

NSW Council for Civil Liberties Background Paper

Possession of Child Pornography

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Abbreviations used

AG	Attorney-General
ALRC	Australian Law Reform Commission
C182	International Labour Organisation Convention No. 182: <i>Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour</i>
CCL	New South Wales Council for Civil Liberties
COAG	Committee of Australian Governments
CROC	<i>(United Nations) Convention on the Rights of the Child</i>
Cth	Commonwealth of Australia
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural</i>
ILO	International Labour Organisation
MCCOC	Model Criminal Code Officers' Committee
NSW	New South Wales
OP-CPC	<i>Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography</i>
SCAG	Standing Committee of Attorneys-General

Terms of Reference

The purpose of this document is to inform debate in the Civil Rights sub-committee of the NSW Council for Civil Liberties. This paper only examines the offence of **possession** of child pornography. The issues of sale, distribution and production of child pornography tend to be more clear cut and worthy of condemnation, but where civil rights issues do arise these have been highlighted.

1. Introduction

1. The sexual exploitation of children in the production of child pornography is abhorrent and a gross violation of the rights of children. The primary purpose of criminalising the production of such pornography is to protect children from the abuse they suffer in the creation of this material. In order to eliminate the market in child pornography, legislation also prohibits the sale, distribution and possession of such material.
2. On the other hand, an individual has the right to express his or her thoughts without censorship, provided they do not hinder or implicate the freedom of others. An individual also has a right to privacy. These rights are fundamental to a free and democratic society.
3. These two interests come into conflict at the periphery of the child pornography issue. Of course, in the vast majority of cases, the need to protect children will outweigh individual rights of free expression and privacy.
4. Throughout the common law world, courts have confirmed that legislators may legitimately prohibit the production, sale, distribution and possession of child pornography that depicts the abuse of an actual child.
5. More controversially, however, courts have ruled that this prohibition on child pornography is not absolute. The courts have found circumstances under which the interests of the individual to freedom of expression and the right to privacy will prevail over society's interest in preventing harm to children.
6. In Canada, the Supreme Court has found that the Charter guarantee of freedom of expression protects individuals who create visual or non-visual child pornography solely from their own imagination and exclusively for their own personal use.¹ The Canadian Charter of Rights and Freedoms also protects teenagers who create self-depicting recordings of their lawful sexual activity, provided that material is held exclusively for their own private use.
7. In the United States, the Supreme Court has found that the First Amendment guarantee of freedom of speech protects the creation, possession and distribution of 'virtual child pornography', that is pornography that does not involve any *real* children in its production.² So, for example, the US Constitution protects pornography involving adult actors who play the roles of children. The First Amendment also protects drawings and writings that depict fictional children.³

¹ *R v Sharpe* [2001] 1 SCR 45, [99]. See: "self-depicting child pornography and freedom of expression" on page 14.

² *Ashcroft v Free Speech Coalition* 535 U.S. 234 (2002).

³ *New York v Ferber*, 458 U.S. 747 (1982).

8. The first section of this paper examines where issues of civil liberties arise in the context of child pornography. First it looks at the differences between visual and non-visual representations of child pornography. Then the section examines freedom of expression and the right to privacy in two respects:
 - (a) when no child is harmed in the production of the material; and
 - (b) when teenagers depict themselves in a sexual manner.
9. The second section examines the harm caused by child pornography. The focus is on identifying when possession of child pornography should and should not be prohibited.
10. The next five sections deal with the legal framework of child pornography laws in Australia, with reference to international norms.

2. civil liberties and child pornography

11. This chapter examines two types of child pornography, the prohibition of which involves civil liberties issues. The first is 'virtual child pornography'. The second is self-depicting child pornography. Each type of child pornography is examined through the prism of freedom of expression and the right to privacy.

2.1 visual and non-visual child pornography: the form of expression

12. Most child pornography laws focus on *visual* depictions of child abuse (usually photographs or videos). As the federal Joint Committee on the National Crime Authority commented in 1995:⁴

In practical terms...the concern with child pornography is primarily on visual, not written, material both in Australia and overseas. It seems that the especially powerful character of visual depictions has partly resulted in this focus. In addition, of course, the production of a photograph or video of actual child sexual abuse necessarily involves the participation of a child, whereas production of written child pornography does not.

13. In the United States, the Supreme Court has ruled that child pornography laws must be 'limited to works that visually depict sexual conduct by children'.⁵ This is based on the First Amendment's constitutional guarantee of free speech. Provided the non-visual material is not obscene,⁶ it will be protected by the Constitution.
14. It is, of course, also possible to create child pornography in non-visual media. For example, with words and sound recording. New Australian federal and NSW laws prohibit child pornography in all its forms – visual and non-visual.⁷ European cybercrime laws prohibit only visual forms of child pornography.⁸

⁴ Commonwealth, Joint Committee on the National Crime Authority, *Organised Criminal Paedophile Activity* (November 1995) [3.50] (footnotes omitted) <http://www.aph.gov.au/senate/committee/acc_ctte/completed_inquiries/pre1996/ncapedo/report/>.

⁵ *New York v Ferber*, 458 U.S. 747 (1982) 764 (White J; Burger CJ, Powell, Renquist & O'Connor JJ joining).

⁶ 'obscenity' in the US applies to material depicting sexual conduct that has no serious literary, artistic, scientific or political value and which an average adult, applying contemporary local standards, would consider offensive and designed to appeal to 'prurient interests': *Miller v California* 413 US 15 (1973). See also: Thomas Tedford & Dale Herbeck, *Freedom of Speech in the United States* (2005, 5th ed) 141-150.

⁷ see [135], & [149] ff.

⁸ see [120]-[121].

2.2 virtual child pornography and freedom of expression

2.2.1 definitions: real, pseudo and virtual child pornography

15. For the purposes of discussion, child pornography can be divided into three categories:
 1. real child pornography;
 2. pseudo child pornography; and
 3. virtual child pornography.
16. Real child pornography depicts real children in a sexual context. The harm caused by real child pornography is obvious.⁹ Underlying such pornography is the crime of the abuse and exploitation of an *actual* child. The prohibition of real child pornography seeks to protect children from such abuse by eliminating both the production and the market in this material.
17. Pseudo child pornography takes an innocent image of a child and manipulates it (by computer or otherwise) to place the child in a sexual context. This is also known as 'morphing'. Real harm is done by pseudo child pornography because a *real* child's image was used in the creation process. The morphed image violates the child's dignity, reputation and right to privacy.
18. Virtual child pornography depicts fictitious children. A 'fictitious child' can be either a pure figment of its creator's imagination or an adult actor playing the part of a child. No child is harmed in anyway in the production of virtual child pornography. Consequently, issues of freedom of expression and thought come to the fore in this category of child pornography.
19. Pseudo and virtual pornography are often lumped together.¹⁰ For example, UNICEF's recent handbook for Parliamentarians on the topic of child protection contains this passage:¹¹

Digital technology also has led to a new phenomenon sometimes called 'pseudo-child pornography', which consists of creating or manipulating images to produce depictions of sexual activity involving children, without the participation of a real child in any sexual activity. Several countries, including Canada, the United Kingdom and the United States, have amended their legislation to prohibit this type of pornography. The UN Special Rapporteur supports making this material illegal because it encourages paedophiles to view their desires as normal and to engage in the exploitation of real children.
20. However, the UNICEF handbook fails to mention that much of the cited legislation prohibiting virtual child pornography has been limited by constitutional courts, particularly in North America.¹²

⁹ see "harm generated by child pornography" on page 17.

¹⁰ for another example, see [125].

¹¹ UNICEF, *Child Protection: a handbook for parliamentarians* (2004) 68.

¹² see "virtual child pornography in the United States" on page 8; and, "virtual child pornography in Canada" on page 10.

2.2.2 virtual child pornography in the United States

21. The US Supreme Court has made a significant distinction between ‘morphed’ and virtual child pornography. In passing, the Court has commented that pseudo child pornography implicates the interests of a real child and therefore causes harm to that child (by violating the child’s dignity, reputation and right to privacy).¹³ Therefore, child pornography laws prohibiting the possession of such images are constitutional.
22. On the other hand, because no child is harmed when a child pornography image is entirely fictional, the US Supreme Court found that it is unconstitutional to prohibit the possession *and distribution* of such images on the grounds that such a law violates an individual’s First Amendment right to freedom of speech. (Freedom of expression is called ‘freedom of speech’ in the US Constitution.)

Ashcroft v Free Speech Coalition (2002) – US Supreme Court

In the United States a criminal law was passed to prohibit the possession of ‘virtual child pornography’. Virtual child pornography is child pornography that ‘appears to depict minors’ but is produced without using any real children. The law was extremely broad and failed to provide any exception for artistic, medical or scientific purposes.

The Supreme Court ruled that, because real child pornography (including ‘morphed’ images) causes harm to real children, laws prohibiting the possession of such images are valid. However, the Court struck down the *virtual* child pornography laws because any harm to children is outweighed by the First Amendment guarantee of freedom of speech.

23. In its reasons, the US Supreme Court reminded the government that it may not legislate to control people’s thoughts:¹⁴

The government “cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.” First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.
24. The US Supreme Court rejected a US government argument that, because virtual child pornography can in reality be indistinguishable from the real thing, both should be banned. According to the Court:¹⁵

The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

¹³ *Ashcroft v Free Speech Coalition*, 535 US 234 (2002), 242 (*obiter dicta*).

¹⁴ *Ashcroft v Free Speech Coalition*, 535 US 234 (2002), 253 (footnotes omitted).

¹⁵ *Ashcroft v Free Speech Coalition*, 535 US 234 (2002), 254.

25. The US government also argued that, because real and virtual child pornography images may be indistinguishable, it could be difficult to prove in a court of law whether an image is virtual or real and therefore it is simply easier to prohibit both kinds of images. The Supreme Court was devastating in its response:¹⁶

The argument, in essence, is that protected speech [virtual child pornography] may be banned as a means to ban unprotected speech [real and pseudo child pornography]. This analysis turns the First Amendment upside down.

The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. "The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted...". The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

26. In March 2003 Congress amended the law on virtual child pornography.¹⁷ The prohibition of any visual depiction that "is, or appears to be, of a minor" was amended to read "is, or is indistinguishable from, that of a minor".¹⁸ An image is an *indistinguishable* depiction if "an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct".¹⁹ While this objective tests resembles the test for obscenity,²⁰ arguably it still offends the principle in *Ashcroft* for its overbreadth,²¹ because, for example, it prohibits the depiction of adult actors who look like children engaging in lawfully sexual activity.
27. It is also worthy of note that the 2003 amendments relate only to *visual* depictions and do not apply to "drawings, cartoons, sculptures, or paintings depicting minors or adults".²² Presumably this is an attempt to address the lack of an exception for artistic and other purposes. Undoubtedly it falls short of the mark because it still applies *inter alia* to "any photograph, film, video, picture, or computer or computer-generated image or picture".²³
28. The 2003 amendments have not yet been challenged in the Supreme Court.

¹⁶ *Ashcroft v Free Speech Coalition*, 535 US 234 (2002), 255 (footnotes omitted).

¹⁷ *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*, Public Law 801-21.

¹⁸ [18 USC § 2556\(8\)\(B\)](#).

¹⁹ [18 USC § 2556\(11\)](#).

²⁰ see n 6 above.

²¹ United States of America, House of Representatives Committee on the Judiciary, *Report: Child Obscenity and Pornography Prevention Act of 2002 (HR4623)*, Report 107-526 (24 June 2002), 96 (minority report). The 2002 Bill was a precursor to the 2003 Act.

²² [18 USC § 2556\(11\)](#).

²³ [18 USC § 2556\(8\)](#).

2.2.3 virtual child pornography in Canada

29. The Canadian Supreme Court was more conservative in its approach to child pornography. While it accepted that freedom of expression protects the production and possession of child pornography that is purely fictional, it required that the creator keep the material exclusively for his or her own personal use.²⁴ Accordingly, any attempt to *distribute* virtual child pornography can be legitimately prohibited by Parliament.

R v Sharpe (2001) – Supreme Court of Canada

In Canada a law was passed to make it an offence to possess child pornography in all its forms. Lower courts ruled the law invalid because it was too broad and violated the constitutional guarantee of freedom of expression.

The Supreme Court ruled that the law was constitutional because it sought to protect children from harm. However, the Supreme Court found that the law was too broad and ruled that there are two (implied) exceptions to the law for:

- (i) self-created expressive material; and,
- (ii) auto-depicting material.

Self-created expressive child pornography is created from an individual's own imagination and kept exclusively for his or her own personal use is protected by freedom of expression.

Auto-depicting child pornography consists of images consensually created by a child depicting themselves engaged in lawful sexual activity and intended exclusively for that child's own private use are also protected by freedom of expression.

30. With respect to prohibiting virtual child pornography, the Court observed that the law passed by the Canadian Parliament sailed 'perilously close' to thought crime:²⁵

The restriction imposed by [the offence of possession of child pornography] regulates expression where it borders on thought. Indeed, it is a fine line that separates a state attempt to control the private possession of self-created expressive materials from a state attempt to control thought or opinion. The distinction between thought and expression can be unclear. We talk of "thinking aloud" because that is often what we do: in many cases, our thoughts become choate only through their expression. To ban the possession of our own private musings thus falls perilously close to criminalizing the mere articulation of thought.

²⁴ *R v Sharpe* [2001] 1 SCR 45, [115]-[118] (McLachlin CJ; Iacobucci, Major, Binnie, Arbour & LeBel JJ joining). The British Columbian Civil Liberties Association's [submissions](#) as intervenor in the *Sharpe* case are available on their website:

<<http://www.bccla.org/othercontent/sharpesc.html>>.

²⁵ *R v Sharpe* [2001] 1 SCR 45, [108].

2.2.4 virtual child pornography in Australia

31. In a recent Victorian case,²⁶ a judge was asked to weigh the risk of harm to children against the right to freedom of expression in a case that involved virtual child pornography (though it was not explicitly identified as such by the court).

