



Indecent Photographs of
Children
Submission by British Naturism to
the Ministry of Justice and the Joint
Committee on Human Rights
November 2009

Introduction

1. British Naturism is the representative organisation for naturists in the UK.
2. About 1.5 million people in the United Kingdom describe themselves as being a naturist¹ and there are about ten times that number who practise naturism to at least some extent. There is a surprisingly high level of acceptance by the public though there are also some who are deeply prejudiced against nudity. Few people realise how numerous we are.²
3. The levels of prejudice and discrimination that naturists encounter is significant, it does result in appreciable harm to individuals, groups and to society as a whole and it does cause unnecessary curtailment of individual freedom.

Coroners and Justice Bill

4. The Coroners and Justice Bill provides an opportunity to remedy the problems caused by the lack of a clear definition of what is meant by "*indecent photograph*". This lack can and does result in family photographs being deemed pornographic, causing both specific and general harm.
5. We have little doubt that the present definition of child pornography is contributing to the growing backlash against child protection legislation which is often perceived as vague, over-broad and counter productive . The law can be clarified and the threshold drawn more sensibly without reducing the protection provided to children. Accordingly we request that the Protection of Children Act, and all other Acts which refer to "*indecent*" images, be amended.

The Problem

6. It is important not to underestimate the harm resulting from the present definition. It encourages attitudes which are known to result in widespread and often significant harm to children and young people.³ Allegations can and do destroy people's lives and the effect on families can be devastating. It encourages people to think of a child's body as inherently sexual, the exact opposite of what is required. It is targeting the consequences whilst making the underlying cause worse.
7. The definition of the offence lacks precision. The meaning of "*indecent*" differs radically from one culture to another, from one time to another and between individuals within a culture. There is little prospect that the ordinary person appreciates how low the conviction threshold is. Some people commit the offence simply because they never dreamt that their innocent family photographs could be considered illegal. Even in the many situations where people are never charged or cautioned, "mud sticks" and the consequences of the stress of criminal investigation can last for years or decades.
8. We are not alone in finding the present definition less than clear:
9. In April 2008 the Internet Watch Foundation website stated "*The law on images of*

1 NOP poll. 2001. "and would you describe yourself as being a naturist?"

2 When a naturist gets dressed the disguise is perfect.. The Statistics Briefing Note provides further information.

3 Health and Well Being of Children and Young People. A British Naturism Briefing Note.

child abuse is relatively clear. It means any images of children, apparently under 16⁴ years old, involved in sexual activity or posed to be sexually provocative." That has now been removed and replaced with references to the Sentencing Advisory Panel's 2007 guidelines on the 2003 Sexual Offences Act⁵ and a set of extracts from that and other legislation. We are not surprised that they no longer feel able to provide guidance themselves.

10. In a letter to the Lord Chief Justice a consortium of the major child protection charities stated. "*There has to be a sexual element to the image*". That is clearly not correct.
11. Manchester Airport had to change their policy on children using body scanners. They had misunderstood the possible extent of the law.
12. In practice there are convictions for material which do not by any sensible criteria meet the intended requirements of the Act. For example the Court of Appeal judgement in R v O'Carroll states "*Each photograph was of a young naked child engaging in normal outdoor activity such as playing on a beach.*" O'Carroll probably thoroughly deserved to be convicted of something, but a jury should not be expected to distort the law because there is no more appropriate charge available. The present Bill addresses that problem so an over-broad and imprecise definition of child pornography is no longer required.
13. If the Internet Watch Foundation (in 2008) and the child protection charities were correct about their interpretation of this statute, and the contrary convictions are aberrations, then there are serious flaws in the justice system and the law should be amended so that it says what it means. More importantly, it should say what Parliament, voicing the views of the electorate, intended it to mean.
14. The media almost invariably use the term "*child pornography*" when reporting cases. This is often misleading and neither the press nor the public are allowed to see the images. Consequently, one of the important checks and balances which apply to most other offences is absent. If the public knew what is sometimes done in their name then there would be an outcry.
15. The problems caused by the lack of clarity are exacerbated by sentencing policy. For family photographs which have been shown to family and friends a guilty plea can make the difference between a fine and prison⁶. Few people will take the risk of prison so they plead guilty even when there is a strong probability that they are innocent. This exerts a downward pressure on the conviction threshold which in turn exerts a downward pressure on societal attitudes (as expressed purely through the artificial medium of court judgements) which further lowers the conviction threshold. This vicious spiral has profound and undesirable consequences for the health of our society. Children are increasingly being perceived as inherently sexual and adults increasingly feel unable to interact normally with children or to offer assistance to a child in distress.

