The sexual abuse of children

A discussion of the inadequacy of the current South Australian legislative regime and suggestions for reform

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One of the main reasons why the current South Australian criminal justice system fails to provide an appropriate response to the issue of child sexual abuse is that the legislation proscribing this conduct does not reflect the dynamics of child molestation. As a result the penalties imposed by the Courts fail to recognise the seriousness of these crimes against children. The adoption of the legislative scheme of the Crimes (Child Sex Tourism) Amendment Act 1994 (Cth) would provide a framework for the re-assessment of these crimes and hopefully lead to a more realistic response by the justice system.

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The public record of court proceedings shows that on 5th June 1996 Douglas John Bensch pleaded guilty to indecent assault of a nine-year-old girl whom he had molested over a period of several months. He had been charged with unlawful sexual intercourse and rape. On the first day of the trial, the prosecution agreed to accept a guilty plea to a charge of indecent assault in lieu of the charges of unlawful sexual intercourse. The rape charges were not proceeded with.

Fifteen months previously, Bensch had pleaded guilty in the Adelaide Magistrate's Court to procuring an act of gross indecency (production of pornographic photographs) and possession of child pornography. In respect of the charge of procuring an act of gross indecency he received an eighteen month good behaviour bond. The charge of possession was dismissed without conviction and without penalty. For the charges of indecent assault, he received a twelve-month suspended sentence (with a nine month non parole period) and the equivalent of a six-month bond.

The sentencing remarks of His Honour Hume J. in June 1996, which received widespread publicity and public comment in South Australia, were criticised for appearing to minimise the seriousness of Bensch's offending and the impact upon the child victim. The Director of Public Prosecutions did not appeal the sentence, presumably because it was within the 'tariff' and therefore not deemed to be manifestly inadequate. Bensch was an elderly man (73 years old) who claimed this was his first offence. Later it was reported that he had previously been imprisoned for the indecent assault of a young girl (Maguire 1996).

The case raises a number of issues regarding the appropriateness of current South Australian laws in the area of child sexual abuse, the prosecution of such matters and the appropriateness of the sentences being handed down. This article contends that for various reasons the full extent and effects of child sexual abuse in the community (and, in particular, the non-incestuous sexual abuse of children) have been underestimated. Because the current legislative framework fails to recognise the dynamics of this abuse, penalties imposed do not reflect the seriousness of these crimes against children.

In this article, the author asserts that the classification of offences outlined in the Crimes (Child Sex Tourism) Amendment Act (1994) (see Fig. 1) should be adopted by State legislatures along with the maximum penalties prescribed therein. In addition, because pornography is an integral part of the non-incestuous abuse of children and its production presupposes abuse, offences involving child pornography ought to be elevated in classification to major indictable (for production of pornography) and minor indictable (for possession of pornography) with penalties which more accurately reflect the substance of the material.

DEFINITIONS

This article adopts the definition of 'child molester' used by Lanning (1992b:1) as, 'a significantly older individual who engages in any type of sexual activity with

individuals legally defined as children'. The word paedophile is deliberately avoided in this article as, in the author's view, its meaning is affected by its misuse in the mass media and the fact that the word defines a specific psychiatric condition.

As part of his behavioural analysis, Lanning (1992b) developed a typology of child molesters which involves the categorisation of child molesters into two broad groups and seven subgroups. For the purposes of this article, Lanning's two categories of preferential child molester and situational child molester are adopted.

According to Lanning, the situational child molester engages in sex with children but does not have a true sexual preference for children. The situational child molester has fewer victims than the preferential child molester and may target other vulnerable individuals such as the disabled or elderly. Frequently, though not exclusively, the incest offender will be a situational child molester.

The preferential child molester possesses a definite sexual preference for children and the majority prefer male children. These people engage in predictable sexual behaviour patterns and have the potential to molest large numbers of victims. According to Lanning (1992b:8), members of higher socio-economic groups tend to be over-represented among preferential child molesters and their behaviour is characterised by frequent and repeated sex with children of a specific age and gender. For reasons which will be outlined, the extent of child molestation by preferential child molesters is unknown.

