

THE PANEL'S ADVICE TO THE COURT OF APPEAL ON OFFENCES INVOLVING CHILD PORNOGRAPHY

FOREWORD BY THE CHAIRMAN

At the request of the Court of Appeal, this latest proposal from the Sentencing Advisory Panel deals with sentencing for offences involving indecent photographs or pseudo-photographs of children. The maximum penalty for possession of such images is 5 years' imprisonment. For making, showing or distributing the material, the maximum is 10 years.

Possession of child pornography is not (as some have argued) a victimless offence. Every indecent photograph or pseudo-photograph of a child is, with limited exceptions, an image of a child being abused or exploited. Easy access to the Internet, and other developments in computer technology, have undoubtedly made these offences more prevalent. No-one knows exactly how many offences are committed, although it is clear that those that come to court are only the tip of the iceberg.

It is fundamental to our proposal that sentencing for these offences should reflect the harm suffered by children who are abused and exploited by the production and distribution of indecent photographs. An offender sentenced for *possession* of child pornography should be treated as being in some degree complicit in the original abuse which was involved in the making of the images. Sentences for possession should also reflect the continuing damage done to the victim or victims, through copying and dissemination of the pornographic images. Those who *make* or *distribute* the images bear a more direct responsibility for their eventual use, as well as for encouraging further production.

Revulsion at these offences is natural. It is all the more important, however, that sentencing follows a rational structure. In our advice to the Court of Appeal we identify two *primary* factors which should determine the seriousness of an individual offence:

the nature of the indecent material (from images depicting nudity or erotic posing to those involving gross assault of children by adults, sadism or bestiality), and

the extent of the offender's involvement with the material (ranging from possession for the offender's personal use to the original production of the images or widescale commercial distribution).

The Panel's consultation paper on this topic attracted a large number of responses. We are grateful, as always, to those who have taken the trouble to let us know their views.

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Chairman of the Sentencing Advisory Panel

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INTRODUCTION

1. The Court of Appeal, in *Wild (No 1)* [2002] 1 Cr App R (S) 37, asked the Sentencing Advisory Panel for advice on the sentencing of offences involving indecent photographs or pseudo-photographs of children. The Court sought the Panel's advice, in particular, on the custody threshold. This follows the case of *R v Toomer and others* [2001] 2 Cr App R (S) 30 in which the Court of Appeal set out some general principles applicable to sentencing for these offences. Since the decision in *Toomer*, the maximum penalties for the relevant offences have been substantially increased, and this increase would, in any event, suggest a need for new sentencing guidelines.

The offences

2. Four offences involving indecent photographs or pseudo-photographs of children were created by the Protection of Children Act 1978. (The definition was extended to include 'pseudo-photographs' by section 84 of the Criminal Justice and Public Order Act 1994.) Under section 1(1) of the 1978 Act, it is an offence for a person:

'(a) to take, or permit to be taken, or to make any indecent photograph or pseudo-photograph of a child; or

(b) to distribute or show such indecent photographs or pseudo-photographs; or

(c) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others; or

(d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs, or intends to do so.'

3. The offence of *possessing* an indecent photograph or pseudo-photograph of a child, under section 160(1) of the Criminal Justice Act 1988, was originally summary only, and the maximum penalty was 6 months' imprisonment. Section 41(3) of the Criminal Justice and Court Services Act 2000 has made the offence triable either way, with a maximum penalty of 5 years' imprisonment on indictment. This applies to offences committed on or after 11 January 2001, when section 41 came into force.

4. The maximum penalty for all the offences under section 1 of the 1978 Act was originally three years on indictment, but this has been increased to 10 years by section 41(1) of the Criminal Justice and Court Services Act 2000. Again, the increased penalty applies to offences committed on or after 11 January 2001.

The current sentencing guidance

5. The general principles set out by the Court of Appeal in *Toomer*, in relation to cases involving downloading and distribution, of indecent photographs of children, are as follows. They were not designed to cover the original production of the images.

'First, sentences up to [the] statutory maximum should be imposed where there is a contested case, and there is evidence of commercial or

large scale exploitation, and the amount of material is significant, especially if the offender has previous convictions.

‘Secondly, non-custodial disposals should normally be reserved for isolated offences where the amount of material is very small, and it is for personal use, or use within a very restricted circle, as for example by passing it on to one other recipient, where there is no commercial element and the defendant has pleaded guilty and is a first offender.

‘Thirdly, where between those two extremes a particular case falls, will depend on the circumstances, and in particular on, first of all, the quality and nature of the material and the quantity thereof. Secondly, whether there is any element of exploitation or commercial gain.

