Virtual Child Pornography – Policing Fantasy? A Critical Evaluation of the Justifications for the Criminalisation of Virtual Child Pornography (VCP)

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Abstract

There is little doubt that the internet and related technologies have had a considerable impact on the accessibility and proliferation of images and videos of child sexual abuse, often referred to as child pornography. Until 2010 computer generated fantasy images which depict imaginary children (hereafter known as virtual child pornography or VCP) were not illegal to possess. However, after a period of consultation in which the government acknowledged there was no research to suggest actual harm caused as a result of such images, only potential harm, these fantasy images became subject to legal sanction pursuant to Ss.62 to 68 Coroners and Justice Act 2009.

The aim of this thesis is to critically evaluate the law pertaining to child pornography and virtual child pornography specifically in order to highlight the areas of the current law which are in need of clarification or reform. This has been achieved through the use of doctrinal analysis, a legal methodology which enables lawyers to critically evaluate the law as drafted through reference to decided case law. In addition, the thesis critically evaluates whether the arguments put forward by the government in the Consultation prior to the enactment of the Coroners and Justice Act 2009 can be justified. The critical evaluation of the justifications for criminalisation consider the philosophical and moral arguments for criminalisation as well as the views expressed by those who responded to the government consultation, data obtained using a Freedom of Information Act request and also through data gathered as a result of conducting a number of semi structured interviews with experts in the field.

The thesis also seeks to consider whether in future VCP or other related technologies could be used in the risk management of certain types of image offenders or for those who acknowledge they have a sexual interest in children but who wish to remain law abiding. The thesis argues that it may be time to acknowledge that criminalising behaviour, such as the possession of VCP, on the basis of perceived harm, as opposed to actual harm is simply not acceptable. It is inevitable that technology will continue to develop and that the legislature will find it difficult to keep up with such advances by means of legislation so it may be that the time has come to investigate whether technology can assist in the risk management of those with a sexual interest in children instead of assuming that the most appropriate approach is to criminalise the possession of images which do not cause any demonstrable harm to a child.

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This thesis is dedicated to Scott Williams.

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Chapter One: Introduction

The aim of this thesis is to discuss the justifications for the criminalisation of Virtual Child Pornography (hereafter VCP). The term VCP does not appear in any statute but has instead been adopted for use in this thesis as an alternative term to that used within S.62 Coroners and Justice Act 2009, namely non photographic pornographic images of children or NPPICs.

This introduction will discuss the difficulties inherent in using the term child pornography before considering the offence itself1. The introduction will then briefly discuss the fact that not all those who molest children or view images can be considered paedophiles2 and that not all those who are clinically diagnosed as paedophiles go on to offend against children. It is necessary to make this distinction as it is only through a more detailed understanding of those who are image offenders is it possible to consider whether virtual images may assist in the risk management of a very specific set of image offenders as discussed in the conclusion to this thesis.

Definitional Difficulties

A full discussion of the definitional difficulties of the term “child pornography” and “VCP” can be found in chapters four and five respectively. As will be seen in chapter four there is no legal definition of "child pornography". Many find the term offensive as it appears to suggest that images of child sexual abuse are to be considered in the same way as traditional adult pornography (Ost 2009). Many of the statutes dealing with illegal imagery use different terminology and during the research stage of this thesis it became apparent that within the interview transcripts respondents used a number of different terms to mean the same thing. As a result the following terms were aggregated to mean "virtual child pornography" or "VCP", namely virtual images, prohibited images, CGI images, virtual pornography and cartoon

[1] The offence itself is discussed in detail in chapter five

[2] Throughout this thesis the term paedophile is used to mean an individual who is diagnosed as such pursuant to either the World Health Organisations "International Classifications of Diseases, Mental Health Section (ICD) or The American Psychiatric Associations "Diagnostic and Statistical Manual for Mental Disorders (DSM), currently in its fifth revised form (2013). This is discussed more fully below in the section entitled "Defining Paedophilia"

pornography involving characters depicted as children. Although no doubt there are many arguments for and against using the term "virtual child pornography" it was felt that a general term would be more beneficial in a thesis such as this, rather than constantly utilising different terminology.

With regard to defining VCP according to Gillespie (2012) VCP can be broken down into two general categories, computer manipulated images and computer generated images. Gillespie (2012) notes that the second category, computer generated images can be broken down into two sub categories; computer created images and rendered images. Computer created images are images created exclusively by computer graphics programs and therefore no photographic image is used in the creation of the image, for example the images used in Japanese Manga, Hentai and other cartoon imagery. Rendered images are images where the computer has used an original image, including photographic images, but such images have been rendered into 3D computer generated images for example an avatar in a video game. However, as discussed below, arguably this would not be considered VCP legally but a pseudo image which is criminalised by means of the Protection of Children Act 1978. It is worthy of note however that it is possible to create computer generated avatars for use in a virtual world without the need for an image of an actual human being i.e "from scratch" (Yar 2013:123). Therefore it is impossible to know for certain whether an avatar has been created from an image of a real human or whether it is an imaginary representation. This can complicate matters legally with regard to avatars in Massively Multiplayer Online Role Playing Games (MMOROGs) such as Second Life.

<u>What does VCP look like?</u>

In real terms VCP can consist of a number of types of images ranging from depictions of cartoon characters who are portrayed as children such as Bart and Lisa Simpson, or Stewie from Family Guy, who is drawn as a baby, engaged in sexual acts to realistic images of imaginary children which could be mistaken for photographs but bear no resemblance to any real human child alive or dead. Japan is also known for producing some particularly

stylised cartoons known as Manga or animations known as Anime and there are sub genres of these which contain sexualised content. Two sub genres of Manga have been subject to considerable discussion, *Lolicon* and *Hentai.* Lolicon is the term used to describe Manga which features very young girls, often prepubescent, in sexual and violent situations which some people consider pornographic (Takeuchi 2015). The other type of Manga to come under scrutiny is *Hentai* which outside of Japan is essentially pornographic Manga, often featuring mythical creatures engaging in sexual acts using their tentacles to penetrate young female characters3. In addition VCP in the form of avatars has been used in online role playing games, such as Second Life, which feature scenarios in which adult avatars engage in sexual activity with other avatars depicted as children. These interactions can then be captured as either still images or videos for future use.

Virtual images are a relatively new challenge for the criminal law. In addition to activities involving real children such as the use of webcams and live stream video to enable people to sexually abuse all over the world, the advances in technology have resulted in the development of new types of images and interactions such as computer generated images and interactions within virtual reality. As a result it will be necessary for society to determine which of these activities should be criminalised and which may have the potential to offer an alternative legal outlet for those with a sexual interest in children. Arguably some technological developments may have a use within risk management strategies for certain types of offenders who are sexually interested in children; this is discussed more fully in the concluding chapter of this thesis.

Possession of VCP became a criminal offence as a result of the enactment of Ss.62-68 of the Coroners and Justice Act 2009 which came into force on 6th April 2010. Possession of a "prohibited image" as it is known in the statute, is an either way offence. On summary conviction it is punishable by up to 6 months imprisonment or a fine or both. On indictment the offence is

[3] Hentai images which would fall foul of the legislation are easily available simply by conducting a search on Google.

punishable by up to 3 years imprisonment, a fine or both. The offence criminalises non-photographic pornographic images of children (NPPICs) such as fantasy visual representations of child pornography which may take the form of computer generated images or cartoons. These images are not prohibited by the existing child pornography offences which only pertain to photographic images or those which appear to be photographic in nature. The intention of the government to criminalise NPPICs became clear in 2007 following publication of a Home Office Consultation Paper (Home Office 2007). The offence focuses on the nature of the image. Rather than being considered 'indecent' the images must be 'grossly offensive, disgusting or otherwise of an obscene character'. In addition, the image must be 'pornographic' in that it must reasonably be assumed to have been produced "solely or principally for the purpose of sexual arousal" (S.62 (3) CJA 2009). In addition to meeting these requirements the image must either focus "solely or principally on the child's genital or anal region" (S.62 (6) (a) CJA 2009), or portray one of the sexual acts set out in the Act (S.62 (7) CJA 2009). Moving or still images are caught by the Act and this therefore encompasses computer-generated images or cartoons (S.65 (2) (a) CJA 2009). A prohibited image of a child for the purposes of the offence includes "an image of an imaginary child" (S.65 (8) CJA 2009). As a result it is clear that the Act will apply to NPPICs which do not depict real children, therefore the child sexual abuse depicted in the images need not actually have any real human victims. The Home Office (2007) and subsequently the law have reflected the difference between indecent photographs of real children and NPPICs. A higher standard of obscenity is required for the offence pertaining to NPPICs. The S.62 offence also carries a lower maximum penalty when compared to the possession of indecent images of real children under S.160 Criminal Justice Act 1988.

Research Aim

The aim of this thesis is to critically evaluate the law on VCP in order to ascertain whether the arguments for the criminalisation of VCP are justified. In the conclusion to this thesis there will also be a critical discussion of whether VCP, and other virtual technologies, could be utilised in a

therapeutic context to assist in the risk management of a specific type of image offender who makes use of child pornography involving real children. In order to determine whether VCP could ever be used in risk management or as part of therapeutic intervention it is necessary to acknowledge from the outset that not all offenders who offend against children do so for the same reasons and not all of those who offend would be considered paedophiles and importantly that not all paedophiles are child sex offenders. This is discussed more fully below.

Research Objectives

The aim of the thesis will be achieved via the following objectives: -

1. A critical consideration of the difficulties of attempting to define child pornography and specifically VCP
2. A critical review and evaluation of the law in England and Wales pertaining to child pornography and VCP specifically.
3. A critical discussion of the problems inherent in the law as currently drafted, particularly with regard to the challenges presented by technological advancement.
4. A critical consideration of the possible justifications for the criminalisation of VCP, for example the philosophical justifications for criminalisation and the criminological evidence as to whether a link can be shown between those who utilise child pornography and offenders who commit contact sex offences.
5. A critical understanding of the perception of the law on VCP among experts and practitioners.

Methodology employed within the thesis

In order to achieve the research aim set out above this thesis uses a combination of three different methodologies, doctrinal analysis to analyse the law, a Freedom of Information Act request to obtain the full responses to the consultation on the criminalisation of VCP and semi structured interviews with experts and practitioners in order to gain their views on whether the criminalisation of VCP can be justified. These methodological approaches and the reasons for choosing these methods are discussed in chapter two.

The researcher believed that it the combination of these methods would enable a greater degree of critical evaluation than simply using doctrinal analysis to analyse the law itself. It was particularly useful to access the full responses to the consultation and utilise that data in combination with the interviews conducted with experts and practitioners to provide a greater degree of context within which to analyse the law.

Defining Paedophilia

There is a clear distinction between child sexual abuse and paedophilia. Child sexual abuse arguably arises whenever there is adult sexual contact with a child who is below the legal age of consent. However, paedophilia is completely different in that it is considered to be a medical condition, a paraphilia or psychosexual disorder as outlined in either the World Health Organisations "International Classifications of Diseases, Mental Health Section (ICD) or The American Psychiatric Associations "Diagnostic and Statistical Manual for Mental Disorders (DSM), currently in its fifth revised form (2013) (DSM-5). This will be discussed below.

The technical diagnostic term "paedophilia erotica" was first utilised by the German Professor of Psychiatry, Krafft-Ebing in the 19th Century. Krafft-Ebing analysed cases of unusual sexuality classifying them as "degeneration" which essentially meant that the disorders had arisen from a pre-existing biological condition or impaired inherited genetics rather than being attributed to an individual moral choice. He did however acknowledge that there were those who had fixed sexual desires and those who chose to experiment sexually. He outlined these disorders in his book "Psychopathia Sexualis" which was first published in 1886 and most recently reissued in 1998. Krafft-Ebing believed that sexual deviancy was very much a medical problem rather than a legal one and as a result he argued that such deviancy should be treated rather than punished.

Although paedophilia or "pedophilic disorder" is currently outlined as a recognised disorder in the DSM-5 Berlin notes that the definition in the most

recent edition may be inadvertently contributing to the misconception that child molestation and paedophilia are the same (2014:404). There are number of reasons for this assertion.

Firstly, the DSM-5 states that it would be an indicator of a Pedophilic Disorder if an individual has "acted upon his sexual urges" (American Psychiatric Association 2013:697). Berlin argues that the use of the words "acted upon" could mean that the individual in question had actually sexually abused a child. However, "acted on" could also mean that the individual has viewed child pornography or masturbated to fantasies involving children (2014:404). As Berlin notes it may be very ill advised to place individuals who have actually sexually abused a child in the same category as individuals who have never acted on an impulse (ibid). Instead of adding clarity to the definition this could in fact add a considerable amount of confusion and any distinction between someone who acts on their urges and someone who does not could be easily lost (ibid).

Secondly, when the DSM-5 was published the discussion of paedophilia made reference to the term "Pedophilic Sexual Orientation". As Berlin notes the use of the term sexual orientation denotes a category of people to which an individual is attracted sexually (ibid). However, at the time there was considerable criticism of the use of the term "sexual orientation" and as a result the American Psychiatric Association stated that they intended to remove the term from the diagnostic manual (American Psychiatric Association Statement October 13, 2013 cited in Berlin 2014:404). However, as Berlin argues removing the term from the manual could be a considerable mistake given that a continued on-going sexual attraction to children is akin to a sexual orientation and therefore by making use of this term it may assist in differentiating between paedophilia and sexual offending which are not synonymous terms but are so frequently confused, especially in the media (ibid).

Berlin also argues that the DSM-5 does not adequately differentiate pedophilic disorder from the criminal behaviour with which it is associated.

Given the societal misunderstanding that the term paedophile and child molester are synonymous Berlin believes that the DSM-5 should have done more to differentiate the psychiatric elements of pedophilic disorder. It is possible to be diagnosed with pedophilic disorder and yet not offend against a child (Berlin 2014:406).

Arguably once there is more widespread acceptance that not everyone who has a sexual interest in children will offend and that not everyone who offends against a child is a paedophile then it may be possible to begin to target treatment options and risk management strategies more specifically based on the motivations of the offender and the type of offence committed.

Characteristics of Online Offenders

There have been numerous studies conducted which have emphasised the importance of distinguishing between the characteristics of those who commit image only offences, contact only offences and offenders who commit both image and contact offences4. Babchishin et al (2015) conducted a meta-analysis of 30 unique samples of offenders and found key differences between the different types of offenders. The samples used within the meta analysis were conducted with varying populations of offenders and not solely those who had committed images offences.

There has been considerable debate with regard to the extent to which those who view images have a history of contact offending. Image offenders often have a higher prevalence of sexual interest in children (Babchishin, Hanson and Hermann 2011) and therefore it is assumed that as a result these offenders may well have committed contact offences. Although it has been noted that a history of image offending is a valid indicator of diagnosing paedophilia (Seto, Cantor and Blanchard 2006), research has consistently found that the number of image offenders who reoffend by committing a contact offence is lower than the rates for contact offenders. Those who are considered mixed offenders have a higher rate of recidivism for contact sex

[4] This is discussed in detail in chapter seven

offences than image only offenders, 6% and 0.2% respectively (Goller et al 2010). However, contact only offenders appear to have a higher recidivism rate than mixed offenders 6% and 13% (Harris and Hanson 2004)[5].

Researchers now believe that image offenders are a distinct group of offenders (Babchishin et al 2011). As Babchishin et al (2015) note the internet and subsequent accessibility of child abuse images may have contributed in part to a new group of offenders who may not have given into temptation in the absence of the internet. Some offenders do appear to limit their offending to viewing images online and it has been found that these types of offenders have greater barriers to general sex offending against children such as less antisociality (Long, Alison and McManus 2013). According to the American Psychiatric Association antisociality is a group of personality traits and attitudes which demonstrate a disregard for the rules of society, the wellbeing of others, a propensity to break rules, a lack of impulse control and low levels of remorse (American Psychiatric Association 2013). Given the lower level of antisociality these offenders may indulge in fantasies about children, however they appreciate that it is not morally right to act upon such fantasies and therefore they do not act upon such thoughts and feelings even when presented with an opportunity (Elliott and Beech 2009). This group of image offenders have also been found to demonstrate greater victim empathy and self-control (Elliott, Beech and Mandeville-Norden 2012). They also often share the demographic characteristics of those who use the internet for example being younger in age and Caucasian (Babchishin et al in 2011).

