CHILD PORNOGRAPHY LAWS
The luck of the locale

CAROLYN PENFOLD

While the Australian legal system is often thought of as reasonably homogeneous, major inconsistencies regarding Internet content and the criminal laws of the Australian States and Territories were highlighted recently by the activities of Operation Auxin.

Operation Auxin was a national investigation sparked by information from United States' authorities regarding the use of credit cards to access child pornography from European Internet sites. In September 2004, officers from Operation Auxin swooped on homes across Australia executing 400 search warrants in connection with Internet child pornography. By 30 September 2004, 150 people across Australia had been charged with 2000 offences. Many more charges have been laid since.

Although Operation Auxin was a national investigation, Australia's legislative structure has meant that the resulting charges have been laid under State and Territory law. Indeed, the charges laid, the defences available and the penalties open to courts differ considerably between jurisdictions. Therefore, even if Operation Auxin found persons in possession of exactly the same quantity of the same content in the same format, those prosecuted may expect very different outcomes depending on where they are charged.

This variation in law is the focus of this article. It begins with an overview of the diversity of State and Territory laws regarding child pornography. It then discusses three attempts to make child pornography law more uniform — the Model Criminal Code, the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) (the Online Services Amendment) for Internet related offences and the amendments to the *Criminal Code 1995* (Cth). While none of these attempts has created uniformity, it is argued that the distinctiveness of Internet content together with the starkly different outcomes produced by the application of divergent State and Territory laws following Operation Auxin require that uniform child pornography laws be pursued with vigour.

Charges following Operation Auxin — State and Territory laws

Operation Auxin was coordinated by a national body, the Australian High Tech Crime Centre (AHTCC). Recognising the supra-jurisdictional reach of Internet crime, the AHTCC was established to provide 'a national coordinated approach to combating serious, complex and multi-jurisdictional high tech crimes, especially those beyond the capability of single jurisdictions'.[1] Raids conducted as part of Operation Auxin were carried out by State and Territory police forces each of which executed its own search warrants and laid the resulting charges in its own jurisdiction. All Australian States and Territories prohibit the possession of child pornography.[2] However, the charges laid under Operation Auxin involve offences, defences and penalties which vary widely between jurisdictions.

Offences

Conviction for possession of child pornography or child abuse material in some jurisdictions requires proof of 'knowing' or 'intentional' possession of child pornography;[3] in others possession is enough.[4] Generally, child pornography or child abuse material is material that describes or depicts, in a manner likely to cause offence to a reasonable adult, a person who is a child under 16 or who looks like a child under 16 whether or not they are engaged in sexual activity.[5] Some jurisdictions require that the minor be engaging in sexual activity or be depicted in an indecent sexual manner or context.[6] Most jurisdictions require only that the material would cause offence to a reasonable adult, while others require that the content would cause 'serious and general offence amongst reasonable adult members of the community'.[7] The offences range from summary to indictable.[8]

Defences

Defences vary greatly. In some jurisdictions, it is a defence to prove the person involved was not in fact under 16 years of age,[9] while in others it is a defence that the defendant believed on reasonable grounds that the minor described or depicted was over 18 years old.[10] In some jurisdictions, it is a defence that the defendant did not know, or could not reasonably be expected to have known that the material contained pornographic content involving a child under 16.[11] In some jurisdictions, it is a sufficient defence to show that the material had genuine artistic, medical, scientific or educational value and in other jurisdictions that the content had artistic value and that the apparent minor was not a minor.[12] Good faith of the defendant may also be an element in such defences.[13]

Penalties

In addition to the great variation in offences and defences, there is also marked variety in penalty levels. For possession of child pornography, child abuse material and child abuse computer games, there is a

REFERENCES

1. AHTCC, 'What does the AHTCC do?' <www.ahtcc.gov.au/> at 3 June 2005.
2. *Crimes Act 1900* (NSW), *Classification of Computer Games and Images Act 1995* (Qld), *Classification of Publications Act 1991* (Qld), *Censorship Act* 1996 (WA), *Summary Offences Act* 1953 (SA), *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas), *Crimes Act 1958* (Vic), *Criminal Code Act 1983* (NT). and *Crimes Act 1900* (ACT).
3. Eg, QLD, Vic, ACT.
4. Eg, NSW.
5. Eg, Tas, WA, NSW, QLD.
6. Eg, Vic.
7. Eg, SA.
8. Eg, NSW and Vic respectively.
9. Eg, NSW, Tas, ACT, NT.
10. Eg, Vic.
11. Eg, NSW.
12. Eg, Vic, SA and Tas respectively.
13. Eg, SA.

variation from no monetary penalty to fines of up to $5000, $11 000 and $22 500.[14] These fines may be in addition to, or instead of, a prison term.[15] Prison terms vary from a maximum of one year to a maximum of five years.[16]

All Australian jurisdictions prohibit the possession of child pornography but beyond that there is no apparent consensus. The next section of this article will address the attempts that have been made to create a more consistent approach to child pornography law.