THE NATURE OF OFFENDING AND THE DIFFICULTY OF DETECTION

It is not uncommon to hear media reports that intra-familial sexual abuse or incest is more common than extra-familial abuse and that girls are more frequently targeted for abuse than boys. Research questions this conclusion. Abel et al (1987) found in their study of paraphiliacs that the majority of child molestations were committed by individuals who targeted young boys outside the home. This was followed by individuals involved in incest with a female family member. This finding was confirmed by Briggs et al in their 1994 report, which concludes that national statistics provide a very inaccurate picture regarding the sexual abuse of boys. Case studies of preferential child molesters who have come to the attention of the authorities reveal large numbers of offences involving large numbers of children. Richard Read QC (1994) in his submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs into the Crimes (Child Sex Tourism) Amendment Bill (1994) cites the case of Bill Allen who boasted of having sex with hundreds of boys. Notorious Queensland child molester, Clarence Osborne, recorded his abuse of 2,500 boys, not one of whom went to the authorities (NCA Inquiry 1995). In 1994, South Australian Police estimated that there were 300 active preferential child molesters in South Australia (NCA Inquiry 1995).

Because the current legislative framework fails to recognise the dynamics of this abuse, penalties imposed do not reflect the seriousness of these crimes against children.

An analysis of the *modus operandi* of the preferential child molester provides some understanding as to why these people escape detection and prosecution. Almost without exception, the preferential child molester begins with a complex seduction process or 'grooming' of the child, involving the winning of the friendship and trust of the child and frequently the child's primary care giver (Lanning 1992b:8). Part of the seduction usually involves the presentation to the child of various forms of pornographic material aimed at lowering inhibition and creating the impression that sexual contact between adults and children is normal. Once the child has been effectively seduced, and the process may take many months, sexual conduct can begin. This typically involves a range of sexual activities which may or may not produce physical symptoms sufficient to amount to corroborative evidence for the purposes of a criminal trial. In the case of Bensch, the female child victim had been digitally raped causing bleeding which may have resulted from a ruptured hymen. Despite this, the perpetrator succeeded in having the charges of unlawful sexual intercourse withdrawn.

In the experience of the author, the conduct engaged in by the child molester will progress in this not uncommon pattern. In the case of boys, it typically begins with genital fondling, ejaculation by the perpetrator onto the boy and urination by the boy onto the perpetrator. The giving of oral sex is presented as affectionate touching or fun and ultimately psychological pressure to reciprocate is placed on the boy. The child molester typically progresses to anal intercourse which although painful and frequently the cause of bleeding is accepted by the boy who is led to believe he is abnormal if he does not like it or is threatened to ensure silence (Briggs et al 1994). Many boys accept the pain as the price to be paid for what is seen as a rewarding friendship. Sexual acts between the perpetrator and the child are often recorded by photograph or video along with acts performed by children with children or the child in explicit sexual poses displaying his or her genitalia.

The preferential child molester ensures that the behaviour remains shrouded in secrecy by means of further sophisticated techniques which transfer the blame to the child victim. These techniques are well known to preferential child molesters and the accumulated wisdom is frequently shared via magazines. Read (1994) reported that Bill Allen was in possession of a large number of such publications including his own writings, all of which graphically described techniques for the seduction of children. So successful are these techniques that very few male children ever report their abuse. Traditional protective behaviours taught to children in schools and homes may be rendered meaningless if the abuse is not recognised by the child victims as being wrong. In addition, those who do report their abuse may be disbelieved or the trusted adult may fail to pass the report on to the relevant authority.

Figure 1

Crimes (Child Sex Tourism) Amendment Act 1994 (Cth)

Meaning of 'act of indecency'

50AB. (1) In this Part:

'act of indecency' means an act that:

(a) is of a sexual nature; and

(b) involves the human body, or bodily actions or functions; and

(c) is so unbecoming or offensive that it amounts to a gross breach of ordinary contemporary standards of decency and propriety in the Australian community.

(2) To avoid doubt, 'act of indecency' includes an indecent assault.

Sexual intercourse with child under 16

50BA. A person must not, while outside Australia, engage in sexual intercourse with a person who is under 16.

Penalty: Imprisonment for 17 years.

Inducing child under 16 to engage in sexual intercourse

50BB. A person must not induce a person who is under 16 to engage in sexual intercourse with a third person outside Australia and in the presence of the first-mentioned person.

Penalty: Imprisonment for 17 years.

Sexual conduct involving child under 16

50BC. A person ('the first person') contravenes this section if, while the first person is outside Australia:

(a) the first person commits an act of indecency on a person who is under 16; or

(b) the first person submits to an act of indecency committed by a person who is under 16; or

(c) the first person commits an act of indecency in the presence of a person who is under 16 ('the child'), and the first person intends to derive gratification from the child's presence during the act; or

(d) the first person submits to an act of indecency committed in the presence of a person who is under 16 ('the child'), and the first person intends to derive gratification from the child's presence during the act; or

(e) the first person engages in sexual intercourse with another person in the presence of a person who is under 16 ('the child'), and the first person intends to derive gratification from the child's presence during the sexual intercourse.

