Crimes against Minors: The Response of Law Enforcement' (Crimes Against Children Research Center, November 2003) 9.

111 See below Part VI F.

112 Gillespie, 'Legal Definitions of Child Pornography', above n 16, 20–1.

113 *State v Senters*, 699 NW 2d 810, 817 (Neb, 2005).

young person is mature enough to engage in sexual activity, they may still require protection.

For example, in *People v Campbell*,¹¹⁴ a husband was found to be in possession of a photograph of his 18 year old wife having consensual sex with a 15 year old girl. Because the wife was no more than ten years older than the girl, the sexual conduct was lawful under Colorado law. However, under the sexual exploitation of children statute, a person under 18 could not consent to the use of his or her body for a sexual purpose. The defendant was convicted of sexual exploitation of a child and contributing to the delinquency of a minor.

The Court rejected the defendant's argument that there was no rational basis for treating his prohibited act of recording sexual activity with a child differently from his wife's legally permissible act of engaging in sexual activity with that same child.¹¹⁵ It was open to the legislature to 'conclude that for fifteen- to eighteen-year-olds, engaging in consensual sex with others who are within a reasonably close age range, and who are not in a position of trust, is less harmful than being photographed for sexually explicit material.'¹¹⁶ So long as there is a rational basis for doing so, legislatures may define 'child' for the purpose of regulating Child Pornography as under 18, even if the age of consent is lower.¹¹⁷

Two key rationales which relate to protecting young people in this context are:

1. the concern that they are vulnerable to exploitation; and
2. that they lack the maturity to make responsible decisions in relation to certain sexual activities.¹¹⁸

In respect of the first, the use of young people in pornography, and the harm that it may cause, is clearly an issue of great concern,¹¹⁹ and appears to have been the rationale for increasing the age from 16 to 18 in both England and Wales and Victoria.¹²⁰ In England and Wales, the amendment was one of a suite of reforms aimed, in part, at ensuring compliance with the *Optional Protocol on the UN Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography*.¹²¹ Similarly, in Victoria the change was brought about to ensure that Victorian legislation complied with the ILO's *Worst Forms of Child Labour Convention*.¹²²

114 *People v Campbell*, 94 P 3d 1186 (Colo Ct App, 2004).

115 Ibid 1189.

116 Ibid.

117 *State v Sinters*, 699 NW 2d 810, 817 (Neb, 2005).

118 Bonnie B Miller, David N Cox and Elizabeth M Saewyc, 'Age of Sexual Consent Law in Canada: Population-Based Evidence for Law and Policy' (2010) 19(3) *The Canadian Journal of Human Sexuality* 105, 106.

119 *Ferber*, 458 US 747, 758 (1982).

120 *Sexual Offences Act 2003* (UK) c 42, s 45(2).

121 United Kingdom, *Parliamentary Debates*, House of Commons, 12 December 2002, vol 396, col 478–9W (Hilary Benn).

122 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 April 2004, 718 (Rob Hulls, Attorney-General).

However, both the ILO Convention and the Optional Protocol criminalise exploitative relationships. For example, the ILO ‘requires criminalisation of the use, procuring or offering of a child under 18 for pornographic performances [and] ... applies to conduct done for commercial purposes.’¹²³ Neither Erotic Auto-Depictions nor Youthful-Adult Pornography can be justified on this basis as neither involves exploitation of a minor. While Self-Produced Juvenile Pornography may, it is clearly possible to criminalise images produced in circumstances of coercion or exploitation without a blanket prohibition on sexual images of juveniles.

The second rationale relates to legitimate concerns as to the maturity of young people to make sensible choices in respect of sexual images of themselves. Why should a young person not circulate sexual images of themselves if they wish to? The principal argument is the reputational harm that may be caused by distribution of such images, a distinction being drawn between the age at which young people should be able to engage in consensual sexual relations and the age at which they should be regarded as sexual objects.¹²⁴ There is also the very real danger of young people being sexually exploited.

Such an argument is very powerful where the images depict unlawful sexual conduct. As was stated in *Ferber*, the materials produced are a permanent record of the abuse of that child, and ‘the harm to the child is exacerbated by their circulation.’¹²⁵ However the harm may extend beyond a record of sexual abuse, to a permanent record of a private sexual moment which may ‘haunt’ their future years. ‘Like a defamatory statement, each new publication of the speech would cause new injury to the child’s reputation and emotional well-being.’¹²⁶ Such harm is independent of any harm caused by the sexual act itself. That is, the act may not cause harm to the child, but the recording and potential for distribution may.¹²⁷

While the logic of this argument can be seen in relation to distribution of images, it is less clear why it should extend to production.¹²⁸ One answer is that without production there can be no distribution.

Even for those who record an intimate act and intend for it to remain secret, a danger exists that the recording may find its way into the public sphere, haunting the child participant for the rest of his or her life. It is reasonable to conclude that persons 16 and 17 years old, although old enough to consent to sexual relations, may not fully appreciate that today’s recording of a private, intimate moment may be the Internet’s biggest hit next week.¹²⁹

123 Ibid.

124 *Explanatory Report*, above n 49, s 104.

125 458 US 747, 759 (1982).

126 *Ashcroft v Free Speech Coalition*, 535 US 234, 249 (2002), cited in *People v Campbell*, 94 P 3d 1186, 1189–90 (Colo Ct App, 2004). See also *State v Senters*, 699 NW 2d 810, 817 (Neb, 2005).

127 *People v Campbell*, 94 P 3d 1186, 1190 (Colo Ct App, 2004).

128 *State v Senters*, 699 NW 2d 810, 817 (Neb, 2005).

