Sentencing Guidelines Council – Indecent images of children


Perhaps unsurprisingly given that the 2003 Act lists some 57 offences, most of which can be committed in a multitude of ways, Lord Justice Leveson wrote in the Foreword to the New Guideline’s ‘Response to Consultation’, ‘This is the largest and most complex guideline the Council has completed to date, covering over 50 sexual offences”. It would be beyond the scope of a short article to review all the amendments and up-dates the Council has made: the purpose of this article is to focus on one area, loosely defined as ‘indecent images of children’, to see whether there has been a significant change in approach.

Background

Indecent images of children are not covered by the Sexual Offences Act 2003. As will be known the statutory basis for the various offences can be found in:

1) Section 1 of the Protection of Children Act 1978 (taking, making, distributing, publishing etc indecent photographs of a child);

2) Section 160 of the Criminal Justice Act 1988 (possession of an indecent photograph of a child);

3) Section 63 of the Criminal Justice and Immigration Act 2008 (possession of extreme pornographic images), and

4) Section 62 of the Coroners and Justice Act 2009 (possession of prohibited images of children).
There is a somewhat surprising level of inconsistency in the maximum sentences available: 10 years for taking, making, distributing, publishing etc indecent photographs of a child, 5 years for possession of an indecent photograph of a child (until 11th January 2001 it was a summary only offence), 3 years for possession of extreme pornographic images (there is no increase where a child is involved) and 3 years for possession of prohibited images of children.


In Oliver the Court concluded that the two primary factors determining the seriousness of a particular offence were the nature of the indecent material and the extent of the offender's involvement in it. As for the nature of the indecent material the Court identified five levels of seriousness:

1) images depicting erotic posing with no sexual activity;
2) sexual activity between children, or solo masturbation by a child;
3) non penetrative sexual activity between adults and children;
4) penetrative sexual activity between children and adults, and
5) sadism or bestiality.

As regards the offender's involvement, the seriousness of an offence increased with his proximity to, and responsibility for, the original abuse. In considering the factors relevant to the level of sentence, the Court considered that possession, including downloading, of artificially created pseudo-photographs and the making of such images, should generally be treated as being at a lower level of seriousness than possessing or making photographic images of real children.
Old Guideline

The Guideline for Indecent photographs of children was to be found within Part 6: Exploitation Offences (in particular Part 6A beginning at page 109). The SGC reviewed the Oliver levels to:

1) Images depicting erotic posing with no sexual activity;
2) Non-penetrative sexual activity between children, or solo masturbation by a child;
3) Non-penetrative sexual activity between adults and children;
4) Penetrative sexual activity involving a child or children, or both children and adults;
5) Sadism or penetration of, or by, an animal.

The SGC guidance thereafter set out 7 Starting Points, inter alia:

i. 6 years for the Offender who commissioned or encouraged or was involved the production of level 4 or 5 images with a range of 4-9 years custody;

ii. 12 months for possession of a large quantity of level 4 or 5 material for personal use only, or a large number of level 3 images being shown or distributed with a range of 26 weeks to 2 years;

iii. 26 weeks for possession of a large quantity of level 3 material, possession of a small number of level 4 or 5, large number of level 2 images being shown or distributed or a small number of level 3 images being shown or distributed with a range of 4 weeks to 18 months;

iv. 12 weeks for possession of a large amount of level 2 material or a small amount of level 3, distribution of level 1 and 2 images on a limited scale, exchange of level 1 or 2 material for no financial gain with a range of 4 weeks to 26 weeks custody;

v. Community Order for possession of a large amount of level 1 and or a small amount of level 2, and the material was for personal use only.

The New Guideline

Beginning at page 75 the New Guideline covers “Indecent Images of Children”, but then goes on to just refer to Indecent Photographs of Children contrary to section 1 of the 1978 Act (the taking, making, distributing, publishing etc) and Possession of Indecent Photograph of a Child contrary to section 160 of the 1988 Act. Given the overhaul of the Guidance it is perhaps surprising that there is no mention of section 63 of the Criminal Justice and
Immigration Act 2008 (possession of extreme pornographic images) or section 62 of the Coroners and Justice Act 2009 (possession of prohibited images of children). These omissions reflect the Response to Consultation in which the Council notes, “The consultation made clear that sentencers can only sentence within the maximum powers set by Parliament. For offences of possession of indecent images the statutory maximum is 5 years imprisonment and for distribution and production the maximum sentence is 10 years imprisonment. The sentence levels recommended by the Council are therefore contained by these statutory maxima”.