Penalty: Imprisonment for 12 years.

Inducing child under 16 to be involved in sexual conduct

50BD. (1) A person ('the first person') must not induce a person who is under 16 to commit, to submit to, or to be present while a third person commits, an act of indecency that:

(a) is committed outside Australia and in the presence of the first person; and

(b) is not committed by or on the first person.

(2) A person ('the first person') must not induce a person who is under 16 to be present while a third person engages in sexual intercourse with a fourth person outside Australia and in the presence of the first person.

Penalty: Imprisonment for 12 years.

CURRENT LEGISLATION AND THE ISSUE OF SUMMARY PROCEEDINGS

The South Australian legislation proscribing sexual conduct with children is contained in the Criminal Law Consolidation Act 1961 and the Summary Offences Act 1953 as detailed in Figures 2 and 3. Currently in South Australia all sexual offences involving children except unlawful sexual intercourse and rape are classified as minor indictable and can be proceeded with summarily. Summary offences attract a maximum fine of $2,000 or two years imprisonment and are dealt with in the Magistrate's Court. In practice, this means that virtually the only time a charge of indecent assault would be dealt with in the higher court would be if it were charged together with charges of unlawful sexual intercourse or rape as an alternative charge. Sentences are handed down in the higher court which are consistent with those awarded in the summary jurisdiction with the sentence proportions between indecent assault and offences against Section 58 and Section 58(a) being maintained.

In this author's opinion, all sexual offences against children should be regarded as serious enough to warrant being classified as major indictable offences. With this in mind, it is observed that Bensch pleaded guilty to possession of child pornography and Section 58(a) and received an eighteen month good behaviour bond. He had produced approximately thirty grossly pornographic and offensive photographs of his child victim.

The issue of proceeding summarily was raised before the House of Representatives Standing Committee on Legal and Constitutional Affairs in their inquiry into the Crimes (Child Sex Tourism) Amendment Bill 1994 (Hansard, House of Representatives 1994, 175:42). In their report to the Parliament, the Committee took the view that the conduct targeted by the legislation was of a serious nature and should not be proceeded with summarily. The activities of preferential child molesters outside Australia and within Australia are grave in their implications in either place. It can be argued that offences perpetrated within Australia should be afforded the same level of seriousness as offences perpetrated outside Australia.

PURSUING THE QUESTION OF SERIOUSNESS TOWARD RECLASSIFICATION

It is generally accepted that maximum penalties reflect the view taken by the legislature of the seriousness of a particular offence. Statutory maximum penalties frequently bear little relationship to sentences actually imposed and this is strikingly apparent in the area of child sexual abuse.

The annual report of the Director of Public Prosecutions for the 1995 to 1996 year indicates the erosion by the District Court of reasonable standards of sentencing appropriate for offenders convicted of sexually abusing children. The Director of Public Prosecutions successfully appealed

three sentences in the 1995-96 year, all of which were increased. This led the Attorney-General, Mr Griffin, to comment that sentencing precedents in the area of child sexual abuse had been reset (Courey 1996). In one case, the perpetrator of three counts of indecent assault and four counts of unlawful sexual intercourse on a 13 year old boy had received an 18-month suspended sentence. Following an appeal by the Director of Public Prosecutions the sentence was increased to a 30-month term of imprisonment with an 18-month non parole period. When the maximum for these offences (7 years for the unlawful sexual intercourse and 8 years for the indecent assault) are considered along with the fact that the offender had committed multiple counts, it is clear that there is a wide disparity between the scales of gravity applied in curial practice and those defined by the legislature (Fox & Freiberg 1990, p. 170).

Bensch received a nine-month suspended sentence and the equivalent of a six-month good behaviour bond. A housebreaker could expect a similar sentence. A comparison of statutory maximum penalties for other sexual offences indicates a clear lack of recognition of the seriousness of these forms of sexual conduct involving children. Offences of gratifying prurient interest attract a maximum penalty of one fifth that of indecent assault whilst the offence of gross indecency attracts a maximum penalty of less than a third that of indecent assault.

An understanding of the concept of seriousness is essential for any discussion regarding classification of offences and range of penalties.

> A measure of crime 'seriousness' requires that a society show consensus about the order of seriousness of specific criminal acts ... (which is) reflected in the Criminal Code, the behaviour of judges and juries and the actions of law enforcement agencies. (Rossi et al 1974).

This paper takes the view that there is no real consensus regarding the seriousness of offences relating to the sexual abuse of children and that this is reflected in the legislative framework and penalties imposed.