129 Ibid.

A similar argument may be made for banning possession of images in order to encourage their destruction.¹³⁰ In essence, such offences are 'intended to protect them from their own lack of judgment.'¹³¹

In the context of possession and production, such an approach punishes a 'remote' harm in that it depends upon a future decision, either by the defendant or another, to distribute the material.¹³² In determining whether such conduct should be criminalised, relevant factors include the risk and gravity of the potential risk, the social value of the proscribed conduct and constraint of other freedoms.¹³³ The risk of distribution is undoubtedly significant, although not inevitable. According to one US survey, 20 per cent of teens (13–19 years of age) surveyed had sent nude images of themselves, with 36 per cent of teen girls and 39 per cent of teen boys saying it was 'common' for nude or semi-nude photos to be shared with people other than the intended recipient.¹³⁴ While the reputational harm which may be caused is undoubtedly significant, this must be balanced with the fact that production of sexual images may be regarded as a significant aspect of sexual expression.¹³⁵ It is by no means clear that a penal sanction is a necessary and justified response to prevent reputational harm at the expense of individual autonomy.¹³⁶

Although the fact that the defendant is a minor is arguably an important factor in justifying intervention,¹³⁷ it should be seen in the context of a minor who is considered sufficiently autonomous to consent to sexual relations. Sexual conduct itself may result in pregnancy or sexually transmitted diseases, both of which may have permanent consequences, yet there is little call for the age of consent to be raised.¹³⁸ Further, to 'punish the choices of one autonomous agent as a deterrent to others is equally objectionable'.¹³⁹

While it may be legitimate to discourage third parties from producing and distributing pornography involving a juvenile, there is a certain illogicality in protecting a young person from reputational harm by prosecuting them for a criminal offence. This is particularly so for offences such as production and possession where punishment is inflicted in anticipation of future action. A distinction may also be drawn between a third party and a person with whom the

130 *Osborne v Ohio*, 495 US 103, 111 (1990).

131 *A H v Florida*, 949 So 2d 234, 238 (Fla Dist Ct App, 2007).

132 Andrew von Hirsch, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation' in A P Simester and A T H Smith (eds), *Harm and Culpability* (Clarendon, Oxford, 1996) 259, 264.

133 *Ibid* 261.

134 The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Young Teens and Adults* (2010) <http://www.thenationalcampaign.org/sextech/pdf/sextech_summary.pdf>. Note that images of young people 18 or above do not constitute child pornography under most laws, unless the person 'appears to be' a minor, see above Part III B.

135 *R v Sharpe* [2001] 1 SCR 45, 109 (McLachlin CJ).

136 A P Simester et al, *Criminal Law, Theory and Doctrine* (Hart Publishing, 4th ed, 2010) 651.

137 *Ibid* 650.

138 Gillespie, 'Legal Definitions of Child Pornography', above n 16, 18.

139 Simester et al, above n 136, 651.

person depicted is close in age and in a relationship.¹⁴⁰ Similar distinctions may be drawn in relation to possession. The multi-faceted nature of this issue therefore means that there is no single solution, and any attempt at reform requires a detailed consideration of context.¹⁴¹

V OTHER ELEMENTS OF THE OFFENCE

It can be seen that sexual images of juveniles raise complex questions of sexual autonomy and paternalism, requiring a nuanced approach. Child Pornography laws, concerned as they are with depictions of child sexual abuse, are arguably ill-suited to the task. Before considering some options for reform it is useful to consider some remaining elements of these offences to determine whether they may mitigate the impact of these laws in this context. Of particular relevance are the mental element of the offence and the definition of ‘pornography’.

A Mental State

The mental state which must be proved for Child Pornography offences varies considerably between jurisdictions.¹⁴² At the highest level, US federal offences require proof that the defendant knew both the sexually explicit nature of the material and that the images were of minors.¹⁴³ At the next level, under Australian federal legislation it is sufficient if the defendant was reckless as to whether the material was Child Pornography.¹⁴⁴ The mens rea requirement is strictest in the UK where it has been held that on a charge of possession the prosecution need not prove that the defendant was aware that the image was of a child.¹⁴⁵

Because of the possibility, particularly in borderline cases, that a defendant will claim to honestly believe the person was over the relevant age, a number of jurisdictions impose a reasonableness requirement on that belief. For example, in Victoria it is a defence to a charge of possession for the defendant to prove that he ‘believed on reasonable grounds that the minor was aged 18 years or older.’¹⁴⁶ The Canadian provisions are even more onerous, requiring the defendant to have taken ‘all reasonable steps’ to ascertain the age of that person and to ensure that,

140 In one Canadian survey, the age of partner at *first* intercourse for 16 year old girls was 17 (28.8 per cent), 18 (16.8 per cent), 19 (7.7 per cent) and 20 or older (8.8 per cent); Miller, Cox and Saewyc, above n 118, 112.

141 Options for reform are discussed below Part VI.

142 Even within one jurisdiction, different mental states may apply to different offences involving children; *Tasmania v Martin (No 2)* [2011] TASSC 36, [3]–[4] (Porter J).

143 *US v Tucker*, 150 F Supp 2d 1263 (D Utah, 2001), applying *US v X-Citement Video Inc*, 513 US 64 (1994).

144 *Criminal Code Act 1995 (Cth)* s 474.19(2)(b). See eg, *Hann v DPP (Cth)* [2004] SASC 86.

145 *R v Land* [1999] QB 65.

146 *Crimes Act 1958 (Vic)* s 70(2)(c). The section also refers to a reasonable belief that the defendant was married to the minor.

where the person was 18 years of age or more, the representation did not depict that person as being under the age of 18 years.¹⁴⁷

In those cases where it must be proved that the defendant knew or was reckless as to the person depicted being a minor, the nature of the images and the manner in which the person is depicted will of course be crucial in assessing the defendant's belief. It is also here that the increase in the definition of minor from 16 to 18 assumes particular significance.

According to the Court in *R v Land*,¹⁴⁸ it should be readily apparent that the person depicted is a minor.

Ignoring members of the child's own family, who will know his or her age, it will be rare in the extreme for a complete stranger to be in possession of indecent photographs of someone who although appearing to be mature could nevertheless be proved by the prosecution to be a child. A glance will quickly show whether the material is or may be depicting someone who is under 16 ...¹⁴⁹

Further, the Court rejected the use of expert evidence in this context. Whether the person is under the relevant age is a question of fact based on inference without any need for formal proof. The purpose of expert evidence is to assist the court with information which is outside the normal experience and knowledge of the judge or jury. In such cases, the jury is as well placed as an expert to determine whether the person depicted is under 16.¹⁵⁰

This decision was made at a time when the relevant age in England and Wales was under 16. Whatever merit there may have been at that time, it may be doubted whether one could state, with the confidence necessary in the context of a penal provision, that a 'glance will quickly show' whether the person depicted is under 18. Ascertaining the age of a person from a visual image is notoriously unreliable. Apart from the variability in rates of sexual maturation due to biological, personal and environmental factors,¹⁵¹ viewing an image in two dimensions does not allow for a full inspection of features. Further, certain markers such as pubic hair may be removed.¹⁵² In one recent study, subjects from Italy and Germany were asked to ascertain the age of women in 11 pornographic images. The images were taken from 'adult' sites and the women depicted were known to be over 18. Amongst laypeople, only 50 per cent of Italians and 23 per cent of Germans correctly identified the women as being over 18.¹⁵³

147 *Criminal Code*, RSC 1985, c C-46, s 163.1 (1), (5).

