

# Indecent images of children, grooming and the law

Dr. Vasileios Karagiannopoulos

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# Topics to discuss

- ▶ Grooming
- ▶ Indecent images and pseudophotos
- ▶ NPPIC
- ▶ Other offences

# Criminalising indecent images of children

Direct harm rationale: Actual children are abused - need for protection from what is often sexual assault

- ▶ Psychological harm in addition to physical
- ▶ Ease of distribution - multiple ways of production
- ▶ Financial incentive and personal interest
- ▶ General acceptance of the need for criminalisation

# Secondary harm

- ▶ Is possession or viewing child sexexploitation images harmful?
- ▶ Criminalisation of possession has been contested
- ▶ Rationale: Every person in the chain needs to be criminalised
- ▶ Also, it arguably leads people to abusing children  
(Research is ambivalent in relation to this)
- ▶ Strongest argument: possession contributes to secondary victimisation -  
how about for those unaware of the images being circulated?

# The role of new technologies

- ▶ International paedophile rings share content using encrypted, p2p technologies
- ▶ Webcam technologies have enabled profiting from webcam sex - livestreaming sexual abuse
- ▶ Darkweb sites for circulation of content
- ▶ Social media and online games used for grooming
- ▶ Links hidden in Bitcoin's blockchain
- ▶ Research showed almost 1 in 10 respondents were users of child pornography

# Defining a child?

- ▶ Is entering puberty a good way of defining childhood?
- ▶ Paedophiliac vs hebephiliac
- ▶ Safer to just prescribe an age limit
- ▶ But what age should be prescribed and how is it ascertained?
- ▶ EU Directive requires age of 18 for child for indecent images vs age of consent or open to state in other documents
- ▶ A child is a person under 18 (s.7(6) of the Protection of Children Act 1978)
- ▶ What is the anomaly with the law here?

- ▶ Is age always obvious? **How old do I look?**
- ▶ Should/could the state ban images of young adults looking as minors?
- ▶ What if people possess images of underage individuals looking more than 18?
- ▶ **Harm principle here?**
- ▶ By S.160 Criminal Justice Act 1988, it is an offence to possess an image of a person under 18, whether or not they look older than they actually are (**rational?**)
- ▶ In UK: **legal** to possess an indecent image of an adult looking younger than 18
- ▶ The age of a child is a finding of fact for the jury to determine not a subject requiring the assistance of experts (*R v Land* [1998] 1 Cr. App. R. 301).

# What is indecent?

- ▶ This is an issue for the tribunal of fact to decide in accordance with recognised standards of propriety (*R v Stamford* [1972] 56 Cr. App. R. 398).
- ▶ The jury considers the issue of indecency objectively and not by applying their wholly subjective views of the matter (*R v Neal* [2011] EWCA Crim 461).
- ▶ The age is an important factor: (*R v Owen* (1988) 86 Cr. App. R. 291).
- ▶ The circumstances in which the photo was taken and motive of the taker are not relevant (*R v Graham-Kerr* (1989) 88 Cr App R 302; *R v Smethurst* [2002] 1 Cr. App. R. 6).



# UK Law - Protection of Children Act 1978

- ▶ S.1 Indecent photographs of children.
- ▶ (1)[Subject to sections 1A and 1B,] 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.
- ▶ (2)For purposes of this Act, a person is to be regarded as distributing an indecent photograph [or pseudo-photograph] if he parts with possession of it to, or exposes or offers it for acquisition by, another person.
- ▶ Penalty: 10 years max
- ▶ Possession also criminalised by s.160 of Criminal Justice Act 1988

# Pseudo-images in the UK

- ▶ What is it exactly?
- ▶ Creating photorealistic images portraying children being abused or
- ▶ manipulating pre-existing porn images to make adult actors appear pre-pubescent by digitally removing pubic hair and resizing genitals and breasts
- ▶ A pseudophoto is defined in s.7.7 Protection of Children Act 1978 as ‘an image whether made by computer graphics or otherwise howsoever, which appears to be a photograph’.
- ▶ Should these images be criminalised? Why? Rationale: **Indirect harm**
- ▶ The UK adopted legislation to criminalise pseudo-images with the **Criminal Justice and Public Order Act 1994** extending the scope of the **Criminal Justice Act 1988** and the **Protection of Children Act 1978** to cover such images.