The results of the 2015 meta-analysis conducted by Babchishin et al are consistent with the general approach of routine activities theory in that those who are motivated to offend may well offend in line with opportunity, namely that those who are motivated and have internet access commit online crimes whereas those who are motivated and have access to children may well commit contact offences. Mixed offenders appear to have internet access

[5] It should be noted that reconviction rates are not the same as reoffence rates and this is discussed in detail in chapter six

and some access to children. However as noted above there are also psychological differences in addition to differences in access. Therefore offending cannot simply be explained by access to technology. Babchishin et al (2015) found that mixed offenders were the most paedophilic and that image offenders demonstrated a greater degree of sexual interest in children than contact offenders which is consistent with previous research (Seto et al 2006). This does therefore arguably mean that mixed offenders pose a greater risk to children than either image only or contact offenders. However, it should be remembered that paedophilic interest alone is not sufficient and that certainly not all those who abuse children could be considered paedophiles.

Babchishin et al (2015) do note that the high levels of paedophilic interest among image offenders may be explained by the age of the victim in the images. It is much more difficult for law enforcement to charge when there is doubt as to the age of the victim portrayed unless the victim is obviously prepubescent. As a result those who are convicted of image offending may be more likely to display paedophilic tendencies; however this may very well not be the case amongst those who view images of post pubescent children (ibid).

The Link Between Online and Offline Offending[6]

"The likelihood that identified CPOs (child pornography offenders) will cross-over to contact sexual offences is a preoccupation for applied risk assessment" (Babchishin et al 2015:12). This will be discussed fully in chapters six and seven which consider risk and the justifications for the criminalisation of virtual child pornography respectively. However, the majority of research has found low rates of recidivism for image offenders in particular, notwithstanding methodological difficulties and issues of validity, but the use of reconviction rates is not without limitations as discussed in chapter six. However as Babchishin et al (2015) note those image offenders who are most at risk of committing contact offences would demonstrate high

[6] This is discussed fully in chapter seven

levels of paedophilic interest and antisociality, have few psychological barriers to offending such as low empathy levels and have access to children.

Could Technology Assist in Risk Management – Questions for Future Research[7]

It is clear that society has advanced considerably in recent years with regard to technology. A few years ago the issue of virtual images had not arisen as the technology to create such images and videos was not as widely accessible as it is now. The concluding chapter of this thesis will consider whether there is a role for technology to be used in the risk management of child sex offenders and image offenders specifically.

Relatively recently a clinic in Montreal has utilised virtual images in the assessment of sex offenders. The assessment takes place in "the vault" which is a room which contains screens on all walls onto which images are projected. The research team are able to generate virtual images which range in age and appearance and they can adapt specific characteristics to mirror the sexual preference of the person being assessed. The person being assessed sits inside the vault wearing stereoscopic glasses which can therefore create a three dimensional experience using the surrounding walls (Solon 2017). Dr Renaud has stated that virtual reality is used for two main reasons firstly because the images are not images of real people and secondly due to the immersive nature of virtual reality the researchers are able to measure more natural behaviour (ibid). The research team acknowledge that they do create pornographic images but that they are not used for the pleasure of the individuals but for assessment purposes and liken the use of images to that of a polygraph. Dr Renaud believes that the system, when combined with other assessments, can be used to build up a profile of an individual with a view to determine the risk the individual poses to society (ibid).

[7] See chapter nine for a more detailed discussion of the role of technology

Penile plethysmography[8] is used in conjunction with viewing the images in order to assess sexual arousal. It is acknowledged that the use of penile plethysmography is controversial and as a result the research team are seeking alternatives such as electroencephalography which used a cap to determine brain activity related to sexual arousal. Dr Renaud believes that this cap could be used to assess empathy levels given that research has shown that lower empathy levels may be an indicator that an individual is at greater risk of committing a contact offence. At the present time the images created are encrypted and stored in a highly secure computer network to ensure that the images are not used inappropriately (ibid).

Although many would be reluctant for such programmes to be developed globally no doubt there is certainly an argument to suggest that advances in technology should be embraced if there is a way to utilise imaginary images to provide an outlet for a very specific group of offenders. Clearly some would argue that this is an acceptance of this behaviour which may result in normalisation. Ethan Edwards the co-founder of "Virtuous Pedophiles" argues that technology could well be used to help manage the risk of individuals committing contact offences. He argues that in the absence of demonstrable harm that imaginary images of children should be legal, along with life size child sex dolls and written erotica involving children[9]. Some academics have suggested that virtual reality and imagery may assist some offenders who have a high degree of self-control (Solon 2017) but without considerably more empirical research it is too early to know how successful this type of risk management would be. Nevertheless given that the use of such technology may result in the protection of real children arguably it is worth exploring.

[8] "Penile plethysmography (PPG) is an objective measure of sexual arousal for men, commonly used to assess sexual arousal to both abnormal (i.e., paraphilic) and normal stimuli. While PPG has become a standard measure in the assessment and treatment of male sex offenders and men with paraphilic interests in both Canada and the United States, there is a lack of standardization of stimulus sets and interpretation of results between sites". (Murphy et al 2015:1)

[9] see https://www.virped.org for more information

Outline of the Structure of the Thesis

After this initial introduction the thesis begins with chapter two which provides an introduction to the methodologies utilised within the rest of the thesis. This thesis has three distinct types of methodology one of which focuses on critically evaluating the law on VCP, doctrinal analysis, the use of semi structured interviews in order to ascertain the perception of the law as it stands amongst expert and practitioners and a Freedom of Information Act 2001 request to provide supplementary data. The thesis utilised triangulated methods in order to consider both the legal and criminological arguments with regard to the criminalisation of VCP. The advantages of this approach will be discussed below in chapter two.

Following the methodology chapter, chapter three considers the purpose of criminalisation in the abstract in order to enable to reader to gain an understanding of the philosophical arguments which underpin the legislation being considered within the rest of the thesis. Chapter four outlines the law on indecent images in general rather than VCP specifically. This chapter is included given the considerable legislative overlap contained within the statutes pertaining to indecent images of real children and the legislation with regard to VCP. This chapter also serves to demonstrate that many of the aspects of the legislation which do overlap are not clearly defined in statute and therefore case law relating to real images is of direct relevance when considering VCP given that previously decided cases will be used by the courts as precedents for cases involving virtual images.

Chapter five considers the law on VCP specifically and the implementation of the legislation from the consultation stage through to the law achieving Royal Assent. Chapter six then considers the impact of accurate risk prediction in sex offenders which is vital if the legislation is to be used to protect the public effectively. The risk of harm being caused to children is one of the principal justifications for the criminalisation of VCP and therefore it is considered important for the reader to gain an understanding of the implications and limitations of accurate risk prediction. This chapter also acts as a precursor to chapter seven which considers the justifications for the criminalisation of

VCP in detail and in particular considers whether there is an empirical evidence to suggest that a link exists between viewing indecent images of children and contact offending given that this is of the utmost importance in attempting to justify the criminalisation of indecent images of imaginary children and cartoon imagery. The chapter also discusses the full responses to the consultation paper on whether or not VCP should ever be criminalised. This information was gathered as a result of a Freedom of Information Act request which provided the full responses to the consultation paper rather than the summary provided by the government.

Chapter eight consider the results of the second methodology utilised in the thesis, namely the semi structured interviews with experts and practitioners in order to gain an understanding of their perception of the law. A thematic analysis of the interviews was conducted both in respect of the questions asked within the interview but also generally in order to highlight any additional themes which emerged from the interview data.

Chapter nine provides a summary and conclusion to the thesis. This chapter also contains a section on further research which includes a discussion of whether VCP could ever be used therapeutically and whether technology could ever be used in the risk management of child sex offenders. The thesis concludes that at the time of writing there is insufficient evidence to suggest that the criminalisation of VCP can either be justified empirically or morally.

The next chapter will discuss the methodology utilised within this thesis.

Chapter Two: Methodology

This Chapter explores the methodological approaches which have been utilised within this thesis. It is evident in any piece of research that there are a number of different types of methodological approach which could be employed but that the methodological approach chosen for any specific research is often determined by the techniques which are feasible given the constraints of the particular research being conducted (Silverman 2004). In the present study the research methodology utilised was, in part, dictated by the subject of the research itself, a critical evaluation of the justifications for the criminalisation of virtual child pornography (VCP).

There are three specific methodologies employed within this thesis; doctrinal analysis, semi structured interviews and a Freedom of Information Act request (FOI). As will be seen below the aim of this thesis is to consider the justifications for the criminalisation of VCP. In order to do that the researcher determined that it was important and necessary to include both legal and criminological methodologies. The doctrinal analysis methodology, a legal methodology, is utilised to analyse the law which was enacted to criminalise VCP. The semi structured interviews were used to ascertain the views of experts and practitioners on the law as it stands and whether criminalisation is justifiable. The FOI request, discussed below, was employed in order to obtain the full set of responses to the consultation paper which preceded the enactment of the law given that the government had only released a summary of responses which in the opinion of the researcher did not fully represent the views of the respondents to the consultation.

Arguably the current research cannot be considered mixed methods. Cresswell (2015:2) has defined mixed methods with a core assumption being that mixed methods include a combination of quantitative data and qualitative data in order to draw interpretations from both types of date for a better overall understanding. Cresswell also clarifies what he does not consider to be mixed methods such as collecting two different types of qualitative data or adding qualitative data to a quantitative piece of research given that it

“involves the collection, analysis and integration of *both* quantitative and qualitative data” (2015:2-3).

Given that the current research is not mixed methods it was necessary to consider whether the combination of research could fall under any other type of collective methodology. The most relevant was considered to be triangulation. Originally Denzin considered triangulation to be “the combination of methodologies in the study of the same phenomena” (1970:297). Denzin suggested that there are four forms of triangulation (ibid) of which the fourth form is the most relevant to this thesis, namely methodological triangulation. Initially Denzin (1970) original concept, in a simplified form, involved using triangulation as a way to validate results by playing one method off against another and increasing reliability through the use of more than one method. However, Silverman (1985:21) raises concerns regarding the idea of a ‘master reality’ as a point of reference for judging the adequacy of methods. He was also sceptical that the use of several methods would lead to a complete picture of any one phenomenon given that each method would draw a picture which needed to be understood individually. Fielding and Fielding (1986:33) were critical of Denzin’s concept of theoretical and methodological triangulation arguing that triangulation may add range and depth to analysis of data but would not result in a greater degree of accuracy or objective truth. As a result of criticism Denzin (1989:246) reformulated the aim of multiple triangulation stating that the aim concerned seeking a more in depth understanding but not a greater degree of validity in research findings. Triangulation is therefore seen as a strategy to gain a deeper understanding of a topic and an increase in knowledge rather than attempting to increase validity and objectivity in interpretation.

Anderson et al (2011) argue that legal research can be used as an additional method of data collection to achieve triangulation in criminal justice and criminological research. Anderson et al (2011) reviewed the methodology sections found in two prestigious criminal justice and criminological journals, namely Justice Quarterly and Criminology, over a period from 2005 to 2010 in order to code and categorize the methods used. Their hypothesis was that

there was a lack of triangulated methods being used in criminal justice and criminological research. They found that of the 166 articles which they reviewed only 7 met their definition of triangulated methods. For the purposes of the research they defined triangulation as “those where the author(s) used three or more different data collection techniques or methods in a single investigation” (ibid:92). Nevertheless they argue that legal research would be a logical addition to criminological and criminal justice research given that the law is “the main catalyst and foundation governing both criminology and criminal justice” (ibid: 97). In the current research the researcher believed that it was essential to combine the legal method of doctrinal analysis with criminological research methods in order to provide a comprehensive critique of the law itself in combinations with the justification for the criminalisation of VCP itself. Arguably it was only by combining methodologies that such research was possible and it was fortunate that the researcher had experience of both criminological and legal methodologies.

Research Aims

The aim of this thesis is to critically evaluate the law on VCP in order to ascertain whether the arguments for the criminalisation of VCP are justified.

Research Objectives

The aim of the thesis will be achieved via the following objectives: -

1. A critical consideration of the difficulties of attempting to define child pornography and specifically VCP.
2. A critical review and evaluation of the law in England and Wales pertaining to child pornography and VCP specifically.
3. A critical discussion of the problems inherent in the law as currently drafted.
4. A critical consideration of the possible justifications for the criminalisation of VCP, for example the philosophical justifications for criminalisation and the criminological evidence as to whether a link can be shown between those who utilise child pornography and offenders who commit contact sex offences.

5. A critical understanding of the perception of the law on VCP among experts and practitioners.

Researching Issues of a Sensitive Nature

In the circumstances, given that the nature of subject matter and the sensitivity required in eliciting an individual's personal viewpoint on such an emotive topic it was considered that a qualitative approach to data collection was the most appropriate. Although VCP does not involve the use of real children it is important to be aware of the fact that any VCP is a depiction of a sexual act with a child, even if that child is imaginary. Any discussion of the sexual abuse of children online is fraught with difficulty. Given that VCP is a relatively new phenomenon there was a potential for there to be greater difficulties with regard to research participants having differing views and understanding of exactly what constituted VCP. As a result it was felt that a qualitative approach would be more appropriate, specifically the use of semi structured interviews, in order to provide a medium in which such definitional difficulties could be freely discussed between the researcher and the interview participant.

During the registration stage of this PhD the idea of using a questionnaire was raised. The purpose of the questionnaire proposed was to gather information from the general public as to their views on VCP. However, although clearly quantitative methods have their place within the study of the sexual abuse of children it was decided that for the purpose of this thesis the views of the general public were not particularly relevant. In addition it is acknowledged that it would be ethically difficult to raise this issue by means of a generalised survey which arguably would be of limited value in the context of this thesis. It is accepted that the idea of using sexually explicit images of children, albeit imaginary children, in the risk management and/or treatment of sex offenders would most likely be perceived by many members of the public as abhorrent. Discussions surrounding child pornography of any description are often highly contentious and as a result it was considered a more measured approach to focus the research on those individuals who work in a related field and therefore arguably have a better understanding of

the complexity of the issues involved. In addition, semi structured interviews are arguably more appropriate than the use of a questionnaire as the foremost concern of the research is depth of study rather than accumulating the views of a large number of individuals in order to draw conclusions (Blaxter et al 2006, Silverman 2005, Bryman 2012).

Ethical Considerations

As Davidson (2002) notes it is important that ethical issues are addressed during both the design and conduct of any type of research whether quantitative or qualitative. Davidson also argues that regardless of the methodology employed to a certain extent social research involves an invasion of the respondents' privacy (ibid). Given the potentially invasive nature of research, especially when researching sensitive topics it is vitally important that such research is conducted in adherence to recognised ethical standards. This research has been conducted in accordance with the British Society of Criminology Statement of Ethics and Middlesex University's Ethical Guidelines. Ethical approval has been granted for this study by the Middlesex Ethics Committee.

The British Society of Criminology outlines a number of responsibilities which researchers have towards research participants. In summary these predominantly relate to the following areas, minimising harm, voluntary participation, informed consent and preservation of confidentiality and anonymity.

Minimising harm

In the present research all those being interviewed are professionals working in very specialist fields. As a result although consideration was given as to whether the participants would be subject to any harm, it was determined that provided sufficient information as to the nature of the research was provided in advance of the interview and informed consent was obtained then the risk of harm to participants was minimized.

Voluntary Participation

All participants were asked if they would be willing to take part in the research with absolutely no obligation placed upon them to be part of the research. Those who were interviewed were all willing participants and expressed a desire to be part of the research.

Informed consent

As King and Horrocks (2010) note researchers should ensure that participants are fully informed about the research process and give their consent to participate prior to any data collection. As a result prior to any data collection a consent form was designed in accordance with Middlesex University's Ethical Guidelines for which approval was sought and received from the supervision team. A copy of the form can be found in Appendix 1. The form highlighted the fact that participation was voluntary and without compensation, that participants could withdraw from the study at any point without giving a reason, the interview could be terminated at any time and participants could refuse to answer a particular question. The form stated that confidentiality would be maintained at all times and any identifying personal information would be removed from the transcripts. Participants were also informed that they would be able to have access to the final research and that the researcher would answer any questions participants had prior to the interview. All participants received the form prior to the interview and all read and signed it therefore giving their informed consent to be part of the research. Although it has been held that the mere fact of signing a consent form may be problematic in criminological research (Roberts and Indermaur (2003) it was determined that given the participants were experts in the field it would be less problematic should it become known that they were participants in the research.