148 *R v Land* [1999] QB 65.

149 *Ibid* 70 (Judge LJ).

150 *Ibid* 70-1 (Judge LJ), cited with approval in *Police v Kennedy* (1998) 71 SASR 175, 191 (Bleby J), although his Honour did not go so far as to say such evidence would be inadmissible, only that it would be 'seldom helpful'.

151 *Tasmania v Martin* [No 2] [2011] TASSC 36, [69] (Porter J).

152 Cristina Cattaneo et al, 'The Difficult Issue of Age Assessment on Pedo-Pornographic Material' (2009) 183 (1-3) *Forensic Science International* e21-e24.

153 *Ibid*.

In contrast to the English courts, other jurisdictions have held that expert evidence may assist the jury; for example, in stating whether certain features are consistent or inconsistent with a person under the relevant age.¹⁵⁴ Relevant experts include paediatricians who may testify as to the apparent age of the child depicted based on physical appearance.¹⁵⁵ Nonetheless, in the case of images expert evidence in these borderline cases is no guarantee. In the study described above, paediatricians fared worse than lay people, incorrectly identifying the women as under 18 in 73 per cent (Italy) and 95 per cent (Germany) of cases.¹⁵⁶

B ‘Pornography’

A further limitation on the potential over breadth of these provisions is the nature of the sexually explicit material to which they apply. The ordinary meaning of the word ‘pornography’ is ‘obscene literature, art, or photography, designed to excite sexual desire.’¹⁵⁷ Under the *Cybercrime Convention*, the meaning of ‘pornographic material’ is to be governed by ‘national standards pertaining to the classification of materials as obscene, inconsistent with public morals or similarly corrupt.’¹⁵⁸ Therefore, material which is ‘artistic, medical, scientific or similar merit may be considered not to be pornographic.’¹⁵⁹ However, ‘sexually explicit conduct’ is intended at least to encompass, whether real or simulated:

- (a) sexual intercourse (including genital-genital, oral-genital, anal-genital or oral-anal) between minors, or between an adult and a minor, of the same or opposite sex;
- (b) bestiality;
- (c) masturbation;
- (d) sadistic or masochistic abuse in a sexual context; or
- (e) lascivious exhibition of the genitals or the pubic area of a minor.¹⁶⁰

Such conduct falls within the definition of ‘Child Pornography’ in most jurisdictions.¹⁶¹ Of course some of these activities are illegal regardless of consent, such as bestiality,¹⁶² and anal intercourse in some jurisdictions.¹⁶³ Further, consensual sadomasochism may constitute an offence depending on the

154 *Arnott v McFadyen* (2002) SCCR 96; *US v Hamilton*, 413 F 3d 1138 (10th Cir, 2005).

155 *US v Marchand*, 308 F Supp 2d 498, 504–5 (D NJ, 2004).

156 Cattaneo et al, above n 152.

157 Butler (ed), above n 19.

158 *Explanatory Report*, above n 49, s 99.

159 *Ibid.*

160 *Ibid* s 100.

161 *Criminal Code 1995* (Cth) s 473.1; *Protection of Children Act 1978* (UK) c 37, s 1; *Criminal Justice Act 1988* (UK) c 33, s 160; 18 USC § 2256(8). To complicate matters, in Victoria where the offence of transmission is charged it must be ‘objectionable material’; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) s 57A.

162 *Crimes Act 1958* (Vic) s 59.

163 See above n 37.

level of harm caused.¹⁶⁴ Nonetheless, the definition applies to a wide range of sexual activity which is perfectly lawful, yet will constitute Child Pornography if one or more of the people involved is a juvenile.

A broad distinction may be drawn between those images depicting actual sexual activity (categories (a)-(d)) and those which depict full or partial nudity. In the case of the former, in some jurisdictions such material does not require any further qualifying adjective such as 'pornographic' or indecent.¹⁶⁵ In these jurisdictions depictions of such activities by juveniles is prima facie Child Pornography. In other jurisdictions even depictions of sexual activity must be 'indecent'¹⁶⁶ or depicted in a way that 'reasonable persons would regard as being, in all the circumstances, offensive.'¹⁶⁷ In contrast, where the depiction is of nudity then in all jurisdictions the image must be 'lascivious',¹⁶⁸ 'indecent',¹⁶⁹ its 'dominant characteristic' being for a 'sexual purpose'¹⁷⁰ or in a way that 'reasonable persons would regard as being, in all the circumstances, offensive.'¹⁷¹

These are ultimately questions of fact and allow the image to be assessed against community standards. In many cases of Juvenile Pornography the images will be of actual sexual activity or graphic depictions of genitalia which are intended to be sexually arousing. They are therefore likely to be considered 'indecent'. However images at the margins such as nudity may well fall outside the definition. This is particularly so given the age of the persons depicted. What may be an inappropriate and indecent image of a 12 year old may not be indecent in the case of a 17 year old. For example, an Ohio court found sufficient evidence of lewdness under state law in photographs of a 16-year-old girl's naked breasts and bikini line with visible pubic hair.¹⁷²

Also relevant in this context is artistic or other merit. Although in the vast majority of cases the social value of Child Pornography will be non-existent,¹⁷³ there is clearly the possibility that such laws may encompass artistic works which depict sexual activity between or with minors, including 'Lolita', 'Romeo and Juliet' and 'American Beauty'.¹⁷⁴ Accordingly, some jurisdictions incorporate such considerations within the offence provision. For example, under Australian federal law factors relevant to whether reasonable persons would regard particular material as being, in all the circumstances, offensive, include 'the literary, artistic

164 *R v Brown* [1994] 1 AC 212.