This is of course is correct, but the Council also sought views about ‘Mixed Collections’ as those who have such indecent images frequently have extreme pornography (including of a child) or prohibited images of children. It would seem, although not expressed, the rationale for the exclusion of extreme pornography of children may well be that the Crown Prosecution Services’ Legal Guidance: Extreme Pornography sets out:

Where the extreme image is of a child; prosecutors should charge the suspect with either an offence contrary to section 1 of the Protection of Children Act 1978 of making the image or possessing such images contrary to section 160 of the Criminal Justice Act 1988.

So the issue may not arise. It remains curious though that the 2008 and 2009 offences, which came into force after the Old Guideline was published, are not mentioned in the New Guideline (even to exclude them). Whatever the reason, the New Guideline does not apply to Possession of Prohibited Images of Children.

As is usual with SC Guidelines the first step is to determine the offence category. The New Guideline sees a reduction from 5 Levels to 3 Categories of Image:

**Category A** (Images involving penetrative sexual activity and images involving sexual activity with an animal or sadism) incorporates the former Levels 4 & 5.

**Category B** (Images involving non-penetrative sexual activity) incorporates the former Levels 2 & 3. There is accordingly no longer a distinction between non-penetrative sexual activity between adults and children and between children.

**Category C** (Indecent Images not falling within A or B).

The New Guideline also differentiates in the activity, or role of the Offender, by providing 3 roles: Possession; Distribution (which includes possession with a view to distributing or sharing images) and Production (which includes the taking or making of any image at source. Making by downloading is to be treated as possession).
By having 3 roles and 3 categories of image the vagaries inherent in the Old Guidelines’ reference to large and small quantities of images is removed. Volume was specifically excluded from the determination of Starting Point and Category Range by the Council, though “High Volume of images possessed, distributed or produced” is an aggravating factor. The list of aggravating factors is extended to include amongst others “collection includes moving images” (which rightly differentiates between a still and a moving image) and “deliberate or systematic searching for images portraying young children, category A images or the portrayal of familial sexual abuse” (which will mean that search terms will become even more relevant).

As for the sentence itself, the former 7 type/nature of activity have morphed into 9 (3 Categories x 3 Roles). The Council has moved the guidance away from very short custodial sentences to offering the option of a community order, or asking the Court to consider whether any custodial sentence can be suspended; yet at the same time each of the 9 types of activity has a Range that includes a custodial sentence, unlike in the Old Guideline.

So how does this work in practice?

It would appear that the removal of ‘volume’ from the first step of deciding Starting Point and Range seems to produce different Starting Points and Ranges for those possessing/distributing images. It also seems to have altered, largely upwards, sentences for those involved with what were level 2 images.

Examples

1. Defendant A, who has specifically searched for and downloaded several dozen moving images involving penetrative sexual intercourse with children:

   a) Under the Old Guideline this offender would have fallen into “Possession of a small number (as opposed to a large quantity) of images at Level 4”, this provided for a Starting Point of 26 weeks with a Sentencing Range of 4 weeks to 18 months custody. No Additional Aggravating Features were present.

   b) Under the New Guideline he falls into Category A Possession with a Starting Point of 1 year with a Sentencing Range of 26 weeks to 3 years custody. There are Additional Aggravating Features regarding the specific search terms, and that the images are moving - these would move the offence up the Range.

2. Defendant B who has distributed non-penetrative images:
a) Under the Old Guideline depending on volume (large versus small number) and who it depicted, this offender could have found himself in one of 3 brackets with Starting Points of 12 months, 26 weeks and 12 weeks with associated Sentencing Ranges of 26 weeks to 2 years down to 4 weeks to 26 weeks.

b) Under the New Guideline he falls in Category B Distribution with a Starting Point of 1 year and a Sentencing Range of 26 weeks to 2 years.

These changes reflect the Responses to the Consultation which really focus on a desire for greater flexibility in sentencing.

Lastly, as with all of the Sentencing Council’s Definitive Guidelines, the Starting Points and Ranges apply “to all offenders irrespective of pleas or previous convictions” unlike the Sentencing Guidelines Council’s Definitive Guideline.

May 2014

Robert Bryan

ONE PAPER BUILDINGS, Chambers of Karim Khail Q.C.