Anonymity and confidentiality

All participants were assured that their anonymity and confidentiality would be maintained at all times. Some interviews took place over Skype and in such cases participants were asked if they agreed to the interviews being recorded in order for the interview to be transcribed. Participants were

assured that no one else would see the interview recordings. For those interviews conducted in person participants were asked if they would consent to the interview being recorded on a digital voice recorder in order to be transcribed at a later date. Again participants were reassured that no one else would have access to the recordings other than the researcher.

All transcriptions of the interviews whether conducted over Skype or in person were anonymised to ensure that the participants could not be identified. All personal information was redacted from the transcripts to preserve anonymity. Arguably this was particularly important in a study such as this discussing such an emotive topic given that some participants may not have wanted anyone else to be aware of their personal views on VCP. However, it is worthy of note that one of the limitations of small scale studies is the potential for individuals to be identifiable, particularly by those who work closely with them. This may inadvertently result in privacy being violated and harm to the reputation of an individual. Given this potential risk the researcher has only utilised sections of the transcriptions which do not contain any personal information or that could in any way lead to the identity of any of the participants. The findings chapter of this thesis does not make reference to particular respondents (for example police officer 1 etc) but merely identifies them by profession. This was done in order to preserve total anonymity given that some opinions expressed would not necessarily be sanctioned by employers.

The issue of interviewing offenders was discussed with the supervisory team. Although initial enquiries have been made with the Lucy Faithfull Foundation as to the possibility of interviewing some of their clients it does not appear that this will be a possibility in time for submission of this thesis. However, the researcher has not ruled out the possibility of interviewing offenders as a piece of follow up research given the fact that it would add an interesting dimension to the research. However, it is understood that this would be subject to additional ethical consideration prior to any such research being undertaken.

With regard to the methodology utilised within the first section of the thesis to analyse the law as it currently stands it was determined that there were no additional ethical considerations which should be taken into account given that the methodology did not involve any participants but instead involved the study of legal documentation and legislation.

Methodologies

Freedom of Information (FOI) Act requests

Since the Freedom of Information Act 2000 came into force in England and Wales on 30th November 2000 it has been possible for citizens to obtain information from public authorities on a variety of different topics. The FOI 200 provides the right for "any person", which includes companies and applies whether or not the person resides in the UK, to be informed in writing as to whether the public authority holds the information specified in the request or information. If the public authority does hold the information requested then the individual requesting it has a right for that information to be communicated to them. If the public authority does not hold the information then the individual has the right to a notice of denial. "public authority" is widely defined within the Act and Schedule One of the Act provides a more comprehensive breakdown of those covered by the Act. Central government departments are included as are regulators such as to the Health and Safety Executive and Local Authorities are also included. The Security and Intelligence Services are excluded.

The information must be disclosed unless it falls within one of the exemptions provided by Part II of the Act. Prior to the disclosure of information the public authority will need to determine whether they hold the information and then question whether it is in the public interest to disclose the information or whether it is in the public interest to withhold disclosure under on the other exemptions. Although a full discussion of the exemptions is beyond the scope of this section the public authority is exempt from disclosing information which is required to safeguard national security, information which would be likely to prejudice international relations or the

defence of the realm. Also public authorities are exempt from disclosing information which is being held as part of a criminal investigation, or where the cost of providing the information would exceed £650 for government departments or £450 for all other public authorities.

In the present research two FOI requests were sent to the Ministry of Justice. The first one on the 22nd December 2015 requesting a breakdown of conviction rates for offences pertaining to indecent images of children both generally and specifically under S.62 Coroners and Justice Act. The information provided can be found in the chapter considering the legal framework. The second FOI request was sent on 17th August 2017 requesting a copy of the full responses to the consultation preceding the criminalisation of VCP(redacted if necessary), given that the government had previously only published a summary of responses. The Ministry of Justice complied with this request on 14th September 2017 and sent a full set of responses which had only been redacted to obscure the names of individual respondents.

The information provided as a result of the second FOI request proved invaluable in the discussion on whether the criminalisation of VCP could be justified as it provided a large amount of data which was directly relevant and which otherwise would have been impossible to acquire without a large scale survey. As Savage and Hyde (2012:304) note “utilising FOIA allows single researchers to undertake research that has previously been the domain of large funded projects who have the resources to collect large amounts of data”. Another advantage of using FOI requests is that there are no ethical issues given that the responsibility of removing any personal data lies with the public authority to which the request is made (ibid). As a result any data received should not include any information which could identify any person living or dead. However, it is worthy of note that some electronic data can contain embedded data and therefore it is necessary to ensure that no personally identifying data is included. With regard to the request made for consultation responses the only embedded data included in the electronic

document was the name of the person at the Ministry of Justice who had collated the data in one document.

As Savage and Hyde note in a study using a number of methodologies combining the data retrieved from an FOI request with other data gathered, such as interviews with experts in the field, can prove useful. For example FOI requests can be used to "triangulate data obtained from other sources. This gives greater validity to the results of the research" (2012:313). In the current research the data gathered from the FOI request proved extremely useful as it provided responses from individuals who identified as having a sexual interest in children. This type of data would have proven very difficult to obtain from an ethical perspective, if not impossible, given that some of the respondents had never been arrested or convicted of any type of offence relating to indecent images of children. Therefore it was felt by the researcher that the data gathered from the FOI request added a considerable amount of insight into all the arguments for and against the criminalisation of VCP.

This chapter will now move on to consider the two other methodological approaches utilised within this thesis beginning with the legal methodology, doctrinal analysis.

Doctrinal Analysis

This research methodology is primarily used within legal research and involves a critical evaluation of legal rules through reference to decided case law. As a result it has been necessary to evaluate the current legislation pertaining to child pornography, both in general and in relation to VCP.

The reasons for including the statutory interpretation pertaining to traditional child pornography and not simply VCP are numerous. Firstly, the primary statutes which criminalise child pornography have been in place for a considerable number of years, the Protection of Children Act since 1978 and the Criminal Justice Act since 1988. As a result there is a considerable body of case law which can be examined and analysed. Secondly, a number of

elements of the statutes have been incorporated into S.62 Coroners and Justice Act 2009 which criminalises the possession of VCP. As a result it is necessary to use the case law which has developed from previous legislation in order to interpret and analyse how certain terms and defences will be interpreted by the courts, given the current lack of appellate case law specifically relating to S.62 Coroners and Justice Act 2009.

Legal Research

Although there is a considerable amount of theoretical literature which discusses the nature of legal scholarship there appears to be a lack of awareness as to what legal researchers actually do. As Murphy and Roberts (1987:682) note "legal theory has failed to provide any significant explanation or justification of what academic lawyers do (as is normally demanded of the theoretical component of a discipline) and thus of what academic law is or might be".

In 1983 Arthurs developed a useful taxonomy of legal research styles as part of his report on legal education and research. It is useful to include this here before discussing the different types of legal research and how they apply to the current thesis.

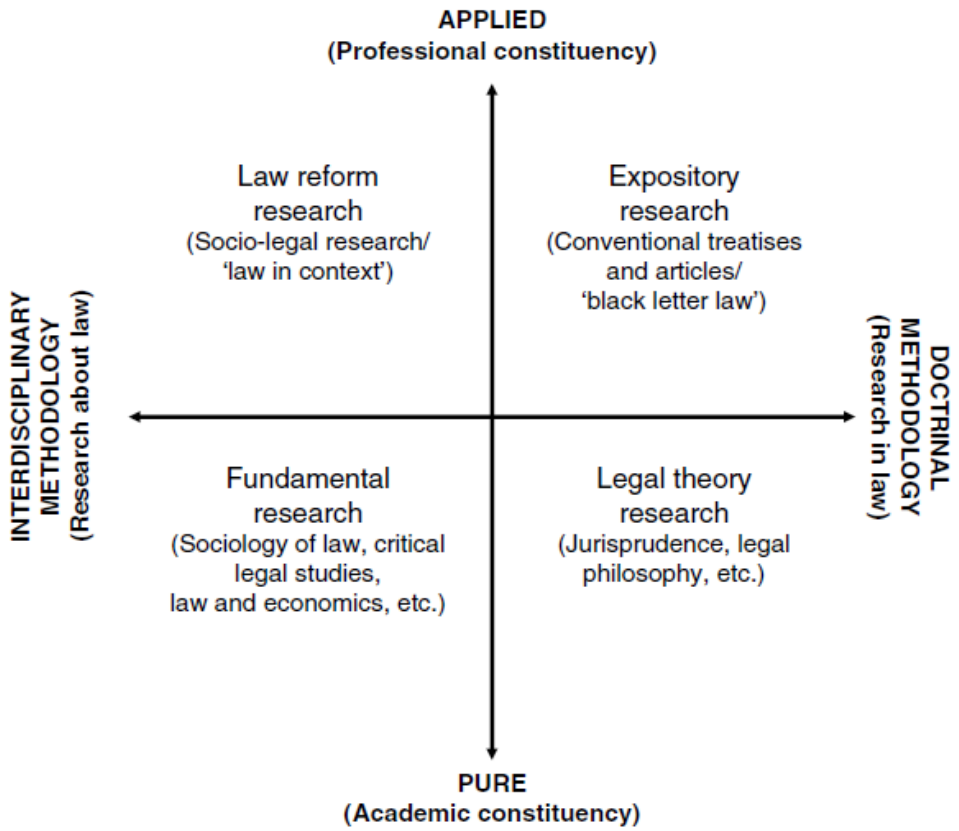

Figure 1 (Arthurs 1983:63)

As can be seen the vertical axis represents the distinction between academic research and applied work which is utilised by legal practitioners and policy makers. However, in the context of this thesis the more interesting discussion involves the horizontal axis and the distinction made between doctrinal research and interdisciplinary research.

Doctrinal legal research is concerned with the development and construction of legal doctrines through the analysis of existing legal rules. In England and Wales, a common law jurisdiction, legal rules lie within statutes and cases but clearly they do not in themselves provide a complete statement of the law in any given situation. This can only be achieved by applying the relevant legal rules to the specific set of facts which are being considered. Legal doctrines assist in determining which legal rules are relevant to a specific situation given they clarify any ambiguities within the rules and place those rules within a coherent structure and outline their relationship to other legal rules. For example in contract law the doctrine of consideration is concerned with the bargain of the contract. A contract is based on the exchange of

promises. Each party to a contract must be both a promisee and a promisor and they must each receive a benefit and each suffer a disadvantage. This benefit or disadvantage is referred to as consideration. Consideration must be something of value in the eyes of the law *Thomas v Thomas* (1842) 2 QB 851. Without consideration a contract will not be considered legally binding. The study of such doctrines is characterised by the study of legal texts and therefore is often colloquially referred to as "Black Letter Law" (Card 2002).

The focus of doctrinal research is the discovery and development of legal doctrines for inclusion in publications such as textbooks and journals and the research questions are predominantly aimed at establishing what the law is in a particular context. Arguably at an epistemological level this is different to the questions asked through empirical investigation in many other areas of research. Scientific research, both in the natural and social sciences, is based upon the collection of empirical data either as a means of testing a theory or of developing a theory. In both cases the validity of empirical research findings is determined by means of a process of empirical investigation. On the other hand the validity of doctrinal research remains unaffected by any form of empirical investigation.

Legal rules are *normative* in character given that they dictate how individuals *ought* to behave (Kelsen 1967). These legal rules make no attempt to explain, predict or understand human behaviour; the sole function of the law is to regulate conduct. As Hart (1961) notes by simply asking the question "What is the law?" doctrinal analysis takes an internal participant-orientated epistemological approach and for this reason is has been described as research in law (Campbell and Wiles 1976, Arthurs 1983). As a result of the normative character of the law the validity of doctrinal research is inevitably dependent upon there being a consensus within the legal academic community rather than by reference to any external reality.

However, in practice it is evident that much doctrinal analysis makes reference to other external factors as well as seeking consistency within the existing body of rules. For example if a particular law or legal ruling is

ambiguous it may be of assistance to consider the social, cultural or historical context of the decision. If external factors are taken into consideration then it is clear that there is a movement toward the work arguably being considered interdisciplinary. As can be seen from the above matrix there is a point along the horizontal axis where the nature of legal research moves from focusing on the meaning of the law to considering the law itself as a social entity. Examples of this can be seen in research which evaluates the effectiveness of a piece of legislation in achieving a specific societal goal or research which considers the extent to which a piece of legislation is being complied with. This has been considered to be research about law rather than research in law (Stott 1998).

When considering the vertical axis of the diagram above the primary distinction is between pure academic knowledge about how the law works and research which is conducted for a specific purpose and not simply academic learning. Arthurs (1983) describes this category as law reform research. It is clear that in a thesis such as this a number of different types of legal research have been employed. Arguably the section of the thesis which considers the moral and philosophical justifications for the criminalisation of virtual child pornography employs doctrinal research in its pure form. Nevertheless expository research has been undertaken in order to discuss the nature of the law on child pornography and the jurisprudence which has helped to shape the development of the law. The thesis also includes law reform research when considering the effectiveness of the legislation in the context of the technological challenges facing the criminal justice system.

Doctrinal Analysis as a Process

The first thing to note is that given that the process of doctrinal analysis involves the development of scholarly arguments which are then subject to criticism and reworking by other academics, doctrinal analysis is unlikely to produce definitive answers to legal questions as the opportunity for further legal debate will always be present. As a result any form of method or methodology employed during this process is often conducted subconsciously by legal academics and practitioners, who if asked, would be

likely to consider themselves simply using their common sense and logic rather than any specific form of methodology which could be recognised by those who conduct empirical research.

However, although not often recognised as a methodology there are processes which are employed by those who conduct legal research which will be outlined. The process will often begin with the question what is the law in a particular set of circumstances and therefore the initial process of applying the law to a particular set of facts can be seen to be an exercise which utilises deductive reasoning. This simple problem based methodology often adheres to a specific pattern the aim of which is to solve a specific legal problem as efficiently as possible. The steps often taken are as follows: -

1) Assemble the relevant facts
2) Identify the legal issues
3) Analyse the issues with a view to determining the relevant law
4) Locate and read the relevant background information, such as textbooks and journal articles
5) Locate and read the primary sources of law such as legislation and case law
6) Put the law into the context of the facts in question
7) Draw a tentative conclusion as to how the law applies to the facts.

Arguably this process to some extent is similar to that employed in social science research, with one important exception, the data which is collected cannot be quantified but instead is made up of the primary materials which make up the law, namely legislation and case law. As a result of the library based nature of the research doctrinal analysis has often been criticised within academic circles (Hutchinson 2013). Doctrinal research, like other research methods, requires a critical evaluation of the literature on a given topic in order for the research to ascertain what is and what is not known about the that particular topic (Walter 2010). However, unlike other disciplines in which secondary research involves the collection and summary of existing literature, the scholarship involved in undertaking doctrinal

research is "much more than a literature review of secondary sources" (Fink 2007:22-23). Within doctrinal research the primary data which is analysed consists of the actual sources of the law. According to Hutchinson (2010:38) primary legal research involves the locating and then "reading, analysing and linking" the information collated to the known body of law.

Doctrinal analysis is a method which often comprises two parts, locating the law and then analysing and interpreting the text of the law itself. Once the law has been located the researcher must then read and analyse the text in order to determining its meaning. This step involves the use of deductive logic, analogy and inductive reasoning i.e the common law devices which allow lawyers to make sense of complex legal questions (Schauer 2009).

Deductive Reasoning

This type of reasoning forms the basis of much scientific research. When applying it to legal research it tends to take the following form; the major premise identifies a general legal rule which results in a specific legal outcome when particular facts are present. The minor premise outlines the particular facts at hand and the conclusion states whether the rule outlined in the major premise applies to the facts in the minor premise and whether the specified legal outcome is likely to occur. For example in licensing law there is a general rule (the major premise) that if an objection to a premise licence application is received there must be a licensing sub committee hearing in front of the local authority. Therefore when an application is received and an objection is received from a number of local residents (the minor premise) it can be concluded that as a matter of deductive logic that a licensing sub committee hearing will take place.