165 *Criminal Code*, RSC 1985, c C-46, s 163.1(1)(a); *Crimes Act 1958* (Vic) s 67A; 18 USC § 2256(2).

166 *Protection of Children Act 1978* (UK) c 37, s 1.

167 *Criminal Code Act 1995* (Cth) s 473.1.

168 18 USC § 2256(2).

169 *Crimes Act 1958* (Vic) s 67A; *Protection of Children Act 1978* (UK) c 37, s 1. In the UK and Victoria, 'indecent' is regarded as an ordinary word and it is for the jury to determine whether 'right-minded persons would consider the act indecent or not': *R v Court* [1989] AC 28, 42 (Lord Ackner); *R v Harkin* (1989) 38 A Crim R 296, 299-301 (Lee J).

170 *Criminal Code*, RSC 1985, c C-46, s 163.1(1)(d).

171 *Criminal Code Act 1995* (Cth) s 473.1.

172 *State v Woods*, 835 NE 2d 728 (Ohio, 2005).

173 *Ferber*, 458 US 747, 762 (1982).

174 *Ashcroft v Free Speech Coalition*, 535 US 234, 247-8 (2002).

or educational merit (if any) of the material'.¹⁷⁵ Similarly, in Victoria it is a defence to a charge of possession of Child Pornography to prove that it possesses artistic merit (unless the child is actually under 18) or is for a 'genuine medical, legal, scientific or educational purpose'.¹⁷⁶

VI OPTIONS FOR REFORM

We have seen that the application of Child Pornography laws to Juvenile Pornography may produce anomalous and potentially unjust outcomes. Yet there are legitimate concerns in relation to the production and distribution of images of lawful sexual conduct involving young people. The challenge is to find an appropriate balance between protecting minors from sexual abuse and reputational harm, while allowing for appropriate sexual conduct between consenting adults.

It is suggested that there are broadly two options which could be adopted to reform these laws, both of which would allow for a more targeted approach to such material than conventional Child Pornography laws. The first ('Option 1') is to return to the situation which existed for many years where the definition of 'minor' for Child Pornography reflects the age of consent. The second ('Option 2') is for such material to remain within the existing framework of Child Pornography laws, but to be redefined as a distinct category of material depicting minors over 16. For these purposes, the term 'Juvenile Pornography' will be adopted, being the term used in Germany in this context.¹⁷⁷ We will now turn to consider the impact of these Options on a range of distinct issues. Although for convenience these impacts will be discussed in relation to Options 1 or 2, many could be adopted alone or in combination.

A Terminology

Although the term 'Child Pornography' is used widely in the literature,¹⁷⁸ legislation,¹⁷⁹ and common usage, it has been criticised as inviting comparisons with adult pornography, suggesting that Child Pornography is something other than the recording of child abuse.¹⁸⁰ This is particularly so in England and Wales

175 *Criminal Code Act 1995* (Cth) s 473.4. See *Criminal Code*, RSC 1985, c C-46, s 163.1(6).

176 *Crimes Act 1958* (Vic) s 70(2)(b). It is also a defence to prove that a film, publication or computer game was, at the time of the alleged offence, classified other than RC, X or X18+ (s 70(2)(a)).

177 *Strafgesetzbuch* [Penal Code] (Germany) § 184c. Although in Germany the age of consent is 14 and so this material applies to images of persons over 14 but under 18.

178 See, eg, Taylor and Quayle, above n 75; Yaman Akdeniz, *Internet Child Pornography and the Law: National and International Responses* (Ashgate, 2008).

179 *Criminal Code Act 1995* (Cth) s 473.1; *Criminal Code*, RSC 1985, c C-46, s 163.1; 18 USC §§ 2252, 2252A; *Crimes Act 1958* (Vic) s 67A.

180 Taylor and Quayle, above n 75, 7; Alisdair A Gillespie, *Child Pornography Law and Policy* (Routledge, 2011) 1–4. See South Australia, *Parliamentary Debate*, House of Assembly, 10 March 2011, 2852 (Robert Bruce Such).

which retains the euphemistic term 'indecent photograph of a child'.¹⁸¹ For this reason, a number of jurisdictions adopt more accurate descriptions such as 'child exploitation'¹⁸² or 'child abuse'¹⁸³ material.

By encompassing images which are neither exploitative nor abusive, the inclusion of Juvenile and Youthful-Adult Pornography within these terms has the potential to undermine these efforts at more accurate description. Both Options address this anomaly but in different ways. Option 1 simply removes Juvenile and Youthful-Adult Pornography from the concept of Child Pornography, thereby focusing those offences on Child Abuse Material. Option 2 retains Juvenile and Youthful-Adult Pornography within the range of Child Pornography offences, but more accurately defines it by removing references to child exploitation or abuse and classifying it as a form of prohibited pornography.

B Obscene Materials

Child Pornography offences are concerned with the protection of children, not the enforcement of moral standards. While under Options 1 and 2 Juvenile Pornography would no longer be regulated as Child Pornography, if it is considered that sexual depictions of young people over 16 are contrary to community values, they may be criminalised under obscenity or classification laws. For example, under the Australian classification system, material which describes or depicts in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not) is to be refused classification.¹⁸⁴ As such it is 'objectionable material' for the purposes of online transmission¹⁸⁵ and subject to criminal penalties.¹⁸⁶ Child Pornography is currently subject to higher penalties under this scheme,¹⁸⁷ and this could be retained for Child Abuse Material.

More extreme images could be subject to a distinct category of offence, as occurs in the UK with the offence of possession of 'extreme pornographic images'.¹⁸⁸ Under this provision, an image is pornographic if it can reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.¹⁸⁹ The image must also be 'extreme' which means an explicit and realistic depiction of a life threatening act, an act which results or is likely to result in serious injury to a person's anus, breasts or genitals, involves sexual intercourse with a human

181 *Protection of Children Act 1978* (UK) c 37, s 1.

182 *Criminal Code Act 1899* (Qld) s 207A; *Criminal Code Act 1924* (Tas) s 1A; *Criminal Code Act Compilation Act 1913* (WA) pt III ch XXV.

183 *Crimes Act 1900* (NSW) pt 3 div 15A; *Criminal Code Act* (NT) s 125A.

184 Attorney-General's Department, *National Classification Code*, F2005L0128, May 2005.

185 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) s 56.