[R v Quick](#) (2004) – Victorian Supreme Court (one judge only)

A Victorian primary school teacher was charged with producing and possessing child pornography. He had written down on paper his explicit sexual fantasies about some of the children he had taught over the past twenty years.

The material in question had been created and kept by the accused exclusively for his own personal use in his own home (he lived alone). The material was not copied or shared with anyone, nor was anyone ever shown the material. A tradesman, working at the accused's home, stumbled upon the material and reported it to police. There was no evidence that Mr Quick had ever sexually abused any of his students.

The Supreme Court trial judge concluded that, because the material was created exclusively for the private use of its creator and was not disseminated to anyone else, the material was not a 'publication' in the strict sense and was therefore not prohibited by Victorian child pornography laws.

32. It was significant in this case that no child was harmed in the production of these writings, and that no one, including the children, knew of the existence of the writings.
33. It was also significant that Mr Quick had never shown his writings to anyone. Because of this, it cannot be said that he was 'publishing' his writings. Because he was not publishing his writings, it cannot be said that he was participating in, or in anyway perpetuating, the market for child pornography. Punishing Mr Quick for transcribing his thoughts would have amounted to 'thought crime'.
34. Significantly, his Honour Justice Redlich also identified a common law freedom to record one's thoughts for one's own private use. In other words, his Honour was of the opinion that Australian common law recognises an individual right to give private expression to one's thoughts by writing them down, or by recording them in any other fashion.
35. His Honour concluded that Parliament, when passing laws prohibiting the possession of child pornography, had never intended to curtail this individual right to privately record one's thoughts for one's own private use:²⁷

²⁶ *R v Quick* (2004) 148 A Crim R 51; [2004] VSC 270.

²⁷ *R v Quick* (2004) 148 A Crim R 51, [95].

To construe the accused's private writings as a publication would fall outside Parliament's purpose, producing unintended consequences. It would involve a curtailment of the freedom of each individual to record their thoughts. The keeping of a diary or other record of a person's fantasies or the writings of a teenage child concerning themselves, where they describe or depict pornographic conduct would be criminalised. Neither the extrinsic evidence or the language employed by the legislature suggests that such an intrusion into the affairs of its citizens was intended. Clear and unmistakable language is required before I should impute an intention to the legislature to interfere with the citizen's freedom to privately record his or her thoughts for their private use.

36. This decision should be treated with caution. It represents the decision of a *single* judge of the *Victorian* Supreme Court. It does not represent authority in New South Wales (or at federal law) for the proposition of a common law guarantee of freedom of expression. In fact, the prevailing wisdom in Australia seems to be that as soon as a child-related pornographic thought is recorded an offence is committed. For example, one criminologist has observed that:²⁸

If a person has a private fantasy involving sex with a child, no offence is committed. If that fantasy is preserved as something more than a thought, then an offence may be involved. The representation of that fantasy in text or digital format on a computer may be sufficient to constitute the possession of child pornography even if the offender has no intention of sharing it with any other person.

37. Also, without a Bill of Rights to protect citizens' rights,²⁹ Australian Parliaments are free to override this common law freedom to privately record one's thoughts, thereby criminalising virtual pornography and excluding the possibility of judicial review. Arguably this has not yet been done in NSW, where neither the words of the new legislation nor the Attorney-General's second reading speech express an intention to curtail an individual's right to record their thoughts.
38. Employing an argument that was rejected by the US Supreme Court, the Australian federal government comes close to expressing a clear intention to criminalise virtual child pornography, however only in circumstances where that material is made available to others (*italics added*):³⁰

²⁸ Tony Krone, 'A topology of online child pornography offending', *Trends and Issues in Crime and Criminal Justice* (2004) 279, Australian Institute of Criminology, <<http://www.aic.gov.au/publications/tandi2/tandi279t.html>>.

²⁹ see "Australia does not have a Bill of Rights" on page 25.

³⁰ House of Representatives, Explanatory Memorandum to Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Bill 2004, 59.

Material that does not necessarily contain actual images of children is covered by the [legislative] definition [of child pornography], because although it may not directly involve an abused child in the production, its *availability* can fuel further demand for similar material. This can lead to greater abuse of children in the production of material to meet this demand.

2.3 virtual pornography and the right to privacy

39. The issue of the possession of virtual child pornography can also be viewed as engaging the right to privacy. What is done in private and causes no one any harm is no business of the state. Of course, there is no common law right to privacy;³¹ nor can such a right be implied in the Constitution.³² However, the *Human Rights (Sexual Conduct) Act* could very well provide the power to override state and territory laws that arbitrarily invade the privacy of citizens who create virtual child pornography exclusively for their own use.
40. The federal *Human Rights (Sexual Conduct) Act* prohibits the federal, state and territory governments from passing laws that arbitrarily interfere with sexual conduct between consenting adults in private.³³ It does this by adopting into Australian law the internationally recognised human right to be free from arbitrary interference with one's privacy.³⁴ As a federal law it overrides any inconsistent law of a state or territory (to the extent of the inconsistency).³⁵ Consequently, if a state or territory attempts to legislate to prohibit the creation or possession of virtual child pornography that was created exclusively for the personal use of an individual, then it is arguable that that legislation will be inconsistent with the *Human Rights (Sexual Conduct) Act* and will therefore be invalid.
41. Of course, the *Human Rights (Sexual Conduct) Act* is an Act of Parliament and, unlike a constitutionally-entrenched Bill of Rights, can be amended or repealed by Parliament.
42. The Commonwealth could also argue that the interference with sexual conduct is not arbitrary. Though such an argument might be lost on the question of proportionality to the stated purpose.

³¹ *Victoria Park Racing and Recreation Grounds v Taylor* (1937) 58 CLR 479.

³² George Williams, *Human Rights under the Australian Constitution* (1999) 15, citing *Police v Carbone* (1997) 68 SASR 200 (no implied right to privacy in the federal Constitution). Though there could be an implied right to *political* privacy: see *Mulholland v Australian Electoral Commission* [2004] HCA 41.

³³ *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4(1).

³⁴ *International Covenant on Civil and Political Rights*, article 17.

³⁵ *Australian Constitution* (1901) s 109.

2.4 self-depicting child pornography and freedom of expression

43. Child pornography laws in Australia are informed by a zero-tolerance policy.³⁶ Perhaps the most ironic (and perverse) consequence of the wide net cast by this zero-tolerance policy is that there is a real danger of criminalising children themselves – the very people the laws are meant to protect.
44. Imagine a 17 year old who posts a digital photograph of him- or herself in a 'sexual pose' on an internet-based personals website. Such a teenager would be guilty of producing, transmitting and possessing child pornography in federal law and liable to serve a term of ten years imprisonment. It does not logically follow that the teenager is a paedophile or a danger to children.
45. Imagine a 15 year old who writes about his or her first sexual encounter and keeps it locked away in a private diary. That teenager is a producer of, and in possession of, child pornography under NSW law and is liable to ten years imprisonment. Again, it is ludicrous to suggest that this teenager is a paedophile or a danger to children.
46. While it is arguable that teenagers should be discouraged from this kind of behaviour (because it might be regretted later, or the transmission might be intercepted by third parties), it certainly should not be criminalised. This is especially true, when one considers the *lifelong* impact of having a child pornography offence on one's criminal record.³⁷
47. This issue of self-depicting child pornography was addressed by the Canadian Supreme Court in 2001.³⁸ The Canadian Criminal Code bans, among other things, visual representations that show a person under eighteen engaged in explicit sexual activity or that depicts, for a sexual purpose, a sexual organ or the anal region of a person under eighteen.³⁹ The Court concluded that the prohibition of auto-depicting child pornography was beyond the power of parliament:⁴⁰

...The ban [on possession of child pornography], for example, extends to a teenager's sexually explicit recordings of him- or herself alone, or engaged in lawful sexual activity, held solely for personal use. ...it is here that the link between the proscribed materials and any risk of harm to children is most tenuous, for the reasons discussed earlier: children are not exploited or abused in their production; they are unlikely to induce attitudinal effects in their possessor; adolescents recording themselves alone or engaged in lawful sexual activity will generally not look like children; and the fact that this material is held privately renders the potential for its harmful use by others minimal.

³⁶ see "zero-tolerance, child pornography and paedophiles" on page 19.

³⁷ see "Consequences of a child sex offence conviction" on page 53.

³⁸ *R v Sharpe* [2001] 1 SCR 45. See also: "virtual child pornography in Canada" on page 10.

³⁹ the legislation is quoted in full by McLachlin CJ in *R v Sharpe* [2001] 1 SCR 45, [6].

⁴⁰ *R v Sharpe* [2001] 1 SCR 45, [105], [109].

...

[Auto-depictions are] visual recordings made by a person of him- or herself alone, held privately and intended only for personal use. Again, such materials may be of significance to adolescent self-fulfilment, self-actualization and sexual exploration and identity. Similar considerations apply where the creator of the recordings is not the sole subject; that is, where lawful sexual acts are documented in a visual recording, such as photographs or a videotape, and held privately by the participants exclusively for their own private use. Such materials could conceivably reinforce healthy sexual relationships and self-actualization. For example, two adolescents might arguably deepen a loving and respectful relationship through erotic pictures of themselves engaged in sexual activity. The cost of including such materials to the right of free expression outweighs any tenuous benefit it might confer in preventing harm to children.

48. The dissenting judges of the Canadian Supreme Court were critical of the majority's analysis, effectively on the grounds that it undermined the purpose of the legislation. For example, after citing with disapproval a Victorian statutory defence to possession of child pornography that one of the children depicted is the defendant,⁴¹ the minority observed that:

...there is no guarantee, even when a teenager is in possession of a pornographic picture or videotape depicting himself or herself, that it was created in a consensual environment or that the photograph or videotape will not be used by the teenager to groom other children into engaging in sexual conduct. The latter point demonstrates that this material has the potential to exploit children even in the hands of those who are depicted in it.⁴²

49. The minority seem to have missed the point that the majority had limited their auto-depiction exception to images depicting *lawful* sexual conduct (requiring consent) and that the images be kept *exclusively* for the *private* use of those depicted.⁴³

2.5 self-depicting child pornography and the right to privacy

50. There is no common law or constitutional right to privacy. The *Human Rights (Sexual Conduct) Act* will not protect self-depicting teenagers, because the Act only guarantees sexual privacy to adults (over eighteen years of age).⁴⁴

⁴¹ *Crimes Act 1958* (Vic) s 70(2)(e): defence to possession of child pornography 'to prove... that the minor or one of the minors depicted in the film or photograph is the defendant'.

⁴² *R v Sharpe* [2001] 1 SCR 45, [230] (L'Heureux-Dubé, Gonthier & Bastarache JJ dissenting).

⁴³ *R v Sharpe* [2001] 1 SCR 45, [116], [118].

⁴⁴ *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4(2).

3. identifying and penalising the harm

3.1 harm and the criminal law

51. Society chooses to criminalise some activities and not others. In a frequently-quoted passage from the introduction to his essay *On Liberty*, John Stuart Mill expressed the view that an activity should only be criminalised in order to prevent harm to others:⁴⁵

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

52. This is the classic liberal formulation of the prevention of harm to others as the only legitimate justification for the intervention of the State in the affairs of the individual. This view is one of many in society. In relation to pornography, other views include those based on morality (it is simply wrong to engage in such behaviour) through to the now-traditional feminist approach (pornography – no matter its form – perpetuates, and is itself a source of, harm to others).⁴⁶

⁴⁵ John Stuart Mill, *On Liberty* (1859), Chapter 1 'Introductory'.

⁴⁶ see David Brown, David Farrier, Sandra Egger & Luke McNamara, *Criminal Laws* (2001, 3rd ed) 96-108.

53. In striking down laws that attempted to prohibit virtual child pornography, the US Supreme Court reiterated that, in a free and democratic society, people are punished for what they *do* and not for what they *think* or for what they *might* do:⁴⁷

To preserve these freedoms [of thought and speech], and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." There is here [in the case of virtual child pornography] no attempt, incitement, solicitation, or conspiracy.

3.2 harm generated by child pornography

54. If child pornography is to be criminalised, then what is the harm it generates? How does it harm individuals? Once the harm is identified, criminal laws can be targeted to prevent that harm.

55. UNICEF identifies two ways in which child pornography is harmful:⁴⁸

First, it encourages the sexual abuse and exploitation of children. Second, every photo or videotape of child pornography is evidence of that child's abuse. The distribution of that depiction repeats the victimization over and over again, long after the original material was created.

56. In 1997 NSW Royal Commissioner Woods identified the violation of privacy as a particular harm of child pornography:⁴⁹

It is degrading, offensive and absolutely unnecessary to invade the privacy of children by photographing or filming them...and by then placing their images on the Internet...for others to access.

57. These statements are self-evident. It is not difficult to conclude that the production, sale and distribution of child pornography that involves the abuse of a real child has caused harm to a child. It is legitimate to prevent such harm by criminalising the activity. Neither is it difficult to conclude that the *possession* of such material *for the purposes* of producing, selling or distributing child pornography is part of the cycle of abuse and should also be criminalised.⁵⁰

⁴⁷ *Ashcroft v Free Speech Coalition*, 535 US 234 (2002), 253-4 (footnotes omitted). For more information see "virtual child pornography in the United States" on page 8.

⁴⁸ UNICEF, *Child Protection: a handbook for parliamentarians* (2004) 67.

⁴⁹ Wood, *Royal Commission into the New South Wales Police Service Final Report: Volume V – the paedophile inquiry* (1997), [16.31].

⁵⁰ see also [180].