‘[Fourthly], whether the offence is simply one of making; that is to say, in most cases downloading and saving or also involves distribution and, if so, to what extent there has been distribution, whether it has been by e-mail to a single specified recipient, or whether the distribution has been significantly more widespread.

‘[Fifthly], the character of the defendant is an important factor, and also the effect of the conviction on the individual.

‘Finally, it is of great importance to consider whether there has been a plea of guilty coupled with co-operation from the outset in the investigation.’

The current sentencing profile

6. The Home Office has given the Panel detailed information relating to those cautioned and sentenced for these offences, on a principal offence basis, for the years 1999 and 2000. The figures, which are summarised in the table at Annex A, distinguish between disposals for (a) the four offences created by the Protection of Children Act 1978, and (b) the offence of *possession*, under the Criminal Justice Act 1988. It is not possible, however, to distinguish between the individual offences under the 1978 Act.

7. It is clear that the figures at Annex A are now of largely historical interest, since they pre-date the increased maximum penalties for these offences. The low use of custody may, nevertheless, indicate that sentencers were not treating these offences sufficiently seriously.

The consequences of conviction

8. Anyone who is convicted of, or pleads guilty to, an offence involving child pornography may be subject to a range of legal consequences in addition to the sentence imposed for the offence. The relevant legislative provisions are:

Registration under Part I of the Sex Offenders Act 1997

Court-ordered disqualification from working with children, under sections 26-34 of the Criminal Justice and Court Services Act 2000

A list (known as 'List 99') maintained by the Department for Education and Skills, under the Education (Restriction of Employment) Regulations 2000, of people barred or restricted from employment as a teacher or worker with young persons under 19

A list maintained by the Department of Health, under the Protection of Children Act 1999, to prevent the employment of unsuitable people in child care organisations

9. Further details of these provisions are given at Annex B. There are, however, two points worth noting here. First, registration under the Sex Offenders Act is mandatory for all offenders *sentenced or cautioned* for a qualifying offence, which includes any offence under section 1 of the Protection of Children Act 1978 or section 160 of the Criminal Justice Act 1988. It seems, however, that there is no requirement to register for an offender who is given an *absolute or conditional discharge*, since, by virtue of section 14 of the Powers of Criminal Courts (Sentencing) Act 2000, a conviction which is followed by a discharge counts for limited purposes only. This is an apparent anomaly.¹ Secondly, offences under both the 1978 and the 1988 Acts are also qualifying offences for court-ordered disqualification from working with children, but only if a custodial sentence of 12 months or longer is imposed.

The nature and prevalence of the offences

10. We pointed out in our consultation paper that, with limited exceptions, the production of child pornography involves the abuse or exploitation of children. An image of a child or children involved in explicit sexual activity records the commission of a serious criminal offence. Images that appear less harmful (such as a photograph of a naked child in a sexually suggestive pose) may still involve the exploitation or degradation of the child or children.

11. It is not always possible to identify or trace the individual children depicted in the indecent photographs which become the subject of police investigations and prosecutions. One reason for this is that many of the images have been in circulation for years, so that by the time they come to light the children shown in them are adults. Another factor, according to information from the police and other sources, is that much of the child pornography distributed via the Internet depicts children who are of foreign (typically Far Eastern) appearance, and does not originate in this country. This is, however, by no means always the case: in particular, technological developments such as the availability of hand-held video cameras have encouraged the growth of a 'cottage industry' among paedophiles who take and distribute indecent photographs involving their own children or others whom they have abused.

12. The Panel has been told that the police, understandably, give priority to tracing children involved in recently produced material, because they are still at risk and in need of protection from future abuse. In addition, it should not be forgotten that adults can suffer continuing shame and distress from the knowledge that indecent images of themselves as children are still in circulation.

13. With all of this in mind, we expressed the view in the consultation paper that an offender convicted for possession of child pornography should be treated as being to

¹ See Alisdair Gillespie: 'Discharging sex offenders' [2002] *Criminal Law Review* 53

some degree complicit in the original child sexual abuse which was involved in the production of the images. The level of sentence for possession should also reflect the continuing damage which is done to the victim or victims, through copying and further dissemination of the pornographic images.

14. We also referred to evidence that child abusers commonly use and are influenced by pornography. An offender convicted only of *possessing* child pornography clearly cannot be sentenced on the basis that he is an actual or potential child abuser, but those who produce or distribute the material do have a more direct responsibility for its eventual use, as well as for encouraging further production. We concluded that sentencing levels for those convicted of the more serious offences of making, showing or distributing indecent images of children should reflect that responsibility. (This would not apply to an offender sentenced for 'making' images if he had simply downloaded them; see paragraphs 23-24 below.)