Von Hirsch (1983) distinguished two major components within the concept of 'seriousness', these being harm and culpability. Harm relates to the injury caused or risked and culpability indicates the concept of the blameworthiness of the offender.

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THE 'HARM' COMPONENT

Early studies (pre-1970s) into the effects of sexual abuse upon children reached diverse conclusions ranging from assertions that sexual activity could contribute favourably to the psychosexual development of the child through to little evidence of adverse effect and 'possible emotional disturbance in some cases' (Tong & Oates 1990, pp. 342-343 & 366).

Because of the secretive nature of the relationship between the preferential child molester and victim, the lack of recognition by the victim of the conduct as abuse, and the consequent lack of reporting, there was, until relatively recently, little specific research on the effect of sexual abuse on male children. Current research clearly indicates serious long-term and short-term psychiatric and psychological disturbance. Evidence is now available which shows that boys suffer similar consequences to girls (Briggs et al 1994).

Silverman et al found that:

> ...child and adolescent sexual abuse before the age of 18 posed serious threats to nearly every aspect of psychosocial functioning for females during mid-adolescence and early adulthood.
>
> At age 21 sexually abused females were significantly more likely to meet all DSM-111-R criteria for the active psychiatric disorders of major depression, post traumatic stress disorder, antisocial behaviour and alcohol abuse-dependence than their nonabused counterparts.
>
> Alarming rates of psychopathology and co-occurring disorders were found among physically and sexually abused young adults at age 21 ... Equally disturbing were the high levels of suicidal ideation reported by both physically and sexually abused females during mid-adolescence (age 15) and the high number of lifetime suicide attempts by early adulthood (age 21). (Silverman et al 1996, p. 720)

Oates concludes that:

> Guilt, felt by the child, is a common result of child sexual abuse (and)... the most commonly mentioned reaction ... was fear... (and a) distrust of adults. (Oates 1992)

Depression, anxiety and fear, low self-esteem along with psychosomatic complaints (such as) stomach aches, headaches, hypochondriasis, faecal soiling, bed-wetting and excessive blinking have all been documented as specific effects of sexual abuse on young children. The early sexualisation of the child frequently results in inappropriate sexual behaviour including open masturbation, excessive sexual curiosity and frequent exposure of genitals. This in itself is clearly damaging to the child. These children can be expected to perform poorly at school and suffer problems with unemployment in adulthood.

If the personal trauma suffered by these children extending into their adult lives is not sufficient to prompt an acceptance of the seriousness of the offending, perhaps a recognition of the downstream cost to the community will attract concern. Sexually abused children have 'a higher than expected incidence of developing problems with the police', especially crimes of violence (Tong & Oates 1990) and a high proportion of homeless children have been sexually abused. When coupled with a high incidence of drug and alcohol abuse, the consequences in terms of law enforcement, health, mental health and productivity are incalculable. In addition, it is becoming abundantly clear that some at least of today's victims are tomorrow's abusers (Briggs 1995).

Figure 2

Criminal Law Consolidation Act 1961

Unlawful Sexual Intercourse, Section 49(1):

A person who has sexual intercourse with any person under the age of 12 years shall be guilty of an offence and liable to be imprisoned for life.

Section 49(2) repealed

Section 49(3):

A person who has sexual intercourse with a person of or above the age of 12 years and under the age of 17 years shall be guilty of an offence and liable to be imprisoned for a term not exceeding 7 years.

Indecent Assault, Section 56:

A person who indecently assaults another shall be guilty of an offence and liable to be imprisoned for a term not exceeding 8 years or, where the victim was at the time of the commission of the offence, under the age of 12 years, for a term not exceeding 10 years.

Act of Gross Indecency, Section 58(1):

Any person who, in public or in private –

(a) permits any act of gross indecency with, or in the presence of, any person under the age of 16 years:

(b) incites or procures the commission by any such person of any act of gross indecency with the accused, or in the presence of the accused, or with any other person in the presence of the accused;

(c) is otherwise a party to the commission of any act of gross indecency by or with, or in the presence of, any such person, or by or with any other person in the presence of any such person, or by any such person with any person in the presence of the accused, shall be guilty of an offence and liable for a first offence to be imprisoned for a term not exceeding three years and for any subsequent offence to be imprisoned for a term not exceeding five years.

(2): It is no defence to a charge under this section that the act of indecency was committed with the consent of the person concerned.