58. The question of mere possession of real or pseudo child pornography is also easy, when it is considered that:⁵¹
- ...[t]he possession of child pornography stimulates demand for such material. An effective way to curtail the production of child pornography is to attach criminal consequences to the conduct of each participant in the chain from production to possession.
59. The consumption of real child pornography contributes to the abuse of children in a real way. Therefore it is legitimate to criminalise such possession.
60. Apart from the elimination of the market in child pornography, there are secondary or indirect reasons often given for the criminalisation of the possession of child pornography. While little research has been done on child pornography, its consumers and its victims,⁵² there is some (not entirely conclusive) scientific evidence that mere possession of child pornography can promote cognitive distortions within an individual.⁵³ The hypothesis is that constant exposure to child pornography bolsters and reinforces a view that child sexual abuse is acceptable behaviour. It is also argued that child pornography fuels fantasies that incite offenders, though others argue that such material actually reduces child sex abuse by acting as a substitute to offending.⁵⁴ Paedophiles also use child pornography to 'groom' or procure children for sexual purposes. By exposing a child to images of other children in a sexual context, the paedophile hopes to make that child more conducive to seduction.
61. As the US Supreme Court points out, such arguments assume that the "harm flows from the content of the images, not from the means of their production".⁵⁵ The Court concluded that such harm was too indirect to justify prohibiting virtual child pornography.

3.3 the need for an underlying harm

62. However, it is more difficult to apply the same logic to material that does not involve *actual* children or any harm to *actual* children. As one US Supreme Court justice noted:⁵⁶

⁵¹ Council of Europe, *Explanatory Report to the Convention on Cybercrime*, [98]. The full text of the ER is available at: <<http://conventions.coe.int/Treaty/en/Reports/Html/185.htm>>. See also: *R v Sharpe* [2001] 1 SCR 45, [28].

⁵² Tony Krone, 'A topology of online child pornography offending', *Trends and Issues in Crime and Criminal Justice* (2004) 279, Australian Institute of Criminology, <<http://www.aic.gov.au/publications/tandi2/tandi279t.html>>.

⁵³ *R v Sharpe* [2001] 1 SCR 45, [87]-[88].

⁵⁴ *R v Sharpe* [2001] 1 SCR 45, [89].

⁵⁵ *Ashcroft v Free Speech Coalition*, 535 US 234 (2002), 242.

⁵⁶ *New York v Ferber*, 458 U.S. 747 (1982) 777 (Brennan J concurring with the majority).

...in the absence of exposure, or particular harm, to juveniles or unconsenting adults, the State lacks power to suppress sexually oriented materials.

63. In the 2002 case of *Ashcroft v Free Speech Coalition*, the US Supreme Court majority found that virtual child pornography is protected by freedom of speech.⁵⁷ The majority make the observation that:⁵⁸

In the case of [real child pornography], the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive. ...[But in the case of virtual child pornography] there is no underlying crime at all.

64. As the US Supreme Court points out, the possession of real child pornography is a crime because a child was harmed in the production of the image. But if no child is harmed and there is no 'attempt, incitement, solicitation, or conspiracy' to harm children, then the material is protected by the constitutional Bill of Rights. This is a useful way of distinguishing between situations in which child protection trumps freedom of expression and situations in which it does not. In a civilised society, words and deeds should be treated differently and people should be punished for what they *have* done (or are planning to do) not what they *might* do.⁵⁹
65. Of course, in certain circumstances, the possession of virtual pornography should be criminal. Those circumstances would involve some kind of associated criminal activity that harms children. For example, possession of such material for the purposes of grooming or procuring children for sexual purposes, or possession of such material for the purposes of the production, dissemination or sale of *real* child pornography.

3.4 zero-tolerance, child pornography and paedophiles

66. It is forcefully argued by some people that nothing short of zero-tolerance to child pornography is acceptable. A zero-tolerance policy, which appears to be the dominant view in Australia, encompasses both real and virtual child pornography. Zero-tolerance makes no concession to freedom of speech or the right to privacy. The rationale for zero-tolerance is rooted in the use that paedophiles make of (real or virtual) child pornography.
67. NSW Royal Commissioner Woods reported that '[p]aedophiles typically share an appetite for child pornography'.⁶⁰ Zero-tolerance campaigners take such a statement and erroneously conclude that everyone in possession of child pornography is a paedophile – a real or potential threat to children who must be punished.

⁵⁷ see "virtual child pornography and freedom of expression" on page 7.

⁵⁸ *Ashcroft v Free Speech Coalition*, 535 US 234 (2002), 254.

⁵⁹ see also [23].

⁶⁰ Wood, *Royal Commission into the New South Wales Police Service Final Report: Volume V – the paedophile inquiry* (1997), [16.28].

68. In an address delivered at the Second World Congress against the Commercial Sexual Exploitation of Children, held in Yokohama in December 2001, John Carr of the London-based Children & Technology Unit (attached to and funded by the UK charity 'NCH') stated that:⁶¹

There is a very strong link between the possession of child pornography and abuse. A person in possession of child pornography is very likely either to be an active abuser already, or to be on a path that will lead him to abuse later.

69. To support his claim Mr Carr cited three American pre-Internet studies, which suggested that anywhere from 'almost all' to 36% of all cases of people caught with child pornography were also child abusers. He then jumps to this 'commonsense' conclusion:⁶²

Thus, while acknowledging that different studies show different levels of probability, ...together they establish beyond doubt what one's common sense also suggests: whenever the authorities uncover someone in possession of child pornography, they are also identifying someone who is potentially a real and active danger to children.

70. In Australia in 1995, the Joint Standing Committee on the National Crime Authority heard similar figures from Australian police, ranging from 78% to 90%:⁶³

Australian law enforcement agencies told the Committee that there was a significant likelihood that a person in possession of child pornography was also involved in sexually abusing children. The validity of this view, which is not universally accepted, is important because law enforcement agencies may, on the basis of it, adopt an investigative strategy of following the child pornography trail in the expectation that it will prove an effective method of uncovering hitherto unsuspected child-sexual abusers.

71. A similar argument was made before the Canadian Supreme Court, in response to which:⁶⁴

The Criminal Lawyers' Association argues that it is dangerous to justify violations of rights on the sole basis that they will assist in the detection and prosecution of other criminal offences. Such reasoning, it argues, could be used to justify many other violations of fundamental rights...

⁶¹ John Carr, *Theme Paper on Child Pornography for the 2nd World Congress on Commercial Sexual Exploitation of Children*, December 2001, 14-15.

⁶² John Carr, *Theme Paper on Child Pornography for the 2nd World Congress on Commercial Sexual Exploitation of Children*, December 2001, 15.

⁶³ Commonwealth, Joint Committee on the National Crime Authority, *Organised Criminal Paedophile Activity* (November 1995) [3.44] (footnotes omitted) <http://www.aph.gov.au/senate/committee/acc_ctte/completed_inquiries/pre1996/ncapedo/report/>.

⁶⁴ *R v Sharpe* [2001] 1 SCR 45, [90].

72. In the interests of perspective when it comes to *actual* child sexual abuse, it is worth noting that the Joint Standing Committee on the National Crime Authority observed that 'most sexual offences against children are committed by their relatives and neighbours who are not paedophiles in the strict sense of the term and who do not operate in any organised or networked way'.⁶⁵
73. The danger with a zero-tolerance regime, which casts such a wide net, is that non-paedophiles will be caught. Perhaps the most ironic (and perverse) consequence of a zero-tolerance policy is that there is a real danger of criminalising children themselves – the very people the laws are meant to protect.⁶⁶ Given the consequences of a conviction for a child sexual offence, the stigma could remain with a child for life and severely limit their career choices.⁶⁷
74. The US Supreme Court is unconvinced by arguments that zero-tolerance towards possession of child pornography is in the best interests of a free society.⁶⁸ The Canadian Supreme Court implied exceptions into Canadian laws that attempted to implement zero-tolerance towards possession of child pornography.⁶⁹
75. Zero-tolerance is a well-meaning but overbroad policy. It is a preventive strategy that casts a wide net and which misses the point. Paedophiles who obtain child pornography and use it to groom or procure children are guilty of the offence of grooming or procuring children – possession of child pornography is the least of their crimes. Paedophiles who obtain child pornography to excite their fantasies and then abuse a child are guilty of the sexual abuse of a child – again, possession of child pornography is the least of their crimes. A preventive policy of zero-tolerance falsely assumes that everyone in possession of child pornography is a danger to children.
76. Policies and legislation that focus on identifying and combating *actual* harm to *actual* children and that educate children to report and how to avoid sexual exploitation will serve a free and democratic Australia (and its children) better than a scattergun preventive policy of zero-tolerance towards possession of all forms of child pornography.

⁶⁵ Commonwealth, Joint Committee on the National Crime Authority, *Organised Criminal Paedophile Activity* (November 1995) "Summary and List of Recommendations", <http://www.aph.gov.au/senate/committee/acc_ctte/completed_inquiries/pre1996/ncapedo/report/>.

⁶⁶ see "self-depicting child pornography and freedom of expression" on page 14.

⁶⁷ see "Consequences of a child sex offence conviction" on page 53.

⁶⁸ see "virtual child pornography and freedom of expression" on page 7.

⁶⁹ see "self-depicting child pornography and freedom of expression" on page 14.

4. The legal framework

4.1 Australian law

77. In Australia, there are state and federal child pornography laws. State laws deal with the production, sale, distribution⁷⁰ and possession⁷¹ of child pornography. State legislation also prohibits the use or procuring of, or agreeing to use or procure, a child for pornographic purposes.⁷²
78. Federal legislation deals with the import & export of child pornography (hardcopy)⁷³ and with child pornography on the internet.⁷⁴ Federal law also prohibits the use of the internet (and other telecommunication technologies) for procuring⁷⁵ and grooming⁷⁶ children for sexual purposes.
79. In 2004 there were a lot of new legislation relating to child pornography passed at both the state and federal levels. This was in preparation for Australia's ratification of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*.⁷⁷
80. The new NSW legislation came into effect on 1 January 2005.⁷⁸ According to the NSW Attorney-General, the main aim of the new legislation is the deterrence and elimination of the market in child pornography.⁷⁹

⁷⁰ *Crimes Act 1900* (NSW) s 91H(2) (offence to produce or disseminate child pornography; max. 10 years prison). 'Disseminate' means to send, supply, exhibit, communicate, make available or agree to do any of the above: s 91H(1).

⁷¹ *Crimes Act 1900* (NSW) s 91H(3) (offence of possession of child pornography; max. 5 years prison).

⁷² *Crimes Act 1900* (NSW) ss 91C (definition of 'child') & 91G (offences). Maximum penalty is ten years imprisonment if the child is between 14 and 18 years of age, or fourteen years imprisonment if the child is under 14.

⁷³ *Customs Act 1901* (Cth) ss 233BAB(5) (import) & 233BAB(6) (export). Max. penalty: \$275,000 and/or 10 years.

⁷⁴ *Criminal Code Act 1995* (Cth) s 474.19 (access, produce, transmit, publish or distribute child pornography). Max. penalty: 10 years.

⁷⁵ *Criminal Code Act 1995* (Cth) s 474.26 (procuring child under 16 for sexual activity). Max. penalty: 15 years prison.

⁷⁶ *Criminal Code Act 1995* (Cth) s 474.27 (sending indecent material to a child under 16 with intent to procure child for sexual activity). Max. penalty: 15 years prison.

⁷⁷ see "Optional Protocol on the sale of children" on page 24 below.

⁷⁸ *Crimes Amendment (Child Pornography) Act 2004* (NSW), assented 15/12/2004, in force 1/1/2005.

⁷⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 Nov 2004, 12738 (Bob Debus, Attorney-General).

The main purpose of the Bill is to increase the maximum penalties for child pornography offences. It is important that courts give effect to the principles of general deterrence and denunciation in cases involving child pornography by imposing substantial sentences, and the Bill gives them the capacity to do so. Those who possess child pornography, though they may not directly harm any child, provide a market for those who produce and distribute this material. If the courts can provide effective deterrence to people who possess child pornography, this market may be eliminated, and the impetus to produce child pornography, and to abuse children in its production, will be reduced.

81. The new federal laws relating to the internet were passed in August 2004 and entered into force on 1 March 2005.⁸⁰
82. In Hobart in November 2004, Australian Police Ministers agreed to introduce uniform national child pornography laws, including uniform penalties and a national register for child sex offenders.⁸¹ At the June 2005 COAG meeting in Canberra, the issue of national uniform child pornography laws was referred to SCAG along with a request for the MCCOC to prepare a report on the issue.⁸²

4.2 International law

83. In January 1991 Australia ratified the *Convention on the Rights of the Child* ('the Convention').
84. The Convention obliges all state parties 'to protect the child from all forms of sexual exploitation and sexual abuse'.⁸³ This includes measures to prevent the 'exploitative use of children in pornographic performances and materials'.⁸⁴ A child is defined as a person below the age of eighteen.⁸⁵
85. Australia has also ratified other international treaties that promote the rights of the child, including the *International Covenant on Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').

⁸⁰ *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Act 2004* (Cth), passed 4/8/2004, assented on 31/8/2004, Schedule 1 commences 1/3/2005.

⁸¹ ABC News Online, 'States agree on national child porn laws' (17 November 2004) <<http://www.abc.net.au/news/newsitems/200411/s1245713.htm>>. **Note:** at the meeting, Western Australian and Victorian ministers were keen to expand the register to include adults who offend against adults.

⁸² Council of Australian Governments, *Communique* (3 June 2005), <<http://www.coag.gov.au/meetings/030605/>>.

⁸³ *Convention on the Rights of the Child*, Article 34.

⁸⁴ *Convention on the Rights of the Child*, Article 34(c).

⁸⁵ *Convention on the Rights of the Child*, Article 1: child means 'every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'.

4.2.1 Optional Protocol on the sale of children

86. The international human rights treaty dealing specifically with child pornography is called the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* ('the Optional Protocol').
87. Article 3(1)(c) of the Optional Protocol requires signatory countries to criminalise, among other things, the acts of:
- Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography...
88. In December 2001 Australia signed the Optional Protocol. It is now standard practice for such international treaties to be referred to the Joint Standing Committee on Treaties for consideration before ratification by Parliament.⁸⁶ The Optional Protocol was referred to the Committee on 11 October 2005.⁸⁷
89. The federal government has indicated that it intends to ratify the Optional Protocol.⁸⁸ But as yet, Australia has not done so.

1. CCL should encourage the government to ratify the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* because it seeks to protect children from slavery, prostitution and pornographic abuse.