186 *Ibid* s 57.

187 *Ibid* s 57A. The equivalent UK legislation is the *Obscene Publications Act 1959* (UK) 7 & 8 Eliz 2, c 66.

188 *Criminal Justice and Immigration Act 2008* (UK) c 4, s 63.

189 *Ibid* s 63(2).

corpse or a sexual act with an animal.¹⁹⁰ In addition, the image must be grossly offensive, disgusting or otherwise of an obscene character.¹⁹¹ Such an offence would include what is currently prosecuted as ‘child abuse material’ in some jurisdictions,¹⁹² but would go further and extend to extreme pornographic images of any person regardless of age.

C ‘Appears to be’

As discussed above, the prohibition of Youthful-Adult Pornography may be justified on the basis that it may promote cognitive distortions which may lead to offending against children. While such a rationale makes some sense where the interest exhibited by the viewer is unlawful or at least deviant, in the case of images of lawful sexual conduct the connection with protection of children from abuse is much more tenuous.

The impact of Options 1 and 2 on this category depends upon how young the person depicted appears to be. Under Option 1, such material would be removed from the definition of Child Pornography but retained for Child Abuse Material so long as the person depicted appeared to be under the age of consent. Under Option 2, it is argued that the definition of Juvenile Pornography should not extend to images which appear to be of a person under 18.¹⁹³ However it is argued that material which does not depict an actual minor should be removed from the ambit of Child Pornography laws where the person depicted is above the age of consent.¹⁹⁴ The prohibition against images which appear to be of a person under 16 would remain.

In either case, images of Juvenile Pornography which are considered to be contrary to community values could be prosecuted, if at all, under obscenity or classification laws. For example, under the Australian system, material which describes or depicts in a way that is likely to cause offence to a reasonable adult, a person who is ‘or appears to be’ a child under 18 is to be refused classification.¹⁹⁵

190 Ibid s 63(7).

191 Ibid s 6(6).

192 *Criminal Code Act 1995* (Cth) s 473.1; *Crimes Act 1900* (NSW) s 91FB; *Criminal Code Act* (NT) s 125A; *Criminal Code Act 1899* (Qld) s 207A; *Criminal Law Consolidation Act 1935* (SA) s 62; *Criminal Code Act 1924* (Tas) s 1A; *Criminal Code Act Compilation Act 1913* (WA) s 217A.

193 *Council Framework Decision 2004/68/JHA*. Such an exception is recognised in the European Union Framework Directive whereby Member States may exclude from the application of child pornography laws, images where the person appears to be a child but was in fact over 18; *Council Directive 2011/93/EU of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and replacing Council Framework Decision 2004/68/JHA* [2011] OJ L 335335/1, art 5(7)).

194 As discussed above, in the US such material falls outside the scope of Child Pornography laws entirely.

195 Attorney-General’s Department, *National Classification Code*, F2005L0128, May 2005.

D Erotic Auto-Depictions

Option 1 would automatically remove Erotic Auto-Depictions from Child Pornography laws in respect of a person over 16. In the case of Option 2, production and possession of such images would constitute an (albeit lesser) offence unless a limited defence was provided for.¹⁹⁶ In *Sharpe*, a majority of the Supreme Court of Canada created an exception for auto-depictions made by a person who is under 18, held privately and intended only for personal use.¹⁹⁷ The Court considered that such materials present little if any risk to children as no child is exploited or abused in their production. Rather than inducing attitudinal effects in their possessor, they 'may be of significance to adolescent self-fulfilment, self-actualization and sexual exploration and identity.'¹⁹⁸ Because the material is held privately, the potential for its harmful use by others is minimal.¹⁹⁹ A simple form of this defence is found in the Victorian legislation, which provides that it is a defence to a charge of possession for the defendant to prove that he or she was one of the minors depicted in the image.²⁰⁰ In order to be effective, the exceptions must also apply to the offence of 'making' Juvenile Pornography as otherwise the person would remain vulnerable to prosecution for producing the recording.²⁰¹

The Supreme Court of Canada further extended the exception to include the recording of sexual activity with others provided that:

- (a) the person possessing the recording must have personally recorded or participated in the sexual activity in question;
- (b) the activity must not be unlawful, that is, it must be consensual and not involve the exploitation or abuse of children;
- (c) all parties must have consented to the recording; and
- (d) the recording must be kept in strict privacy and intended exclusively for private use by the creator and the persons depicted therein.²⁰²

As noted by the Court, the consensual nature of the recording is crucial. This point is also emphasised by the European Union which states that pornographic performances may lawfully take place within the context of a consensual sexual relationship where the child has reached the age of consent, or between peers who are close in age, development or maturity, so long as the acts do not involve 'any

196 Although our focus is on Juvenile Pornography, such a defence should arguably apply to Child Pornography more broadly.

197 *R v Sharpe* [2001] 1 SCR 45, 108 (McLachlin CJ and Iacobucci, Major, Binnie, Arbour and LeBel JJ). The minority, L'Heureux-Dube, Gonthier and Bastarache JJ delivered a separate judgment, also allowing the appeal, but not accepting the exceptions created by the majority: at 238.

198 *Ibid* [109].

199 *Ibid* [105]. Also see *Council Directive 2011/93/EU of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and replacing Council Framework Decision 2004/68/JHA* [2011] OJ L 335/1 art 5(8).

200 *Crimes Act 1958* (Vic) s 70(2)(e).

201 *R v Sharpe* [2001] 1 SCR 45, 117.

202 *Ibid* 119.

abuse or exploitation'.²⁰³ Even in the case of peers, coercion is a concern with one survey indicating that 51 per cent of teen girls (but only 18 per cent of boys) said pressure from a boy/girl is a reason to send sexual messages or images.²⁰⁴

E Self-Produced Juvenile Pornography

The issue becomes more difficult in the context of Self-Produced Juvenile Pornography which is distributed to others. In *Sharpe*, the majority found that the exception would not apply to the offences of printing, publishing or possessing for the purpose of publishing.²⁰⁵ The concern is that the recording of a sexual image can easily become accessible to many and effectively irretrievable. Under Option 1, such material would no longer be criminalised except under obscenity laws. An alternative, adopted by a number of US jurisdictions, is to enact a specific 'sexting' offence. For example, in Vermont it is an offence for a minor, knowingly and voluntarily and without threat or coercion, to use a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person.²⁰⁶ Further, it is an offence for a person to possess such a visual depiction transmitted to the person, unless the person took reasonable steps, whether successful or not, to destroy or eliminate the visual depiction.²⁰⁷ Option 2 would have a similar effect by classifying the material as a lesser offence.