Offence of Person Who for Prurient Purposes, Incites or Procures Commission by Child of Indecent Act, Etc., Section 58(a)(1):

A person who, with a view to gratifying prurient interests (whether of that person or some other person) –

(a) Incites or procures the commission by a child of an indecent act: or

(b) Causes or induces a child to expose any part of his or her body,

shall be guilty of an indictable offence and be liable for a first offence to be imprisoned for a term not exceeding two years and for any subsequent offence to be imprisoned for a term not exceeding three years.

(2): Subsection (1) applies whether events referred to in the subsection occur in public or in private, with or without the consent of the child.

(3): In this secion –

'Child' means a person under the age of 16 years.

CULPABILITY

The true nature of the sexual behaviour pattern of the preferential child molester is simply not sufficiently understood by the Courts and, therefore, not recognised. The majority of sexual offences perpetrated upon children are committed by offenders who have obtained a position of trust with the child's family or extended family. This is ususally the case with preferential child molesters. When the victim and offender are known to each other the culpability of the offender is often minimised by the courts (Rossi et al 1974). Total stranger abuse is rare and when prosecuted usually receives higher penalties appropriate to its seriousness. Paradoxically, stranger abuse, being a single incident usually with no secrecy and no breach of trust and no guilt or responsibility placed on the victim, may be less damaging in some respects, although effects may be different and severe. Abuse by a trusted adult 'violate(s) a child's sense of trust, safety and security ... leaving the child with a more profound sense of betrayal' (Oates 1992). The breach of trust inherent in the molestation of a child by a family member or friend should be afforded the same level of culpability as other offences which involve a breach of trust, for example, employee fraud or larceny.

If the seriousness of child sexual abuse is accepted along with the fact that the scale of child sexual abuse may well be very much higher than currently believed, the criminal justice system is clearly not protecting our most vulnerable. A reassessment of the seriousness of offences involving the sexual abuse of children is required if the sentences imposed are to properly reflect the culpability and degree of harm caused to the victim.

THE RECLASSIFICATION OF OFFENCES

The behaviour of the preferential child molester involves a complex course of conduct which is not addressed by the current legislative scheme. The Crimes (Child Sex Tourism) Amendment Act 1994 (Cth) creates an umbrella offence,

'sexual conduct involving child under 16'. This offence recognises the conduct sought to be proscribed and specifically includes indecent assault to avoid the difficulties of obtaining a conviction where the indecent act does not include an act which constitutes an indecent assault. The drafters of the Model Criminal Code have adopted a similar scheme, however the suggested format does not, at this stage, specifically include indecent assault. Until the legislature comes to terms with the true nature of the sexual abuse of children, the law will not truly reflect the conduct which is sought to be proscribed. The format of the Crimes (Child Sex Tourism) Amendment Act should be adopted to avoid uncertainty and it is hoped that in due course all Australian states will have a uniform approach with appropriate statutory maximum penalties.

The Model Criminal Code suggests that the age at which a child be deemed by law not to have the capacity to consent to sexual activity be set at 10 years. The reason given by the drafters of the Model Criminal Code for these particular age divisions is that there is a variance of ages across Australia and these age limits reflect a compromise, there being no definitive way of determining the issue. Whilst this may be a valid drafting technique, the suggested age limit fails to recognise the nature of the conduct sought to be proscribed. An analysis of the behaviour of the preferential child molester indicates that, unless detected, molestation occurs until the child reaches puberty and is no longer attractive due to sexual maturity. In Australia, few girls and fewer boys reach puberty at age 10. To be effective, the legislation should prescribe age limits which reflect known behavioural aspects common to offenders.

In addition, the suggested age limit will undoubtedly cause difficulties for law enforcement agencies and prosecutors. If, as is common, the conduct reported spans the pre-pubescent years, then in theory two different charges could be laid and proved. Plea bargaining would most certainly occur in respect of the more serious offence especially if the child, when the offence is reported, is some years older than 10 and memories vague.

Short of a more deliberative approach to the question, an age limit of 16 should be adopted and a provision inserted in the legislation stating that the court must take the age and maturity of the victim into account when sentencing.

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THE QUESTION OF PORNOGRAPHY

When Bensch was arrested, court transcripts indicate that police discovered more than thirty photographs of his child victim, many of them grossly indecent and sexually explicit. Upon pleading guilty to production of pornography pursuant to Section 58(a) of the Criminal Law Consolidation Act, Bensch received an 18-month good behaviour bond.

The current South Australian laws dealing with child pornography are contained in Section 3[illegible] of the Summary Offences Act (see Figure 3). This section provides for the separate offences of production, production for sale, sale and simple possession of pornography.

Investigations by law enforcement agencies and studies of child molesters have shown that the possession of child pornography in any form is a clear indicator of the sexual orientation and intent of the collector and may be a guide to their offending pattern (Tate 1990, Lanning 1992b).