90. The full text of the Optional Protocol is reproduced at the end of this paper.⁸⁹

⁸⁶ Senate Legal and Constitutional Legislation Committee, *Hansard: Consideration of Budget Estimates* (10 February 2003) 157-158.

⁸⁷ <<http://www.aph.gov.au/house/committee/jsct/11october2005/index.htm>>.

⁸⁸ 'The Optional Protocol will be ratified by Australia, subject to the necessary Cabinet approvals': *List of Multilateral Treaties under Negotiation, Consideration or Review by the Australian Government* (tabled in June 2004),

<<http://www.austlii.edu.au/au/other/dfat/mta/mta2004.html>> (accessed 19 December 2004).

This document also indicates that the Optional Protocol was discussed at the March 2004 meeting of the Standing Committee of Attorneys General.

⁸⁹ see page 58 ff.

4.2.2 ILO Convention No. 182

91. The International Labour Organisation ('ILO') also has a *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*.⁹⁰ The Convention is also known as ILO Convention No. 182 ('C182'). C182 is considered a 'fundamental convention' by the ILO. Among other things, C182 prohibits the 'use, procuring or offering of a child [under the age of 18]...for the production of pornography'. The offence of possession of child pornography does not fall within the scope of C182.
92. The Joint Standing Committee on Treaties has recommended that C182 be ratified.⁹¹ The government has indicated that it will ratify C182 'subject to legislation being in place for all Australian jurisdictions for Australia to meet its obligations prior to ratification'.⁹²
93. As yet, Australia has not ratified C182.

2. CCL should encourage the government to ratify ILO Convention No. 182 because it seeks to protect children from being abused and used in child pornography.

94. The full text of C182 is reproduced at the end of this paper.⁹³

4.3 Australia does not have a Bill of Rights

95. At international law, the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* is read in light of the International Bill of Human Rights, which protects fundamental rights and freedoms.
96. In Canada and the United States freedom of expression and the right to privacy are enshrined in the Constitution. In Europe these rights are found in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁹⁴ This allows a court to review legislation to ensure that it does not violate these fundamental rights and freedoms.

⁹⁰ International Labour Organization, *Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, Articles 1-3. See <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

⁹¹ Commonwealth, Joint Standing Committee on Treaties, *Review of Treaties: Report 56* (8 October 2003), Chapter 3 (Recommendation #3).

⁹² Commonwealth, Joint Standing Committee on Treaties, *Review of Treaties: Report 56* (8 October 2003), [3.2].

⁹³ see page 67 ff.

⁹⁴ see [194]. Convention text:

<<http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>>.

97. This safeguard, protecting civil liberties, is an important element missing from the Australian legal context because Australia is now the only Western nation without a Bill of Rights. This means that Parliament can, if it expresses a clear intention to do so, override fundamental rights and freedoms. For example, a recent Victorian case of possession of (written) child pornography was dismissed because the court recognised the accused's common law right to record his thoughts.⁹⁵ Arguably, with recent changes to legislation, if this case had occurred in NSW the court would have been bound to proceed with the prosecution.⁹⁶
98. There are only two sources of protection in Australian law to override state or territory legislation: one is statutory and one is constitutional. The federal *Human Rights (Sexual Conduct) Act* might offer some protection to those who create virtual child pornography exclusively for their own private use.⁹⁷
99. There is an implied constitutional guarantee of freedom of political communication, though it is hard to see how it could protect freedom of expression in the privacy of an individual's home.⁹⁸ The material would need to relate to government or political matters.⁹⁹ Further, any protection afforded would only extend to protect speech that did not incite people to commit child sexual abuse (a crime).
100. Without a Bill of Rights, Australian courts, unlike their Canadian, European or American counterparts, are essentially powerless to check the excesses of often-rushed & ill-considered child pornography legislation.
101. In the short-term, to remedy this significant deficiency, Australian legislation should explicitly state that these offences must be read subject to the fundamental rights and freedoms enunciated in the *International Covenant on Civil and Political Rights*. Such an amendment would not render the possession of child pornography lawful or endanger the legitimate end of eliminating the market in child pornography, but it would provide Australian courts with the necessary power to protect privacy and freedom of expression where, on a case-by-case basis, it is appropriate.

3. CCL should encourage Australian Parliaments to legislate that child pornography offences should be read subject to the fundamental rights and freedoms set down in the *International Covenant on Civil and Political Rights*. Such legislation would help to protect those peripheral circumstances where child pornography laws inadvertently infringe on freedom of expression and the right to privacy.

⁹⁵ see "virtual child pornography in Australia" on page 11.

⁹⁶ see [134].

⁹⁷ see "virtual pornography and the right to privacy" on page 13.

⁹⁸ see also [192].

⁹⁹ see recent WA child pornography case: *Holland v R* [2005] WASCA 140 (3 August 2005), applying *Coleman v Power* [2004] HCA 39.

102. Specifically, the fundamental guarantee of freedom of expression in the ICCPR comes from Article 19. It is important to note that it is subject to important exceptions (in paragraph 3):

Article 19

1. Everyone shall have the right to hold opinions without interference.
 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.
-

5. Definition of child pornography

103. The scope of child pornography offences is largely determined by the statutory definition of 'child pornography'. The definition in international law comes from the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*.
104. In Australia, the accepted definition of child pornography has remained relatively unchanged for decades.¹⁰⁰ For example, the now-repealed *Film and Video Tape Classification Act* defined the term "child abuse film" as:¹⁰¹
- a film which depicts a person (whether engaged in sexual activity or otherwise) who is, or who is apparently, a child in a manner that is likely to cause offence to a reasonable adult...
105. In the 1990s the Australian Law Reform Commission recommended a new uniform national classification and censorship scheme, which was introduced in 1995.¹⁰² New South Wales took its statutory definition of child pornography from that federal National Classification Code, which refused classification ('RC') to publications that:¹⁰³
- describe or depict in a way that is likely to cause offence to a reasonable adult, a minor who is, or who appears to be, under 16 (whether the minor is engaged in sexual activity or not)...
106. In 2004, there were dramatic legislative changes to the legal definition of child pornography across Australia. In 2005, the MCCOC will be asked to examine the question of uniform national child pornography laws.¹⁰⁴

4. CCL should support the initiative of framing and introducing uniform national laws on child pornography. This will standardise the definition of child pornography across the nation.

5. CCL should actively seek to have input into the framing process to ensure that matters of civil liberties are taken into account.

¹⁰⁰ see also: Australian Law Reform Commission, *Film and Literature Censorship Procedure* (1991) Report 55, [5.18], <<http://www.austlii.edu.au/au/other/alcrc/publications/reports/55/ch5.html>>.

¹⁰¹ *Film and Computer Game Classification Act 1984* (formerly *Film and Video Classification Act 1984*) (NSW) s 3.

¹⁰² *Classification (Publications, Films and Computer Games) Act 1995* (Cth), commenced 1/1/1996.

¹⁰³ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) Schedule 1 ("National Classification Code") 1(b). The NSW provision was worded slightly differently but had the same meaning: *Crimes Act 1900* (NSW) s 578B, repealed by *Crimes Amendment (Child Pornography) Act 2004* (NSW) Sch 1 cl 5.

¹⁰⁴ see [82].

6. CCL should also recommend that the issue be sent to the Model Criminal Code Officers' Committee for thorough consideration and public consultation.¹⁰⁵

¹⁰⁵ this last recommendation was made in the original release of this paper (dated January 2005). This recommendation has been implemented: see [82].

5.1 International law

5.1.1 Optional Protocol on the sale of children

107. The *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* ('the Optional Protocol') defines child pornography as:

Article 2(c): ...any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

'representations'

108. The definition prohibits 'representations' of children. This would appear to encompass only visual depictions and not words.
109. The *New Shorter Oxford English Dictionary* (1993) stresses the tangible and visual nature of a 'representation':
- 1 a** An image, likeness, or reproduction *of* a thing; *spec.* a reproduction in some material or tangible form, as a drawing or painting. **b** The action or fact of exhibiting or producing in some visible image or form.
110. The US Supreme Court has drawn a very clear line between visual and written child pornography.¹⁰⁶ Written child pornography is protected by the First Amendment, whereas visual pornographic depictions of real children are not protected by the Bill of Rights.

'a child'

111. A 'child', as defined in the *Convention on the Rights of the Child*, is a person 'below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'.¹⁰⁷ This is the definition of a child recognised in international law.

real and virtual child pornography

112. The definition in the Optional Protocol prohibits representations 'of a child'. There is no mention of whether that child should be real, or whether the child can be fictional. This means that the issue of virtual child pornography is not explicitly addressed in the definition.¹⁰⁸

¹⁰⁶ *New York v Ferber*, 458 U.S. 747 (1982). See also [13] above.

¹⁰⁷ *Convention on the Rights of the Child*, Article 1.

¹⁰⁸ for 'virtual child pornography' see: "definitions: real, pseudo and virtual child pornography" on page 7.

113. The Optional Protocol should be read in the light of the fundamental human rights and freedoms listed in the *International Covenant on Civil and Political Rights*.¹⁰⁹ Therefore it is arguable that freedom of expression and the right to privacy operate to protect virtual child pornography in ways similar to those described by the US and Canadian Supreme Courts.¹¹⁰

representations of 'explicit sexual activities'

114. The Optional Protocol prohibits representations of a child engaged in *explicit* sexual activities (real or simulated). Canadian child pornography laws follow this definition closely. The Canadian Supreme Court has defined the phrase 'explicit sexual activities' to mean:¹¹¹

...acts which viewed objectively fall at the extreme end of the spectrum of sexual activity –acts involving nudity or intimate sexual activity, represented in a graphic and unambiguous fashion, with persons under or depicted as under 18 years of age. The law does not catch possession of visual material depicting only casual sexual contact, like touching, kissing, or hugging, since these are not depictions of nudity or intimate sexual activity. Certainly, a photo of teenagers kissing at summer camp will not be caught. At its furthest reach, the section might catch a video of a caress of an adolescent girl's naked breast, but only if the activity is graphically depicted and unmistakably sexual.

representations of 'sexual parts of a child for primarily sexual purposes'

115. The Optional Protocol also prohibits representations of the sexual parts of a child for primarily sexual purposes. Again, Canadian laws are similar and define child pornography as visual material whose "dominant characteristic" is the depiction "for a sexual purpose" of a sexual organ or the anal region of a child. The Canadian Supreme Court concluded that:¹¹²

The question is whether a reasonable viewer, looking at the depiction objectively and in context, would see its "dominant characteristic" as the depiction of the child's sexual organ or anal region. The same applies to the phrase "for a sexual purpose", which I would interpret in the sense of reasonably perceived as intended to cause sexual stimulation to some viewers.

Family photos of naked children, viewed objectively, generally do not have as their "dominant characteristic" the depiction of a sexual organ or anal region "for a sexual purpose". Placing a photo in an album of sexual photos and adding a sexual caption could change its meaning such that its dominant characteristic or purpose becomes unmistakably sexual in the view of a reasonable objective observer. Absent evidence indicating a dominant prurient purpose, a photo of a child in the bath will not be caught.

¹⁰⁹ see [95] ff.

¹¹⁰ see "civil liberties and child pornography" on page 6 ff.

¹¹¹ *R v Sharpe* [2001] 1 SCR 45, [49].

¹¹² *R v Sharpe* [2001] 1 SCR 45, [50]-[51] (footnotes omitted).

116. New Australian federal child pornography laws use this phrase “dominant characteristic...for a sexual purpose”.¹¹³

5.1.2 European Convention on Cybercrime

117. The Council of Europe's *Convention on Cybercrime* defines 'child pornography' as:¹¹⁴

Article 9(2): ...pornographic material that visually depicts:

- a. a minor engaged in sexually explicit conduct;
 - b. a person appearing to be a minor engaged in sexually explicit conduct;
 - c. realistic images representing a minor engaged in sexually explicit conduct.
-

'a minor'

118. A 'minor' is defined as a person under 18, though a signatory nation has the discretion to lower that age to 16 – but no lower.¹¹⁵

'pornographic material'

119. The 'pornographic' nature of the material is meant to be governed by national classification schemes, referencing recognised community standards of obscenity and public morals.¹¹⁶ It is not designed to capture 'material having an artistic, medical, scientific or similar merit'.

'visually depicts'

120. The depiction must be visual. The written word is not proscribed. This means that the electronic exchange of (written) pornographic literature describing children in a sexually explicit manner falls outside the scope of the European *Convention on Cybercrime*.

121. Visual depiction includes 'data stored on computer diskette or on other electronic means of storage, which are capable of conversion into a visual image'.¹¹⁷

'sexually explicit conduct'

122. As a minimum standard, 'sexually explicit conduct' encompasses the real or simulated depiction of:¹¹⁸

- 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.

¹¹³ *Criminal Code Act 1995* (Cth) s 473.1(b). For more information, see [145] & [167].

¹¹⁴ Council of Europe, *Convention on Cybercrime*, n 191, Article 9(2).

¹¹⁵ Council of Europe, *Convention on Cybercrime*, n 191, Article 9(3).

¹¹⁶ Council of Europe, *Explanatory Report to the Convention on Cybercrime*, n 51, [99].

¹¹⁷ Council of Europe, *Explanatory Report to the Convention on Cybercrime*, n 51, [99].