# Goodland v DPP

- ▶ Bristol Magistrates Court convicted Goodland for sellotaping two photos together (one of a girl in a gymnastics suit and one of a naked adult)
- ▶ Both photos legal per se
- ▶ Strict approach on pseudophotos: sellotaping two images together and photocopying **could trigger** the Protection of Children Act provisions
- ▶ Acquitted on appeal - criticism of initial decision

- ▶ The new definitions in the wording of s.7(4) of the Protection of Children Act 1978 clarified the definition of photo:

References to a photo include:

- (a) **the negative and positive version**
- (b) **data stored on a computer disc or by other electronic means which is capable of conversion into a photograph**

The UK adopts an aggressive approach

Many cases of possession are being prosecuted under s.1 PCA for the more serious ‘making indecent images’

Is possession making?

## *R v Bowden [2000] QB 88*

- ▶ A person who either downloads images or prints them is making them!!!! See also R v Jayson [2003] 1 Cr App R 13
- ▶ Photos or pseudo-photos found online may have originated beyond the UK so to download or print them within the UK is to create new material!!!!
- ▶ The impact: Anyone saving an indecent image (even in the browser cache) has made an image under s.1 of the POCA.
- ▶ But what about access with no downloading?

# More case-law

- ▶ “To make” has been broadly interpreted:
- ▶ Opening an attachment to an email containing an image (*R v Smith* [2003] 1 Cr. App. R. 13)
- ▶ Downloading an image from a website onto a computer screen (*R v Jayson* [2002] 1 Cr. App. R. 13)
- ▶ Storing an image in a directory on a computer (although depending on where that image is stored, this could also be a possession charge under s. 160 CJA 1988) (*Atkins v DPP*; *Goodland v DPP* [2000] 2 Cr. App. R. 248)
- ▶ Accessing a pornographic website in which indecent images appeared by way of automatic “pop-up” mechanism (*R v Harrison* [2008] 1 Cr. App. R. 29)
- ▶ See [CPS website](#) for more case law

# Possession

- ▶ Possession definitions have been developed through case law.
- ▶ *R v Okoro (No. 3) [2018] EWCA Crim 19*
- ▶ The test to determine possession:
- ▶ The images must be in the custody or control of the suspect i.e. so that they are capable of accessing, or in a position to retrieve the image(s); and
- ▶ The suspect must have known that they possessed an image or group of images on the relevant device/devices.
- ▶ Knowledge of the content of those images is not required
- ▶ Defences can be used for establishing lack of knowledge

# Live streaming

- ▶ *R v Smith and Jayson* [2003] 1 Cr. App. R. 13: causing an image to be displayed on a computer screen amounted to making it.
- ▶ Possible offences committed:  
‘publishing’ or ‘distributing’ indecent images under s. 1 PCA 1978 and offences under ss. 10, 14 of the Sexual Offences Act 2003 (causing/inciting or arranging/facilitating a child sex offence).



# Prosecuting grooming

- ▶ The act of **befriending or establishing an emotional connection with a child** in order to lower the child's inhibitions in **preparation for sexual abuse**
- ▶ Grooming has been around before the Internet
- ▶ **Before 2003: multiple provisions used to prosecute acts committed while grooming**
- ▶ **Obscene Publications Act 1959** or
- ▶ **Protection of Children Act 1978** (offenders would often use child pornography to convince a child it was ok to engage in sexual conduct)
- ▶ **Malicious Communications Act 1988** (which outlaws the sending of offensive or threatening communications) and
- ▶ **Protection from Harassment Act 1997** (which outlaws activity which the offender knows amounts to harassment)
- ▶ **Adequate??**

- ▶ **Solution s.15 of the Sexual Offences Act 2003:**
- ▶ ‘Meeting a child following sexual grooming’ criminalising the process of grooming and meeting and **not the grooming per se**
- ▶ To commit the offence an adult (18+) must either:
- ▶ 1. have met or communicated with the child(<16) on **at least 2 previous occasions**
- ▶ 2. the offender must then either **meet the child or travel with the intention of meeting the child (or vice versa)** and
- ▶ 3. have the intention of committing a relevant sexual offence included in the Act Part 1
- ▶ **Victim must be under 16 and offender must not reasonably believe it is 16+**
- ▶ The phrasing is intended to avoid criminalisation of innocent communications with children
- ▶ Max penalty: 10 years

# *R v G*

- ▶ The court of Appeals reviewed grooming offline in R v G
- ▶ Close family friend of the victim
- ▶ Victim's family and his family intended a holiday together.
- ▶ G was accused of assaulting the victim on five occasions and was convicted under s.15.
- ▶ **Defendant appealed** arguing that the previous communication he has had with the child **was of non-sexual nature** (friendly meetings)
- ▶ Appeal based on claim that prior communication must have been **undertaken to instigate sexual relationships** for s.15 to be applicable.