Attempts at creating uniform law

The Model Criminal Code

In Australia, the federal government is a government of specified powers with legislative competence only over those areas specified in the *Australian Constitution*. Intrastate crime generally falls outside those areas. Therefore, State and Territory governments who have residual powers to legislate for the peace, welfare and good government of their territories are charged with creating legislation to address much of Australia's criminal law and, in particular, intrastate crime. The result, as Operation Auxin has starkly illustrated, is the development of inconsistent law.

This division of jurisdiction and ensuing inconsistent law has long caused concern in Australia. In 1990, the then Queensland Attorney General asked:

> Why should a person's criminal responsibility, the punishment which a certain offence carries, or even, indeed, whether certain conduct amounts to an offence, vary simply by the crossing of State boundaries? In a country as homogeneous as Australia, this amounts to at worst lunacy or at best illogicality.[17]

Concerns about the outcomes of Australia's divergent criminal law led to an attempt to draft a Model Criminal Code for all Australian jurisdictions. However, the introduction of uniform law raised new concerns about State and Territory independence and became politically sensitive. Although the intention of the drafters of the Model Criminal Code was to draft model laws which States and Territories could then implement as and when appropriate for their jurisdiction, there was concern in individual States and Territories that a central body was going to *dictate* State and Territory law. Therefore, although the Model Criminal Code has been drafted to cover many areas of criminal law, it has been enacted only to a very limited degree.

In regard to computers and the Internet, some of the Model Criminal Code has been introduced at the Commonwealth level, for example, the *Cybercrime Act 2001* (Cth); and to a lesser degree at State level, for example, the *Crimes Amendment (Computer Offences) Act 2001* (NSW).[18] However, the majority of law in this area remains inconsistent. Interestingly, possession of child pornography distributed via the Internet was intentionally left uncovered by the Model Criminal Code. The committee charged with the Code's development found that this area was the subject of 'intense and continuing political debate' and that the committee had neither special expertise nor representative status regarding such issues. It stated that it 'makes no recommendation' regarding control over Internet content or possession of objectionable material on computer databases.[19] Therefore, the Model Criminal Code carried no provisions or recommendations for making more consistent the law in this particular area.

The Online Services Amendment

In 1999, the Commonwealth government used its telecommunications power to introduce the Online Services Amendment to address complaints about Internet content, to protect children from exposure to unsuitable Internet content and to restrict access to offensive Internet content.[20] In enacting the Online Services Amendment, the government was motivated, amongst other things, by concerns of 'possible regulatory fragmentation of differing State and Territory legislation and the possible adverse effect on the development of the online industry'.[21] However, because of the division of legislative powers between the Commonwealth and State governments discussed above, the Commonwealth government's efforts were to be limited. For example, it had no power to regulate purely intrastate activities of individuals such as creating or possessing content.

It was hoped that the Online Services Amendment would engender, and be part of, an integrated legislative response to Internet content regulation to ensure that Internet content in every Australian jurisdiction would be covered by uniform law. Commonwealth legislation would cover those parts of Internet content regulation which fell within federal power and those outside power would be covered by uniform State and Territory legislation. Indeed, the Commonwealth government frequently referred to its legislation as part of a broader scheme to be enacted throughout the country. Clause 1(3) of the

14. Eg, Vic, Tas, NSW, QLD respectively.

15. Eg, WA.

16. Eg, Tas and Vic respectively.

17. MR Goode, 'Constructing Criminal Law Reform and the Model Criminal Code', 3 <www.isrcl.org/Papers/Goode.pdf> at 3 June 2005.

18. Ibid.

19. Model Criminal Code, Chapter 4, 87 <www.aic.gov.au/links/mcc.html> at 3 June 2005.

20. Now incorporated as *Broadcasting Services Act 1992* (Cth) s 3 (k), (l) and (m).

21. Broadcasting Services Amendment (Online Service) Bill 1999, Second Reading Speech, Cth, *Parliamentary Debates*, Senate, 21 April 1999, 3957, 3959 (Senator Ian Campbell, Parliamentary Secretary to Senator Alston, Minister for Communications, Information Technology and the Arts).

