



ALISDAIR A. GILLESPIE

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Child Pornography

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Alisdair A. Gillespie



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Child Pornography

Child Pornography: Law and Policy draws together literature from law, criminology, sociology and psychology to examine this controversial subject. The book begins by examining what child pornography is and how it is currently defined. By drawing upon the laws in four different countries, the book identifies the different methods of classification and the scope of legal intervention. The second part of the book critically examines each offence and assesses whether it is effective at countering child pornography. The text contains an essential chapter on young people who are complicit in the production and distribution of child pornography, raising interesting questions about the interface between law and child sexual experimentation. Finally, the book considers international responses to child pornography and the actions of the police in investigating and prosecuting such crimes. *Child Pornography: Law and Policy* provides a detailed analysis of the legal and policy framework and examines whether the current system is at all effective at tackling the production and dissemination of abusive material.

Alisdair A. Gillespie is Professor of Criminal Law and Justice at De Montfort University, Leicester. He has published widely in the field of the sexual exploitation of children and has advised national and international bodies, including criminal justice agencies and child protection charities, on this area.

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I should also like to acknowledge the Internet Watch Foundation. In January 2010 I was privileged to be appointed to the board of the IWF. The Foundation acts as the industry self-regulator, and its activities have made a significant impact on the proliferation of child pornography, not only in the United Kingdom but in other parts of the world.

I also acknowledge the assistance of Routledge, who have stayed with me during the project. It was subject to delays and changes of substance but the editorial staff stayed with me, for which I am very grateful.

It goes without saying that all errors, confusions and misunderstandings are, of course, my own.

A.A.G.

Contents

<i>List of figures and tables</i>	viii
<i>Acknowledgements</i>	ix
1 Introduction	1
<i>Terminology</i>	1
<i>Child pornography in modern society</i>	4
2 What is child pornography?	12
<i>Defining child pornography</i>	12
<i>Involvement in child pornography</i>	25
3 Defining indecent photographs of children	42
<i>Child</i>	42
<i>Photograph</i>	46
<i>Indecent</i>	51
4 Other legal definitions of child pornography	64
<i>United States</i>	64
<i>Canada</i>	76
<i>Australia</i>	82
5 Virtual child pornography	98
<i>Defining virtual child pornography</i>	98
<i>Competing arguments</i>	103

6	Offences relating to indecent photographs of children	117
	<i>Making, taking and dissemination</i>	117
	<i>Possession</i>	137
	<i>Abuse of children through pornography</i>	147
7	Non-photograph-based child pornography	150
	<i>Obscenity</i>	150
	<i>Coroners and Justice Act 2009</i>	163
8	Other approaches to criminalising child pornography	176
	<i>United States</i>	176
	<i>Canada</i>	191
	<i>Australia</i>	202
9	Young people and child pornography	218
	<i>Production</i>	219
	<i>Accessing child pornography</i>	237
10	Sentencing	242
	<i>The guideline</i>	242
	<i>Nature of the material</i>	244
	<i>Extent of involvement</i>	249
	<i>Form of material</i>	253
	<i>Aggravating factors</i>	259
	<i>Mitigating factors</i>	268
	<i>Thresholds</i>	277
11	The international dimension	286
	<i>Global initiatives</i>	287
	<i>European initiatives</i>	296
	<i>Jurisdiction</i>	304
12	Policing child pornography	310
	<i>Organisation</i>	310
	<i>Operational</i>	317
	<i>Victims</i>	331

13 Conclusion	337
<i>Terminology revisited</i>	337
<i>Defining child pornography</i>	339
<i>Virtual child pornography</i>	345
<i>Offences</i>	348
<i>The international dimension</i>	354
<i>The victim</i>	359
<i>Conclusion</i>	360
 <i>Bibliography</i>	 362
<i>Index</i>	373

List of figures and tables

Figure

1.1	Convictions, 1994–2007	7
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Tables

1.1	Convictions, 1994–2007	6
2.1	Scale of images	24
2.2	Krone’s typology of behaviour	28
4.1	Terminology used to describe ‘child pornography’	83
4.2	Age of a ‘child’	84
8.1	Production or making	203
8.2	Distribution	204
8.3	Making available	207
8.4	Accessing	213
8.5	Defences	214
10.1	The COPINE scale and that used in <i>R. v Oliver</i> (2003)	246
10.2	Sentencing guidelines	278
10.3	Wrall’s collection	281
10.4	Biddulph’s collection	281
10.5	Lee’s collection	283

Introduction

This is a book about child pornography, which is an issue that still provokes considerable debate, as will be noted throughout this book, and which defies a definition. The purpose of this book is to examine the existing literature on child pornography and consider what implications this has on the law. Whilst the book will be based on the law in England and Wales, as this is the jurisdiction the author is most familiar with, a number of other jurisdictions (Australia, Canada and the United States) will be examined along with international policy and legal instruments.