Case records of the Child Exploitation Unit in Victoria showed that between July 1989 and June 1991, in 78% of cases involving multi-victim offences, pornographic material depicting children was located. In the remainder of cases, police could not be certain that it did not exist. In evidence before the Joint Committee on the National Crime Authority inquiry into organised criminal paedophile activity, South Australian police indicated that 90% of the time the possession of child pornography indicates paedophilia (Hansard 12/795, p. 95). Lanning (1992b, p. 24) concludes that the preferential child molester will almost always collect some form of child pornography or erotica and that many have huge and highly prized collections.

Child pornography takes a variety of forms. Frequently the child molester will film himself or another adult actually indecently assaulting or raping the child, often ensuring that the film or photograph does not identify the adult perpetrator. Others coerce the child or children to pose displaying their genitalia or to perform sexual acts with other children. The production of such material clearly presupposes the sexual abuse or exploitation of the child or children.

Some research indicates that the production and collection of child pornography fulfils several purposes for the child molester:

1. To facilitate the seduction of a child. Child pornography and adult hard core pornography is regularly used by child molesters to lower the inhibitions of children and lend credence to the idea that sexual relations between children and adults are normal.
2. To blackmail the victim and preserve secrecy, especially as the child grows older and becomes less useful to the child molester and when the risk of reporting is greatest. In addition, photographic evidence is used to pressure a child into continuing a relationship.
3. To confirm or validate their own behaviour and as a means of trade or exchange with other child molesters.
4. As a means of sexual arousal and for masturbation purposes.
5. For profit.

(Lanning 1992b; Briggs 1995)

This article takes the view that the possession of child pornography should be reclassified as a minor indictable offence, and the production of child pornography be reclassified as a major indictable offence in addition to and separate from the charge of sexual conduct with a child. In the writer's view, such a reclassification would more accurately reflect the seriousness of these offences. The Committee responsible for the drafting of the Model Criminal Code suggests that the offence of possession of pornography remain summary in nature. The legislature and the judiciary need to come to terms with the fact that the collection of child pornography in itself perpetuates the sexual abuse of the subject of the pornography. Any analysis of pornographic material depicting children will lead to the inescapable conclusion that the material amounts to a record on film or photograph of the sexual abuse of the child involved. One of the difficulties with the prosecution of pornographic offences regarding children is that the majority of the population, including the judiciary, have no realistic idea of the nature of this material. There is a general misconception that child pornography is rather like adult pornography which is produced with informed, willing participants for harmless titillation. In reality, the only similarity between child pornography and adult pornography would be the rape or indecent assault of an adult depicted in film or photograph.

It is the failure of the legislature and the judiciary to distinguish between the two which has prompted a response which effectively disguises and minimises the seriousness of the offence. The failure to accommodate the connection between child pornography and child molestation has resulted in a fragmented approach to the prosecution of offences which is exploited by the defence to produce what the writer views as inadequate sentences. In the case of Bensch, the pornography charges were dealt with in the Magistrate's Court 15 months before the unlawful sexual intercourse and indecent assault charges reached the District Court for trial. As a result, the pornography aspect was not taken into account when assessing the seriousness of Bensch's course of conduct. This article takes the view that the possession of child pornography should be recognised by prosecutors and accepted by the judiciary as an integral part of the offence of child molestation in a similar way to the possession of money bags and scales in drug dealing prosecutions.

In addition, from the law enforcement point of view, the elevation of the charges would enable police to access the Criminal Law (Undercover Operations) Act 1995 which is currently only available in respect of a select few summary offences, for example, unlawful bookmaking, purchasing fish without a licence, illegal possession of animals, and illegal possession of native plants.

This legislation would provide protection to law enforcement personnel involved in operations seeking to locate and prosecute those involved in the production, distribution and collection of child pornography. Without this protection, undercover police establishing trading connections with child molesters are themselves at risk of committing offences when they receive and subsequently possess child pornography. Given the seriousness and secretive nature of this type of offence, it is absurd that law enforcement personnel investigating the sexual abuse of children are denied access to this legislation.

Prosecutions for offences against Section 33 of the Summary Offences Act currently require the written consent of the Attorney General. This paper takes the view that this section should be abolished as it performs no useful purpose and simply provides a further hurdle for law enforcement officers in the prosecution of these offences.