History

16. The offence was first enacted by s.1 Protection of Children Act 1978 (England & Wales) and subsequently amended many times, usually to include more types of

4 The Sex Offences Act 2003 raised this age to 18

5 These present essentially the R v Oliver ruling

6 Sentencing Guidelines

image or to include more types of activity associated with them and notably to raise the age limit to 18. As far as we know there has been no serious reconsideration of the conviction threshold⁷. The initial Parliamentary consideration was almost certainly inadequate due to time pressure and it was carried out in an atmosphere of moral panic whipped up by Mary Whitehouse and others – although Lord Longford stated clearly “*we are not talking, after all, about nude photographs*”⁸. The possibility of variation in the threshold of “*indecent*” was guarded against by requiring all prosecutions to be mounted by the Director of Public Prosecutions. No such concern appears to exist now, and prosecutions are indeed mounted against “*nude photographs*”.

17. In the following account The Children’s Charities’ Coalition for Internet Safety, CHIS, represented Barnardo's, Child Line, The Children's Society, National Children's Bureau, NCH, NCVCCO, and NSPCC.
18. On 8th April 2002 the CHIS responded to a Sentencing Advisory Panel consultation on behalf of the above charities.
Our understanding of the law leads us to believe that pictures of the kind mentioned in [Copine levels⁹] 1- 3 would not be criminally pornographic under any circumstances. ... There has to be a sexual element to the image. ... The fact that certain types of person might find particular types of images sexual in some way is not a good enough reason for the originator to be prosecuted for making them or for someone else to be prosecuted for possessing them. There has to be an objective basis for agreeing the sexual nature of the depiction for purposes of establishing offences relating to child pornography.
19. Similar representations were made by and on behalf of naturists.
20. Experience shows that the¹⁰ CHIS understanding of the law is incorrect.
21. The Sentencing Advisory Panel ignored the representations and the final guidelines retained a category for images without any sexual or erotic content.
22. On 27th August, 2002 CHIS wrote to The Lord Chief Justice urging him to ignore the Sentencing Advisory Panel.
*... We think it is too broad.
.... A very large number of families in Britain will, entirely properly, possess pictures of their own children “.....naked or semi-naked in legitimate settings.....”.*
The idea that such pictures should even appear on a list that seeks to categorise child pornography, or that it is bracketed with “Explicit erotic posing...”, will greatly offend a good many people. Moreover the reasoning for including COPINE’s 2 & 3 seems curious....
23. On November 21, 2002, in R. v. Oliver and others, the Court of Appeal ruled:
We do not that agree with the Panel that COPINE typologies 2 and 3 are properly

7 The exception appears to be an unsuccessful attempt by Lord Avebury to introduce a measure of common sense during a debate on the Criminal Justice and Public Order Bill, 1994 (Hansard, 1994 July 11).