Throughout the book a number of focuses are used to scrutinise the legal position in respect of child pornography. The first focus is its definition and Chapters 2–5 present a variety of definitions, including considering the controversial subject of virtual child pornography. The next focus is the criminalisation of child pornography and Chapters 6–8 consider what offences are created in the various jurisdictions. Chapter 9 considers the specific issue of children becoming involved in the creation of child pornography and Chapter 10 examines how offenders are sentenced. The third focus considers how child pornography is policed and thus an examination is made of how international law and policy affects the legal position of child pornography and Chapter 12 considers how law enforcement bodies tackle child pornography.

Terminology

It was said that child pornography is something that continues to provoke debate and this is true even of the terminology. Whilst this book is called *Child Pornography: Law and Policy* the term ‘child pornography’ is extremely contentious and many believe that it should no longer be used.

Edwards argues that the term is an oxymoron arguing that it is not pornography but rather it is the representation of the rape, abuse and torture of children (Edwards, 2000: 1). Taylor and Quayle expand on this by noting that the term ‘child pornography’ is offensive because of the juxtaposition of ‘child’ with ‘pornography’ with the latter term being aligned to erotica, something that is clearly inappropriate when considering the depiction of the sexual abuse of children (Taylor and Quayle,

2003: 4). It is the fact that modern pornography presumes consensual activity that is what makes many argue that the term child pornography is wrong. An example of this is presented by Ost who notes that the Metropolitan Police, when giving evidence to a parliamentary select committee, stated that the term ‘child pornography’ presents the child as a consensual and willing partner in sexual relations (Ost, 2009: 31). However Ost continues by questioning whether prefixing the word ‘pornography’ with ‘child’ would bring a different reaction from the public than if it was prefixed by the word ‘adult’ (Ost, 2009: 32). It is submitted that a different reaction is more likely. Whilst in the 1970s – when child pornography legislation was first developed – few outside of child protection and law enforcement would have understood what this meant, the same is not true today.

Newspapers frequently report child pornography convictions and well known operations such as Operation Ore (discussed in Chapter 12) mean that public understanding of child pornography is becoming more developed. The reality of child pornography is reported freely by the press. In 2006 Alan Webster and Tanya French were jailed for the rape, and photographing, of a 12 week-old baby girl. In 2009 Vanessa George was jailed for photographing children, including babies, which she looked after at a nursery in Plymouth. These cases, together with others, present the reality of child pornography. They were widely reported in the media and so it could be argued that the public are able to differentiate between adult and child pornography. That said, perhaps it is irrelevant whether people can differentiate between adult and child pornography if the term itself is suggestive of consensual sexual activity.

If the term child pornography is considered inappropriate then what should be used instead? Common alternatives are ‘images of sexual abuse’ or ‘child abuse images’ (Taylor and Quayle, 2003: 7) and certainly the latter has found favour with law enforcement agencies with both the Child Exploitation and Online Protection Centre (CEOP) and the Internet Watch Foundation (IWF) using this term (CEOP, website; IWF, website). However there are undoubted difficulties with this term. The first is that it limits the material. It will be seen from the later chapters of this book that whilst the law tends to focus on photographic representations of child abuse this is only one form of material. Other forms of material exist, including sound, text and pictorial representations. If the label ‘child abuse images’ is used, therefore, this is overly limiting. Of course this can be solved by referring to material rather than images, thus one possible label could be ‘child abuse material’.

Whilst it may seem that ‘abuse’ is the least controversial part of this alternative definition it does, in fact, raise questions. It has been noted that academic definitions of child pornography emphasise the impact it has on a child and the fact that a child must be abused in its production (Beech *et al.*, 2008: 218) but it will be noted later in this book that this is not true of all material. Even if we focus on photographic material it does not follow that a child must be abused to produce the material. It will be noted in Chapter 2 that a wide range of material is used as child pornography. Taylor and Quayle note that the common thread in all material

is that they provide sexual gratification for the producer and viewer (Taylor and Quayle, 2003: 5). Tate, in one of the earliest studies on child pornography, noted that offenders use a broad range of material (Tate, 1990) and this was further developed by the COPINE unit at University College Cork who produced a typology of child pornography (Taylor *et al.*, 2001 discussed in Chapter 2). Research notes that offenders will use indicative material including, for example, pictures of children in underwear (Taylor *et al.*, 2001) which could come from clothing catalogues. It is difficult to say that such children have been abused in the production of such images.