With respect to the offence of production of pornography, one of the major difficulties encountered by law enforcement personnel and prosecutors when dealing with prosecutions related to pornographic material is proof of age, in particular with respect to children close to age 16. Attempts have been made to use certificates from the Office of Film &

Figure 3

Summary Offences Act 1953

Section 33(1): In this section –

'child' means a person under, or apparently under, the age of 16 years;

'child pornography' means indecent or offensive material in which a child (whether engaged in sexual activity or not) is depicted or described in a way that is likely to cause serious and general offence amongst reasonable adult members of the community.

(2) A person who –

(a) produces, or takes any step in the production of, indecent or offensive material for the purpose of sale;

(b) sells indecent or offensive material;

(c) exhibits indecent or offensive material in a public place or so as to be visible from a public place;

(d) deposits indecent or offensive material in a public place or, except with the permission of the occupier, in or on private premises;

(e) exhibits indecent material to a person so as to offend or insult that person;

(f) delivers or exhibits indecent or offensive material to a minor (other than a minor of whom the person is a parent or guardian);

(g) being a parent or guardian of a minor, causes or permits the minor to deliver or exhibit indecent or offensive material to another person; or

(h) causes or permits a person to do an act referred to in a preceding paragraph of this subsection,

is guilty of an offence.

Penalty –

(a) if the offence involves child pornography – for a first offence, division 5 imprisonment and for a second or subsequent offence, division 4 imprisonment;

(b) in any other case - division 4 fine or division 7 imprisonment.

(3) A person who is in possession of child pornography is guilty of an offence. Penalty: Division 6 fine or imprisonment.

(6) A prosecution for an offence against this section cannot be commenced without the written consent of the Minister.

Literature Classification, however, these have been held not to be admissible in South Australian courts. Likewise, evidence from The Office of Film & Literature Classification personnel is inadmissible as this field of expert evidence is not recognised by the courts. A section deeming an Office of Film & Literature Classification certificate to be proof of age in the absence of proof to the contrary would alleviate this problem.

THE SENTENCING DISCOUNT FOR A PLEA OF GUILTY

The final issue which arises in this context from the prosecution of Bensch is the issue of the sentencing discount for a plea of guilty. As previously stated, on the day Bensch went to trial in the District Court (some 18 months after his offending came to the notice of the authorities), negotiations between the defence and the prosecution resulted in a plea of guilty to a charge of indecent assault and the withdrawal of the charge of unlawful sexual intercourse. The sentencing judge gave Bensch a 'substantial discount' for his plea of guilty on the basis that he had 'spared the child a very considerable ordeal'.

One rationale for the sentencing discount for a plea of guilty is that the criminal justice system wishes to reward remorse and contrition which it believes is indicated by a plea of guilty. It is widely accepted that the saving of court time and expense of a trial ought to be encouraged, however it is arguable that a guilty plea entered as a means of inducing the prosecution not to proceed with a more serious charge should not attract a substantial discount. In addition, the timing of the plea ought to be taken into consideration when a discount is being considered. In the case of Bensch, Court transcripts show that the plea was entered on the morning the trial began after some hours of legal argument.

It is unacceptable that offenders who plead guilty can expect a substantial discount in penalty on the basis that they have spared the child the ordeal of giving evidence when it is the criminal justice system itself which has consistently failed to implement reforms which would ameliorate the ordeal. The adverse effects upon children of investigation and court hearings and the harmful effects of repeated questioning and reiteration of details of the abuse are well-documented and there is a plethora of research recommending less harmful methods of prosecuting cases involving child victims (Davies 1992; Brennan 1988; Cashmore 1995).

CONCLUSION

Although the media has often publicised the inadequacies of the Australian justice system in dealing with child sexual abuse cases, community concerns seem to have had little effect on either the prosecuting authorities or the judiciary. The case of Douglas John Bensch confirms that the sexual exploitation of children is not taken seriously and that sentences do not reflect the long term damage that is invariably inflicted on victims. It is recommended that the format of the Crimes (Child Sex Tourism) Amendment Act 1994 (Cth) be adopted along with the maximum penalties prescribed therein and offences of child pornography be elevated both in classification and penalty commensurate with their seriousness. The development of a Model Criminal Code provides an ideal opportunity for the review of current legislation and the implementation of a legislative scheme which will more accurately reflect the conduct of the child molester and its effect upon child victims. □

REFERENCES

Abel, G.G., Becker, J.V., Mittleman, M., Cunningham-Rathner, J., Rouleau, J.L. & Murphy, W.D. 1987 'Self reported sex crimes of non-incarcerated paraphiliacs', *Journal of Interpersonal Violence*, Vol. 2, No. 1, pp. 3-25.