¹¹⁸ Council of Europe, *Explanatory Report to the Convention on Cybercrime*, n 51, [100].

real and virtual child pornography

123. The European definition divides child pornography into three categories of depiction involving:
- a. sexual abuse of a *real* child;
 - b. an adult who appears to be a child engaged in sexually explicit conduct;
 - c. 'realistic' images of child sexual abuse that do not involve a real child engaged in sexually explicit conduct.
124. Article 9(2)(a) captures real child pornography and is aimed at protecting against child abuse.¹¹⁹ The last two categories 'aim at providing protection against behaviour that, while not necessarily creating harm to the 'child' depicted in the material, as there might not be a real child, might be used to encourage or seduce children into participating in such acts, and hence form part of a subculture favouring child abuse'.¹²⁰ This is a reference to the documented practice of paedophiles 'grooming' children for sexual purposes.
125. The last category of 'realistic' images includes both morphed images of real children and images of purely imaginary children.¹²¹ This blurs the distinction made by the US Supreme Court between morphed and virtual child pornography.¹²² It appears that the Europeans do not subscribe to this distinction, given a recent recommendation of the Council of Europe Committee of Ministers' that member states introduce 'criminal sanctions for mere possession, in whatever form, of pornographic material involving children or simulating the images of a child'.¹²³ However, it should be recalled that the offences in the European Convention must be committed intentionally and 'without right', which might suggest that the offence is not as absolute as it at first seems.¹²⁴
126. Finally, the Convention should also be read in the light of the *European Convention on Human Rights*.¹²⁵ This means that the European Human Rights Court might strike down legislation that prohibits virtual pornography – despite the definition in the *Convention on Cybercrime*.

¹¹⁹ Council of Europe, *Explanatory Report to the Convention on Cybercrime*, n 51, [101]-[102].

¹²⁰ Council of Europe, *Explanatory Report to the Convention on Cybercrime*, n 51, [102].

¹²¹ Council of Europe, *Explanatory Report to the Convention on Cybercrime*, n 51, [101].

¹²² see "definitions: real, pseudo and virtual child pornography" on page 7.

¹²³ Council of Europe, Committee of Ministers, *Recommendation on the protection of children against sexual exploitation* (31 Oct 2001) Rec(2001)16, [45], <<https://wcd.coe.int/ViewDoc.jsp?id=234247>>.

¹²⁴ 'without right': see [184] & [193].

¹²⁵ see [193]-[194].

5.2 New South Wales law

127. From 1 January 2005, the definition of 'child pornography' in NSW is:¹²⁶

91H(1) Definitions

...material that depicts or describes, in a manner that would in all the circumstances cause offence to reasonable persons, a person under (or apparently under) the age of 16 years:

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

federal classification no longer required

128. Prior to January 2005, it was necessary to have material classified by the federal Classification Board before a prosecution for child pornography could proceed.¹²⁷ As a result of the large volume of child pornography downloaded by people from the internet, authorities claim it is now impractical to require such classification before charges can be laid.¹²⁸
129. The new definition does not require federal classification of the offensive material. The decision of whether something is child pornography or not is no longer made by the professional censors at the Classification Board. The decision is now a matter of fact for a jury (or magistrate).
130. Nevertheless, a classification certificate issued by the Director or Deputy Director of the federal Classification Board relating to a film, publication or computer game is still admissible in court and is *prima facie* evidence of the matters stated in the certificate.¹²⁹
131. This change also means that, at the investigatory stage, police now have the discretion to decide whether something is child pornography or not, without reference to the National Classification Code or the federal Classification Board.

¹²⁶ *Crimes Act 1900* (NSW) s 91H(1) inserted by *Crimes Amendment (Child Pornography) Act 2004* (NSW) Sch 1 cl 4.

¹²⁷ *Crimes Act 1900* (NSW) s 578B, repealed by *Crimes Amendment (Child Pornography) Act 2004* (NSW) Sch 1 cl 5.

¹²⁸ This was illustrated by the recent controversy surrounding Operation Auxin, a police operation targeting child pornography on the internet. Police failed to have the offending material, which amounted to hundreds of thousands of images, classified by the Office of Film and Literature Classification before charging the accused men – potentially jeopardising the entire operation: see Sean Nicholls & Les Kennedy, 'Gap in child pornography law to be closed', *Sydney Morning Herald*, 20 October 2004, <<http://www.smh.com.au/articles/2004/10/19/1097951699870.html>>.

Complementary changes were also made at the federal level: *Classification (Publications, Films and Computer Games) Amendment Act (No. 2) 2004* (Cth) passed 9/12/04, assented 14/12/04.

¹²⁹ *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 58(1). In order to remedy the problems encountered in Operation Auxin, under the new legislation a certificate may be issued retrospectively: *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 58(2) inserted by *Crimes Amendment (Child Pornography) Act 2004* (NSW) Sch 2 cl 2.3.

'material'

132. From January 2005 the classes of offending material are:¹³⁰

91C Definitions

...any film, printed matter, electronic data or any other thing of any kind (including any computer image or other depiction).

133. This amounts to a considerable broadening of the definition. The medium of the alleged child pornography may be 'any other thing of any kind'. Conceivably this definition includes unpublished material such as personal diaries and transcribed personal thoughts. This has implications for freedom of expression.¹³¹

134. In a recent Victorian prosecution for possession of child pornography in the form of written sexual fantasies involving children, the charges were dismissed by a Supreme Court judge because the written notes did not amount to a 'publication' under the Act.¹³² In NSW, with this new expanded definition, it is likely that such a prosecution could proceed.

'depicts or describes'

135. The material must 'depict or describe' the offensive conduct. This is the formula that has been used in Australia for decades.¹³³ Because this definition goes beyond visual material to include *written* material, it extends far beyond international human rights standards.¹³⁴

'cause offence to reasonable persons'

136. This formula has also been used in Australia for decades.¹³⁵ However, the significant change is that this will now be a matter for a jury, and not a professional censor from the Classification Board. This could lead to anomalous jury verdicts in which similar material is treated differently.

137. The legislation offers no guidance as to what constitutes objectively offensive material. According to the Attorney-General this test of offensiveness ensures that 'innocent family photographs of naked children, for example, will not be captured'.¹³⁶

¹³⁰ *Crimes Act 1900* (NSW) s 91C.

¹³¹ see "self-depicting child pornography and freedom of expression" on page 14.

¹³² *R v Quick* (2004) 148 A Crim R 51. For more information see: "virtual child pornography in Australia" on page 11.

¹³³ see [104]-[105].

¹³⁴ see [108]-[110].

¹³⁵ see [104]-[105].

¹³⁶ NSW, *Parliamentary Debates*, Legislative Assembly, 11 Nov 2004, 12738 (Bob Debus, Attorney-General).

'(or apparently under)'

138. Similar phrases have been used in Australia for decades.¹³⁷ This captures the category of virtual pornography that involves adult actors playing the parts of children.
139. The decision about whether the subject is 'apparently under' 16 years of age is now a decision for the jury, not a professional from the Classification Board.
140. In the United States, possession of this kind of pornography is protected by the First Amendment.¹³⁸ In Europe, possession of this kind of pornography is prohibited if it is intentional and 'without right'.¹³⁹
141. In Australia, in the case of child pornography involving adult actors playing the parts of children, it is arguable that the federal *Human Rights (Sexual Conduct) Act*,¹⁴⁰ which prohibits laws that arbitrarily interfere with sexual conduct between consenting adults in private, protects such activity under the aegis of the fundamental human right to privacy.¹⁴¹

'engaged in sexual activity'

142. This phrase appears to encompass a much broader range of activity than the international standard of '*explicit* sexual activity'.¹⁴²
143. In fact, this phrase in this form is new. Though a similar formula has also been used in Australia for decades, it was usually been placed in a phrase like 'whether engaged in sexual activity *or not*' or 'whether engaged in sexual activity *or otherwise*'. Consequently this phrase has not been the subject of caselaw in Australia and the range of conduct it covers remains to be defined. For example, does it include teenagers kissing and hugging? Recalling the 'offensiveness' test: does it include same-sex teenagers kissing or hugging?
144. The NSW definition leaves it open for material that shows two fully-clothed teenagers kissing at camp to be determined child pornography.¹⁴³ As the Canadian Supreme Court points out, a teenager who makes and keeps, exclusively for her or his own personal use, 'photos or videos of themselves engaged in lawful sexual acts' will also be criminalised by this kind of legislation.¹⁴⁴

¹³⁷ see [104]-[105].

¹³⁸ see "virtual child pornography in the United States" on page 8.

¹³⁹ see [123]-[125].

¹⁴⁰ *Human Rights (Sexual Conduct) Act 1994* (Cth).

¹⁴¹ *International Covenant on Civil and Political Rights*, article 16. See also "virtual pornography and the right to privacy" on page 10.

¹⁴² see the examples of the Optional Protocol and the Council of Europe's *Convention on CyberCrime* above.

¹⁴³ see *R v Sharpe* [2001] 1 SCR 45, [49].

¹⁴⁴ *R v Sharpe* [2001] 1 SCR 45, [41]. See "self-depicting child pornography and freedom of expression" on page 14.

5.3 federal law

145. The definition of child pornography was changed in federal law in August 2004 and it is now quite complex. At federal law, child pornography is material:¹⁴⁵

473.1 Definitions

- (a) that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:
 - (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
 - (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
 - (b) the dominant characteristic of which is the depiction, for a sexual purpose, of:
 - (i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or
 - (ii) a representation of such a sexual organ or anal region; or
 - (iii) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
 - (c) that describes a person who is, or is implied to be, under 18 years of age and who:
 - (i) is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
 - (ii) is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
 - (d) that describes:
 - (i) a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or
 - (ii) the breasts of a female person who is, or is implied to be, under 18 years of age;and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.
-

'that reasonable persons would regards as being...offensive'

146. All four definitions include this test, which is a reworking of the 'cause offence to reasonable persons' formula that is currently used in NSW law and has been used in Australian law for decades.¹⁴⁶

¹⁴⁵ *Criminal Code Act 1995* (Cth) s 473.1 inserted by *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Act 2004* (Cth) s 1; and, *Customs Act 1901* (Cth) s 233BAB(3) amended by *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Act 2004* (Cth) s 24.

¹⁴⁶ see [104]-[105] & [136].

147. It is a matter for the jury whether a 'reasonable person' would be offended. Federal law offers the following guidance on what might be taken into account when considering whether material is objectively offensive. The matters include:¹⁴⁷
- (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
 - (b) the literary, artistic or educational merit (if any) of the material; and
 - (c) the general character of the material (including whether it is of a medical, legal or scientific character).
148. These tests are the tests used by the Classification Board.¹⁴⁸ Asking a jury to judge the 'literary, artistic or educational merit' of material has been criticised as inappropriate in the context of criminal proceedings, especially when a penalty of imprisonment attaches.¹⁴⁹ Prince and Jordan argue that:¹⁵⁰

It is one thing to select individuals representing Australian society to be on the Classification Board, and for the Board then to judge a film against its members' standards of 'morality, decency and propriety' and their assessment of 'literary, artistic or educational merit'. It is quite another to require a judge or a non-expert selection of jurors to decide what is meant in a strict legal sense by eg 'standards of propriety generally accepted by reasonable adults', let alone to determine whether particular material has 'literary or artistic merit'.

Allowing a court to convict and imprison people based on these types of legal 'standards' appears to be a throw-back to the type of situation in eg the 1971 Oz obscenity trial in the United Kingdom.

'depicts' and 'describes'

149. The first two definitions relate to *visual* depictions of child pornography. The other two definitions relate to *non-visual* descriptions of child pornography. They are defined to include:¹⁵¹

depict includes [material that contains] data from which a visual image (whether still or moving) can be generated.

describe includes [material that contains] data from which text or sounds can be generated.

¹⁴⁷ *Criminal Code Act 1995* (Cth) s 473.4 & *Customs Act 1901* (Cth) s 233BAB(4A), inserted by *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Act 2004* (Cth), Schedule 1; passed 4/8/2004, assented on 31/8/2004, commences 1/3/2005.

¹⁴⁸ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 11.

¹⁴⁹ Peter Prince & Roy Jordan, 'Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004', *Bills Digest*, No 13/2004-05, Parliamentary Library (2 August 2004), 21.

¹⁵⁰ Peter Prince & Roy Jordan, 'Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004', *Bills Digest*, No 13/2004-05, Parliamentary Library (2 August 2004), 19-20.

¹⁵¹ *Criminal Code Act 1995* (Cth) s 473.1, inserted by *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Act 2004* (Cth), Schedule 1; passed 4/8/2004, assented on 31/8/2004, commences 1/3/2005.

150. Formerly federal law only prohibited offensive 'depictions'.¹⁵² This new definition introduces into federal law a prohibition on non-visual *descriptions*, including audio recordings.¹⁵³
151. According to the federal government, paragraphs (a) and (b) cover 'depictions' and are 'intended to cover all visual images, both still and motion, including representations of children, such as cartoons or animation'. Paragraphs (c) and (d) cover 'descriptions' and are 'intended to cover all word-based material, such as written text, spoken words and songs'.¹⁵⁴
152. Issues of freedom of expression are engaged here because this definition prohibits the transcribing of thought in a written form or the dictation of thought in an audio format.¹⁵⁵

'under 18 years of age'

153. Formerly at federal law, an item constituted child pornography if it depicted a person 'who is, or who appears to be, under 16 years of age'.¹⁵⁶ The new definition increases the age limit to a person who is, or appears to be, under 18.
154. This definition will cause no end of headaches when it is considered that the age of consent in most Australian states is 16. Two consenting 17 year olds who take sexually explicit photographs of themselves or each other (engaging in a *lawful* activity) do not fall foul of state child pornography laws. However, if they email (or simply *intend* to email) those photographs to each other they will be committing the federal offences of disseminating, producing and possessing child pornography.¹⁵⁷ The same could be said of photographs taken and/or transmitted by a mobile telephone.
155. Because non-visual material is also proscribed, a teenager's written account of a real or fantasised sexual encounter, if transmitted on the Internet, also constitutes an offence at federal law.¹⁵⁸

¹⁵² *Customs Act 1901* (Cth) s 233BAB(3) ('an item of child pornography...depicts a person...'); repealed by *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Act 2004* (Cth).

¹⁵³ see [135].

¹⁵⁴ House of Representatives, Explanatory Memorandum to Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Bill 2004, 6.

¹⁵⁵ see "civil liberties and child pornography" on page 6 ff.

¹⁵⁶ *Customs Act 1901* (Cth) s 233BAB(3) ('who is, or who appears to be, under 16 years of age'); repealed by *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Act 2004* (Cth).

¹⁵⁷ see "accessing, transmitting, publishing or distributing child pornography on the Internet" on page 46.

¹⁵⁸ see also [44]-[46].