The view that child pornography intrinsically involves the abuse of children also raises difficult issues in terms of children who voluntarily participate in the production of material. This is a sensitive topic and one that is discussed more extensively in Chapter 9 but it must be recognised that some adolescents are producing their own material. An example would be two 16 year-olds who film themselves having consensual sexual intercourse. In many countries, including England and Wales, two 16 year olds can legally have sexual intercourse but it is prohibited to take an indecent photograph of a child under 18. Thus the 16 year-olds could be guilty of infringing child pornography laws. Can we really say that these adolescents have abused each other? By calling it child abuse images this is exactly what we would be stating: those adolescents would be guilty of child abuse. Of course a solution would be to decriminalise the example discussed above (something developed further in Chapter 9) but even if this were done it does not answer the point about the broad range of material noted above.

Taylor and Quayle argue that an essential feature of child pornography is that there is a power imbalance between adult and child (Taylor and Quayle, 2003: 2) and this is developed by Ost who notes that the inherent power imbalance means that a child is, at the very least, exploited by either the production or use of the material (Ost, 2009). Exploitation arguably bears a wider definition than abuse (see the discussion in Buck, 2010: 262–263) and certainly in the context of sexual exploitation it is considered to include situations where a child is unaware that they are being used for a person's own deviant purposes. In the context of child pornography it is submitted that this could include situations where a person takes an innocent picture of a child and places it within a sexualised context. For example, the actions of the offender in *R v H* [2005] EWCA Crim 3037 involved a teacher, who was also the school photographer, who took pictures of school children and then, using a graphic manipulation program, added images of semen on to their faces, the resultant image making it appear that they had been engaging in sexual activity (this case is discussed in more depth during Chapter 5). It would be difficult to say that the children featured in those images have been abused but it may be more realistic to say that they have been exploited. If we return to the issue of adolescents filming themselves having sexual intercourse, it would be difficult to say that they have either abused or exploited each other. However if the image was then disseminated or shown to another without both parties'

consent then whilst it is unlikely to transform this into abuse it may be appropriate to think of this as exploitation. The footage was recorded for private purposes and the breach of trust involved in disseminating the photograph could be considered exploitative.

Accordingly it could be argued that a better term for child pornography is 'child exploitative material'. However a difficulty with avoiding the term 'child pornography' in a book like this is that, as will be seen, many legal instruments specifically refer to child pornography and this does not appear to be changing. The latest international instrument is the proposal by the EU for a new Directive on combating the sexual abuse, sexual exploitation of children and child pornography (COM (2010) 94; 2010/0064 (COD) discussed more extensively in Chapter 11) and this expressly uses the term 'child pornography' as do many other international and national laws. Some authors, to acknowledge the difficulty of the term, use 'child pornography' only when the instruments themselves use the term (e.g. Middleton *et al.*, 2009: 6) but in a book such as this it is likely that it would become confusing. Therefore this book will continue to use the term 'child pornography' although it will also use the other terms that exist within legal instruments. By using the term it is not intended to downplay the behaviour of those who engage with this material or minimise the impact on victims. It will be clear throughout this book that the author believes that child pornography does amount to the sexual abuse or exploitation of a child and that children are harmed by its production, dissemination and viewing. However as the term bears currency in legal instruments it must be used.

Child pornography in modern society

As Ost notes, the sexual abuse of children, including through their prostitution, has occurred throughout history (Ost, 2009: 25). There is a long and inglorious history relating to the sexual subjugation of children and this includes the portrayal of child pornography that can be found in ancient works of art (Ost, 2009: 25). However notwithstanding this, the issue of child pornography had probably not reached the attention of the general populace until the latter part of the twentieth century and, in particular, the first part of the twenty-first century. Why is this? During that period there was certainly an increase in media attention on the subject (Sheldon and Howitt, 2007: 26–27) but why? During the latter half of the twentieth century the issue of censorship began to be reconsidered and increased liberalisation allowed for restricted and censored works to appear. Whilst censorship receded there was, at the same time, recognition that certain forms of material could be exploitative and in the 1970s countries, most notably England and Wales and the United States, developed specific laws to tackle child pornography.