Australian Federal Police Assocation 1995, submissions to the Commonwealth of Australia Joint Committee on the National Crime Authority Report, *Organised criminal paedophile activity.*

Briggs, F. (ed) 1995, *From victim to offender: How child sexual abuse victims become offenders*, Allen & Unwin, NSW.

Briggs, F., Hawkins, R. & Williams, M. 1994, *A comparison of the early childhood and family experiences of incarcerated, convicted male child molesters and men who were sexually abused in childhood and have no convictions for sexual offences against children*, University of South Australia, Magill Campus, SA, p. 80.

Brennan, M. 1988, *Strange language*, Riverina Literacy Centre, Wagga Wagga.

Cashmore, J. 1995, 'The prosecution of child sexual assault: A survey of NSW DPP solicitors', *ANZ Journal of Criminology*, Vol. 28, No. 1.

Commonwealth of Australia Joint Committee on the National Crime Authority 1995, *Official Hansard Report*, 12 July, p. 55.

Commonwealth of Australia Joint Committee on the National Crime Authority 1995, *Official Hansard Report*, 12 July, p. 95.

Courey, J. 1996, 'Sex abuse sentences "too lenient"', *The Advertiser*, 2 November.

Davies, G. 1992, 'Protecting the child witness in the courtroom', *Child Abuse Review*, Vol. 1, No. 1.

Director of Public Prosecutions, South Australia 1995-96, Annual report, p. 12.

ECPAT Australia 1995, submission to the Commonwealth of Australia Joint Committee on the National Crime Authority Report, *Organised criminal paedophile activity*, p. 2.

Fox, R. & Freiberg, A. 1990, 'Ranking offence seriousness in reveiwing statutory maximum penalties', *Australian & New Zealand Journal of Criminology*, 23, pp. 105-191.

House of Representatives Standing Committee on Legal and Constitutional Affairs 1994, *Report into the Crimes (Child Sex Tourism) Amendment Bill 1994* to the Parliament of the Commonwealth of Australia, p. 31.

Lanning, K. 1992(a), Child sex rings: *A behavioral analysis for criminal justice professionals handling cases of child sexual exploitation*, 2nd ed, National Center for Missing and Exploited Children, Arlington, VA, p. 14.

Lanning, K. 1992(b), Child molesters: A behavioral analysis for law enforcement officers investigating cases of child sexual exploitation, 3rd ed, National Center for Missing and Exploited Children, Arlington, VA.

Maguire, Shane 1996, *Sunday Mail*, 7 July.

Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General 1996, *Discussion paper: Sexual offences against the person.*

Oates, R.K. 1990, 'Understanding child sexual abuse', Current Affairs Bulletin 23.

Oates, R.K. 1992, 'The effects of child sexual abuse', *Criminal Law Journal*, 66.

Read, R. 1994, submission to the Inquiry into the Crimes (Child Sex Tourism) Amendment Bill, Vol.1, p.86.

Rossi, P.H., Waite, E., Bose, C.E. & Berk, R.E. 1974, 'The seriousness of crimes: normative structure and individual differences', *American Sociological Review*, 39, p224.

Silverman, A.B., Reinherz, H.Z. & Giaconia, R.M. 1996, 'The long-term sequelae of child and adolescent abuse: A longitudinal community study', *Child Abuse and Neglect*, Vol. 20, No. 8, p.709.

Summit, R.C. 1983, 'The child sexual abuse accommodation syndrome', *Child Abuse and Neglect*, Vol. 7, p. 177.

Tate, T. 1990, *Child pornography: An investigation*, Methuen, London.

Tong, L. & Oates, R.K. 1990, 'Short term effects of child sexual abuse' in *Understanding and Managing Child Sexual Abuse*, Harcourt Brace Jovanovich, Sydney, p. 342.

Tong, L. & Oates, R.K. 1990, 'Long term effects of child sexual abuse', in *Understanding and Managing Child Sexual Abuse*, Harcourt Brace Jovanovich, Sydney, p. 366.

Tyler, R.P. 1985, 'Child pornography: Perpetuating the sexual victimisation of children', *Child Abuse and Neglect*, Vol. 9, No. 3, p. 313.

Von Hirsch, A. 1983 'Commensurability and crime prevention: Evaluating formal sentencing structures and their rationale', *Journal of Criminal Law and Criminology*, Vol. 74, p. 209.

Public Hearing of the Inquiry into the Crimes (Child Sex Tourism) Amendment Bill 1994, Official Hansard Report, 19 May, transcript of evidence, p. 175.

Public Hearing of the Inquiry into the Crimes (Child Sex Tourism) Amendment Bill 1994, Official Hansard Report, 23 May, transcript of evidence, p. 272.