An alternative would be to allow for a defence to distribution of Juvenile Pornography for the person depicted in the image. Under Victorian law, this is currently a defence to possession²⁰⁸ but not to production²⁰⁹ or transmission.²¹⁰ It could also be a defence to a charge of possession where the recipient was close in age to the person depicted. For example, it is a defence to a charge of possession of Child Pornography that the defendant was given the image by the minor and at the time was not more than two years older than the minor was or appeared to be.²¹¹ Further safeguards could be built in by ensuring that, notwithstanding closeness in age, the defendant was 'not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of

203 Council Directive 2011/93/EU of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L 335/1 art 88(2).

204 The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Young Teens and Adults* (2010) <http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf>.

205 Ibid.

206 13 VSA § 2802b(a)(1).

207 Ibid § 2802b(a)(2), § 2802b(a)(2). For a summary of US reforms see Elizabeth C Eraker, 'Sexting: Sensible Legal Approaches to Stemming Teenagers' Exchange of Self-Produced Pornography' (2010) 25 *Berkeley Technology Law Journal* 555, 573–82.

208 *Crimes Act 1958* (Vic) s 70(2)(e).

209 Ibid s 68.

210 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 57, 57A.

211 *Crimes Act 1958* (Vic) s 70(2)(d).

dependency and is not in a relationship with the complainant that is exploitative of the complainant'.²¹²

Yet another alternative would be to allow for a defence where there is a relationship between the defendant and the person depicted. A limited defence of this nature is provided for in England and Wales. On a charge of possession, where the image is of a child over 16 it is a defence to show that the defendant and child were married, civil partners, or lived together as partners in an enduring family relationship.²¹³ The defence does not apply where a person other than the child or defendant is shown in the image.²¹⁴ Further, if there is evidence that the child did not consent to the image being in the defendant's possession, or as to whether the defendant reasonably believed the child so consented, it is for the prosecution to prove lack of consent or lack of belief.²¹⁵ Such defences could also extend to offences of making or distributing Juvenile Pornography, but only where the distribution occurs between the juvenile and the defendant.²¹⁶

An additional concern is the commercial market which would be generated for sexual images of those over 16. 'Barely legal' pornography which currently focuses on those over 18 would likely expand to depict young people over 16. Under Option 1, such material would fall outside Child Pornography laws and would be prosecuted, if at all, under obscenity or classification laws. Option 2 would retain the criminalisation of such material, albeit for a lesser offence.

However Child Pornography laws are not the only way to deal with such material. If it is contrary to community standards then they may be regulated under obscenity and classification laws.²¹⁷ In addition, concern as to the vulnerability of young people to exploitation can be addressed by offences such as procuring a minor for the making of Child Pornography.²¹⁸ Similar offences apply in relation to prostitution²¹⁹ and could continue to apply to minors under 18, thus recognising the distinction between allowing young people some sexual freedom and protecting them from exploitation. A distinction could also be drawn between 'publishing', which implies that the material is made available to the public or a section of the public, as distinct from the transmission of material between two people or to the creation of material purely for personal use.²²⁰ Concern as to the distribution of private images is not limited to minors and could be addressed by a general offence of distributing a prohibited visual recording of another person.²²¹

212 *Criminal Code*, RSC 1985, c C-46, s 150.1(2.1).

213 *Criminal Justice Act 1988* (UK) c 33, s 160(1)(2).

214 *Ibid* s 160(3).

215 *Ibid* s 160(4).

216 *Protection of Children Act 1978* (UK) c 37, s 1A.

217 See Part VI D.

218 *Crimes Act 1958* (Vic) s 69.

219 *Sex Work Act 1994* (Vic) s 5.

220 *R v Quick* (2004) 148 A Crim R 51, 65–6 (Redlich J).

221 See, eg, *Criminal Code 1899* (Qld) s 227B; *Criminal Code*, RSC 1985, c C-46, s 162(4). Also see Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (Discussion Paper, Commonwealth Attorney-General's Department, 2005) 31.

F Prosecutorial Discretion

It might be thought that prosecutorial discretion could be relied upon to avoid the unjust application of these laws in the context of Juvenile Pornography. It is undoubtedly the case that the vast majority of prosecutions for Child Pornography concern images which clearly show the abuse of children under 16. For example, in one study 92 per cent of offenders possessed Child Pornography depicting genitals or explicit sexual activity, 80 per cent penetration of a minor, 71 per cent sexual contact between an adult and a minor, and 21 per cent depicting violence.²²²

This suggests that offenders are not being arrested for possessing marginal or ambiguous sexual images of minors such as images where it is hard to ascertain whether the subject is a minor or where the context was casual nudity without sexual abuse to the child.²²³

Where Juvenile Pornography is prosecuted, it may well be along with images which are clearly child abuse material and/or where it is questionable whether the images depict lawful sexual conduct.²²⁴

Nonetheless, there are clearly examples of Child Pornography laws being used to prosecute Juvenile Pornography. For example, in 2011 Victoria Police charged and then cautioned a boy and a girl, both 17, who had made a sex tape and sent it to their friends.²²⁵ If prosecutorial discretion is to be relied upon it should be clear on what basis it is to be exercised, particularly when it applies to a category of offence which Parliament has seen fit to impose a sentence of five years imprisonment or more. However, in Australia neither the Commonwealth²²⁶ nor Victorian²²⁷ Directors of Public Prosecutions specifically address this category of offence. In England and Wales, although the Crown Prosecution Service provides detailed guidance in relation to indecent photographs of children, on this issue they merely state that the relevance of the increase in age from 16 to 18 is likely to be 'limited' for most prosecutions.²²⁸

Of course, Option 1 would simply remove the issue and the question would be whether such images should be prosecuted under other provisions, if at all. Option 2 would allow clearer guidance to be provided in relation to prosecution policy

²²² Wolak, Finkelhor and Mitchell, 'Internet Sex Crimes against Minors: The Response of Law Enforcers', above n 110, 10.