15. A few respondents to the consultation paper thought that possession of child pornography for personal use should not be an offence. A large majority, however, supported the general approach outlined in the paper, which we have followed in the proposals made here.

16. Consultees also confirmed the Panel's impression that the prevalence of child pornography offences is impossible to estimate, but that the number of offences detected and prosecuted is very likely to be only a small proportion of the real total. It is also generally accepted that increased access to the Internet has greatly exacerbated the problem. As some respondents have pointed out, the Internet not only makes pornographic images more easily accessible to those who are looking for them, but also increases the likelihood of such material being found accidentally by others who may subsequently become corrupted by it. The creation of this risk adds to the culpability of offenders who distribute the material, especially if they post it on publicly accessible areas of the Internet.

THE PANEL'S PROPOSALS

Assessing the seriousness of an offence

17. In the Panel's view, there are two *primary* factors which should determine the seriousness of an individual offence:

- (a) the nature of the indecent material, and
- (b) the extent of the offender's involvement with the material.

18. Our proposals at paragraphs 25-38 below on the choice and length of sentence are based on these factors. At each level of seriousness there may be other aggravating or mitigating factors which will influence the sentencer.

The nature of the material

19. In our consultation paper we suggested that it might be possible to use or adapt, for sentencing purposes, the 10 stage typology used by the COPINE² project to describe the range of images of children used by paedophiles. The purpose of this was to

² Combating Paedophile Information Networks in Europe, at the University of Cork

provide for sentencers an objective standard for assessing the nature of this material, in terms of the degree of harm done to the child or children involved.

20. There was a strong measure of support for this proposal among our respondents, some of whom pointed out that professionals involved in these cases were already familiar with the COPINE typology. As we mentioned in the consultation paper, however, the scheme was not designed for use by the courts, and we have concluded that it does need some modification, in particular to avoid unnecessary disputes in court as to the precise category into which a particular image falls. Taking account of suggestions from our consultees, we have identified 5 levels of material according to the degree of harm to the victims. The table below gives a general description of the type of images at each level, and compares them with the equivalent COPINE categories. We have not included COPINE category 1 (Indicative (non-erotic / non-sexualised pictures)) because images of this nature would not be classed as indecent. Images in COPINE categories 2-3 might be the subject of a dispute as to whether or not they were indecent. We have included them at level 1 of our scheme because there may be cases where an offender has been convicted, or pleaded guilty, solely on the basis of images of this nature.

21. The Panel strongly recommends that sentencers should always view for themselves the images involved in a particular case, in order to reach their own judgment on the nature of the material.

Level	Description	COPINE typology
1	Images depicting nudity or erotic posing, with no sexual activity	2. Nudist (naked or semi-naked in legitimate settings / sources) 3 Erotica (surreptitious photographs showing underwear/nakedness) 4 Posing (deliberate posing suggesting sexual content) 5 Erotic posing (deliberate sexual or provocative poses) 6 Explicit erotic posing (emphasis on genital area)
2	Sexual activity between children, or solo masturbation by a child	7 Explicit sexual activity not involving an adult
3	Non-penetrative sexual activity between adult(s) and child(ren)	8 Assault (sexual assault involving adult)
4	Penetrative sexual activity between child(ren) and adult(s)	9 Gross assault (penetrative assault involving adult)
5	Sadism or bestiality	10 Sadistic / bestiality (sexual images involving pain or animal)

The nature of the offender's activity

22. There was broad agreement, among respondents to the Panel's consultation paper, with the propositions that the seriousness of an individual offence increases with

the offender's proximity to and responsibility for the original abuse, and that any element of commercial gain will place an offence at a high level of seriousness. We suggested, however, and again there was general agreement with our view, that the swapping of images should in itself be regarded as a commercial activity, because it fuels the demand for the material. As we pointed out in the consultation paper, widescale distribution, whether or not it involves financial profit, is intrinsically more harmful than a transaction limited to two or three individuals, both in terms of the potential use of the images by active paedophiles and of the shame and degradation caused to the original victims.

23. We also proposed in the consultation paper that the downloading of indecent images onto a computer for personal use should be treated, *for sentencing purposes*, as equivalent to possession, despite the Court of Appeal's decision in *Bowden*³ that someone who has downloaded such an image may properly be convicted of 'making' an indecent photograph under section 1(1)(a) of the 1978 Act. Our reason for this was that 'making' in the sense of making or taking an original indecent film or photograph of a child is clearly a more serious matter than downloading an image from the Internet, which is more akin to buying a pornographic magazine from a shop or mail order service. The majority of our respondents agreed, and this is the line we follow in our advice.