However, this is somewhat idealistic given that the law is rarely this straightforward. In reality the deductive model will often fail to produce a definitive answer without considerable further analysis. Although legal rules are often stated in general terms they have been referred to as having an "open texture" (Hart 1961) given that they are often capable of being interpreted in more than one way. In the example given above for instance

there has been considerable discussion as to the meaning of what constitutes a valid objection and therefore what would be sufficient to trigger a licensing sub committee hearing. There is often doubt as to whether a specific rule can be applied to a particular factual situation and in practice this doubt will frequently be manipulated by the lawyers for both parties in order to strengthen their arguments and result in a favourable outcome for the client. As Hutchinson (2013:14) notes "only rarely will there be a rule that directly and unambiguously determines the outcome of the problem presented. Seldom will the applicable black letter rule (precedent) have been determined in a case with identical facts and circumstances.... to the problem under consideration. Seldom will legislation or regulations unambiguously determine the outcome of problems which arise". Hart (1961) concluded that in these difficult cases it would be for the judge to determine the outcome using recognised patterns of reasoning which in turn are used by lawyers in future cases in order to assist in the prediction of the outcome of future cases, the use of analogy.

The Role of Analogy

Arguably the most commonly used technique is the process of analogical reason. Analogy involves applying the reasoning from one specific case to another specific case, unlike deductive reasoning which applies the reasoning from a general rule to a specific case. When it is unclear if a specific legal rule will apply to a particular factual situation it can be incredibly helpful to examine cases which have previously been adjudicated by the courts. If the facts of the decided case are sufficiently similar to the instant facts then a conclusion can be made as to whether it would be likely that the instant facts would be decided in a similar way if the matter were to come before a court. This is the basis for the doctrine of judicial precedent.

Determining whether the facts of two cases are sufficiently similar is of course subjective and therefore the judiciary can use their discretion to distinguish one case from another if they feel that the facts of the instant case are not sufficiently similar to the facts of the decided case and therefore the doctrine of judicial precedent does not apply and the decided case is not

considered binding. However judicial discretion is not without limits and according to Bell (1989:48) judicial discretion in such cases is constrained by "rules of legal discourse" which are essentially the social conventions found within the legal community. Bell describes how these legal discourses provide an external legal framework within which a person must operate if their arguments are to count as legal justifications and it is clear that the judiciary, as well as all lawyers and legal scholars are subject to the same framework.

Inductive Reasoning

Inductive reasoning can be described as the process whereby the reasoning from a specific case becomes a general rule. Inductive reasoning can prove to be particularly useful when a specific factual situation does not appear to be covered by an existing legal rule and therefore it becomes necessary to fill the gap in the current law. It is possible for the general rule to be derived from a number of similar factual examples rather than a single example, such as where specific cases have been decided in a similar fashion they are later held to be examples of the new legal rule. For instance in tort law the case of *Donoghue v Stevenson [1932] AC 562* is a good example of inductive reasoning in practice. There had been a number of cases of negligence before this particular case, involving a snail in a ginger beer bottle, came before the courts; but it was not until this case that the tort of negligence was recognised as a more general rule which could be applied to novel cases not covered by the authorities which had come before this case. This was the result of Lord Atkin proposing the now well known neighbour principle which establishes when a duty of care might arise. Again, as in the case of analogy discussed above, the development of new legal rules will be subject to the rules of legal discourse.

It is now widely accepted that in some cases the law cannot be determined from a simple analysis of legal rules in isolation. As MacCormick (1994) notes although judges will often justify their determinations by reference to existing rules there is a certain recognition that the same rules can often be used to justify alternative and sometimes opposing legal outcomes. As Hart

(1961) notes this can be the result of the open texture of the rules and when this occurs the law has been described as indeterminate (Kress 1989). If the law is considered indeterminate then it is inevitable that some cases are decided by means of a value judgement from a particular judge on a particular day. This has been criticised as undermining the rule of law. However, in recent years these decisions often come under the banner of "policy consideration" which appears to be more accepted by the legal community and the public at large. Therefore the challenge for any legal research is to try to anticipate the likely outcome of future cases and the extent to which policy considerations will affect the outcome. According to Dworkin (1986) policy decisions are not necessarily an arbitrary and unpredictable use of judicial power but instead, he argues that legal systems are underpinned by a series of underlying principles and rules which judges are bound to follow when determining the outcome of a case, similar to Bell's (1986) rules of legal discourse.

Criticisms of the Doctrinal Method

One of the primary criticisms of the doctrinal analysis method is that the researcher is very much preoccupied with an inside view of the law. The view that the law can be studied in isolation without any discussion of the relevant factual context is the result of the common law's underlying liberal philosophy (Hutchinson 2013). Arguably that liberal philosophy is somewhat conservative and therefore it is not particularly surprising that legal critique is somewhat restrained. As Salter and Mason (2007:100) have noted "it is important not to exaggerate the critical dimension to black letter analysis because, on balance, such analysis tends towards conservatism rather than radicalism". As Simmonds (1984:30) asserts "legal science, being itself a body of practices, can be understood only by reference to its own self-conception".

This exposes a serious weakness within doctrinal research as a methodology. It has been asserted by critics that this type of methodology only considers the rules of law themselves, often in a social, moral, political and theoretical vacuum, and therefore the methodology makes no reference

to the context of the problems the rules of law are in place to resolve. The methodology also does not take into account the purpose for which the law was enacted or the effect such an enactment has upon the society in which the rules of law operate (Twining 1976). At times it may be the case that the legal researcher is considering the legal rules in isolation without any consideration of how those legal rules may be reformed or improved. Therefore potentially this type of legal research can make little reference to the practice of the courts themselves, decided case law, or the policy discussions within Parliament that may have led to the enactment of the law in the first instance.

It can appear that rules are reviewed by a researcher objectively however this may disguise a personal attitude which may be overly conservative and underpinned by positivism and liberal theory (Hutchinson 2013). As the critical legal theorists and post modernists Simpson and Charlesworth (1995) note rules can never be neutral of the law objective.

It has been argued that true legal research and scholarship should entail a sociological understanding of the law (Campbell 1974). One of the main criticisms of doctrinal analysis is the expectation that the law is viewed and evaluated without reference to any greater social context. As a result when conducting research in an area such as VCP it is arguably necessary to combine this particular legal methodology with criminological research methods in order to critically evaluate the law pertaining to VCP in the context of the wider moral debate surrounding sexually explicit images of imaginary children.

Patton (1990) has highlighted some advantages of combining methodological techniques. Although Patton was not making specific reference to the combination of legal research methodologies in combination with criminological methodologies, there seems no reason why the same principles should not apply. Patton suggests that combining methodologies may result in an improvement in reliability. In addition, a combination of methods may assist the researcher to develop the research generally given

that the earlier methodologies employed may assist in broadening the research objective and therefore adding a different dimension to the study.

Doctrinal Analysis in Context

The aim of this section is to provide an example of the operation of doctrinal research in practice in this context of the current research.

The main source of data in the case of doctrinal research will be the legal instrument in question, namely S.62 Coroners and Justice Act 2009.

According to S.62 Coroners and Justice Act 2009
(1) It is an offence for a person to be in possession of a prohibited image of a child.
(2) A prohibited image is an image which—
(a) is pornographic,
(b) falls within subsection (6), and
(c) is grossly offensive, disgusting or otherwise of an obscene character.

As a result in order to fully understand the nature of the offence it is necessary to determine whether there are any relevant definitions of the various elements of the offence. For the purposes of this example of doctrinal analysis in context the focus will be on the words "grossly offensive".

In order to research the meaning of legal words the first necessary stage is to determine whether the words are defined in the statute itself, in this case they are not. Given the lack of statutory definition it is necessary to research whether the words have been defined or interpreted in any decided cases. As with all legal research decided cases are hierarchical and therefore a definition in a case decided by the Supreme Court would be of far greater value than a Crown Court decision. As a general rule the decision of the higher courts are binding on the lower courts (Cownie et al 2013). There are a number of legal case databases available and therefore it was necessary

to conduct a search in order to determine whether there were any decided cases which discussed a definition of "grossly offensive".

By logging onto the Middlesex University intranet it was possible to access the electronic resources held by the library. Within the electronic databases is a legal database entitled Westlaw. Having logged onto the database it was possible to conduct a search for the term "grossly offensive". There are a number of options as to the types of results required and therefore it was necessary to only check the box relating to cases and document free text. The search returned 97 results of which 52 pertained to criminal law. It was then necessary to read the description of each case in order to determine whether the case was relevant or whether the case merely mentioned the words "grossly offensive" in another context, for example the phrase "grossly offensive" is also a constituent part of the offence under S.63 of the Criminal Justice and Immigration Act 2008 which outlines the offence of the possession of extreme pornography.

Having read the description of the cases it was apparent that none of the cases included a definition or a discussion of the meaning of the words "grossly offensive". The majority of cases which considered S.62 of the Coroners and Justice Act 2009 were primarily concerned with issues of sentencing rather than any discussion of the offence itself. Given that there do not appear to be any cases which discuss the meaning of "grossly offensive" either in the context of the Coroners and Justice Act 2009 or the Criminal Justice and Immigration Act 2008, it was necessary to determine whether there were any secondary sources which provided any form of definition of the meaning of the words.

Prior to the enactment of both Acts the Ministry of Justice released a circular outlining the background to and elements of the offence (Ministry of Justice 2009, Ministry of Justice 2010). In both of the circulars the commentary on the words "grossly offensive" is the same (the following extract is contained within Ministry of Justice 2009: para 12 onwards)

"**Grossly offensive, disgusting or otherwise of an obscene character**

12. The words ‘grossly offensive’ and disgusting’ are not alternatives to ‘obscene character’ but are examples of it. They are drawn from the ordinary dictionary definition of ‘obscene’ and reflect different aspects of that concept. They are intended to convey a non-technical definition of that concept. It is a definition which is distinct from the technical definition contained in the Obscene Publications Act 1959, that definition being specifically geared to the concept of publication.

13. Again, this element of the offence must be read in conjunction with the other two elements. The test as to whether an image comes within the terms of the offence is not simply whether it is grossly offensive, disgusting or otherwise of an obscene character, rather it is a test of whether all elements of the offence are met. It is all three elements working together which should ensure that the only images which are caught are those which would also fall foul of the Obscene Publications Act 1959."

As a result it is clear that the words "grossly offensive" are meant to provide a non technical description of images. Therefore it was necessary to determine whether any guidance had been issued by The Crown Prosecution Service. The Crown Prosecution Service Legal Guidance sets out the following:

"**Grossly offensive, disgusting or otherwise of an obscene character (section 62 (c))**

'Grossly offensive, disgusting or otherwise of an obscene character' are not intended to be read as three separate concepts. "Grossly offensive" and "disgusting" are examples of "an obscene character" and not alternatives to it. They are drawn from the ordinary dictionary definition of 'obscene' and are intended to convey a non-technical definition of that concept".

As is evident here again there is no actual definition of what would be considered "grossly offensive" but instead the words are merely a non technical way to describe something which may be considered obscene.

Arguably this lack of definition may have an echo of the US Supreme Court case of *Jacobellis v. Ohio, 378 U.S. 184 (1964)* in which (when referring to hard core pornography) Potter Stewart, one of the Justices famously stated "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that". There is a difficulty with employing the equivalent standard of "I know it when I see it" given that such loosely defined elements of an offence can be open to very different interpretations by different Magistrates and juries.

Finally, in order to be as thorough as possible it was necessary to examine and review any commentaries which had been written on S.62 Coroners and Justice Act 2009, whether this be in the form of journal articles or practitioner texts. By employing a Westlaw search for the words "grossly offensive" this time within the journal section of the database Westlaw returned 114 results of which 90 pertained to criminal law. It was then necessary to read the description of each journal article in order to determine relevance. Having reviewed the list and downloaded the relevant articles it was then necessary to read all the articles to extract any relevant information. Given that there is not a lot written on this particular statutory provision it was not possible to find much additional information which would assist in determining the meaning of the words "grossly offensive". Antoniou (2013:342) adds a useful observation by stating that "the material must depict child sexual abuse that goes beyond the threshold of indecency….the Coroners and Justice Act 2009 adopts the higher standard of obscenity", however again this does not offer any insight into defining the words "grossly offensive". This was found to be the case with regard to the remaining journal articles which offer criticism of a lack of definition but do not seek to assist in providing clarity as to the meaning of the words "grossly offensive". The principal practitioner text for criminal lawyers, Archbold Criminal Pleading Evidence and Practice (2018) again no offers no additional insight into the meaning of "grossly offensive" but simply states that an image must be "grossly offensive,

disgusting or otherwise of an obscene character" (Richardson 2018) (31-128).

Under usual circumstances it would be necessary to consider the case law under the Obscene Publications Act 1959 in order to determine the test for obscenity. However, given that the Ministry of Justice has expressly stated that "grossly offensive" is a non technical definition of the concept of obscenity, the Obscene Publications Act 1959 case law is not relevant as it contains a specific and technical definition of obscenity, namely

"For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it" (S.1(1) Obscene Publications Act 1959.

Therefore to conclude it is apparent that the decision as to whether an image is "grossly offensive" will be determined by the Magistrates, District Judge or Jury and no doubt they will know it when they see it!

Semi Structured Interviews

The third methodology employed within this thesis is the use of semi structured interviews in order to ascertain the opinion of a number of academic experts and practitioners as to whether the criminalisation of VCP can be justified. The interviews have sought to determine whether the experts believe that VCP has a role to play in the risk management of child sex offenders and/or paedophiles who do not currently offend against children. The interviews will also endeavour to elicit views as to whether VCP could be used in a therapeutic context.

According to Rubin and Rubin (2005) many social scientists tend to use qualitative research methodologies in order to attempt to accumulate detailed accounts of human behaviour and the contexts in which such behaviours

occur. Arguably therefore qualitative methods may be most suitable in order to develop a greater understanding of the nature of behaviour and the ways in which the social world is experienced by the subject.

Clearly, there are a number of different types of qualitative research methodology which could be employed in a research project such as this but as Kvale (1996, 2003) notes interviews are often more powerful in gathering data, especially when compared to quantitative methodologies, such as the use of questionnaires. As Cohen et al (2007:29) state interviewing "is a valuable method for exploring the construction and negotiation of meanings in a natural setting". As Berg (2007:96) highlights one major advantage of interviewing is the fact that it enables participants to "speak in their own voice and express their own thoughts and feelings".

The value of semi structured interviews in social research has long been recognised and therefore it is often considered to be one of the most favoured methods in the social sciences. As Kvale (1996) notes certain things are not directly observable and therefore interviewing individuals can be one of the most effective ways of exploring particular topics. Additionally, given that interviews are an interactive process the interviewer can seek clarification on a particular point made by an interviewee and ask follow up questions to elicit more detailed information while responding to any issues raised during the interviews. As a result it could be argued that interviews can help to broaden the scope of a research topic.

As Kvale (1996:174) recognises an interview is "a conversation, whose purpose is to gather descriptions of the world of the interviewee". Blaxter et al (2006) state that interviews are often worthwhile as they enable researchers to gather information which is not accessible through the use of questionnaires and observations. Interviews enable researchers to determine if a question has been understood as originally intended and if not, the researcher is able to provide the interviewee with additional guidance or rephrase the question in order to elicit the answers most relevant to the research. As a result the data will arguably be more accurate and therefore

more useful. Given the availability of relatively low cost digital recording equipment researchers can record the interviewee's words with a greater degree of accuracy than can be achieved through contemporaneous note taking, which Hermanowicz (2002) notes may be deemed obtrusive or disruptive. Recording interviews can also take considerable pressure off the researcher when the time comes to transcribe the interview. Clearly there may be inaudible moments but arguably a greater degree of accuracy can be achieved than through note taking alone.

Although interviewing has distinct advantages there are disadvantages. Hermanowicz (2002) highlights that even though interviewing is among the most revealing and often enjoyable research methods it can be deceptively difficult. Hammersley and Gomm state that it is important that researchers remember that "what people say in an interview will indeed be shaped; to some degree, by the questions they are asked; the conventions about which can be spoken about... by what they think the interviewer wants; by what they believe he/she would approve of or disapprove of" (2008:100).

Robson (2002) notes that interviews can be time consuming with regard to both data collection and analysis given that the interviews need to be transcribed. The transcribed interviews then need to be coded and the results analysed. Therefore, in summary, there are a number of advantages of interviewing, in comparison to quantitative methods such as questionnaires, namely, fewer incomplete or irrelevant responses, a higher degree of flexibility both with regard to question order and the possibility of question development as the interview progresses. However, it has been noted that interviews can be time consuming, often involve a small scale study, there is the potential for inconsistency and the interviews and therefore research data is never 100% anonymous.