8 Hansard 1978 May 18

9 The lower Copine levels, ten in all, are:

- 1 Indicative (non-erotic / non-sexualised pictures)
- 2 Nudist (naked or semi-naked in legitimate settings / sources)
- 3 Erotica (surreptitious photographs showing underwear / nakedness)
- 4 Posing (deliberate posing suggesting sexual content)

10 Convictions for photographs which have no sexual element.

within Level 1. As it seems to us, neither nakedness in a legitimate setting, nor the surreptitious procuring of an image, gives rise, of itself, to a pornographic image. Accordingly, with that amendment to the Panel's proposals, we categorise the relevant levels as:

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

24. We greatly welcomed this ruling. It introduced some much needed clarity and it drew the line sensibly.
25. Tuesday, 29 July 2003 in R v O'Carroll the Court of Appeal ruled that R v Oliver did not apply to juries. The clarity had lasted only 8 months.
26. These two cases give rise to the perverse situation that in one type of court the law is considerably less clear, and the threshold for conviction considerably lower, than in another.

A case study

27. One of our members recently asked us for some advice concerning some 1930s naturist magazines which he had bought at auction. Our advice can be summarised as:
 - We have to guess the nature of the photographs from your description. Anything else risks you being charged with supplying and ourselves with possession.
 - A jury has to guess (strictly speaking “*determine*”) what “*generally accepted standards of propriety*” are. The polling data shows that perceived attitudes are often very different from actual attitudes so the conviction threshold is probably a lot lower than it should be. To assist the jury in their guessing, the prosecution will offer a range of suggestions, including moral outrage, character assassination and vilification. Many defences seem to be ill-educated in the basic decency of non-sexual representations of the human body.
 - You have to guess what the jury will guess, having guessed what the prosecution and defence may argue.
 - With all that guess work it is near impossible to advise you. Quite simply nobody actually knows.
 - If the photographs come to the attention of the authorities then they will probably pursue an investigation. They are terrified of being blamed for failure to pursue when they should but they know that they are unlikely to be blamed for harm done to you and your family. It is likely that all correspondence, computers, family photograph albums, belonging to you, your wife and your children will be confiscated, during a “raid” where the neighbours will be left in no doubt about the object of the search. There is a real chance that your children will be taken into care. Naturist photographs will be given low priority so it will probably be a year or more¹¹ before the computers are even looked at. Meanwhile your reputation, career and family has been destroyed. Even if

¹¹ Conversation with a police child abuse specialist, 2008.

justice should prevail there is little prospect of any compensation, you may have to fight to get your property back, your marriage is likely to be over and you have a permanent life long record as a suspected paedophile.

28. Unfortunately that is not alarmist. It happens. Our member decided to destroy the magazines.

Conclusion

29. The absurdity of the situation we find ourselves in, and the insult to our lifestyle, is causing real and growing anger. It brings both the law and child protection into disrepute. These sentiments are shared by many people who are not naturists.¹²
30. If the major child protection charities, the Internet Watch Foundation, and organisations such as Manchester Airport have misunderstood then there is little prospect that members of the public can understand it or that a court hearing will have the law explained to it clearly and accurately.
31. The uncertainty and the draconian consequences of even an investigation, mean that a significant minority group is scared to take family photographs without donning protective clothing.
32. The offence must be defined in such a way as to prevent misguided or bigoted investigations. It is all too easy to ignore the harm done to the innocent accused and their families.
33. The present definition of child pornography results in isolated cases of serious harm and widespread low level harm. It encourages attitudes to change in a direction which is known to result in harm.¹³
34. The major child protection charities and ourselves have asked for the law to be clarified and modified so as to require a clear sexual element to the criminal image. We are at a loss to understand why this has not been done.
35. Nudity is not inherently sexual but a few individuals are deeply prejudiced and unable to accept that. Sometimes they are in positions of authority and the public do need to be protected from them.

Requested amendment

36. Replace the word "indecent" with the word "sexual" or the words "sexual or erotic". There are probably numerous places where this change will be required. We know of the Protection of Children Act and s.170(2)(b) of the Customs and Excise Management Act 1979.

British Naturism

www.british-naturism.org.uk

24 November 2009

¹² As was stated by the CHIS in their letter to the Lord Chief Justice.

¹³ See references in The British Naturism publication "Health and Well-being of Children and Young People"

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