24. A more recent Court of Appeal decision⁴ has further extended the interpretation of 'making', to include a simple request for the downloading of an indecent image so that it is displayed on screen. It is no longer necessary for the offender to take any further action to 'save' the image, although the prosecution does have to prove that the accused knew what sort of image he was calling for. The effect of this judgment is that a conviction of 'making' can be based solely on the locating by a computer expert of an image in the Internet browser 'cache', provided there is additional evidence to show that the offender was seeking such material. The Panel suggests that the starting point for sentence should be lower in such a case than in one where the offender has actively saved the material.

The choice and length of sentence

Custodial or community sentences

25. A significant number of respondents thought that the overall level of sentencing proposed in our consultation paper was too low, pointing out that Parliament had, by substantially increasing the maximum penalties available, indicated that these offences should be punished more harshly. We have taken account of this view in the revised proposals at paragraphs 29-38 below. We do not, nevertheless, agree with the small minority of respondents who suggested that a custodial penalty should *always* be imposed for these offences. Nor do we accept the point that offences involving child pornography should automatically be treated as being of equal seriousness to child abuse. The higher maximum penalties do provide scope for sentencers to reflect the seriousness of offences such as those involving the filming of real sexual assaults on children, or the commercial production and distribution of child pornography. There is a less obvious need, however, for markedly more severe sentencing of cases at the lower end of the scale.

³ [2000] 2 Cr App R (S) 26

⁴ *R v Westgarth Smith; Jayson* Times Law Report 23 April 2002; [2002] EWCA Crim 683

26. In the Panel's view, the choice between a custodial and a non-custodial sentence is a particularly difficult one for a sentencer dealing with an offence of this nature. On the one hand, there is considerable pressure, especially since the maximum penalties have been increased, to mark society's abhorrence of child sexual abuse and child pornography by the use of custody. On the other hand, there is evidence that sex offender treatment programmes can be effective in controlling offenders' behaviour and thus preventing the commission of further offences. Attendance at such programmes can be ordered as a condition of a community rehabilitation order, or as a condition of licence on release from custody, but because of their length they are not available in the custodial setting for offenders serving a sentence of under 4 years. Some offences will, of course, be so serious that only a custodial sentence is appropriate, but the Panel recommends that, in any case which is close to the custody threshold, the offender's suitability for treatment should be assessed, with a view to imposing a community rehabilitation order with a requirement to attend a sex offender treatment programme.

27. We pointed out in our consultation paper (see paragraph 9 above) that the court has the power to disqualify an offender sentenced for one of these offences from working with children, but only if a custodial sentence of at least 12 months was imposed. This led one or two of our consultees to suggest that sentences ought to be pitched at a level where this additional power is available. While we understand this argument, we do not think it right that sentencing practice should be driven by the availability of additional orders, or by the availability of treatment programmes for offenders in custody, and we recommend that this point should be made in any new guidelines from the Court of Appeal.

28. The starting points suggested below would be appropriate for an adult offender, with no previous convictions for offences of this nature, after a contested trial.

Fines and discharges

29. The Panel believes that a fine would normally be appropriate in a case where the offender was **in possession of the material purely for his own use** (including cases where material was downloaded from the Internet, but without further distribution), and *either*

- (i) the material consisted entirely of 'pseudo-photographs', the making of which did not involve the actual abuse or exploitation of children (see paragraph 31 below), *or*
- (ii) there was no more than a small quantity of material at level 1.

30. A conditional discharge may be appropriate in such a case if the defendant pleads guilty and has no previous convictions; but a discharge should not, in the Panel's view, be given purely in order to avoid the requirement for registration under the Sex Offenders Act 1997.

31. The term 'pseudo-photograph' is used in the Protection of Children Act 1978, as amended by the Criminal Justice and Public Order Act 1994, and in section 160 of the Criminal Justice Act 1988, to include images made or manipulated by computer which are not technically photographs. It is possible, for example, to produce a 'pseudo-photograph' by 'morphing' a picture of adults to make them look like children, or by juxtaposing two images to create a new picture of a child in an indecent act or pose. We

suggested in our consultation paper that *possession* of 'pseudo-photographs' of this kind should be placed at the lowest level of seriousness, because they do not involve the actual abuse or exploitation of children.

32. The majority of respondents to the consultation paper supported this approach, but there were one or two who disagreed, pointing out that the difference between a pseudo-photograph of this sort and an image of a real child is not always obvious to the viewer, and that both have the potential to corrupt. The Panel still believes that *possession* (including downloading) of artificially created pseudo-photographs should be treated as being at the lowest level of seriousness, and that *making* such images is less serious than making photographic images of real children. We accept, however, that a pseudo-photograph and a real photograph may have an equally corrupting effect on the viewer, and that pseudo-photographs may be traded for commercial gain as if they were real. The distinction between real and pseudo-photographs will, therefore, be irrelevant in a case involving the showing or distribution of images to others.