Nevertheless, regardless of the potential disadvantages of interviewing there is no doubt that for the current research project interviews were by far the most appropriate research methodology. Semi structured interviews have been chosen for a number of reasons. As Crow and Semmens (2008) note

semi structured interviews are likely to be particularly helpful when the researcher is investigating a complex topic or when conducting research which could be referred to as an "elite" topic (Moyser and Wagstaffe 1987). Elite studies involve the more powerful members of society, such as judges, magistrates, senior police officers (ibid). Therefore it may be beneficial to conduct interviews with such individuals and utilise their considerable knowledge to the greatest extent possible. When conducting research into VCP and child pornography generally it would be beneficial for there to be a certain level of flexibility with regard to the order of questions asked and an opportunity for follow up questions to be asked and therefore semi structured interviews arguably are the most suitable research method for gathering the desired information.

The Interviews

Semi structured interviews were undertaken with 13 individuals working within this area of expertise, 3 academics, 4 police officers, 4 legal professionals and 2 practitioners working directly with sex offenders.

Sampling

With regard to the selection of participants to be interviewed a purposive sampling approach has been employed with the aim of generating in-depth understanding of the topic of this thesis (Patton 2002). As Patton (2002) notes purposive sampling entails selecting participants on the basis that they will be able to provide "information rich data" to be analysed (ibid:230). With regard to the present study participants were selected who had a specialist knowledge of the subject matter concerned. Given this is a particularly specialist area of knowledge there were a limited number of potential research participants. As a result a number of letters requesting participation were sent to those individuals who had been highlighted as being experts in the area. Of these a certain number replied and agreed to be interviewed. As a result the sample can be seen to be somewhat self selecting as all those who replied were subsequently interviewed. Therefore the sampling method could be viewed as convenience sampling which is seen as a sub type of purposive sampling. However, given that convenience sampling has

been criticised for being the least rigorous and least justifiable method of sampling (Sandelowski 1995) the researcher would prefer that the sampling technique be considered expert sampling where the sample only includes those who have expertise in a certain area (Statistics How To 2018).

Although purposive sampling has obvious advantages it has been criticised as a result of the possibility of selection bias. In the present study arguably there is little selection bias as all those individuals who replied to the request to take part in the research were in fact interviewed. However, it is acknowledged that in the instant case there was not a particularly large pool of potential participants who could have been participants in any event. However, it is acknowledged that there is no intention to attempt to apply the findings from the present study to the general population and therefore there less emphasis was placed of the generalisability of the results. However, the sampling technique is appropriate in the context of the research aims and broader qualitative approach.

It should be noted at the outset that VCP is a very specific area of law and as a result one of the limitations of the research was the difficulty in locating experts in this area who were available and willing to be interviewed. Half of the interviews were conducted over Skype and half of the interviews were conducted in person. All interviews were recorded and with the interviewees' permission have subsequently been transcribed.

As Patton notes the aim of qualitative interviewing is “to get the person being interviewed to talk about (their) experiences, feelings, opinions and knowledge” (1990:297).

Semi structured interviews frequently utilise a topic guide which may include "a list of topic headings and possibly key questions to ask under those headings" (Robson 2011:278). In respect of the research into VCP and the justifications for its criminalisation the interviews were structured loosely as set out below: -

1) Introduction to the study and the purpose of the research.

At the beginning of each interview the researcher outlined the nature and purpose of the study and drew the interviewees' attention to the consent form and the researcher provided a reminder that the interviewee could refuse to answer any question and stop the interview at any time.

2) General professional background

The researcher asked the interviewee to provide a brief overview of their professional career, together with an explanation as to how the interviewee had come to be working in their specific area of expertise.

3) Interviewee's opinion with regard to whether VCP should be illegal in principle

It was necessary in almost all cases to provide an overview of the law relating to VCP and the specific offence as set out in S.62 Coroners and Justice Act 2009. Although all interviewees were familiar with the general principles of the offence it was not expected that interviewees knew the legislation in great detail. The Interviewees were asked to provide reasons for their answers.

4) A follow up question was asked to ascertain whether the interviewees' opinion changed if the non photographic pornographic images of children (VCP) were created using images of real adults who had consented to their images being morphed into VCP

The aim of this question was to ascertain whether the interviewees' views changed if the human being depicted in the image had consented to such an image being created. Again the respondents were asked to give reasons for their answers.

5) Possession versus distribution/creation

S.62 of the Coroners and Justice Act 2009 criminalises the possession of VCP specifically rather than the creation or distribution of VCP. The interviewees were asked for their opinion as to whether the law was correctly focused.

6) Criminalisation on the grounds of morality

The respondents were asked for their views on whether actions should be criminalised on the basis of morality, both generally and specifically in cases where it is not possible to demonstrate any direct harm being caused.

7) The alleged link between online offending and contact offending against children

The respondents' were asked for their opinion, given their professional experience, as to whether there is a link which can be demonstrated between viewing pornographic images online and contact sex offending against children. The respondents were also asked if their view changed if the images viewed were VCP – given that VCP pertains to images which depict imaginary children.

8) Personal experience of anyone utilising VCP

Respondents working within the Criminal Justice System were asked if they had ever come across offenders who had utilised and/or been prosecuted/sentenced for the use of VCP and if so whether this had been seen in combination with more traditional child pornography or whether VCP had been seen in isolation.

9) The use of VCP in managing offenders in order to manage risk

Finally the interviewees were asked if they could ever envisage a scenario in which VCP could be used as a risk management tool for those offenders who

are diagnosed with paedophilia. Given that some of the research now points to the fact that paedophilia can be considered a sexuality it may be necessary in the future to evaluate alternative methods of risk management in order to prevent offending even if the material concerned is considered morally distasteful.

Although the general outline set out above was used when conducting the interviews, as is often the case, the questions were developed and follow up questions asked depending on the responses from the interviewees. This enabled the interview to take the form of a conversation more than an interview which arguably enabled the respondent to feel more comfortable. The researcher felt that this was particularly important given the sensitive nature of the topic of the research and the questions being asked. Arguably it also enabled the interviewee to acknowledge that the topic and legislation can be quite confusing and that there are no easy answers when discussing difficult matters such as images of child sexual abuse, whether real or imaginary.

Limitations of the Research

The main limitation of the research, as outlined above was the number of available experts who were available to be interviewed. Although a relatively large number of emails were sent to academics and practitioners who held expert knowledge in the area of child pornography the number who replied was limited. Of those who did reply there were some who expressed a willingness to take part in the research. However, when follow up contact was made there was then no response. Again contact was made with a number of legal professionals, many of who expressed a willingness to be involved but then their professional lives became so busy it was impossible to schedule an interview.

It is recognised however, that it may not be possible to draw definitive conclusions from the interviews undertaken. However, the purpose of the interviews in conjunction with the legal analysis and data gathered from the FOI request is to analyse whether or not there is any real justification for the

criminalisation of VCP. In addition, the interviews have served to validate the findings from the legal research and provided a useful insight into the potential problems facing the legislature as technology advances, specifically with regard to actions of individuals in virtual worlds and virtual reality.

Another limitation of the research is the fact that VCP is a relatively new phenomenon. As a result there have been a small number of reported cases which include the use of VCP. Cases heard in the Crown Court or Magistrates Court are not reported as a matter of course therefore it has been necessary to request the assistance of the Ministry of Justice to ascertain the extent to which cases of VCP have come before the courts. Although the Ministry of Justice have provided the relevant statistics on how many cases of VCP had been prosecuted, their records are not particularly up to date and do not provide information on specific cases. As a result even though enquiries have been made of the Crown Prosecution Service it has proved impossible to study case transcripts as the majority of such cases have simply not been recorded.

Data Analysis

As noted above the decision to use a qualitative methodology for this research was theoretically and practically based; there was a commitment to seek to understand the perspective of those being studied (Bryman 1988:61-63). In addition, given the small number of respondents available a quantitative approach would have been impossible. The approach taken to analyse the data was primarily thematic as there was a desire to identify commonalities and differences in the views of the respondents.

According to Gibson and Brown (2009:128-9) when using thematic analysis the researcher is seeking to achieve three aims, examining commonality, examining difference and examining relationships. It is clear that thematic analysis is widely used but there does not appear to be a consensus with regard to what exactly thematic analysis is and how to it should be done (see Attride-Stirling 2001, Tuckett 2005). When conducting data analysis Grounded Theory is often the method of choice. According to Charmaz and

Bryant "Grounded theory is a method of qualitative inquiry in which researchers develop inductive theoretical analyses from their collected data and subsequently gather further data to check these analyses. The purpose of grounded theory is theory construction, rather than description or application of existing theories. (2011: 292). Although thematic analysis is similar to Grounded Theory there is less emphasis on developing a theory when using thematic analysis. Given that thematic analysis is not associated with any particular theoretical framework it arguably has a degree of flexibility which enables it to be used in many different ways. For example in the current thesis two types of thematic analysis have been undertaken, one which can be considered conceptual in the sense that the data has been examined with the conceptual framework of the questions asked in interview. In addition a more general thematic analysis has been conducted in order to determine the themes which have emerged from the research which can be seen as independent from the actual questions asked. This is turn has provided additional data which has proved invaluable when considering the fundamental principles of criminalisation and societal views on those with a sexual attraction to children.

Data Analysis in Practice

The first stage of the data analysis involved reading and re-reading the transcripts of the interviews thoroughly in order to ensure, as Schmidt (2004:255) notes that the researcher does not neglect any ideas or sections of the transcript when conducting the analysis. The next stage was to summarise the interviews in order to enable the research to focus on the main questions raised by the respondent without getting lost in the detail of the responses (Miles and Huberman 1994:51). This also enabled the researcher to create comparisons between the interview transcripts and allowed for notes to be made on broad topics such as whether or not the respondent was in favour of the criminalisation of VCP in principle. This was very useful when it came to looking at the data specifically in relation to the questions asked, for example to gain expert opinion on whether or not there is a link between viewing child pornography and contact offending. However, this analysis proved to be relatively basic so a decision was made to analyse

the data fully using an inductive approach in order to determine the themes emerging from the data which were not directly connected to specific questions but nonetheless enhanced the researcher's understanding of the underlying themes when dealing with such an emotive topic.

Therefore another set of transcribed interviews were used which had not been annotated in any way. These were then put into a table with a column for the research to highlight the emerging themes as the data was categorised and coded. As a result of all respondents using varying terminology to describe VCP (these terms have been aggregated to mean VCP and are discussed in the introduction) and the fact that qualitative data analysis software such as Nvivo would be unlikely to recognise the use of the different terms used by the respondents, a decision was made to code the data manually.

Gibson and Brown note that "a code draws attention to a commonality within a dataset" (2009:130). Clearly therefore if a code applies to one dataset but not another then this can assist in identifying differences. It is also possible to use codes to identify patterns within the data which can assist in the exploration of relationships. As a result therefore coding data can assist a researcher to achieve the three main aims of a thematic analysis as discussed above.

As with many aspects of thematic analysis there are no hard and fast rules as to the nature of a code. For example, Matthews and Ross (2010) use a system of abbreviations and numbers, Miles and Huberman (1994) use a more complicated set of abbreviations, whereas Barbour (2008) and Saldana (2009) use full words or short phrases. There is a considerable amount of discussion in the literature on qualitative research methods as to the types of strategies to be employed when coding data. Gibson and Brown (2010) suggest making a distinction between apriori codes which are created to highlight categories that are already of interest to the researcher, whereas empirical codes are those which are derived from reading the data itself. Empirical codes are more likely to be used in inductive research in which the

data is examined and analysed prior to the consideration of existing literature, whereas apriori codes are more likely to be used in deductive research which is likely to be based in part on the researchers previous knowledge. However, it should be noted that even when conducting inductive research using empirical codes it is likely that the researcher's previous knowledge of the subject being studied will inform the decision making process when coding data.

In the present thesis apriori codes were used when considering the conceptual thematic analysis based on the questions asked, whereas empirical codes were used during the inductive phase of the research which considered the underlying themes of the data which were not immediately related to the questions asked.

Therefore the following process was repeated for both the thematic analysis pertaining to the questions asked of the respondents and as part of a more general thematic analysis in order to determine any additional themes arising from the interview transcripts.

1) Initial categories were identified by means of a through reading of the interview transcripts. As Neuman (2006) notes a thorough reading of the transcripts is vital in order to fully understand the categories emerging from the data. The categories chosen tended to be broad subject areas into which the data could be grouped.

2) After the initial list of categories had been determined and it had been decided that the codes relating to these categories would take the form of words and phrases the codes were written alongside the interview transcripts. In order to do this easily the interview transcripts were placed in table format with a specific column included in which the codes were written. The process of coding, sometimes known as data reduction (Hennink et al 2011:227) helped to summarise the key points of the interviews which in turn facilitated the researcher to see beyond the specific detail of each interview

which in turn made it easier to determine the themes contained within the interview transcripts (Richards 2009).

3) The codes and categories were refined as required. Some codes were removed as they did not appear sufficiently frequently within the interview data. New categories were also identified to bring together codes which at first instance appeared to standalone.

4) Themes were identified in order to determine the general research findings. It was important to remember the purpose of thematic analysis at this stage namely "examining commonality, examining differences and examining relationships" (Gibson and Brown 2009:128-9). Given the inductive approach being taken the research Bryman (2008) notes that the researcher should also be mindful of the fact that an unexpected theme may arise from the data and this was certainly the case within this research.

Having identified the theme in the interview transcripts a final review of the transcripts to place to ensure that nothing had been missed. Once this had been done the research findings were collated. The finding from the interviews are discussed in a later chapter after a discussion of the legal framework upon which VCP is criminalised, the philosophical context and an in depth discussion of the reasons for criminalisation. However it was felt by the researcher that placing the methodology section and the beginning of the thesis would provide a useful overview of the types of methods employed in the following chapters.

Having discussed the particular methodologies utilised within this thesis, the next chapter will provide the philosophical context for a discussion on the justifications for criminalisation. Arguably before being able to consider the justifications for specific legislation it is helpful to provide an overview of the reasons for criminalisation which can later be applied to specific legislation, in this case S.62-S.68 of the Coroners and Justice Act 2009.

Chapter Three: Harm, Morality and the Limits of Law

The aim of this chapter is to provide a broad overview of the justifications for the criminalisation of behaviour, specifically with regard to behaviour which can be considered immoral and/or obscene. The chapter will specifically consider the harm and offence principles before discussing obscenity and freedom of expression. This chapter aims to provide an overall background against which the justifications for the criminalisation of VCP can be evaluated.

The Coroners and Justice Act 2009 (CJA 2009) came into force in April 2010. Certain sections of the Act attracted considerable media attention. The aim of the Act was "to deliver more effective, transparent and responsive justice and coroner services for victims, witnesses, bereaved families and the wider public." (Liberty Central 2010).

However, the Act also contained provisions pertaining to the offence of assisted suicide and the new defence to murder entitled loss of control which replaced the old defence of provocation. In light of these considerable legislative developments it is arguably unsurprising that the criminalisation of non photographic pornographic images of children, referred to in this thesis as virtual child pornography (VCP), was somewhat overlooked by the media. Prior to S.62 of the CJA 2009 the possession of fantasy visual representations of child pornography, in the form of computer generated images, cartoons or drawing was not prohibited by law. In 2007 the government demonstrated its intention to criminalise such images through the publication of a Home Office Consultation Paper entitled "Consultation on the Possession of Non-Photographic Visual Depictions of Child Sexual Abuse. The Consultation Paper accepted that:

"cartoons, drawings and material created entirely by manipulation of computer software do not harm real children in the same way as taking indecent photographs of children, which are currently covered by legislation" (Home Office 2007:4).

However, two harm based arguments were put forward with regard to criminalisation, namely that

"fantasy images themselves fuel abuse of real children by reinforcing potential abusers' inappropriate feelings towards children" (ibid:5) and that "these images can be used to help groom victims" (ibid:5).

It should be noted again that S.65 CJA 2009 which defines the word "image" and "child" specifically states that "references to an image of a child include references to an image of an imaginary child" (S.65(8)).