'or appears to be'

156. This phrase has been used in Australia for many decades and comes from the national classification scheme.¹⁵⁹
157. Parliament intended that this definition capture virtual child pornography, on the grounds that it helps to perpetuate the market in real child pornography.¹⁶⁰
- Material that does not necessarily contain actual images of children is covered by the definition, because although it may not directly involve an abused child in the production, its availability can fuel further demand for similar material. This can lead to greater abuse of children in the production of material to meet this demand.
158. This reasoning fails to acknowledge the limits placed on such laws by the US and Canadian Supreme Courts, in recognition of freedom of expression.¹⁶¹ Of course, in a country like Australia – without a Bill of Rights – Parliaments possess the power to make such laws without reference to international human rights standards.
159. However, it is also possible that the federal *Human Rights (Sexual Conduct) Act* would protect the transmission on the Internet of a pornographic recording of two consenting adults dressed as children, so long as the viewers were consenting adults in private.¹⁶²
160. It should also be noted that it is still open to a jury, being satisfied that the adult actors appear to be under 18 years of age, to conclude that the material is not offensive to a reasonable person in the circumstances. Of course, to put adults through a trial in these circumstances is unacceptable – particularly when the law itself is in need of reform.

¹⁵⁹ see [104]-[105].

¹⁶⁰ House of Representatives, Explanatory Memorandum to Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Bill 2004, 59.

¹⁶¹ see “virtual child pornography and freedom of expression” on page 7; and “self-depicting child pornography and freedom of expression” on page 14.

¹⁶² see [141] above, and “virtual child pornography in Canada” on page 13.

'engaged in...sexual activity'

161. This is a new phrase in Australian law. Unlike international standards, it does not require that the sexual activity be *explicit*.¹⁶³
162. The legislation provides no definition of what constitutes 'sexual activity' for the purposes of child pornography offences. However, for the purposes of the offences of procuring or grooming children for sexual purposes, the legislation provides the following definition:¹⁶⁴

sexual activity means:

- (a) sexual intercourse as defined in section 50AC of the *Crimes Act 1914*;¹⁶⁵ or
 - (b) an act of indecency as defined in section 50AB of that Act;¹⁶⁶ or
 - (c) any other activity of a sexual or indecent nature that involves the human body, or bodily actions or functions.
163. That definition might aid any attempt to determine what 'sexual activity' means. However, defining 'sexual activity' as 'activity of a sexual...nature', as paragraph (c) does, is not ultimately very illuminating.

'engaged in a sexual pose'

164. This is also a new phrase in Australian law. The legislation provides no definition of what constitutes a 'sexual pose'. Nor does it require the pose to be sexually *explicit*.

'or is implied to be engaged in'

165. This is a variant on the phrase 'or appears to be', which is discussed above.¹⁶⁷
166. The intention of the possessor is irrelevant for the purposes of determining whether the material is child pornography or not – that is a decision for the jury. So presumably a jury would be instructed in law that if a reasonable person viewing or reading the material would assume that the material *implies* that the child is being sexually abused in some way, then the material is child pornography.

¹⁶³ see [142]-[143].

¹⁶⁴ *Criminal Code Act 1995* (Cth) s 474.28(11).

¹⁶⁵ "sexual intercourse" means:

- (a) the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person; or
- (b) the penetration, to any extent, of the vagina or anus of a person, carried out by another person by an object; or
- (c) fellatio; or
- (d) cunnilingus; or
- (e) the continuation of any activity mentioned in paragraph (a), (b), (c) or (d).

¹⁶⁶ "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.

¹⁶⁷ see [156] ff.

“dominant characteristic...for a sexual purpose”

167. This is a new phrase in Australian law. However, this wording is almost identical to similar Canadian legislation. The Supreme Court of Canada has examined the meaning of the phrase.¹⁶⁸

¹⁶⁸ see [115].

6. Offences

6.1 possession of child pornography

168. Mere possession of child pornography is an offence in all Australian jurisdictions. The following table outlines the offences and penalties:¹⁶⁹

Jurisdiction	Provision	Maximum penalty
NSW	<i>Crimes Act 1900</i> (NSW) s 91H(3)	5 years
ACT	<i>Crimes Act 1900</i> (ACT) s 65	5 years/500 penalty units
NT	<i>Criminal Code</i> (NT) s 125B	10 years/10,000 penalty units
Queensland	<i>Criminal Code 1899</i> (Qld) s 228D	5 years
SA	<i>Criminal Code Consolidation Act 1935</i> (SA) s 63A	5 years
Tasmania	<i>Classification (Publications, Films and Computer Games) Enforcement Act 1995</i> (Tas) s 74A	2 years/100 penalty units
	<i>Criminal Code</i> (Tas) s 103C	21 years ¹⁷⁰
Victoria	<i>Crimes Act 1958</i> (Vic) s 70	5 years
WA	<i>Censorship Act 1996</i> (WA) s 60	5 years

Table 1: Possession of Child Pornography Offences in Australia

169. In 1991, the Australian Law Reform Commission ('ALRC') recommended that, as a general rule, the mere possession of material refused classification ('RC') by the Classification Board should not be criminalised. However, the ALRC made an exception for child pornography and recommended the criminalisation of 'knowingly' possessing child pornography:¹⁷¹

¹⁶⁹ this table is adapted from Tony Krone, 'A topology of online child pornography offending', *Trends and Issues in Crime and Criminal Justice* (2004) 279, Australian Institute of Criminology, <<http://www.aic.gov.au/publications/tandi2/tandi279t.html>>.

¹⁷⁰ the standard maximum sentence for *all* serious crimes in Tasmania.

¹⁷¹ Australian Law Reform Commission, *Film and Literature Censorship Procedure* (1991) Report 55, [5.17] (footnotes omitted) & Appendix 2 s 41 (producing etc child pornography).

The mere possession of child pornography should, however, be an offence. This is not because child pornography has been deemed unsuitable for commercial distribution and is classified RC. The production of child pornography is likely to involve child sex abuse and is often associated with child sex abuse offences. The prime concern must be the welfare of children. Australia's obligations in this respect have been emphasised by its ratification of the United Nations *Convention on the Rights of the Child*. Under article 34 signatory States undertake to protect children from all forms of sexual exploitation and sexual abuse. Particular mention is made of measures to prevent the inducement or coercion of a child to engage in unlawful sexual activity and the exploitative use of children in pornographic performances and materials. ...the best way to safeguard the welfare of children is to eliminate the production of and market for child pornography. [The ALRC proposes] that the possession and production of child pornography, regardless of its intended use, be prohibited. The Commission received many submissions in support of this proposal and recommends that it be adopted.

170. In 1996, as part of a new national classification scheme based on the ALRC's recommendations, New South Wales introduced the offence of possession of child pornography under section 578B of the *Crimes Act*.¹⁷² The maximum penalty was \$11,000 or 2 years imprisonment. Proceedings under section 578B:
- (a) could not be commenced later than 2 years after the date of the alleged offence;¹⁷³
 - (b) could not be commenced until the material in question had been classified by the federal Classification Board; and
 - (c) were dealt with in the Local Court before a magistrate.
171. In 1997, the Woods Royal Commission recommended that the 'offence of possession of child pornography (both for personal use and for sale) be made indictable and the maximum penalties increased'.¹⁷⁴ The Royal Commissioner, his Honour Mr Justice Woods, gave the following reasons:¹⁷⁵

¹⁷² *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) commenced 1/1/96.

¹⁷³ usually summary offences must be brought within 6 months: *Criminal Procedure Act 1986* (NSW) s 179.

¹⁷⁴ Woods, *Royal Commission into the New South Wales Police Service Final Report: Volume V – the paedophile inquiry* (1997) [16.97 & 16.99] (Recommendation #102).

¹⁷⁵ Woods, *Royal Commission*, n 174, [16.99] (footnotes omitted).

...the child pornography industry is particularly abhorrent. Its production is inevitably associated with the degradation of children. Those who acquire child pornography create the market which promotes this abuse. The Commission considers that offences associated with child pornography, including its possession, should be treated as of greater seriousness than offences involving the publication of restricted material generally. To this end where the material in question involves child pornography the Commission recommends that consideration be given to amending those provisions earlier mentioned to make the offences indictable, and to increase the available maximum penalty.

172. From 1 January 2005, section 578B was replaced by a new offence of possession of child pornography.¹⁷⁶ The new offence is indictable and the maximum penalty has been increased to five years imprisonment.

91H(3) Possession of child pornography

A person who has child pornography in his or her possession is guilty of an offence.

173. The new offence is an indictable offence, which means that it can be tried in the District Court before a jury and judge. However, a defendant may be tried in the Local Court before a magistrate if the Office of the Director of Public Prosecutions and defendant agree.¹⁷⁷ According to the NSW Attorney-General the intention is that the most serious cases will proceed on indictment in the District Court before a jury.¹⁷⁸
174. Indictable offences have no limitation period, even if tried in the Local Court.¹⁷⁹ Under the new offence, the material in question no longer needs to be classified by the federal Classification Board. Whether the material is child pornography or not is now a question of fact for the magistrate or jury to decide.

¹⁷⁶ *Crimes Act 1900* (NSW) s 91H(3).

¹⁷⁷ *Criminal Procedure Act 1986* (NSW) Sch 1 Pt 1 clause 2 (Table 1: Indictable offences that are to be dealt with summarily unless prosecutor or person charged elects otherwise).

¹⁷⁸ New South Wales Legislative Assembly, *Parliamentary Debates* (11 Nov 2004) 12738 ff (Mr Debus, A-G).

¹⁷⁹ *Criminal Procedure Act 1986* (NSW) ss 179 & 270.

6.2 accessing, transmitting, publishing or distributing child pornography on the Internet

175. The federal government is responsible for regulating telecommunications.¹⁸⁰ New federal Internet-related offences were passed in August 2004 and commenced on 1 March 2005.¹⁸¹ From March 2005, it is an offence to use a telecommunications service, such as the world wide web or email, to intentionally access, transmit, publish or distribute child pornography material.¹⁸² The maximum penalty is 10 years imprisonment.

474.19 Using a carriage service for child pornography material

- (1) A person is guilty of an offence if:
- (a) the person:
 - (i) uses a carriage service to access material; or
 - (ii) uses a carriage service to cause material to be transmitted to the person; or
 - (iii) uses a carriage service to transmit material; or
 - (iv) uses a carriage service to make material available; or
 - (v) uses a carriage service to publish or otherwise distribute material; and
 - (b) the material is child pornography material.
-

176. It is sufficient that the defendant was reckless as to the content of the material.¹⁸³ However, the defendant must have *intended* to access, transmit, publish or distribute the material. This requirement of intentional knowledge ensures that 'a person who accidentally comes across child pornography on the Internet would not be caught by the proposed offence, because they would not have had any awareness [of an unjustifiable substantial risk] that the material they were accessing was in fact child pornography'.¹⁸⁴
177. It is also an offence to possess, produce, supply or obtain child pornography material with the intention of using the internet (or any other telecommunications service) to intentionally access, transmit, publish or distribute child pornography material.¹⁸⁵ The maximum penalty is 10 years imprisonment. This offence is primarily aimed at:

¹⁸⁰ *Constitution* (1901) s 51(v): 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to...postal, telegraphic, telephonic, and other like services'.

¹⁸¹ *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Act 2004* (Cth), passed 4/8/2004, assented on 31/8/2004, Schedule 1 commences 1/3/2005.

¹⁸² *Criminal Code Act 1995* (Cth) s 474.19.

¹⁸³ 'recklessness' in this context means that the defendant was aware of an unjustifiable substantial risk that the material was child pornography: *Criminal Code Act 1995* (Cth) s 5.4.

¹⁸⁴ House of Representatives, Explanatory Memorandum to Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Bill 2004, 36.

¹⁸⁵ *Criminal Code Act 1995* (Cth) s 474.20.

...use of the Internet, email and other online applications to trade or traffic in child pornography. It is intended to cover the range of activities that a person can engage in when using these applications, including, amongst others, viewing; copying; downloading; making available for viewing, copying or downloading; sending and exchanging.¹⁸⁶

178. It should be noted that, though aimed primarily at the internet, these laws also capture mobile phones. This is significant given new MMS technology that allows photographs taken on a mobile phone to be transmitted to other mobile telephones – and even onto the internet.

¹⁸⁶ House of Representatives, Explanatory Memorandum to Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Bill 2004, 35.

6.3 possession in international law

179. Article 3(1)(c) of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* ('the Optional Protocol') requires Australian law to criminalise, among other things, the acts of:
- Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography...
180. It is important to note that the Optional Protocol only requires the criminalisation of possession where it is 'for the above purposes', i.e. where the possession is for the purposes of producing, distributing, disseminating, importing, exporting, offering or selling child pornography. Mere possession is not an offence under the Optional Protocol.
181. Australian law, which has evolved over the past few decades, goes far beyond the Optional Protocol by prohibiting the mere possession of child pornography.
182. Other international forums on the topic of child pornography also go further than the Optional Protocol. The Declaration and Agenda for Action,¹⁸⁷ which emanated from the First World Congress against Commercial Sexual Exploitation of Children held in Stockholm in August 1996, calls upon states to, among other things:¹⁸⁸
- develop or strengthen and implement national laws to establish the criminal responsibility of service providers, customers and intermediaries in child prostitution, child trafficking, child pornography, including possession of child pornography...
183. The 'Overarching Conclusions' of the Vienna Conference on Combating Child Pornography on the Internet calls for zero tolerance towards child pornography on the internet and the criminalisation of 'intentional possession' of child pornography.¹⁸⁹ The conclusions of the Stockholm and Vienna Conferences have no standing in international law, though they are both acknowledged in the recitals to the Optional Protocol.¹⁹⁰

¹⁸⁷ 'Declaration and Agenda for Action from the World Congress Against the Commercial Exploitation of Children', Stockholm, Sweden, 27-31 August 1996, <<http://www.ilo.org/public/english/comp/child/standards/resolution/stockholm.htm>>.

¹⁸⁸ 'Declaration and Agenda for Action', n 187, Article 4(b).