Community sentences

33. A community sentence would, in the Panel's view, be indicated in a case where the offender was in possession of a large amount of material at level 1, and/or no more than a small number of images at level 2, but where the material had not been distributed or shown to others. For an offender with the necessary level of motivation and co-operation, the appropriate sentence would be a community rehabilitation order with a sex offender programme.

The custody threshold

34. The Panel suggests that the custody threshold is passed in a case where any of the material has been shown or distributed to others, or in cases of possession where there is a moderate or large amount of material at level 2 or above. A custodial sentence of *up to 6 months* would be appropriate in a case where:

- (a) the offender was *in possession* of a large amount of material at level 2 or a small amount at level 3; *or*
- (b) the offender had *shown or distributed* indecent material at level 1 or 2 on a limited scale, *or*
- (c) some images at level 1 or 2 had been *exchanged* with other collectors, but with no element of financial gain.

35. A custodial sentence of *between 6 and 12 months* should be considered where:

- (a) a large quantity of material at level 3 was found in the offender's possession, and there was no showing or distribution to others, *or*
- (b) the offender was in possession of a small number of images at levels 4 or 5; *or*
- (c) a large number of images at level 2 had been shown or distributed; *or*

(d) a small quantity of material at level 3 had been shown or distributed.

More serious offences

36. A custodial sentence of *between 12 months and three years* will, in the Panel's view, be appropriate where:

- (a) the offender was in possession of a large quantity of the most pornographic material (levels 4-5), even if there was no showing or distribution to others; *or*
- (b) a large number of images at level 3 was shown or distributed; *or*
- (c) the offender had been involved with the production of, or traded in, material at levels 1-3.

37. Bearing in mind that the new maximum penalty for offences under 1978 Act (10 years imprisonment) is the same as the maximum for offences of indecency with a child, the Panel suggests that sentences longer than three years should be reserved for cases where

- (a) images at levels 4 or 5 have been shown or distributed; *or*
- (b) the offender was actively involved in the production of highly pornographic images of children (levels 4-5), especially where this involves a breach of trust on the part of someone responsible for the care of the child(ren), whether or not there was an element of commercial gain, *or*
- (c) the offender had commissioned or encouraged the production of such images.

38. Sentences closer to the 10 year maximum should be reserved for very serious examples.

Previous convictions for offences involving child pornography or child abuse

39. The above guidelines apply to an adult offender without previous convictions for like offences, after a contested trial. Where the offender has one or more previous convictions for offences involving child pornography, or for physical or sexual abuse of children, the Panel suggests that the sentencer should place the case at least one level higher than would otherwise have been appropriate. If the current offence has already passed the custody threshold, the effect of such a record (depending on the number and seriousness of the offences involved) could be a significant increase in the length of the custodial sentence.

Aggravating and mitigating factors

40. Specific factors that would aggravate the seriousness of an individual offence are listed below.

- (a) An offence under section 1(1)(b) of the 1978 Act (showing or distribution) would be more serious if the image(s) were shown or distributed to a child or children.

- (b) The *number* of images involved will affect the seriousness of an offence, subject to the comments in paragraphs 41-43 below.
- (c) The way in which a collection is organised on the offender's computer (e.g. by systematic structuring within multiple directories and folders or random allocation to a single folder) may indicate a more or less sophisticated approach to trading, or a higher level of personal interest in the material. An offence would be less serious if the offender had simply viewed the images without storing them. (See paragraph 24 above.)
- (d) An offence of distribution would be more serious if the images were posted on a public area of the Internet, or distributed in a way that would make them more likely to be found accidentally by computer users who were not specifically looking for pornographic material.
- (e) Where the offender was responsible for the original production of the images (whether as still photographs or on video) the offence will be more serious if the child or children involved were members of the offender's own family, or if the offender has abused a position of trust (e.g. as a teacher, friend of the family, social worker, youth group leader) to persuade the child(ren) to participate.

The quantity of material

41. Although we do not consider the quantity of material to be one of the *primary* factors in determining the seriousness of an offence, it seems (as we pointed out in the consultation paper) self-evident that the amount of indecent material involved must have some effect on the seriousness of an offence. There are, however, two difficulties with this. First, it is not easy to be precise about what constitutes a 'small' or a 'large' amount, especially given that collections of hundreds or even thousands of images do not appear to be uncommon among Internet users.