Nevertheless, even the Executive Summary of the Consultation Paper acknowledges that

"We are unaware of any specific research into whether there is a link between accessing these fantasy images of child sexual abuse and the commission of offences against children, but it is felt by police and children's welfare organisations that the possession and circulation of these images serves to legitimize and reinforce highly inappropriate views about children".

It is clear therefore that the criminalisation of VCP is based on potential harm that may arise rather than any demonstrable direct harm caused. The aim of this chapter is firstly to consider the extent to which the law should attempt to police morality and the harm based arguments for the criminalisation of any behaviour. The specific justifications for the criminalisation of VCP will be considered in chapter seven of this thesis.

To What Extent Should the Law Attempt to Police Morality?

Feinberg (1990:79-80) argues that the regulation of morality is less than satisfactory given that

"much of what we call morality consists of rules designed to prevent evils of a kind whose existence would not be the basis of any assignable person's grievance... To prevent them with the iron fist of legal coercion would be to

impose suffering and injury for the sake of no one else's good at all. For that reason the enforcement of most non-grievance morality strikes many of us as morally perverse".

This appears to imply that some of the regulation of morality is not therefore justified on the basis of harm (considered below) but instead on the basis of legal moralism. Legal moralism can be defined as "the immorality of an act of type A is a sufficient reason for the criminalization of A, even if A does *not* cause someone to be harmed" (ibid:4). Some have argued that in its most extreme form legal moralism is the view that what is morally required is also legally required, therefore the law's proper function is to enforce morality (Kuflik 2005). However, clearly it would be impossible to have a criminal sanction for every immoral act. It would be impossible to enforce and arguably would result in almost everyone in society being criminalized and the enforcement of the law would surely violate an individual's privacy and autonomy and therefore ultimately cause harm.

As a result the following may provide a better definition of legal moralism and certainly one which appears to reflect the current approach taken with regard to the regulation of morals within society

"if the conduct of type A is regarded as (or is) immoral, this *can* provide a sufficient reason for the state to criminalize A, even though A-type conduct does not cause (or risk causing) someone to be harmed" (Petersen 2011:85).

Traditionally therefore there have been three basic arguments used to defend legislation the aim of which is the protection of public morality (Foster 2011); first, the prevention of physical harm and the prevention of the incitement of criminal acts based on the Millian harm principle. Second, the protection of morals is used to prevent the vulnerable from being corrupted or depraved, the central tenet of the Obscene Publications Act 1959 offences. However many libertarians feel this interference is never justified and that self autonomy and self fulfilment should take precedence (Foster

2011). Third, some indecency legislation such as the Post Office Act 1953 and some broadcasting controls are based on protecting society from shock or outrage, however this is a particularly weak justification and one which may not be considered a justifiable interference with the right to freedom of expression (*Handyside v UK (1976) 1 EHRR 737*). These justifications for criminalisation will be considered firstly in principle in this chapter and then specifically in relation to VCP in a later chapter in order to determine if any provide a legitimate justification for criminalisation.

The Harm Principle

It is understandable that many discussions of criminalisation begin with a discussion of the harm principle. This principle is often seen as the determining factor when deciding which conduct should be criminalised and which should not. John Stuart Mill, the founding father of the harm principle, suggested a clear limit to the coercive power of the law in his concept of the harm principle:

"That the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, whether physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forebear....because in the opinion of others to do so would be wise or even right." (Mill 2017:10).

Feinberg frames the harm principle as follows "It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no means that is equally effective at no greater cost to other values" (1988:xiii).

The quotation captures the essence of the harm principle namely that conduct should not be criminalised unless it is harmful to others. Conduct which does not harm others should therefore not be criminalised even if that conduct is considered by many to be immoral. The harm principle opposes legal moralism and the view that it is considered acceptable to criminalise

behaviour simply because it is considered to be immoral. This contention has aroused continued debate amongst legal philosophers for the past Century and a half about what exactly constitutes ‘harm’ and what is or should be the relationship between morality and law.

What is 'harm'?

Mill, as a philosopher, was not explicit on this point and used terms such as ‘harm’, ‘loss’, ‘damage’ and ‘injury’ as if interchangeable although his overriding concern was the general good. Thus, while it may harm a businessman if his trade suffered as a result of competition, provided the competition was fair and conducted according to agreed rules then such harm should be allowed because competition would contribute to the general good. What Mill (2017) was clear on is a distinction between harm and offence which he saw as insufficient in seriousness to warrant legal intrusion and given that people can take offence at a huge array of actions this would seem a reasonable standpoint.

Does Harm Include Offence to Others?

A considerable source of dispute has been whether harm includes the feelings that other people may have about the conduct of certain individuals. For example if a person behaves in a way which causes distress, anxiety or offence to others then if this causes 'harm' to those individuals is this sufficient to warrant criminalization. Feingberg (1988) has argued that offence can be considered a harm, but only where the offence is a 'serious offence'. He argues that for an offence to be considered a harm then another person's interests must be set back and therefore feeling minor offence or anxiety would not in fact set a person's interests back: -

"One's interests... consist of all those things in which one has a stake...These interests, or perhaps more accurately, the things these interests are *in*, are distinguishable components of a person's well-being: he flourishes or languishes as they flourish or languish. What promotes them is to his advantage or *in his interest*; what thwarts them is to his detriment or *against his interest*" (ibid:34).

Therefore for the harm principle to be satisfied there must be an adverse effect upon something substantial. Therefore what matters is not a wrong *per se* but the implications of that wrong on a person's well being. However, as Feinberg continues

"the offended mental state in itself is not a condition of harm. From the moral point of view, considered in its own nature (apart from possible causal linkages to harmful consequences), it is a relatively trivial thing" (1988:3)
For Feinberg the law can be used to prevent offence when such offence is serious enough when measured against three standards:

1. The extent of offensiveness standard. If the offence caused was of sufficient intensity, durability and extent that repugnance amongst general strangers could be anticipated.
2. Reasonable avoidability standard. The ease to which offended witnesses to a given act could avoid seeing that act.
3. The Volenti standard. Whether or not witnesses have willingly undertaken the risk of being offended by dint of curiosity or expected gratification. (1988:45)

In order to determine which conduct that causes offence is sufficiently serious to warrant criminalisation Feinberg (1988) suggests that it is for the legislators to balance the seriousness of the offence caused against the reasonableness of the behaviour in question (ibid: Chapter 8). In his work, Rights, Justice and the Bounds of Liberty Feinberg argued

"In order for the offense (repugnance, embarrassment, shame etc.) to be sufficient to warrant coercion, it should be the reaction that could reasonably be expected from almost any person chosen at random, taking the nation as a whole, and not because the individual selected belongs to some faction, clique or party" (2014:88).

Feinberg acknowledges that certain behaviours may cause "profound offense". Profound offense has five specific characteristics; firstly, it must have a different tone to an ordinary nuisance in that it must be deep,

profound, shattering or serious; secondly, people must be offended by the mere thought of the behaviour taking place regardless of whether they personally witness it and even if the behaviour takes place in private; thirdly profound offense cannot be avoided simply by looking away; fourthly given that profound offense arises from an affront to the general standards of propriety it is offensive because it is believed to be wrong. It is not simply believed to be wrong because it causes offence. Finally, profound offense tends to be impersonal and as a result individuals do not personally feel they are victims of the offensive behaviour.

Therefore it could be argued that VCP fulfils the characteristics of profound offense and therefore there is an argument for criminalisation simply because the idea of fantasy images of children in sexualised situations is offensive, especially considering the statute uses the words "grossly offensive" and therefore the images would only fall foul of the act if they were grossly offensive in nature. Nevertheless the CJA 2009 criminalises the private possession of VCP and it is therefore arguably different to the majority of behaviour which is criminalised on the basis of the protection of morality. Offences such as the common law offence of outraging public decency, or the offence of the public display of indecent matter contrary to S.1(1) Indecent Displays (Control) Act 1981 have a public element included in the actus reus of the offence.

Under such circumstances Feinberg (1988) argued that the harm principle could be extended to embrace an offence principle. However, the notion of 'serious offence' is problematic as it is extremely difficult to measure offence. Feinberg (1984:46) states that to be considered a serious offence the behaviour of the actor must cause a 'disliked psychological experience', however this does not in reality assist in determining the meaning of offence as it is itself rather vague.

Simester and Sullivan (2008:590) argue that the conduct in question should be wrongful and not merely offensive:

"Suppose, for example, that the sight of an interracial couple holding hands causes enormous affront to a particular community. It seems to us that, regardless of the scale of the reaction, there is no case for invoking the Offence Principle here, because there is nothing wrong with the couple's behaviour".

The distinction employed by Simester and Sullivan (2008) it that the offensive behaviour must have a negative impact upon the party who is offended. There a racial insult is likely to be considered harmful as it has a direct impact upon the victim but witnessing two men or women kissing would not be considered harm as it would not impact upon the person who witnessed the behaviour directly even if that person found it distasteful or offensive.

Many of these abstract deliberations were crystallised in rather more concrete terms by the debate between Hart and Devlin following the publication of the Wolfenden Report in 1957 which looked at the legal standing of prostitution and male homosexuality.

The Wolfenden Report defended the following conception of the function of the criminal law

"..its function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation or corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence".(Wolfenden et al 1957:2)

However the Report went on to conclude that

"It is not the duty of the law to concern itself with immorality as such" (ibid). In fact the report stated that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business"

(Wolfenden et al 1957:224). Lord Devlin, a High Court Judge, dissented from this view and argued that popular morality should be allowed to influence lawmaking even to the extent that private acts between consenting adults should be subject to legal sanction if they were deemed to be morally repugnant to the so-called 'reasonable man' embodied as he would put it by 'the man in the Clapham omnibus' (Devlin 1965:15). For Devlin there was a shared morality which bound society together and it followed that to allow anything abhorrent to that morality risked the breakdown of society and the limits of tolerance were breached by any actions which aroused general feelings of intolerance, indignation or disgust or vices so abominable that their existence caused offence. Strong and consensual sentiments of revulsion were sufficient evidence than an action was harmful to society and therefore the law could be used to eradicate such vices and conduct. Such thinking led Devlin to the arguably unsustainable opinion that "what is important is not the quality of the creed but the strength of belief in it" (ibid:114) – a view that, somewhat perversely since it was rooted in a commitment to some notion of morality, could permit all manner of overtly *immoral* actions provided there were sufficient people to endorse them.

In opposing Devlin, Hart, a legal professor and philosopher of jurisprudence, pointed to the very real possibility that so-called moral objections to given behaviour might actually be based on fear, prejudice or misunderstanding rather than the rational approach necessary for law. Hart (1968), in adherence to the Millian view and in agreement with the Wolfenden Report's conclusion, stated that the law had no business interfering with private acts that harmed no-one and indeed that to punish such individuals would cause them harm where they had caused no such harm. Ryan (2008) also notes that Hart emphasized the intense misery that criminalization of people's sexual preferences entailed.

As Allen (2003) highlights, public morality is an ever changing concept and the courts have frequently struggled to find the delicate balance between issues of law and morality. If the purpose of the law is not, in fact, to police morality then the question should be asked as to why then does the law seek

to protect citizens against matters which it considers obscene or immoral. Devlin (1965) notes that the line that divides the criminal law from the moral is not actually determinable by any clearly defined principle. Instead the boundary between criminal law and moral law is fixed by balancing the advantages and disadvantages of each specific criminal offence.

The Concept of Obscenity

The concept of obscenity will always remain problematic. As Robertson (1979:2) notes "the problem of drawing a line between moral outrage and individual freedom has become intractable at a time when one person's obscenity is another person's bedtime reading".

The first piece of legislation to deal with obscenity was the Obscene Publications Act 1959 (OPA 1959). According to the Legal Guidance provided by the Crown Prosecution Service the Act was designed to "to penalise purveyors of obscene material by making it an offence under section 2 either to publish an obscene article or to have an obscene article for publication for gain; and to prevent such articles from reaching the market by way of seizure and forfeiture proceedings under section 3" (CPS 2018). It is worthy of note that a prosecution for an offence under S.2(1) may only be brought within 2 years of the commission of the offence (S.2(3)). In the civil case of *Loutchansky v Times Newspapers Ltd (No 2) [2001] EWCA Civ 536* it was suggested that a publication occurs every time an article is downloaded from the internet so this prohibition on prosecution may not assist those who choose to publish their articles online.

The offences outlined in S.2(1) OPA 1959 are triable either way and carry a maximum sentence of 5 years and/or a fine if convicted on indictment.

There is no intention to deal with the law in detail here with regard to what the Courts have held to constitute a “publication” but suffice to say for an article to be considered obscene for the purposes of an offence under S.2(1) OPA 1959 the article must have a tendency to deprave and corrupt. The Act states

"(1) For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) In this Act “article” means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures".

The terms "deprave and corrupt" have been considered in many cases but were defined by Mr Justice Byrne in the case which considered whether DH Lawrence's novel Lady Chatterley case could be considered as obscene as follows: -

"To deprave means to make morally bad, to pervert, to debase or corrupt morally. To corrupt means to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile": *R. v. Penguin Books Ltd [1961] Crim.L.R. 176 at 177*.

The issue of whether an article is considered obscene is a matter solely for the tribunal of fact be that a Bench of lay Magistrates, District Judge or jury. It is not a matter to be determined by expert evidence. However, expert evidence may be adduced with regard to the subject matter of the material being considered. For example in *R v Skirving, R v Grossman [1985] QB 819* expert evidence was permitted with regard to the effects of taking illegal drugs and how such drugs were ingested but it was solely a matter for the tribunal of fact as to whether the publication advising other on how to take drugs could be considered obscene.

In *R v Barker [1962] 1 WLR 349*, the Court of Appeal refined the test with regard to specific types of publication. The Court held that where a publication is to a specific individual, such as where goods are sold to an

individual, the first matter to be decided in the test for obscenity is whether the article is likely to deprave or corrupt the particular individual who has received the publication. When determining this it is likely that the individual's age and occupation would be relevant factors as to whether that individual could be corrupted or depraved; for example in *R v Clayton and Halsey [1963] 1 QB 163* it was held that where the publication was made to a police officer it would be unlikely that the police officer would be corrupted or depraved. The second issue to be considered where publication is made to an individual is whether there is any likelihood that anyone else would see the article and whether they could be corrupted or depraved. Where the publication is made to a larger number of people and the world at large the original test for obscenity applies, namely whether any person or persons were likely to see/hear the article and if so, whether the effect of the article, taken as a whole, was such as to deprave and corrupt them (S.1(1) OPA 1959).

When considering whether the persons who had come into contact with the publication would be corrupted or depraved the House of Lords stated
"The Act's main purpose is to prevent the depraving and corrupting of men's minds by certain types of writing; it could never have been intended to except from legislative protections a large body of citizens merely because, in different degrees, they had previously been exposed, or exposed themselves, to the 'obscene' material. The Act is not merely concerned with the once and for all corruption of the wholly innocent; it equally protects the less innocent from further corruption, the addict from feeding or increasing his addiction. To say this is not to negate the principle of relative 'obscenity'; certainly the tendency to deprave and corrupt is not to be estimated in relation to some absurd standard of purity of some average reasonable man. It is the likely reader. And so to apply different tests to teenagers, members of the men's clubs or men in various occupations or localities would be a matter of common sense" (*Lord Wilberforce in DPP v Whyte [1972] AC 849, at 863*).

The question of how many people needed to be potentially corrupted and depraved for an offence to have been committed was raised within the same case. Lord Pearson made the point that the *de minimis* principle might be applied if the number of persons was likely to be so small but on the other hand "if a seller of pornographic books has a large number of customers who are not likely to be corrupted by such books, he does not thereby acquire a licence to expose for sale or sell such books to a small number of customers who are likely to be corrupted by them" (ibid: 866).

With regard to the law's role in policing morality the House of Lords held that erotic material could in fact corrupt an individual even if there were no overt sexual behaviour as a result of the aforementioned corruption, if the material was sufficient to stimulate sexual fantasy and "arouse thoughts of a most impure and libidinous nature". Lord Wilberforce felt that "influence on the mind is not merely within the law but is its primary target" (ibid: 20). Lord Pearson added that in his opinion the words "deprave and corrupt" in the statutory definition were referring to the effect of the obscene articles on the mind and emotions and it was not necessary for there to be any sexual activity resulting from the corruption, as noted in 1868 by Chief Justice Cockburn in *R v Hicklin* (1867-68) L.R. 3 Q.B. 360 (ibid: 23). Lord Cross however, although agreeing that depravity and corruption were conditions which affected the mind, he believed that there should be some tangible evidence of inappropriate behaviour in order to establish that someone had been depraved or corrupted. He believed that it would be a matter for the jury to decide whether the obscene article would affect those who viewed the material, in this case whether the elderly men would be corrupted when they bought material in order to arouse sexual fantasies which they later relied upon during the course of masturbation (ibid: 26).