²²³ Ibid.

²²⁴ *DPP (Cth) v Ison* [2010] VSCA 286.

²²⁵ Nicole Brady, 'Teen Sexting: It's Illegal, but it's in Every High School', *The Age* (online), 10 July 2011 <<http://www.theage.com.au/technology/technology-news/teen-sexting-its-illegal-but-its-in-every-high-school-20110709-1h85a.html>>.

²²⁶ Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2008) <<http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>>.

²²⁷ Although the Office of Public Prosecutions has issued guidelines in relation to sexual offences in 'boyfriend/girlfriend' cases; Director of Public Prosecutions Victoria, *Director's Policy: The Prosecutorial Discretion* (2012) 15–16 <<http://www.opp.vic.gov.au/getattachment/c19fca74-1629-41df-a13c-9e017aabd79d/2-The-Prosecutorial-Discretion.aspx>>.

²²⁸ Crown Prosecution Service, *Indecent Photographs of Children* (August 2010) <http://www.cps.gov.uk/legal/h_to_k/indecnt_photographs_of_children/>.

for this category of material. Rather than being seen as of 'limited' relevance, such guidelines could indicate in what circumstances charges should be pursued. For example, relevant factors may include: volume of material, nature of images, whether it was found alone or with Child Abuse Material, whether for personal use, relative ages and the relationship with the offender.

G Facilitating Prosecutions

At least in the US, the increase in the definition of 'child' was justified in part to facilitate Child Pornography cases in borderline cases.²²⁹ Although Option 1 would remove this justification, it is not necessary to enact a sweeping expansion of Child Pornography laws in order to facilitate such prosecutions. For example, where it is alleged that the person depicted is under 16, a reverse onus provision could be applied. This could provide that where an image appears to be of a child under 16 then they are presumed to be so unless the defendant can prove to the contrary.²³⁰ Alternatively, the defendant could be required to prove that he believed, on reasonable grounds, that the person depicted was over 16.²³¹ In some jurisdictions such images may be prosecuted on the basis that they 'appear to be' of a minor, with no need to prove that the person depicted was in fact under 16.

H Sentencing

The increasing criminalisation of Child Pornography offences has been accompanied by an increase in penalties. In Victoria, for example, possession of Child Pornography was originally a summary offence punishable by a fine.²³² It now carries a maximum penalty of five years imprisonment,²³³ with similar or greater penalties found in other jurisdictions.²³⁴ Under Australian federal law, the maximum penalty rises to 25 years imprisonment where an offence is committed on three or more occasions.²³⁵ The seriousness with which these offences are now regarded is reflected in the fact that possession is now commonly subject to an immediate custodial sentence.²³⁶ In some jurisdictions certain sentencing options are denied for this class of offence. For example, the US federal sentencing

229 See Part VI C.

230 See, eg, 18 USC § 2252A(c)(2). It should be noted that such an affirmative defence was subject to constitutional challenge in the US; *Ashcroft v Free Speech Coalition*, 535 US 234, 255 (2002). A variation of this is found in *Protection of Children Act 1978* (UK) c 37, s 7(8) which provides that if the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes as showing a child.

231 See the provisions discussed at Part V A.

232 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Vic) s 88.

233 *Crimes Act 1958* (Vic) s 70(1).

234 *Criminal Code Act 1995* (Cth) ss 474.19, 474.20; *Criminal Code*, RSC 1985, c C-46, s 163.1(4); *Criminal Justice Act 1988* (UK) c 33, s 160(2A); 18 USC §§ 2252(b)(2), 2252A(b)(2).

235 *Criminal Code Act 1995* (Cth) s 474.24A.

236 Judicial Commission, New South Wales, *Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences*, Monograph 34 (2010) 41; Kate Warner, 'Sentencing for Child Pornography' (2010) 84(6) *Australian Law Journal* 384, 394.

guidelines provide that possession of Child Pornography is not subject to probation.²³⁷

The change in the definition of ‘child’ from 16 to 18 therefore brought Juvenile Pornography within a sentencing range intended for images of child sexual abuse. Of course, such offences are commonly determined summarily, bringing them within a lower sentencing range.²³⁸ Sentencing discretion may also be applied to reflect the age of the person depicted and other relevant circumstances. This is specifically recognised in England and Wales where the Sentencing Guidelines provide that sentences should generally be lower where the person depicted is aged 16 or 17.²³⁹ However sentencing discretion can only go so far when Parliament has indicated that this is a serious criminal offence, indistinguishable on its face from images of child sex abuse. Under the guidelines, leniency applies only where the defendant possesses ‘a few’ images, the images do not depict sadism or bestiality and where they are retained solely for the use of the offender.²⁴⁰ Nor does it alter the fact that the sentencing judge is operating within a sentencing range which is arguably disproportionate to the nature of the offence.

As in any area of the criminal law it is vital that the sentencing regime appropriately reflects the nature of the offending, and both Options 1 and 2 allow for a more targeted sentencing response. Removing Juvenile Pornography from the definition of Child Pornography would remove the issue for some images and allow more targeted sentences for others. Erotic Auto-Depictions would not be criminalised at all. In the case of distribution, if a specific ‘sexting’ offence was considered appropriate it could differentiate between adult and juvenile offenders. For example, under the Vermont statute a defendant who is a minor is prosecuted as a juvenile and may be subject to diversion programs,²⁴¹ while an adult is liable to imprisonment for six months.²⁴²

More widespread publication and distribution could still be criminalised under classification laws which are generally subject to lower penalties. For example, in Victoria, online transmission of objectionable material is subject to a maximum penalty of two years imprisonment, while for online transmission of Child Pornography the maximum penalty is 10 years imprisonment.²⁴³ An offence of extreme pornographic material would allow the punishment of certain forms of images, regardless of the age of the person depicted. In the UK, the maximum penalty for possession of extreme pornographic images is three years imprisonment on indictment.²⁴⁴

237 Under the United States Sentencing Commission, *2010 Federal Sentencing Guidelines* (2010), the base level for possession of material involving the sexual exploitation of a minor is at least 18 (§ 2G2.2) making it a Zone C offence (ch 5 pt a) for which probation is not available (§ 5B1.1(a)).

238 *Criminal Justice Act 1988* (UK) c 33, s 160(3); *Criminal Procedure Act 2009* (Vic) s 28.