- ▶ As the court argued: s.15 on its face could be taken to mean that prior communications must also be sexual in nature
- ▶ However, the only requirement prior to the intentional meeting is ‘meeting or communication on at least two occasions’.
- ▶ There is no requirement that either communication be sexual in nature
- ▶ Prior communications could serve to secure the confidence of the target

- ▶ The judge also clarified the mens rea:
- ▶ It is sufficient if, with the intention of meeting, A travels to B or vice versa.
- ▶ A must intend to commit the relevant sexual offence, whatever the meeting arrangement.
- ▶ It is **not enough** that A decides to take advantage of the situation and commit an offence during the meeting if not his initial intention
- ▶ In this case the offence was considered to have been made out and the appeal was rejected

- ▶ According to *R v G* the offence relates to:
- ▶ 1. Whether the accused has been in **contact with the victim prior to the meeting in question?** (the nature of the contact is not important) and
- ▶ 2. what was the **intent of the accused at the time of travel** to meet the victim?
- ▶ CPS Guidelines: Strict penalties depending on age of victim and the type of the act
- ▶ Penalties subject to aggravating factors such as intimidation or coercion or use of drugs or alcohol.

## S. 14 of SOA 2003: Arranging or facilitating commission of a child sex offence

- ▶ (1) A person commits an offence if—
  - ▶ (a) he intentionally arranges or facilitates something that he intends to do, intends another person to do, or believes that another person will do, in any part of the world, and
  - ▶ (b) doing it will involve the commission of an offence under any of sections 9 to 13.
- ▶ Max penalty 14 years
- ▶ See *R v Glancey* where the police framed Glancey through a sting operation online pretending to be like-minded child abusers helping Glancey find access to live webcam footage of young girls.

# Relevant grooming offences

- ▶ S.12 of SOA 2003: **Causing a child to watch a sexual act**
- ▶ (1) A person aged 18 or over (A) commits an offence if—
- ▶ (a) for the purpose of obtaining sexual gratification, he intentionally causes another person (B) to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity,
- ▶ (b) the activity is sexual, and
- ▶ (c) either—
- ▶ (i) B is under 16 and A does not reasonably believe that B is 16 or over, or
- ▶ (ii) B is under 13.
- ▶ Is a static photo of someone naked an activity?
- ▶ Sexual gratification can happen later: *R v Abdullahi*



# Sexual communications with a child (s.15A)

- ▶ This section was introduced by the Serious Crime Act of 2015
- ▶ It focuses on sexual communications with someone under 16
- ▶ Purpose: Intentional communication for sexual gratification
- ▶ Max penalty: 2 years
- ▶ Difference with s.15?

# Prohibited images of children

- ▶ Non-photographic pornographic images of children
- ▶ In *Goodland*: the prosecutor tried to define the line between pseudo-images and legal artistic content:
- ▶ **the exhibit must appear to be a product of photography rather than a cartoon, sketch painting or other indecent representation of a child.**
- ▶ However s.62 of the Criminal Justice and Coroners Act 2009 equates these images to pseudo-photos criminalising the possession of prohibited images of children

# So what is a NPPIC?

- ▶ The image is prohibited if it is
  - ▶ A. pornographic and
  - ▶ B. grossly offensive, disgusting or otherwise of an obscene character.
  - ▶ C. falls within ss.62(6) and (7) (meaning the image focuses solely or principally on a child's genitals or anal region and that it portrays a prohibited act (long list))
- ▶ Penalty up to 3 years in prison

# Defences and exclusions

1. Legitimate reasons for possession
  2. Not seen the image and no idea what the image is
  3. No request and no possession for unreasonable time
- ▶ Same defences for previous cases of indecent photos/pseudo-photos
  - ▶ Classified works (videos) are excluded

The background features abstract, overlapping green geometric shapes, primarily triangles and polygons, in various shades of green, ranging from light lime to dark forest green. These shapes are concentrated on the right side of the slide, with some extending towards the left. The overall effect is a modern, layered design.

► Any questions or comments?