42. There is a more serious difficulty about the use of quantity as a criterion in a case where the defendant has been indicted on a small number of charges as sample counts representing a larger number of alleged offences. If, in such a case, the defendant pleads guilty, or admits after conviction to the whole range of allegations, the sentencer may pass sentence on the basis of all the offences admitted. If, on the other hand, the defendant disputes the allegations which are not included as counts in the indictment, then the sentencer must pass sentence only on the basis of the specific counts in the indictment of which the defendant has been convicted (*R v Canavan*; *R v Kidd*; *R v Shaw* [1998] 1 Cr App R 79).

43. It may be possible to overcome this difficulty in a case of possession, by treating a file on the defendant's computer, which contains a number of individual images, as a single item. Where, on the other hand, an offender who has downloaded material from the Internet is charged with 'making' indecent photographs, each individual act of downloading must be treated as a separate offence. After we had published our consultation paper the Law Commission published a consultation paper on the effective prosecution of multiple offences, which addressed the problem raised by *Canavan* primarily in relation to cases of multiple fraud.⁵ It appears that the new procedures

⁵ *Effective prosecution of multiple offences: background and proposals for debate*, Law Commission, February 2002

proposed by the Law Commission may also be applicable to child pornography offences, and we await the outcome of the Commission's work on this issue.

The age of the children

44. In the consultation paper we invited comment on the relevance of the children's age to the seriousness of an offence. We pointed out that, despite the concern and revulsion understandably provoked by the abuse of very young children, older children might suffer just as much harm (especially psychological harm) from their involvement in abuse which has been filmed or photographed. Some of our consultees agreed with this point, while others emphasised the greater risk of serious physical harm to younger children, including babies. Another point that was made was the level of distress suffered by the families of child victims, as well as the children themselves. On balance, we maintain our original view that the age of the child(ren) portrayed should not *in itself* be taken to aggravate or mitigate the seriousness of an offence, since it is very difficult to quantify the effect of age in terms of aggravation of the offence. Where the nature of the material indicates that the victim is likely to have suffered particularly serious harm (e.g. with an image showing genital abuse of a baby) that will be reflected in the sentence.

The defendant's good character

45. In the consultation paper we questioned how much importance should be attached, for sentencing purposes, to the fact that an offender sentenced for one of these offences was an otherwise exemplary citizen, for whom the fact of conviction itself would have a salutary effect. Bearing in mind that a sentencer will, as a general principle, take account of the defendant's good character, the majority of responses confirmed the Panel's initial view that no special weight should be attached to good character in relation to these offences. Where the offender's relationship to the victim or the victim's family involves a breach of trust, that will be an aggravating factor. (See example (e) in paragraph 39 above.)

A timely guilty plea and co-operation with the investigation

46. A plea of guilty is a statutory mitigating factor under section 152 of the Powers of Criminal Courts (Sentencing) Act 2000. The extent of the sentencing discount allowed will vary according to the timing and circumstances of the plea. A defendant who pleads guilty before venue is decided at the magistrates' court will normally be given full credit for so doing, which may amount to a discount of one third, or more.⁶ Full credit will not, however, be given in a case where the defendant, in effect, has little choice but to plead guilty.⁷

Young offenders

47. The number of offenders aged under 18 who are sentenced or cautioned for these offences is very small. In 1999, only one young offender was sentenced, and none was cautioned, for possession of indecent photographs; while three were cautioned, and none sentenced, for the more serious offences under the Protection of Children Act 1978. In 2000, two young offenders were cautioned, and none sentenced, for

⁶ *Barber* [2002] 1 Cr App R (S) 548

⁷ *Landy* (1995) 16 Cr App R (S) 908

possession; while three were sentenced and four cautioned under the 1978 Act. All the sentences were probation or supervision orders.

48. In the Panel's view, the most appropriate sentence for a young offender convicted of one of these offences is likely to be a supervision order with a relevant treatment programme. However, as we recorded in our advice to the Court of Appeal on sentencing of rape, we are concerned by the apparent shortage of adequate treatment programmes for young sex offenders.

Extended sentences

49. The offences of taking or making, showing and distributing indecent photographs of children, under section 1 of the Protection of Children Act 1978, qualify as 'sexual offences' for the purposes of section 85 of the Powers of Criminal Courts (Sentencing) Act 2000. (This does not apply to the offence of possession, under the Criminal Justice Act 1988.) Section 85 enables the court, when imposing a custodial sentence of any length for one of these offences, to add an *extended period of licence*, during which the offender will remain under supervision and at risk of recall to custody. This power is available in a case where the normal period (if any) for which the offender would be on licence 'would not be adequate for the purpose of preventing the commission [by the offender] of further offences and securing his rehabilitation'.