It has been noted that once law highlights an issue its incidence increases, probably not because its commission is necessarily more frequent but rather because law enforcement agencies now have an incentive to act on that material, meaning more offences are detected and prosecuted (Adler, 2001: 231). However, communication technologies have certainly revolutionised the manner in which child pornography

operates and the growth of the internet and digital technologies has meant the amount of child pornography material has grown exponentially (Taylor and Quayle, 2003). The growth in material led to it featuring more prominently on the public policy agenda. It is notable, for example, that England and Wales introduced a law, *inter alia*, tackling the production and dissemination of child pornography in 1978 (Protection of Children Act 1978) and possession in 1988 (s. 160, Criminal Justice Act 1988). Yet its increasing prominence on the public policy agenda is perhaps demonstrated by the fact that these laws have been amended by no less than six statutes since 1988, with five of these amendments taking place since 2000.

The increased prominence of child pornography and an increased prosecution rate for the offences (see Akdeniz, 2008: 25) meant that media interest was sparked and thus the reporting of the matters increased, also raising public consciousness of the issue. It can be concluded therefore that although, as will be seen later in this book, child pornography is certainly not necessarily a 'hi-tech' crime, the use of technology has radically transformed its incidence and, to an extent, also its very nature.

Prosecutions

The transformation in child pornography can, to an extent, become evident by the growth in prosecutions. Reference in this section will be made to the position in England and Wales but it is illustrative of the general position. Identifying the precise numbers of people who have been convicted is somewhat difficult. Whilst Parliament has occasionally published detailed figures, obtaining annual figures is almost impossible. The most comprehensive crime data presentation is made in the *Criminal Statistics* publication each year. The latest, at the time of writing, is 2008 (published in 2010). However despite the fact that individual offences relating to, for example, the adulteration of food (category 89) or allowing a chimney to be on fire (category 161) are included there is no single category for child pornography. Instead offences relating to indecent photographs of children are included within category 86 ('obscene publications, etc., and protected sexualised material'). This includes not only offences relating to indecent photographs but also, *inter alia*, displaying an indecent matter, supplying video recordings of an unclassified work, having protected material in possession and been given or shown protected material.

In Chapter 12 it will be noted that there is no single approach taken to policing child pornography and the absence of statistics makes it difficult to assess trends in the effectiveness of policing. It is submitted that it would be helpful if statistics relating to indecent photographs of children (the relevant offences for child pornography in England and Wales: see Chapters 3 and 6) were kept separately. There is sufficient difference between protected material and indecent photographs of children to justify a separate analysis.

In this section, therefore, reference will be made to two sources. The first is a House of Commons written answer from 2009 (Hansard, HC Written Answers,

13 October 2009, col. 846W). This dealt with statistics relating to the years 2003–2007 inclusive. The second source is Akdeniz, 2008, who has analysed earlier data, and the figures for the years 1994 to 2003 were taken from this source. In Table 1.1 the data relate to convictions (including those who plead guilty) for offences under either s. 1, Protection of Children Act 1978 or s. 160, Criminal Justice Act 1988. The detail of these offences is set out in Chapter 6 but broadly speaking s. 160 relates to the possession of child pornography whereas s. 1 relates to its taking, making and distribution (but see the ruling in *R v Bowden* [2000] QB 88 discussed in Chapter 6 which blurs the distinction between the two offences in relation to material downloaded from the internet). The trend can perhaps be better seen in graph form (Figure 1.1).

It can be seen that there has been a general upward trajectory, with the trajectory starting to climb steeply at around the time of the millennium. This corresponds with the take-up of technology and, especially, the growth of broadband technology that allowed quick access to the internet and the ability to speedily download large image files. There is a definite spike between 2003 and 2006 which is probably explainable by Operation Ore. This was the UK version of the operation that arose after the US Postal Inspection Service arrested the operators of Landslide Productions. Ore is the largest police operation in this area to have ever been undertaken and it will be discussed in Chapter 12. Over 7,000 names were contained on the Landslide lists and the police began to work through this list at around the time of the millennium. It took some time for the matter to come before the courts and this will explain the delay. The conduct of Ore will be

Table 1.1 Convictions, 1994–2007

Year	Section		Total
	1	160	
1994	27	36	63
1995	44	37	81
1996	69	79	148
1997	103	81	184
1998	82	105	187
1999	139	99	238
2000	217	77	294
2001	289	75	364
2002	434	97	531
2003	1048	239	1287
2004	978	184	1162
2005	958	196	1154
2006	768	166	934
2007	782	185	967