¹⁸⁹ International Conference on Combating Child Pornography on the Internet, *Conclusions and Recommendations: Major overarching conclusions*, <<http://textus.diplomacy.edu/thina/txGetXDoc.asp?IDconv=3193>>. This conference was a joint US-European conference.

¹⁹⁰ see "Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography" on page 58.

184. The Council of Europe's *Convention on Cybercrime* takes a middle-road: prohibiting the electronic/digital possession of child pornography where that possession is both intentional and 'without right'.¹⁹¹ Full intent is required. The expression 'without right' acknowledges the possibility of circumstances in which the intentional possession of child pornography should not attract criminal liability.¹⁹²

¹⁹¹ Council of Europe, *Convention on Cybercrime*, Article 9(1)(e). Entered into force: 1 July 2004. The full text of the Convention can be viewed at: <<http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>>. Downloading child pornography 'for oneself' is also prohibited: Article 9(1)(d).

¹⁹² see "'without right'" on page 52.

7. Defences

185. It should be noted that the issues discussed in this section relate to criminal *defences*. It is a fundamental principle of the criminal law that, absent a clear statutory intention to the contrary, if a defendant successfully raises a defence at trial, then the onus falls on the *prosecution* to rebut the defence beyond reasonable doubt.¹⁹³
186. The defences discussed in this section are statutory defences, included in the legislation by Parliament. It should be noted that the usual defences of necessity, duress etc. will also be available to anyone charged with possession of child pornography.

7.1 defences to possession of child pornography

187. In New South Wales it was formerly a defence to the possession of child pornography, if proved:¹⁹⁴
- (a) that the defendant did not know, or could not reasonably be expected to have known, that the film, publication or computer game concerned is or contains pornographic material involving a child under 16, or
 - (b) that the person depicted in the material was of or above the age of 16 at the time when the film, computer game or publication was made, taken, produced or published.
188. From 1 January 2005 it is a defence to a charge of possession of child pornography that:¹⁹⁵
- (a) the defendant 'did not know, and could not reasonably be expected to have known, that he or she produced, disseminated or possessed (as the case requires) child pornography';
 - (b) the material is not or would not be refused classification by the federal Classification Board;
 - (c) the material is genuinely and reasonably for child protection or scientific, medical, legal, artistic purposes or other public benefit;
 - (d) the defendant is a police officer acting in his or her official duties;
 - (e) the defendant is performing his or her official duties as an employee of the Office of Film and Literature Classification.

¹⁹³ *Woolmington v DPP* [1935] AC 462 (Lord Sankey). See also: *He Kaw Teh* (1985) 157 CLR 523. See also: House of Representatives, Explanatory Memorandum to Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No. 2) Bill 2004, 37.

¹⁹⁴ *Crimes Act 1900* (NSW) s 578B(5) repealed by *Crimes Amendment (Child Pornography) Act 2004* (NSW).

¹⁹⁵ *Crimes Act 1900* (NSW) s 91H(4).

189. A further defence is available (for possession charges only): that the material was unsolicited and 'the defendant, as soon as he or she became aware of its pornographic nature, took reasonable steps to get rid of it'.¹⁹⁶ This will cover instances of unsolicited or spam email that includes child pornography.¹⁹⁷ It would also cover the recent incident in which several school principals were inadvertently emailed child pornographic images by NSW Police.¹⁹⁸

7.2 defence to internet offences

190. It is a statutory defence to the federal internet offences if it can be shown that the action constituting the offence is committed for, and does not extend beyond, the public benefit, i.e. for reasons of law enforcement or the administration of justice.¹⁹⁹
191. It is also a defence that the offences were carried out as 'scientific, medical or educational research'. However, such research must have been previously approved in writing by the Justice Minister.²⁰⁰ Concern has been raised that anyone doing legitimate research on child pornography will not have access to this defence unless they have the written permission of the Minister.²⁰¹ The Attorney-General's Department, when queried about this by a Senate Committee, stated that:²⁰²

...one of the most difficult issues that we did face was the whole issue of research into paedophilia and making sure that we had an appropriate mechanism for dealing with that. We had a general test, which related to research, and some of the feedback we got was that this had actually been misused by people in the past. Consequently we tightened up the provisions in relation to research. We spoke to the Australian Institute of Criminology about just how prevalent this research was, and the information we received was that it was not very prevalent. To make sure that there was certainty with the provisions, we decided that where it was specific research into paedophilia we would have an approval process from the Minister for Justice. We were concerned that it was difficult to get a good general formula.

¹⁹⁶ *Crimes Act 1900* (NSW) s 91H(5).

¹⁹⁷ NSW, *Parliamentary Debates*, Legislative Assembly, 11 Nov 2004, 12738 ff (Bob Debus, Attorney-General).

¹⁹⁸ Dan Proudman, 'Porn Bungle', *Newcastle Herald* (Newcastle), 26 November 2004, 1.

¹⁹⁹ *Criminal Code Act 1995* (Cth) s 474.21(1).

²⁰⁰ *Criminal Code Act 1995* (Cth) ss 474.21(1) & 474.21(2)(d).

²⁰¹ Peter Prince & Roy Jordan, 'Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004', *Bills Digest*, No 13/2004-05, Parliamentary Library (2 August 2004), 21.

²⁰² Commonwealth Senate, Legal and Constitutional Legislation Committee, *Provisions of the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No. 2) 2004*, August 2004, [3.10].

192. It is arguable that Parliament does not, for the purposes of citizens informing themselves about the issues surrounding child pornography, have the power to require a citizen to obtain the Minister's permission to research these issues. In other words, if the purpose of the research is legitimate, is undertaken to inform public political debate on the issue and does not incite the breaking of any law, then it is more than likely that it will be protected by the Constitution – by the implied constitutional guarantee of freedom of political communication.²⁰³

7.3 'without right'

193. The European *Convention on Cybercrime* prohibits the possession of child pornography where that possession is both intentional and 'without right'.²⁰⁴ The expression 'without right' acknowledges the possibility of circumstances in which the intentional possession of child pornography should not be criminal. It is flexible enough to remedy the excesses of child pornography laws, while leaving untouched the legitimate purpose of putting an end to the real child pornography market. According to the drafters of the Convention:²⁰⁵

...the term 'without right' allows a Party [to the Convention] to take into account fundamental rights, such as freedom of thought, expression and privacy. In addition, a Party may provide a defence in respect of conduct related to "pornographic material" having an artistic, medical, scientific or similar merit. ...the reference to 'without right' could also allow, for example, that a Party may provide that a person is relieved of criminal responsibility if it is established that the person depicted is not a minor...

194. In other words, child pornography laws must be read in light of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

²⁰³ *Lange v ABC* (1997) 189 CLR 520, 566-7. A law must (i) 'burden freedom of communication about government or political matters'; and (ii) be directed to, and be 'reasonably appropriate and adapted' to achieve, a legitimate end. See also: Tony Blackshield & George Williams, *Australian Constitutional Law and Theory* (2002, 3rd ed) 1192-1195.

²⁰⁴ see "possession in international law" on page 48.

²⁰⁵ Council of Europe, *Explanatory Report to the Convention on Cybercrime*, n 51, [103].

8. Consequences of a child sex offence conviction

195. From September 2004, the consequences in NSW of a child sex offence conviction have increased.²⁰⁶ This makes it imperative that people who present no harm to children should not be caught by this legislation.
196. There are serious consequences in NSW for anyone who is convicted of a child sex offence, including possession of child pornography. Anyone convicted of possession of child pornography:
- must report to the Commissioner of Police so that they can be entered on the Child Protection Register and must thereafter report annually (for eight years for one-time offenders; for fifteen years for two-time offenders; for the rest of their life for offenders with three or more convictions) any changes to their name, residential address, motor vehicle or employment;
 - is prohibited from working in child-related employment (for the rest of their life), unless exempted by the Administrative Decisions Tribunal or Industrial Relations Commission; and,
 - is prohibited from 'loitering near a school or premises frequented by children' (for the rest of their life).

²⁰⁶ *Child Protection (Offenders Registration) Amendment Act 2004* (NSW) passed 11 November 2004, assented 24 November 2004, commenced 30 September 2005.

8.1 Child Protection Register

197. From September 2005, the old "Register of Offenders" is replaced with a "Child Protection Register".²⁰⁷ There are two classes of offenders required to register: *Class 1* offenders include those guilty of committing, attempting, aiding or inciting child murder and child sexual assault; *Class 2* offenders include those guilty of committing, attempting, aiding or inciting indecent acts with children, kidnapping children and filming children for indecent purposes.²⁰⁸ Child pornography offences, including possession, are Class 2 offences.²⁰⁹
198. In relation to the possession of child pornography, a Class 2 offence will *exclude* an offence where:²¹⁰
- charges were dismissed by the magistrate, no conviction was recorded and no supervision order was made²¹¹ (these will generally be the least serious offences committed by first-time offenders);
 - a conviction was recorded, there was only one offence and the penalty did not include fulltime, periodic or home detention or a requirement for supervision;
 - a conviction was recorded, there was only one offence and the offender was a juvenile.
199. A Class 2 offender is required to report relevant personal information to the Commissioner of Police, including:²¹²
- (a) name;
 - (b) any other names by which the person is known (pseudonyms, aliases);
 - (c) date of birth;
 - (d) residential address;
 - (e) names and ages of any children residing in the house with the offender, and names and ages of any children with whom the offender has regular unsupervised contact;
 - (f) nature of employment, name and address of employer;
 - (g) details of the person's affiliation with any club or organisation that has child membership or child participation in its activities;
 - (h) make, model, colour and registration number of any motor vehicle owned or regularly used;
 - (i) details of any tattoos or permanent distinguishing marks that the person has (including details of any tattoo or mark that has been removed);

²⁰⁷ *Child Protection (Offenders Registration) Act 2000* (NSW) s 19. Similar legislation exists in other states: e.g. *Sex Offenders Registration Act 2004* (Vic), *Community Protection (Offender Reporting) Act 2004* (WA) and *Child Protection (Offender Reporting) Act 2004* (Qld).

²⁰⁸ *Child Protection (Offenders Registration) Act 2000* (NSW) s 3.

²⁰⁹ *Child Protection (Offenders Registration) Act 2000* (NSW) s 3.

²¹⁰ *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A.

²¹¹ i.e. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10 (dismissal of charges).

²¹² *Child Protection (Offenders Registration) Act 2000* (NSW) s 9.

- (j) nature and particulars of offences that make the person registerable.
200. It is an offence to provide false or misleading information to the Police Commissioner, for which the maximum punishment is a fine of \$11,000 and/or 2 years imprisonment.²¹³
201. A registrable offender is required to report annually to police.²¹⁴ The Australian Federal Police must be informed if the offender leaves Australia.²¹⁵ Police have the discretion to fingerprint and photograph the offender, and any part of the offender's body (excluding genitalia, anus and, in the case of females and transgender people, breasts), when he or she reports.²¹⁶
202. Every time a registerable person moves house, gets a new job or buys a new car, they must report this change to the nearest police station within 14 days.²¹⁷ It is an offence to fail to report these changes to police, for which the maximum penalty is \$11,000 and/or 2 years imprisonment.²¹⁸ A registerable person must also inform police of any intention to leave New South Wales for more than 14 days, or to leave Australia for any period of time.²¹⁹
203. Reporting obligations continue for eight years for one-time offenders and for fifteen years for offenders with two convictions from two separate occasions.²²⁰ A new "3 strikes and you're out" regime now operates, whereby an offender convicted of at least three possession of child pornography charges on three separate occasions will have to report to police *for the rest of their life*.²²¹ It is important to note that the usual 'spent conviction' rules do no longer apply under this Act,²²² which means in this case that anyone who is found guilty of three offences throughout their entire lifetime will be subject to these life-long reporting conditions. These life-long reporting conditions can be suspended by the Administrative Decisions Tribunal, if the offender has been reporting for fifteen years and the Tribunal is satisfied that the offender 'does not pose a risk to the safety of children'.²²³ Reporting periods for juvenile offenders is half that of adult offenders.²²⁴ The juvenile equivalent of 'life-long' reporting is 7½ years of reporting.

²¹³ *Child Protection (Offenders Registration) Act 2000* (NSW) s 18.

²¹⁴ *Child Protection (Offenders Registration) Act 2000* (NSW) s 10.

²¹⁵ *Child Protection (Offenders Registration) Act 2000* (NSW) s 11E.

²¹⁶ *Child Protection (Offenders Registration) Act 2000* (NSW) s 12E & 12F.

²¹⁷ *Child Protection (Offenders Registration) Act 2000* (NSW) s 11.

²¹⁸ *Child Protection (Offenders Registration) Act 2000* (NSW) s 17.

²¹⁹ *Child Protection (Offenders Registration) Act 2000* (NSW) s 11A.

²²⁰ *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A.

²²¹ *Child Protection (Offenders Registration) Act 2000* (NSW) s 14A(1)(c)(iii).

²²² *Child Protection (Offenders Registration) Act 2000* (NSW) s 21C.

²²³ *Child Protection (Offenders Registration) Act 2000* (NSW) s 16.

²²⁴ *Child Protection (Offenders Registration) Act 2000* (NSW) s 14B.

204. An offender may be exempted from reporting obligations by the Administrative Decisions Tribunal, which may only exempt offenders whom the Tribunal is satisfied 'does not pose a risk to the safety of children'.²²⁵

8.2 Prohibited Employment

205. In NSW it is an offence to apply for, undertake or remain in child-related employment if a person has ever been found guilty of a 'serious sex offence' or is on the Register of Offenders.²²⁶ The maximum punishment is a \$11,000 fine and/or 2 years imprisonment. All child pornography offences, including possession, are serious sex offences.²²⁷ The scope of 'employment' encompasses volunteers, contractors and trainers.²²⁸ For the purposes of this Act, there is no such thing as a spent conviction.²²⁹ In other words: once a prohibited person, always a prohibited person. So even though you may no longer be registrable on the Register of Offenders, you may nevertheless be prohibited from child-related employment.
206. Employers in child-related employment must require all employees to disclose if they have ever been found guilty of a serious sex offence.²³⁰ Employers must not employ prohibited persons in child-related employment.²³¹
207. A prohibited person may apply to the ADT or IRC for an exemption that will permit them to work in child-related employment.²³²
208. The NSW Minister for Youth commissioned Ms Helen L'Orange to review this legislation. Ms L'Orange handed her report to the Minister on 16 December 2004 and it is expected to be tabled in Parliament in early 2005.²³³

²²⁵ *Child Protection (Offenders Registration) Act 2000* (NSW) s 16.