50. The Court of Appeal gave guidance on the use of extended sentences, based on a proposal from the Panel, in *R v Nelson* [2002] 1 Cr App R (S) 565. The Panel believes that it would be helpful for the Court of Appeal, in any new guidelines on child pornography offences, to remind sentencers that an extended sentence may be appropriate, and that the custodial term of an extended sentence for a sexual offence may be of any length.

THE CURRENT SENTENCING PROFILE

A.1 The Home Office has given the Panel detailed information relating to those cautioned and sentenced for these offences, on a principal offence basis, for the years 1999 and 2000. The figures, which are summarised in the table below, distinguish between disposals for (a) the four offences created by the Protection of Children Act 1978, and (b) the offence of *possession*, under the Criminal Justice Act 1988. They do not distinguish between the individual offences under the 1978 Act.

	1978 Act offences	1988 Act (Possession)	1978 Act offences	1988 Act (Possession)
YEAR	1999	1999	2000	2000
NUMBER:	(169)	(131)	(254)	(94)
Cautioned	31 18%	34 26%	35 14%	25 27%
Sentenced	138 82%	97 74%	219 86%	69 73%
SENTENCE:				
Absolute or conditional discharge	4%	8%	6%	10%
Fine	9%	27%	5%	13%
Community penalty	38%	38%	37%	45%
Custody	47%	22%	50%	29%
AVERAGE LENGTH OF CUSTODIAL SENTENCES				
Magistrates' courts	3.7 months	3.4 months	3.5 months	3.6 months
Crown Court	10.4 months	-----	10.5 months	-----
AVERAGE FINE				
Magistrates' courts	£700 (8 persons)	£533 (26 persons)	£204 (5 persons)	£361 (9 persons)
Crown Court	£538 (4 persons)	-----	£890 (5 persons)	-----

A2. It should be borne in mind that the offence of possession was still summary only in the years covered by the table, and that the maximum penalty for the offences under the 1978 Act was still three years. The *longest custodial sentence* given by the Crown Court for offences under the 1978 Act, over the two-year period, was 30 months.

THE CONSEQUENCES OF CONVICTION

B.1. Anyone who is convicted of, or pleads guilty to, an offence involving child pornography may be subject to legal consequences in addition to the sentence imposed for the offence. The relevant legislative provisions are summarised below.

The Sex Offenders' Register

B.2. Offences under section 1 of the 1978 Act and section 160 of the 1988 Act are among those to which Part I of the Sex Offenders Act 1997 applies. This means that anyone *convicted of or cautioned for* such an offence is required to register his name and address with the police. The length of time an individual's name remains on the register is linked to the severity of the sentence. For an adult offender with a custodial sentence of 30 months or longer, registration is for an indefinite period. For a custodial sentence of more than 6 months but less than 30 months, the registration period is 10 years; and for a custodial sentence of 6 months or less, it is 7 years. Following a non-custodial sentence or a caution, registration is for a period of 5 years. For an offender aged under 18, the registration period is half the adult equivalent.

B.3. Information from the Sex Offenders' Register may be used by the police to monitor the activities of individual offenders, for the prevention or detection of crime. Information may also be shared with other agencies such as the National Probation Service, local authority social services, housing and education departments, and health authorities. Nearly all police forces also have a 'community notification policy' for managing the disclosure of information about offenders to other agencies and individuals. A research report evaluating the effectiveness of sex offender registration reveals that some prosecutions involving paedophile networks and Internet offences have arisen from intelligence gained from the register.⁸

Court-ordered disqualification from working with children

B.4. Sections 26-34 of the Criminal Justice and Court Services Act 2000 introduced new provisions for the court to order an offender who is convicted of an offence against a child to be disqualified from working with children. There is some doubt as to whether the new provisions apply to offences committed at any time, or only to those committed on or after 11 January 2001, when the relevant sections of the Act came into force. The underlying question, whether the provisions are preventative or punitive, has not yet been determined by the Court of Appeal.

B.5. An offence against a child, for the purposes of this legislation, includes an offence under section 1 of the 1978 Act or section 160 of the 1988 Act, but only if a custodial sentence of 12 months or longer was imposed. If the offender was aged 18 or over at the time of the offence, the court must make a disqualification order *unless* it is 'satisfied, having regard to all the circumstances, that it is unlikely that the individual will commit any further offence against a child'. The relevant standard of proof here is the civil, rather than the criminal, standard (*G, The Times*, 12 November 2001). In the case of an offender aged under 18 at the time of the offence, the court must make a

⁸ Joyce Plotnikoff and Richard Woolfson: *Where are they now?: an evaluation of sex offender registration in England and Wales* (Police Research Series Paper 126); Home Office, 2000

disqualification order *if* it is 'satisfied , having regard to all the circumstances, that it is likely that the individual will commit a further offence against a child'.