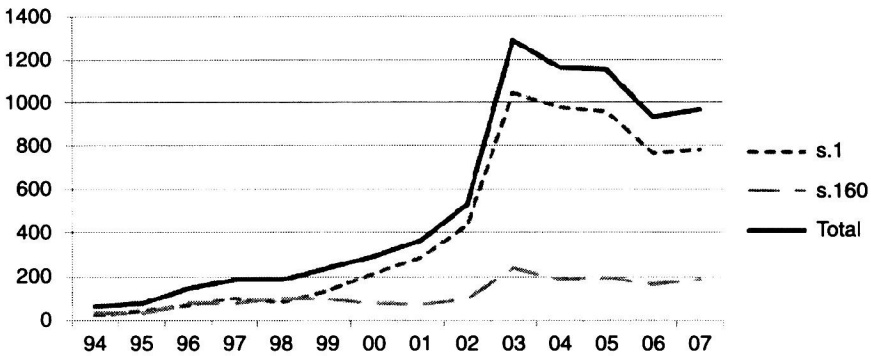


Figure 1.1 Convictions, 1994–2007.

discussed in Chapter 12 but by 2006 the operation was winding down and this would seem to be represented in the graph.

There has not been another large-scale operation like Ore since, in part because there was some doubt as to whether people would ever access sites in the same way again (Bains, 2008 reports that most distribution of child pornography exists through peer-to-peer technology although the IWF report that commercial websites are beginning to increase once again: IWF, 2010). This means that the police are unlikely to identify a large number of persons from a single source again. However reference to the graph and table shows that the reduction in prosecutions has not been dramatic and prosecutions remain relatively high, especially when compared to the early 1990s when home internet was in its infancy.

Whilst the latest prosecution statistics are not available, it would appear the position is remaining true to this trend. *Criminal Statistics 2008*, discussed above, states that the total number of convictions for ‘possession of obscene material, etc.’ is 1,285. Whilst some of these crimes will relate to the offences relating to restricted material it is more likely that the vast majority of them will refer to offences relating to child pornography. It would seem therefore that the number of crimes is beginning to rise once again. This will be in part because of the resources that were put into this area by the police (discussed in Chapter 12) and the increase in knowledge in this area. A completely unscientific manner of gauging law enforcement action is to consult newspapers. A simple search of newspaper indices (which will, of course, show duplicated cases although this particular search index did have a duplication filter) reports 1,700 stories for a search entitled ‘“child pornography” and guilty’. As noted above it is not suggested that this result has any empirical validity but it does suggest that the reporting of convictions relating to child pornography is an almost weekly occurrence. The realisation that people access child pornography has entered the public consciousness and attracts significant media attention.

Moral panic

The increased media attention has led to questions being raised as to whether a moral panic exists in respect of child pornography. The classic formulation of a moral panic remains that put forward by Stanley Cohen who studied the response to the Mods and Rockers in the 1960s, especially the reaction to relatively limited outbreaks of violence that occurred between them at Brighton. His work set the foundation for what has become a separate area of study (Garland, 2008) the sub-discipline of moral panic studies. Cohen summarised a moral panic as:

A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.

(Cohen, 2002: 1)

The term quickly entered the lexicon and somewhat ironically even the media use the term (Altheide, 2009: 80) often inappropriately. This is something that Cohen himself has identified: in the introduction to the third edition he notes that after thirty years of study the concept has become more refined and has entered media discourse (Cohen, 2002: vii).

Garland cites Hall *et al.*, who note that the essence of the moral panic is that those in authority and influence (e.g. police, politicians and the press) begin to talk 'with one voice' about a particular phenomenon, its damage and required solutions (Garland, 2008: 10). After Cohen the most widely accepted definition is that by Goode and Ben Yehuda (Garland, 2008: 10) who state that there are five elements to a moral panic:

- Concern.
- Hostility.
- Consensus.
- Disproportionality.
- Volatility.

Garland is concerned that this definition neglects the moral core at the heart of a moral panic and also the fact that the concern is symptomatic, i.e. that those in authority will claim it is part of a wider problem (Garland, 2008: 11).

Does child pornography amount to a moral panic? Certainly some accept that it does (Cavanagh, 2007 although she cites no evidence as to why this amounts to a moral panic, merely claiming that it does, see p. 5). There would appear to be a broad consensus that the paedophile (used in its societal rather than clinical sense,