²²⁶ *Child Protection (Prohibited Employment) Act 1998* (NSW) s 6(1).

²²⁷ *Child Protection (Prohibited Employment) Act 1998* (NSW) s 5(3)(c).

²²⁸ *Child Protection (Prohibited Employment) Act 1998* (NSW) s 3.

²²⁹ *Child Protection (Prohibited Employment) Act 1998* (NSW) s 5(6).

²³⁰ *Child Protection (Prohibited Employment) Act 1998* (NSW) s 7.

²³¹ *Child Protection (Prohibited Employment) Act 1998* (NSW) s 8.

²³² *Child Protection (Prohibited Employment) Act 1998* (NSW) Pt 3.

²³³ NSW Commission for Children and Young People, "Review of the Commission's Legislation" (Media Release, 16 December 2004)

<http://www.kids.nsw.gov.au/news/lawspolicies/1083889745_18115.html> accessed 28 December 2004.

8.3 Loitering (by convicted child sex offender)

209. As of 1 January 2005, a person convicted of a child pornography offence will become a 'convicted child sex offender' for the purposes committing, attempting or inciting the offence of 'loitering near a school or public place regularly frequented by children'.²³⁴ The maximum punishment for this offence is \$11,000 and/or two years imprisonment. For the purposes of this offence, a 'child' is defined as a person under the age of 16.²³⁵ The spent convictions provisions do not apply to this offence, so: once a convicted child sex offender, always a convicted child sex offender.²³⁶
210. The offence was originally recommended by the NSW Wood Royal Commission into the NSW Police Force on the grounds that paedophiles often 'loiter in areas where children gather...[such as] in the vicinity of schools, public toilets, and places such as beaches, swimming pools, sporting arenas, parks'.²³⁷ It is worth noting that his Honour Royal Commissioner Woods recommended the offence to criminalise behaviour that involved 'loitering for sexual gratification'. That circumstance (of sexual gratification) is not an element of section 11G.
211. Now that possession of child pornography has been incorporated into this offence, the scope of this offence could extend to someone convicted for one offence of possession of child pornography and who is waiting for his or her children to come out of school at the end of the day or is minding his or her own children at the beach. This arguably is open to arbitrary application and the possibility of police harassment. The offence makes sense if it is aimed at stopping the production of child pornography, the procurement of children or for sexual gratification, however beyond that it seems excessive.
212. The inclusion here of the mere possession of child pornography in the definition of 'child sex offence' is an example of the application of the overbroad preventive strategy of a zero-tolerance policy towards child pornography.²³⁸

²³⁴ *Summary Offences Act 1988* (NSW) s 11G(1).

²³⁵ *Summary Offences Act 1988* (NSW) s 11G(2).

²³⁶ *Summary Offences Act 1988* (NSW) s 11G(3).

²³⁷ Wood, *Royal Commission into the New South Wales Police Service Final Report: Volume V – the paedophile inquiry* (1997) [14.52]. See also: David Brown, David Farrier, Sandra Egger & Luke McNamara, *Criminal Laws* (2001, 3rd ed) 932.

²³⁸ see "zero-tolerance, child pornography and paedophiles" on page 19 ff.

9. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000. Entered into force on 18 January 2002

The States Parties to the present Protocol,

Considering that, in order further to achieve the purposes of the Convention on the Rights of the Child and the implementation of its provisions, especially articles 1, 11, 21, 32, 33, 34, 35 and 36, it would be appropriate to extend the measures that States Parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and child pornography,

Considering also that the Convention on the Rights of the Child recognizes the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development,

Gravely concerned at the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography,

Deeply concerned at the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution and child pornography,

Recognizing that a number of particularly vulnerable groups, including girl children, are at greater risk of sexual exploitation and that girl children are disproportionately represented among the sexually exploited,

Concerned about the growing availability of child pornography on the Internet and other evolving technologies, and recalling the International Conference on Combating Child Pornography on the Internet, held in Vienna in 1999, in particular its conclusion calling for the worldwide criminalization of the production, distribution, exportation, transmission, importation, intentional possession and advertising of child pornography, and stressing the importance of closer cooperation and partnership between Governments and the Internet industry,

Believing that the elimination of the sale of children, child prostitution and child pornography will be facilitated by adopting a holistic approach, addressing the contributing factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, armed conflicts and trafficking in children,

Believing also that efforts to raise public awareness are needed to reduce consumer demand for the sale of children, child prostitution and child pornography, and believing further in the importance of strengthening global partnership among all actors and of improving law enforcement at the national level,

Noting the provisions of international legal instruments relevant to the protection of children, including the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, the Hague Convention on the Civil Aspects of International Child Abduction, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, and International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,

Encouraged by the overwhelming support for the Convention on the Rights of the Child, demonstrating the widespread commitment that exists for the promotion and protection of the rights of the child,

Recognizing the importance of the implementation of the provisions of the Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography and the Declaration and Agenda for Action adopted at the World Congress against Commercial Sexual Exploitation of Children, held in Stockholm from 27 to 31 August 1996, and the other relevant decisions and recommendations of pertinent international bodies,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Have agreed as follows:

Article 1

States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.

Article 2

For the purposes of the present Protocol:

- (a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;
- (b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;
- (c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

Article 3

1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

- (a) In the context of sale of children as defined in article 2:
 - (i) Offering, delivering or accepting, by whatever means, a child for the purpose of:

- a. Sexual exploitation of the child;
 - b. Transfer of organs of the child for profit;
 - c. Engagement of the child in forced labour;
 - (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;
 - (b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2;
 - (c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.
2. Subject to the provisions of the national law of a State Party, the same shall apply to an attempt to commit any of the said acts and to complicity or participation in any of the said acts.
 3. Each State Party shall make such offences punishable by appropriate penalties that take into account their grave nature.
 4. Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.
 5. States Parties shall take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments.

Article 4

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, when the offences are committed in its territory or on board a ship or aircraft registered in that State.
2. Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, in the following cases:
 - (a) When the alleged offender is a national of that State or a person who has his habitual residence in its territory;
 - (b) When the victim is a national of that State.

3. Each State Party shall also take such measures as may be necessary to establish its jurisdiction over the aforementioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.
4. The present Protocol does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 5

1. The offences referred to in article 3, paragraph 1, shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties and shall be included as extraditable offences in every extradition treaty subsequently concluded between them, in accordance with the conditions set forth in such treaties.
2. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider the present Protocol to be a legal basis for extradition in respect of such offences. Extradition shall be subject to the conditions provided by the law of the requested State.
3. States Parties that do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 4.
5. If an extradition request is made with respect to an offence described in article 3, paragraph 1, and the requested State Party does not or will not extradite on the basis of the nationality of the offender, that State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution.

Article 6

1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 3, paragraph 1, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of the present article in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

Article 7

States Parties shall, subject to the provisions of their national law:

- (a) Take measures to provide for the seizure and confiscation, as appropriate, of:
 - (i) Goods, such as materials, assets and other instrumentalities used to commit or facilitate offences under the present protocol;
 - (ii) Proceeds derived from such offences;
- (b) Execute requests from another State Party for seizure or confiscation of goods or proceeds referred to in subparagraph (a);
- (c) Take measures aimed at closing, on a temporary or definitive basis, premises used to commit such offences.

Article 8

1. States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:
 - (a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses;
 - (b) Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;
 - (c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;
 - (d) Providing appropriate support services to child victims throughout the legal process;
 - (e) Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;
 - (f) Providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
 - (g) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.

2. States Parties shall ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim.
3. States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.
4. States Parties shall take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present Protocol.
5. States Parties shall, in appropriate cases, adopt measures in order to protect the safety and integrity of those persons and/or organizations involved in the prevention and/or protection and rehabilitation of victims of such offences.
6. Nothing in the present article shall be construed to be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.

Article 9

1. States Parties shall adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the present Protocol. Particular attention shall be given to protect children who are especially vulnerable to such practices.
2. States Parties shall promote awareness in the public at large, including children, through information by all appropriate means, education and training, about the preventive measures and harmful effects of the offences referred to in the present Protocol. In fulfilling their obligations under this article, States Parties shall encourage the participation of the community and, in particular, children and child victims, in such information and education and training programmes, including at the international level.
3. States Parties shall take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences, including their full social reintegration and their full physical and psychological recovery.
4. States Parties shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.
5. States Parties shall take appropriate measures aimed at effectively prohibiting the production and dissemination of material advertising the offences described in the present Protocol.

Article 10

1. States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism. States Parties shall also promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations.
2. States Parties shall promote international cooperation to assist child victims in their physical and psychological recovery, social reintegration and repatriation.
3. States Parties shall promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.
4. States Parties in a position to do so shall provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes.

Article 11

Nothing in the present Protocol shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in:

- (a) The law of a State Party;
- (b) International law in force for that State.

Article 12

1. Each State Party shall, within two years following the entry into force of the present Protocol for that State Party, submit a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol.
2. Following the submission of the comprehensive report, each State Party shall include in the reports they submit to the Committee on the Rights of the Child, in accordance with article 44 of the Convention, any further information with respect to the implementation of the present Protocol. Other States Parties to the Protocol shall submit a report every five years.
3. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of the present Protocol.

Article 13

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.
2. The present Protocol is subject to ratification and is open to accession by any State that is a party to the Convention or has signed it. Instruments of ratification or accession shall be deposited with the Secretary- General of the United Nations.

Article 14

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after its entry into force, the Protocol shall enter into force one month after the date of the deposit of its own instrument of ratification or accession.

Article 15

1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary- General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any offence that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter that is already under consideration by the Committee on the Rights of the Child prior to the date on which the denunciation becomes effective.

Article 16

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties that have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments they have accepted.

Article 17

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States Parties to the Convention and all States that have signed the Convention.

10. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

This treaty came into force on 19 November 2000. It is also known as ILO Convention No. 182.

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 87th Session on 1 June 1999, and

Considering the need to adopt new instruments for the prohibition and elimination of the worst forms of child labour, as the main priority for national and international action, including international cooperation and assistance, to complement the Convention and the Recommendation concerning Minimum Age for Admission to Employment, 1973, which remain fundamental instruments on child labour, and

Considering that the effective elimination of the worst forms of child labour requires immediate and comprehensive action, taking into account the importance of free basic education and the need to remove the children concerned from all such work and to provide for their rehabilitation and social integration while addressing the needs of their families, and

Recalling the resolution concerning the elimination of child labour adopted by the International Labour Conference at its 83rd Session in 1996, and

Recognizing that child labour is to a great extent caused by poverty and that the long-term solution lies in sustained economic growth leading to social progress, in particular poverty alleviation and universal education, and

Recalling the Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, and

Recalling the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, and

Recalling that some of the worst forms of child labour are covered by other international instruments, in particular the Forced Labour Convention, 1930, and the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, and

Having decided upon the adoption of certain proposals with regard to child labour, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this seventeenth day of June of the year one thousand nine hundred and ninety-nine the following Convention, which may be cited as the Worst Forms of Child Labour Convention, 1999.

Article 1

Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

Article 2

For the purposes of this Convention, the term *child* shall apply to all persons under the age of 18.

Article 3

For the purposes of this Convention, the term *the worst forms of child labour* comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Article 4

1. The types of work referred to under Article 3(d) shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards, in particular Paragraphs 3 and 4 of the Worst Forms of Child Labour Recommendation, 1999.
2. The competent authority, after consultation with the organizations of employers and workers concerned, shall identify where the types of work so determined exist.
3. The list of the types of work determined under paragraph 1 of this Article shall be periodically examined and revised as necessary, in consultation with the organizations of employers and workers concerned.

Article 5

Each Member shall, after consultation with employers' and workers' organizations, establish or designate appropriate mechanisms to monitor the implementation of the provisions giving effect to this Convention.

Article 6

1. Each Member shall design and implement programmes of action to eliminate as a priority the worst forms of child labour.
2. Such programmes of action shall be designed and implemented in consultation with relevant government institutions and employers' and workers' organizations, taking into consideration the views of other concerned groups as appropriate.

Article 7

1. Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.
2. Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to:
 - (a) prevent the engagement of children in the worst forms of child labour;
 - (b) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;
 - (c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour;
 - (d) identify and reach out to children at special risk; and
 - (e) take account of the special situation of girls.
3. Each Member shall designate the competent authority responsible for the implementation of the provisions giving effect to this Convention.

Article 8

Members shall take appropriate steps to assist one another in giving effect to the provisions of this Convention through enhanced international cooperation and/or assistance including support for social and economic development, poverty eradication programmes and universal education.

Article 9

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 10

1. This Convention shall be binding only upon those Members of the International Labour Organization whose ratifications have been registered with the Director-General of the International Labour Office.
2. It shall come into force 12 months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member 12 months after the date on which its ratification has been registered.

Article 11

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 12

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organization of the registration of all ratifications and acts of denunciation communicated by the Members of the Organization.
2. When notifying the Members of the Organization of the registration of the second ratification, the Director-General shall draw the attention of the Members of the Organization to the date upon which the Convention shall come into force.

Article 13

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations, for registration in accordance with article 102 of the Charter of the United Nations, full particulars of all ratifications and acts of denunciation registered by the Director-General in accordance with the provisions of the preceding Articles.

Article 14

At such times as it may consider necessary, the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 15

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides --
 - (a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 11 above, if and when the new revising Convention shall have come into force;
 - (b) as from the date when the new revising Convention comes into force, this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 16

The English and French versions of the text of this Convention are equally authoritative.