Arguably their Lordships' decision in *Whyte* does not result in all publications being considered obscene if they provoke erotic thoughts but merely highlights that it is not *necessary* for a publication to result in anti social or overtly sexual behaviour to be considered capable of depraving or corrupting it's reader/viewer.

It is matter for the jury to determine whether a publication is likely to deprave and corrupt. The arbiters of fact are asked to "keep in mind the current standards of ordinary people" (*per Lord Reid in Knuller v DPP [1973] AC 435 at 457*). The jury are to set the standard which is considered acceptable for the public good at the time of the trial. This can therefore result in inconsistent decision making which is discussed in more detail below in the context of the S.62 Coroners and Justice Act 2009 offence.

Obscenity and Freedom of Expression

Before considering specific arguments pertaining to the criminalisation of VCP it is important to examine how the law has dealt with the competing need to enable freedom of expression and the desire to protect societal morality.

In the context of VCP it would appear that the question to be asked is whether artistic expression in the form of computer generated images of imaginary beings can ever be considered to offend against the rules of morality, and if so is that a sufficient justification to regulate it by means of criminal sanction (DuBoff and King 2006).

From the perspective of obscenity the law in this area in England and Wales is contradictory. Art itself is afforded special protection under section 4 of the Obscene Publications Act 1959 which provides a defence for articles which may be considered to offend against the legislation. It states

“4.(1) Subject to subsection (1A) of this section a person shall not be convicted of an offence against section two of this Act, and an order for forfeiture shall not be made under the foregoing section, if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern”.

According to the judgment of *R v Cader and Boyars Ltd [1969] 1 QB 151* where a defence is raised under S.4 the jury should be directed by the judge

to consider the defence of public good after they have adjudicated that the material is in fact obscene. The jury must consider the number of people they believe would tend to be depraved and corrupted by the material, the level of depravity and corruption and the nature of the depravity and corruption. The jury must also balance the strength of the literary, sociological, artistic or ethical merit that the article may have. The jury should then weigh up the competing factors and decide whether on the balance of probabilities the material is justified as to being for the public good. The burden is on the defendant to establish the defence (*Calder v Powell (1965) 1 QB 509*). It was established in the House of Lords in *DPP v Jordan [1977] AC 69* that even though the Act mentions "other objects of general concern" adducing evidence to demonstrate that pornographic material may be psychologically beneficial to individuals with certain sexual interests given that it helps to relieve sexual tension and divert the individual from criminal behaviour has been deemed inadmissible. However given that 1977 is over 40 years ago if a similar case were to be adjudicated today there may be a possibility that the court may take a different approach if there were empirical evidence to support such a claim. However, in 2012 the Court of Appeal ruled that it was possible for an internet relay chat to fall foul of S.2 of the Obscene Publications Act 1959 even though the conversation only took place between two people. The Court held that this was sufficient to amount to a publication *R v GS [2012] 2 Cr App R 14*. Arguably this could be considered to be a considerable infringement to individual privacy and freedom of expression and does beg the question as to whether it is morally right to prosecute an individual for thoughts they share with another person over electronic devices. Arguably this type of prosecution could be considered within the realms of policing thought.

However, as Kearns (2003) notes other offences have been used to target artistic expression which does not make any allowance for the artistic nature of the item which has been labelled offensive, these offences are, blasphemy, corrupting public morals and outraging public decency. Arguably if Kearns were writing the same article in 2018 he may include S.62 Coroners and Justice Act 2009 with regard to cartoon images which may be

considered obscene and art such as Japanese Manga and Hentai which are discussed in more detail in later chapters.

The Balance between Freedom of Artistic Expression and the Protection of Morality in General Terms

Pursuant to Article 10 of the European Convention on Human Rights as enacted into domestic law via the Human Rights Act 1998, everyone has a right to freedom of speech and this has been held to incorporate a right to artistic expression.

In *Handyside v UK (1976) 1 EHRR 737* the European Court of Human Rights (ECHR) stated at 754

"Freedom of expression constitutes one of the essential freedoms of a democratic society and one of the basic conditions for its progress and for each individual's self fulfilment. It is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock and disturb. Such are the demands of pluralism, tolerance and broad-mindedness without which there is no democratic society".

However, although this extract could be considered to be evidence that the European Court believes that artistic expression is of paramount importance even if that expression offends, shocks or disturbs, it should be remembered that the right to freedom of expression is a qualified right. As a result state interference with this right can be justified provided that the interference is prescribed by law and necessary in a democratic society on one of the grounds set out in Article 10(2) such as "the protection of health or morals". In addition, the European Court made it clear that each contracting state was to be given a wide margin of appreciation: the court stated (at 753)

"It is not possible to find in the domestic law of the various contracting States a uniform conception of morals. The view taken by their respective laws on the requirements of morals varies from time to time and from place to place,

especially in our era which is characterised by a rapid and far reaching evolution of opinions on the subject…State authorities are in principle in a better position than an international judge to given an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them".

The case law has demonstrated that the European Court has in fact granted contracting states a wide margin of appreciation with regard to claims that the right to freedom of expression has been breached where artwork has included depictions of sexuality. In Switzerland Josef Muller and those responsible for the art exhibition were prosecuted (*Muller and Others v Switzerland (1988) 13 EHRR 212)* after producing three paintings which were described by the domestic court as being "morally offensive to the vast majority of the population" (at 214), given that the depicted images of bestiality, sodomy and fellatio. Muller took his case to the ECHR on the basis that his Article 10 rights had been breached. However, the European Court held that the restriction imposed had been prescribed by law and that the aim to protect the morality of society was a legitimate aim. It is worthy of note however that the Court emphasised the fact that Muller's art was exhibited to the general public and that attendance was not restricted to those over 18 but that children were encourage to visit the gallery (*Scherer v Switzerland (1994) 18 EHRR 276)*. Therefore the Swiss authority's actions may have been justified in order to 'protect' unsuspecting visitors to the gallery.

However, even in other cases such as *Otto-Preminger Institute v Austria (1994) EHRR 34*, *Wingrove v UK(1996) 24 EHRR 1* and *Hoare v UK [1997] EHRLR 678*, which have involved films or videos to which access could or would be restricted, the courts have still found no violation of Article 10. However, as McHarg (1999) has noted the courts have viewed interference with Article 10 rights more favourably with regard to private rather than public matters. Therefore arguably if it could be demonstrated that the viewings or collections were private then the outcome of the aforementioned cases, or future art exhibitions may be different (Watkins 2005).

Unfortunately however, it would appear that there is no evidence that the European Court has upheld the right to freedom of artistic expression where such expression can be considered to offend against a society's moral principles. In *S and G v UK* (Application No 17634), the European Court upheld a prosecution for conspiracy to corrupt public morals, (*R v Gibson and Sylverie [1991] 1 All ER 441),* by displaying a sculpture which depicted a model head with earrings made out of freeze dried human foetuses. The Court held that the law was sufficiently clear and the interference legitimate even though there was no artistic merit defence, therefore Article 10 had not been breached.

However, these cases do not appear to take into account the artistic context of the pieces in question. Kearns (2003:35) argues that in a post modernist society there should be no conflict between art and morality, but instead that there is deemed to be a "dynamic equilibrium of different identities, all co-existing in an homogenous state of respect for difference". Under such a scheme artistic expression and law should be regarded as equal. Kearns argues that the non recognition by law of the distinctive ontology of artistic expression undermines this principle given that artistic expression cannot be differentiated as an entity with special cultural value from other social phenomena. Arguably artistic expression should be treated as a distinct entity and therefore any consideration of whether a piece of such expression is obscene should be viewed in the context of the piece of artistic expression as a whole. It would appear that this is the purpose of the "artistic merit" defence within the Obscene Publications Act 1959 and it is unfortunate that such a defence is not replicated in other criminal offences affecting artistic work for example it certainly would have been beneficial if such a defence had been included in Ss.62 to 68 Coroners and Justice Act 2009.

Having discussed the philosophical reasons for the criminalisation of a particular action, with reference predominantly to the harm and offence principles, the concept of obscenity and the right to freedom of expression the thesis will now consider the law relating to indecent images of children.

This will provided an overview and critique of the existing legislation in order to determine the overlaps, areas for clarification and areas for reform.

Chapter Four: Indecent Images of Children – The Legal Framework

The aim of this chapter is to provide an overview of the current legislation pertaining to indecent images of children. The chapter will consider traditional child pornography before considering the law relating to virtual child pornography in the following chapter.

There are a number of reasons why child pornography is treated differently to adult pornography. Arguably the most important reason relates to the fact that in order to produce a pornographic image of a child, traditionally a photograph, a child must be abused; therefore the image is a record and evidence of a criminal offence in a way that an adult pornographic image is not. This is known as the direct harm principle as discussed in the previous Chapter. To produce child pornography children must be harmed and as a result the law must to try to prevent such harm.

It is evident that the purpose for any legal intervention changes over time. In 1978 when the Protection of Children Act was enacted it was clear that the main reason, and for some the only reason, for criminalising the making, distribution and publication of child pornography was the protection of children (Williams 2004). One MP stated

"The whole object and purpose of the Bill and of the House today is totally different. We are concerned not with the consumer of pornography but solely with the children used in the production of pornography" (Per Mr Alison MP H.C Deb vol 943 at Col 1853-4).

It was clear that the POCA 1978 was not concerned with policing morality but instead with protecting children given that although the law focused on images they were seen as a visual depiction of child abuse and therefore in need of criminalisation. However, as set out below, in 1988 a decision was made to criminalise possession of child pornography in addition to making, taking and distributing it.

Many argue that the government has a responsibility to protect children from the "evils associated with the possession of child pornography" (*R v Sharpe (2001) unreported, SCC 2 File No. 2 27376 26th January 2001)*. The discussion as to whether there is, in fact, empirical evidence to suggest that there is a risk to children will be discussed in greater detail below. However, the Courts believe that

"Even the young inexperienced amateur who downloads one image for his or her personal gratification does a significant criminal act which adds to the scale of human misery, because if there was no market for these images children would not be degraded producing them" (*R v Toomer and Others [2001] 2 Cr App R (s) 30, para 6)*.

The official governmental response is that although those who possess child pornography are not directly responsible for corrupting children they are causing indirect harm by encouraging production and dissemination of the images *R v Koeller [2001] EWCA Crim 1854, para 11*. It is also claimed that a person who only downloads and views images "contributes to the risk of psychological harm suffered by the children forced to pose or participate in sexual conduct captured by the images" *R v Monument [2005] EWCA Crim 30*. The serious psychological harm arises from the child's knowledge that images of their abuse would be viewed by others who may become sexually aroused by their abuse. As Taylor and Quayle (2003) note at worst the image is a permanent record of abuse and serves to perpetuate the images and memory of that abuse for as long as the image exists and in the case of the internet that may be forever.

Nevertheless, it may be argued that a private collection of indecent images may do less harm if the possession of such images is not linked to any other criminal offending. There may also be no direct harm caused to children with regard to written materials, drawings and virtual child pornography which is discussed in detail below.

Using the Term Child Pornography

There is no legal definition of "child pornography". In fact the words child and pornography were not used in any piece of legislation until Ss. 48 to 50 of the Sexual Offences Act 2003. The Internet Watch Foundation finds the term child pornography unacceptable and argues that the use of such language seeks to legitimise images which are not pornography but a permanent record of child abuse. However, although the term child pornography is itself contentious it is frequently used in law enforcement documentation and academic literature and therefore will be used throughout the thesis although the criticism of the term has been noted. The primary pieces of legislation which cover "traditional" child pornography are the Protection of Children Act 1978 and the Criminal Justice Act 1988. Both statutes refer to offences pertaining to photographic based forms of child pornography classified as "indecent photographs of children". "Indecent pseudo-photographs" were added to POCA 1978 as a result of an amendment made by means of the Criminal Justice and Public Order Act in 1994. The necessity of this addition will be discussed below.

S.1 of the POCA 1978 frames the offence which is extremely flexible and can be committed in seven different ways (Gillespie 2005), although the principal offences relate to making indecent images, taking indecent images and distributing these images. Since 2001 the maximum sentence for committing an offence is 10 years imprisonment. In addition to the offences set out in the POCA 1978, S.160 of the Criminal Justice Act 1988 (CJA 1988) contains an offence of simple possession of child pornography, which since 2001 carries a maximum sentence of 5 years imprisonment. In addition, Ss 62-68 of the Coroners and Justice Act 2009 (CJA 2009) contains an offence pertaining to the possession of non photographic pornographic images of children (virtual child pornography) which is framed differently to the other pieces of legislation and therefore this offence will be considered separately below. The offence pertaining to virtual child pornography has a maximum penalty of 3 years imprisonment.

Levels of Prosecution

Before considering the law in depth it is useful to consider the scale of offending in England and Wales.

Table 1 Convictions for Child Pornography Offences 1980 - 2003 (Akdeniz 2008)

Year	S.1 POCA 1978	S.160 CJA 1998
1980	13	
1981	14	
1982	12	
1983	12	
1984	19	
1985	24	
1986	11	
1987	29	
1988	31	2
1989	39	16
1990	35	32
1991	39	43
1992	44	30
1993	37	35
1994	27	36
1995	44	37
1996	69	79
1997	103	81
1998	82	105
1999	139	99
2000	217	77
2001	289	75
2002	434	97

According to figures compiled for Hansard Written Answers on 13th October 2009 the following table shows the figures outlining the level of conviction for child pornography offences from 2003 to 2007.

Table 2: The number of persons found guilty at all courts in England and Wales for offences relating to child pornography(1) from 2003 to 2007(2)

Offence Description	*2003*	*2004*	*2005*	*2006*	*2007*
Take, permit to be taken, or to make distribute or publish indecent photographs or pseudo-photographs of children (POCA 1978)	1,048	978	958	768	782
Possession of an indecent photograph or pseudo-photograph of a child (CJA 1988)	239	184	196	166	185

(1)Offences under the POCA 1978, S.1 and S.6 as amended by S.84 of the Criminal Justice and Public Order Act 1994 and S.41(1) Criminal Justice & Court Services Act 2000 S.41(1); Offences under S.160 Criminal Justice Act 1988 as amended by the Criminal Justice & Court Services Act 2000.

(2)The statistics relate to persons for whom these offences were the principal offences for which they were dealt with. When a defendant has been found guilty of two or more offences the principal offence is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the more severe.

Source:

Office for Criminal Justice Reform-Evidence & Analysis Unit.

As a result of a request pursuant to the Freedom of Information Act 2000 it was possible to ascertain the conviction statistics from 2008 to 2014. These figures also include those convicted of offences pertaining to VCP pursuant to S.62 CJA 2009.

Table 3: Total conviction rates for all 3 child pornography offences 2007 to 2014

	Offence	2008	2009	2010	2011	2012	2013	2014
Magistrates	S.1	370	332	403	443	530	563	535
Crown	POCA	588	692	843	840	785	829	991
Total	1978	958	1024	1246	1283	1315	1392	1526
Magistrates	S.160	91	99	110	78	91	112	126
Crown	CJA	136	123	55	168	156	172	219
Total	1988	227	222	165	246	247	284	345
Magistrates	S.62	-	-	-	0	6	11	2
Crown	CJA	-	-	-	6	2	3	5
Total	2009	-	-	-	6	8	14	7

(Personal correspondence with the Ministry of Justice)

A sharp increase in prosecution is visible from the mid 1990s. Although official figures do not specify the method by which the images have been obtained it is reasonable to assume that the increase in conviction is the result of the exponential growth of internet access from home (Office of National Statistics 2006) and the corresponding availability of child pornography. It is also clear from the statistics that compared to 2002 the conviction level almost tripled. The sharp increase in convictions is the result of "Operation Ore" the largest internet child pornography investigation in recent years. Operation Ore commenced as a result of credit card details being passed to the UK authorities by the FBI which had been used to subscribe to a US child pornography portal known as Landslide (Kelly and de Castella 2012).