B.6. A disqualification order imposed on an offender who was aged under 18 at the time of the offence will remain in force for at least 5 years after the offender's release from custody, when the offender may apply for the order to be reviewed. For an adult offender, the disqualification period is at least 10 years after release from custody. A disqualification order which is no longer in force may be restored by the High Court on the application of a chief officer of police or a director of social services, if the individual has acted in such a way 'as to give reasonable cause to believe that an order. . . is necessary to protect children in general, or any children in particular, from serious harm' from the offender.

B.7. It is an offence under the 2000 Act for a disqualified individual knowingly to apply for or undertake any work (whether paid or voluntary) with children; and also for an employer knowingly to offer such work to a disqualified individual, or to allow a disqualified individual to continue in such work. For both offences the maximum penalty is 6 months imprisonment or a fine up to the statutory maximum, or both on summary conviction; and 5 years imprisonment, or a fine, or both, on conviction on indictment. A 'disqualified individual', in this context, includes someone whose name is on List 99 or on the Protection of Children Act list (see below), as well as someone on whom a court has imposed a disqualification order.

Other disqualification from working with children

B.8. The Department for Education and Skills maintains a list (known as 'List 99') of people barred or restricted by the Secretary of State, under the Education (Restriction of Employment) Regulations 2000, from employment by a local education authority or other body as a teacher or worker with children or young persons under the age of 19. (A 'worker with children or young persons', in this context, includes employees such as classroom assistants, school caretakers, care workers in special or residential schools or youth workers in the youth service). Anyone found guilty, on or after 1 November 1995, of one of a number of offences involving children, and who was employed in relevant employment before or at the time of the offence or the conviction, is *automatically* barred from such employment. Qualifying offences include those under section 1 of the 1978 Act (taking or making, distribution and showing of indecent photographs of children), but *not* the offence of possession under section 160 of the 1988 Act. The Secretary of State also has *discretion* to impose a bar on a range of other grounds, including a conviction for *any* criminal offence which results in a custodial sentence of more than 12 months.

B.9. A separate list, maintained by the Department of Health under the Protection of Children Act 1999, is designed to prevent the employment of unsuitable people in child care organisations. The list covers people who have been dismissed or re-deployed by such an organisation on the grounds of misconduct (whether or not in the course of their employment) which harmed a child or placed a child at risk of harm; or who have resigned or retired in circumstances where the organisation would otherwise have dismissed them, or considered dismissing them, on such grounds.

B.10. The Criminal Records Bureau established under the Police Act 1997 now provides a regulated 'one stop' service for employers recruiting for posts that involve working with children. The Bureau will provide information on potential employees

from police records, criminal records, List 99 and the Protection of Children Act list. Employers designated as 'child care organisations' for the purposes of the legislation are obliged to apply for this information, and other employers are encouraged to do so.

ANNEX C: THE CONSULTATION EXERCISE

In accordance with the duty imposed on the Panel by section 81(4)(a) of the Crime and Disorder Act 1998, we issued a consultation paper on 15 January 2002, setting out the Panel's provisional views on the sentencing of offences involving child pornography. Copies of the paper were sent to over 100 individuals and organisations, including the Panel's 27 statutory consultees and the Resident Judges at all Crown Court centres. The document was also published on the Panel's website, and in the *Justice of the Peace* journal. Responses were received from those listed below.

Dr Yaman Akdeniz

Anonymous response

Association of Chief Police Officers

His Honour Judge Findlay Baker QC

Malcolm Boura

British Association of Social Workers

British Police Experts Group for combating child abuse on the Internet

Campaign to End Rape

Child and Woman Abuse Studies Unit

Children's Charities' Coalition for Internet Safety

His Honour Judge Coleman

His Honour Judge Colston QC

Criminal Sub-Committee of HM Council of Circuit Judges

Crown Prosecution Service

District Judges (Magistrates' Courts) Legal Committee

Donald Findlater, The Lucy Faithfull Foundation

Tim Forcer

General Council of the Bar and Criminal Bar Association

Alisdair A Gillespie

Steven Hallworth, Obscene Publication Internet Unit, Metropolitan Police

Justices' Clerks' Society

Christopher Kinch QC

Stephen King

Law Society

His Honour Judge Moss

National Probation Service - London Probation Area Team

NAVSCIP

Northamptonshire Area Child Protection Committee

Tom O'Carroll

Police Superintendents' Association

Pornography and Violence Research Trust

Dr Ethel Quayle

Royal College of Psychiatrists

Dr Peter Sommer

Staffordshire Police

Professor Max Taylor

Daniel Thorlby

Tower Productions

His Honour Judge Wilkie QC, Law Commission