All Australian jurisdictions prohibit the possession of child pornography but beyond that there is no apparent consensus.

Broadcasting Services Amendment (Online Services) Bill 1999 (Cth) stated that part of the scheme would be: '(a) State/Territory laws that impose obligations on (i) producers of content and (ii) persons who upload or access content'. The supplementary Explanatory Memorandum explained that the amendment 'puts the Bill in the context of a national scheme already agreed to by the Commonwealth, State, and Territory Attorneys General'.[22]

However, five years after the enactment of the Commonwealth legislation, the uniform national scheme apparently agreed to by all State and Territory Attorneys General has not come to fruition. The draft model legislation was enacted in South Australia and in New South Wales.[23] However, in New South Wales, the legislation never commenced operation. Even in South Australia where Parliament did intend to pursue the uniform regulation, the legislation deals only with making available or supplying content over the Internet and not with accessing or receiving content.[24] Therefore, the regulation of Internet content in the States and Territories continues to vary drastically. It differs as to whether or not Internet material is specifically restricted, what categories of material are restricted and what penalties apply for breach of the laws.

The Commonwealth Criminal Code

In 2004, the Commonwealth government amended the Commonwealth Criminal Code to include offences such as use of a carriage service to access, transmit or publish child pornography or child abuse material, or to procure or groom under-aged persons.[25] However, the amendment was not yet in force at the time charges were laid under Operation Auxin. Accessing child pornography over the Internet now carries a maximum 10-year sentence under the Commonwealth legislation. Therefore, in the event of future child pornography operations, charges may be laid under this new Commonwealth legislation. This will result in more uniform outcomes for persons charged with child pornography offences.

Notably, the charges available under the Commonwealth's legislation must be within federal power. Because possession of child pornography is a purely intrastate activity outside any head of Commonwealth power, it is not covered by the Commonwealth Act. Therefore, while the new legislation will allow federal prosecutions for some activities including *accessing* child pornography, it will not cover others such as *possession* of child pornography!

The result — the new Commonwealth legislation adds another layer of law rather than removing existing inconsistencies. Individuals accessing child pornography on the Internet may now be charged uniformly with accessing content under Commonwealth legislation but be subject still to varying State and Territory laws regarding possession of the same content. Therefore, while the federal attempt is a step in the right direction, prosecutions for possession of Internet child pornography have become more complex.

The distinctiveness of Internet content

There are many challenges to be overcome in any attempt to unify Australian criminal laws. Clearly, it is not only laws relating to child pornography or to the Internet which would benefit from harmonisation. However, the nature of Internet content and its accessibility justify special efforts to harmonise law in this area.

Concerns regarding the type of content which new technologies may make available pre-date the wide availability of the Internet in Australia. Bulletin Board Systems (BBS), the forerunner of the current Internet, were recognised as allowing access to problematic material. Even while the proportion of problematic material on BBS was accepted to be small, it was seen that such material might be *extremely* problematic to the extent of including child pornography and paedophile contacts.[26]

An investigation by the Australian Broadcasting Authority into Internet regulation also raised issues relating to the availability of content such as child pornography. It reported that police had found significant amounts of child pornography online which typically provided 'highly detailed and explicit descriptions of the sexual abuse of children including incest, stalking, kidnapping, and sexual violence'.[27]

In addition to the type of content available, there were concerns that as such content had no physical existence, it could be disguised, encrypted, made anonymous and therefore, well hidden. The new technologies provide a means for access, networking and distribution of content that is far easier to use and far harder to police than the distribution of physical content which had preceded it.

'Child Pornography Laws' continued on page 140

22. Supplementary Explanatory Memorandum (undated), Broadcasting Services Amendment (Online Services) Bill 1999 (Cth).

23. *Classification (Publications, Films and Computer Games) (Miscellaneous) Amendment Act (No 2) 2001* (SA) and *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* (NSW).

24. *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 75C and 75D.

25. *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act 2004* (Cth) inserted into *Criminal Code Act 1995* (Cth) s 474.

26. Computer Bulletin Board Systems Task Force, *Regulation of Computer Bulletin Board Services* (1995).

27. Australian Broadcasting Authority, Investigation into the content of on-line services (ABA Sydney 1996) 63–64.