239 Sentencing Guidelines Council, *Sexual Offences Act 2003*, Definitive Guideline (2007) 6A.7.

240 *Ibid.*

241 13 VSA § 2802b(b)(1).

242 *Ibid* § 2802b(c).

243 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 57, 57A.

244 *Criminal Justice and Immigration Act 2008* (UK) c 4, s 67(3)(b).

Even if retained within the scope of Child Pornography offences, defining a separate category of Juvenile Pornography would also have a number of benefits. For example, Parliament may impose a lower maximum penalty rather than relying upon sentencing discretion. Differential sentencing could be applied for offenders who are minors or close in age. It would also allow a broad range of specific sentencing options to be available even if denied to Child Abuse Material.

I Sex Offender Registration

A related issue, and one of the most potent sanctions in relation to offences involving Child Pornography, is registration as a sex offender. Such requirements are found in many jurisdictions and typically require an offender to report specified information to police for a defined period.²⁴⁵ In general terms, such schemes aim to reduce the likelihood of re-offending, facilitate the investigation and prosecution of any future offences, and to prevent registered sex offenders working in child-related employment.²⁴⁶ Although in most cases this information is not made public,²⁴⁷ in the US so-called 'Megan's Law' provisions²⁴⁸ require states to maintain a register of violent and sexual offenders and to ensure the information is made publicly available.²⁴⁹

Whatever the merits of such schemes, they may have draconian consequences in relation to Juvenile Pornography. For example, under the Victorian scheme both state and federal Child Pornography offences are registrable offences.²⁵⁰ Although the court has a discretion where the offender is under 18,²⁵¹ in the case of an adult offender registration is mandatory. Therefore an adult who is sentenced in relation to Juvenile Pornography would be required to report to police personal details including identifying information, internet accounts, user-names, employer details, affiliation with clubs or activities involving children and travel plans.²⁵² The report must be made annually²⁵³ for a minimum of eight years. If the defendant was convicted of three or more offences, the reporting period is life.²⁵⁴ In one example, a young man was registered for life after being convicted

245 See, eg, *Sexual Offenders Registration Act 2004* (Vic); *Sexual Offences Act 2003* (UK) c 42, pt 2.

246 *Sexual Offenders Registration Act 2004* (Vic) s 1(1).

247 *Ibid* s 63.

248 Although still colloquially known as 'Megan's law' after seven year old Megan Kanka who was abducted, sexually assaulted and murdered in New Jersey in 1994 (42 USC § 16901), the program is officially named the 'Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Program' (42 USC § 16902).

249 42 USC §§ 16901–62. For an example of California's Megan's Law disclosure, see Office of the Attorney General, *Megan's Law Home* (2009) State of California Department of Justice <<http://www.meganslaw.ca.gov>>.

250 *Sex Offender Registration Act 2004* (Vic) s 7, sch 2.

251 *Ibid* ss 11(2)–(3).

252 *Ibid* s 14. The defendant may be photographed and/or fingerprinted for the purposes of identification; at ss 27, 27A.

253 *Ibid* s 16.

254 *Ibid* s 34(1).

of taking and sending photographs of his 17 year old girlfriend.²⁵⁵ In addition to the stigma of being a registered sex offender, the offender is prohibited from working with children.²⁵⁶ It also represents a considerable allocation of police resources which may detract from monitoring of those who arguably present a greater danger to the community.

There are at least two ways in which the more extreme impacts of such schemes may be ameliorated. Under Option 1, Juvenile Pornography would no longer be a notifiable offence. A similar approach is adopted in the UK where offences involving an indecent photograph of a child are only notifiable where the person depicted was under 16 and the offender was over 18, or where the offender was under 18 and sentenced to at least 12 months imprisonment.²⁵⁷ This restricts notification to those cases where the image depicts unlawful sexual conduct. In the case of a young offender, this is further limited to instances where the sentencing court considered the matter serious enough to warrant a significant term of imprisonment.²⁵⁸

The second approach would be to provide the court with discretion in the case of Juvenile Pornography. As noted above, the Victorian legislation already contains a general discretion in relation to young offenders. This would be a targeted extension of that discretion allowing the court to determine whether registration is necessary in the case of an adult defendant where the images depict lawful sexual conduct. The Victorian Law Reform Commission has recommended that registration should require a court order, and in respect of child pornography offences only where the court is satisfied, on the balance of probabilities, that registration is necessary to protect children from sexual abuse.²⁵⁹

VII CONCLUSION

The convergence of communication and computing technologies has greatly facilitated the dissemination of images of child sexual abuse. The prosecution of all those who participate in such conduct is rightly the focus of legislatures and law enforcement throughout the world. However, that same technology provides individuals with the ability to produce and distribute sexual images of themselves and others. By increasing the definition of 'child' for the purposes of Child Pornography offences above the age of consent to sexual activity, a number of jurisdictions have ensured that offences aimed at protecting young people

255 Victorian Law Reform Commission, *Sex Offender Registration*, Final Report (2012) 66. In the US, 18 year old Phillip Alpert was convicted of child pornography offences and registered as a sex offender after distributing images of his then 16 year old girlfriend; Robert D Richards and Clay Calvert, 'When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case' (2009) 32 *Hastings Communications and Entertainment Law Journal* 1.

256 *Sex Offender Registration Act 2004* (Vic) s 68.

257 *Sexual Offences Act 2003* (UK) c 42, sch 3.

258 In Vermont, a minor is not subject to sex offender registration even where he or she has previously committed an offence under the section; 13 VSA § 2802b(b)(2)(3).

259 Victorian Law Reform Commission, above n 255, xxiii, recommendation 10.

from abuse may apply equally to lawful sexual conduct. Those who choose to record lawful sexual activity may therefore find themselves the subject of serious criminal offences and labelled as child sex offenders.

The circumstances in which this seemingly anomalous situation may arise are multi-faceted, and any response must take into account a broad range of factors. The age of the participants, their relationship, the nature of the conduct and whether it is possession or distribution; all have an impact on where the appropriate balance lies. While not proposing a simple solution, this article has offered two broad options for reform. These allow for a range of responses that hopefully will provoke discussion as to the appropriate balance between protecting young people from harm and allowing legitimate sexual expression.