It is evident that the number of offences has generally been increasing. However, it is interesting to note that since the introduction of the CJA 2009 very few individuals have been convicted of the possession of VCP. This in

itself may well prompt further questions to be asked regarding the necessity of the offence in any event.

Child Pornography Legislation

The Offences

Possession of Indecent Images of Children

The possession of indecent photographs and/or pseudo-photographs of a child is a criminal offence pursuant to S.160 CJA 1988 as amended by the CJPOA 1994. The possession of indecent images was not originally a criminal offence under POCA 1978. However, the perceived necessity for an offence of simple possession was reiterated by the court in *R v Land [1999] QB 65* in which it was stated

"the object is to protect children from exploitation and degradation. Potential damage to the child occurs when he or she is pictured indecently, and whenever such an event occurs the child is exploited. It is the demand for such material which leads to the exploitation of children and the purpose of the Act is to reduce, indeed as far as possible to eliminate, trade in or possession of it"

Although the possession offence is considered by the courts to be a less serious offence the courts have consistently held the view that those who possess child pornography contribute to the abuse of children and the trade in abuse images of children (Ost 2002).

S.160 CJA 1988 (as amended by the CJPOA 1994 and Criminal Justice and Immigration Act 2008 (CJIA 2008), the amendments highlighted in square brackets, states

"(1)**[** Subject to section 160A,**]** it is an offence for a person to have any indecent photograph [or pseudo-photograph**]**of a child in his possession.
(2)Where a person is charged with an offence under subsection (1) above, it shall be a defence for him to prove—

(a)that he had a legitimate reason for having the photograph **[**or pseudo-photograph**]** in his possession; or
(b)that he had not himself seen the photograph **[**or pseudo-photograph**]** and did not know, nor had any cause to suspect, it to be indecent; or
(c)that the photograph **[**or pseudo-photograph**]** was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time.
[(2A)A person shall be liable on conviction on indictment of an offence under this section to imprisonment for a term not exceeding five years or a fine, or both.**]**
(3)A person shall be liable on summary conviction of an offence under this section to **[**imprisonment for a term not exceeding six months or**]** a fine not exceeding level 5 on the standard scale **[**,or both**]**.
(4)Sections 1(3), 2(3), 3 and 7 of the Protection of Children Act 1978 shall have effect as if any reference in them to that Act included a reference to this section."

As set out in S.160(4) the definitions within S.160 mirror those within S.1 POCA 1978. As a result the definitions of the word "child", "photograph" and "pseudo-photograph" are the same in both statutes. As will be discussed below the meaning of the word indecent is also expressly the same and therefore following the decision in *R v Bowden [2001] QB 88* there is an overlap between the offences. These elements will be discussed after the elements of both statutes have been outlined.

<u>The Meaning of "Possession"</u>

The CJA 1988 does not define what is meant by "possession". When the statute was drafted it is likely that Parliament had in mind the situation where a person has physical possession of an indecent image in a tangible form. However, in light of technological developments the situation is not quite as simple. The principal case to consider possession is *R v Porter [2006] 1 WLR 2633*. In this case Porter was convicted of 17 offences involving indecent images of children, 15 offences of making indecent images of children, in this case downloading images pursuant to the meaning given in

R v Bowden [2001] QB 88 (discussed below), and 2 counts of simple possession.

The first count of possession pertained to 40 movie files which contained indecent images of children, 7 of these had been placed in the defendant's recycle bin and the other 37 had not been downloaded but were retrieved from the cache of his computer. The second possession count pertained to 3575 indecent photographs of children. Of these 2500 were thumbnails which had automatically been generated by picture viewing software. The original photographs had been deleted but the thumbnails were still retrievable using computer forensic software such as EnCase. The remaining pictures had been deleted in the sense that the defendant had placed them in his recycle bin and then asked the computer to delete the files[10].

Therefore the defendant could recover some of the video files himself and he accepted this. However, the remaining video files and image files could only be retrieved using specialist computer forensic software which the defendant did not possess. The prosecution argued that the defendant was guilty if he was in possession of a computer and indecent images of children were present on the computer and these could be recovered and viewed. The Crown therefore conceded that the defendant did not have possession of the images which could only be accessed using forensic software and that the thumbnails were automatically generated. The defendant's counsel argued that images are only possessed if they are readily available for viewing and therefore the defendant was not in possession of the indecent images given that he had attempted to delete them.

The Court of Appeal acknowledged the difficulties of the word possession in other legal spheres. The Court held that the position of the Crown was unreasonable given that some of the images could only be recovered by using software which had to be authorised by the United States government. The Court therefore held that for the purposes of S.160 CJA 1988 the test for

[10] This simply instructs the computer not to be able to find the files but retains the file on the hard drive until the file is overwritten by another.

possession was whether the defendant had "custody or control" of the images. In the case of deleted images the Court decided that if a defendant cannot retrieve or gain access to an image then he does not have custody or control of it. As a result the level of technological expertise of the defendant will be an issue of fact to be considered by the arbiters of fact in the case, be it Magistrates or a jury.

Arguably if the defendant concedes that he had access to the images prior to deleting them then he would potentially be guilty of possession depending on when he is charged and the state of the image at the time. However, if the defendant argues that he was never in possession of the images the issue is more complex. In *R v Rowe [2008] EWCA Crim 2712* the Court of Appeal quashed a conviction in the case of a defendant who had been convicted of the possession offence even though the images had been deleted and he disputed having custody or control of the images at any point. However, it would be possible to use S.1 POCA 1978 where it can be shown that a defendant has downloaded an image given the Court's decision that downloading is the equivalent of "making" an image. This is discussed more fully below in the context of the overlap between the two offences.

<u>The Mens Rea - Knowing Possession</u>

The Courts have been clear that the defendant must knowingly possess an indecent image of a child (*Atkins v DPP [2000] 1 WLR* 1427). Ormerod (2006) argues that in the context of deleted images then unless a defendant were aware that the images remained on his computer after he had deleted them then he should actually be acquitted. Although many people realise that simply deleting an image is insufficient there may be some who do not realise that images remain on a hard drive even after the recycle bin has been emptied. Therefore the technological knowledge of the defendant may be important in establishing his culpability.

<u>Offences pursuant to S.1 POCA 1978 (as amended by Criminal and Justice Act 1994)</u>

S.1 POCA 1978 creates a number of different offences

1)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.

(3)Proceedings for an offence under this Act shall not be instituted except by or with the consent of the Director of Public Prosecutions.

(4)Where a person is charged with an offence under subsection (1)(b) or (c), it shall be a defence for him to prove—

(a)that he had a legitimate reason for distributing or showing the photographs **[**or pseudo-photographs**]**or (as the case may be) having them in his possession; or

(b)that he had not himself seen the photographs **[**or pseudo-photographs**]**and did not know, nor had any cause to suspect, them to be indecent.

Essentially this statute creates 14 separate offences given that there are 7 methods of committing a S.1 offence and this can apply to either photographs or pseudo-photographs.

<u>Taking or Making an indecent image of a child and the overlap with the offence of Possession</u>

Neither of the terms "take" or "make" are defined in POCA 1978. The circumstances and the motivations of the photographer are not relevant to whether an image is to be considered indecent for the purposes of S.1(1) POCA 1978. The jury must consider two questions 1) is it proved that the

defendant deliberately and intentionally took the photograph and 2) if so, is it indecent? (see discussion below).

Although it would initially appear that the two statutes outline separate offences, POCA 1978 focusing primarily on offences pertaining to making and distributing images, whereas the CJA 1988 simply criminalises possession, as Gillespie (2005) notes the position is not as straightforward as a result of the way that the Courts have chosen to interpret "making" an indecent photograph.

"Making" an indecent image was not included in the original drafting of the POCA 1978 but was inserted by the Criminal Justice and Public Order Act 1994 (CJPOA 1994) in order to ensure that computer based child pornography was encompassed by the legislation. However, the interpretation of the word "making" by the courts has led to some confusion as to which offence should be charged where the defendant has downloaded an image from the internet.

The difficulty first arose in the case of *R v Bowden [2001] QB 88*. In this case the Court of Appeal held that downloading an indecent image from the internet would contravene S.1 POCA 1978 given that when an image is downloaded onto a computer hard drive an image file is created and it could therefore be considered that an image had been "made" within the meaning of S.1. Although it was argued by counsel that "making" an image required actual creation this proposition was expressly rejected by the Court of Appeal. Although technically an image would exist on a hard drive that was previously not there Ormerod argues that it was an unnecessary complication given that the activity of downloading an image would be caught by the possession offence and therefore would still be a criminal activity (Ormerod 2001). It is difficult to ascertain why the Court of Appeal considered that downloading images from the internet should be considered to fall within the more serious offence. The Court of Appeal may have considered the transmission of images over jurisdictional boundaries to be a relevant consideration. However, as Gillespie (2005) notes this is flawed

given that it is not a new phenomenon as some defendants have brought child pornographic material into this country from abroad in the past and also the only real relevance of the jurisdictional point is the potential risk for distribution but that is contained within a separate offence in any event.

However, at the time of Bowden's conviction the maximum penalty for possession was 6 months imprisonment so the Court of Appeal may have determined that downloading images constituted the offence of "making" an indecent image in order to be able to impose an appropriate penalty of, at that time, up to 3 years imprisonment. However, now that the penalty for possession is 5 years imprisonment Gillespie questions whether there is a continued justification for including downloaded images within the more serious offence given there is little difference between saving an image to a hard drive and placing a photograph in an album (ibid).

Nevertheless the cases of *R v Smith; R v Jayson [2003] 1 CR App R 13* arguably extended the difficulties of internet related images and the law. These appeals related to the viewing of child pornography on the internet without any active downloading on the part of the defendants. However, the defendant's internet browser had automatically stored a copy of the image in the computer's cache resulting in an image being physically stored on the hard drive. The Divisional Court had previously held that knowledge was an essential ingredient of the offence (*R v Atkins [2002] 2 Cr APP R 248)* and given that Jayson was aware that his internet browser would automatically store a copy of all pictures on a website in the cache the Court of Appeal held that this was sufficient to constitute the offence of "making" an indecent image. The Court therefore held that the rule in *Bowden* was not restricted to actively downloading images. With regard to the other appellant, Smith, the Court also extended the rule to opening an email attachment where the defendant knew or suspected that the file contained an indecent image given that the opening of the file would store a temporary file on the defendant's computer.

Gillespie (2005) notes that these cases cause difficulties since the activities of the defendants were clearly outside the scope of the Act at the time it was drafted. However, although it may be argued that the defendants did not intend to possess an image when considering the usual meaning of the word "possess", it is difficult to understand why the Court of Appeal would view the activities of the defendants as being more serious than simple possession and certainly whether such activities are as serious as other ways of committing a S.1 offence such as the distribution of indecent images. Gillespie (2005) suggests that the law should be redrafted in order to draw a distinction between personal use possession which includes downloading images and the creation and distribution of images (ibid). The Court of Appeal have stated that as far as sentencing is concerned the offender should be sentenced similarly for downloading or possession regardless of which statute was actually utilised when the defendant was charged (*R v Oliver [2003] 1 Cr App R 28)*.

Until the law is redrafted it would clearly be sensible if prosecutors were to use the S.160 possession offence for offences pertaining to personal use and reserve the S.1 offence for those whose activities extend beyond personal use.

Mens Rea of S.1 POCA 1978

The statute makes no mention of the mens rea required in the commission of this offence. However, although the statute is silent it is unlikely that such an offence would be strict liability unless it is clear that is what Parliament intended (Ormerod 2009). Mens rea in the context of S.1 POCA 1978 was first discussed in *Atkins v DPP [2000] 1 WLR 1427*.

In this case the appellant was charged with 10 counts of possession of indecent images and 10 counts of making an indecent image. All such counts pertaining to images retrieved from the cache of the appellant's computer. He was also charged with 14 counts of making an indecent photograph which related to images he had deliberately downloaded.

In the Divisional Court the issue of mens rea was raised. The DPP argued that the offence should be an offence of strict liability and the very act of causing a file to come into existence was sufficient to commit the offence (ibid at 1438). However, the Court disagreed. Lord Justice Simon Brown stated

"I would unhesitatingly reject this submission...To construe it as creating an absolute offence in the sense contended for by the prosecutor...in my judgement would go altogether too far... In short it is my conclusion that, whilst "making" includes intentional copying ...it does not include unintentional copying" (ibid).

The question of mens rea also came before the Court in *R v Smith; R v Jayson [2003] 1 Cr App R 13.* In this case it was held that a defendant will be guilty of an offence if it can be established that when he opened an attachment to an email he opened the attachment intentionally and knew that by doing so he was, or was likely to be, "making" an indecent image of a child. As stated above this case also determined that the mere act of downloading a photograph or pseudo-photograph was sufficient to constitute the act of "making", again provided the defendant did so intentionally and knew that by doing so he was, or was likely to be, "making" an indecent image of a child. The Court also held that it was not necessary to prove that the defendant did any act with a view to saving the image to his computer.

The case of *R v Harrison [2008] 1 Cr.App.R 29* considered the situation where a defendant had visited legal pornography websites during which time indecent images of children had appeared on screen in a pop up window. It was held that it would be the defendant who would be considered to be the "maker" of the image and not the web designer. However, in order the satisfy the mens rea requirement the jury had to be sure that the defendant knew about the pop ups when he accessed the legal site and that when accessing the legal site that there was a likelihood that the pop ups would contain illegal images.

Gillespie (2012) argues that this extends the law too far. In *R v Smith; R v Jayson [2003] 1 Cr App R 13* it was accepted that it was sufficient to prove mens rea if a defendant opened an email or downloaded an image that was or was likely to be an indecent image. However, with regard to pop ups Gillespie (2012) argues that a user has no control over whether visiting a site will trigger pop ups containing illegal images and often cannot prevent such pop up windows from appearing, given that website designer often spend a considerable about of time and money to make sure that their pop up windows are not captured by pop up blockers. Therefore it may not be just to prosecute those who unintentionally happen upon illegal images when searching for and viewing legal pornography. If the law were to change its focus from how an image is acquired to the actions of the offender, as Gillespie (2012) suggests, then those who inadvertently stumble upon child pornography would receive a greater degree of protection.

The Elements Common to Both Statutes

The Definition of "Child"

There is no generally accepted definition of the word "child". Jewkes (2010) argues that this is because the concept of childhood is fluid; "childhood…is a social construction, subject to continuous processes of (re)invention and (re)definition". King (2007) argues that society has a role to play in defining the concept of childhood and that our understanding will change according to our perceptions and cultural influences. In Western cultures society is to a certain extent still influenced by the Victorian view of childhood innocence (Egan and Hawkes 2010), whereas sexually active children have been portrayed throughout history (Evans 1993) and in recent years it is more apparent that adolescents are even more aware of their sexuality through interaction with the media. In general there are three ways to decide who should be considered a child for the purposes of child pornography, by biology, by maturity or by age. From a biological perspective it is accepted that puberty marks the stage in development when a body is capable of sexual reproduction and as a result sexual activity with a pre-pubescent child would be considered deviant (Seto 2004). There are some advantages to using puberty as a marker for what constitutes a child. Firstly, it would

accord with the generally accepted definition of the clinical paraphilia known as paedophilia which is considered to be a sexual preference for pre-pubescent children (American Psychiatric Association 2000). Therefore it would appear that linking child pornography to puberty would accord with the psychological understanding of paedophilia. In addition, there is some difficulty in ageing children involved in child pornography. If puberty is used as the determining factor then what constitutes a child is more easily identified objectively (Seto 2008). However, there are disadvantages to using puberty as the marker for child pornography. There is evidence to suggest that the age of puberty is decreasing (Herman-Giddens and Slora 1997) and factors such as race and body mass index can affect the onset of puberty (Kaplowitz et al 2001). As a result therefore to use puberty as an identifier may mean that it would protect a reducing number of children.

Another difficulty with using a biological measure when determining the illegality of child pornography stems from the fact that simply because physiologically an individual may be able to reproduce does not mean that they are emotionally and psychologically ready for sexual activity. If puberty were used in defining the word "child" it would be problematic given that child pornography would be separated from other sexual offences where the age of consent is commonly used to define a child. The law would be unsatisfactory if it criminalised sexual contact with a pubescent child but not the taking of indecent images of a child of the same age.

There are also difficulties inherent in using maturity when defining the word "child". Clearly children mature at differing rates and although the law has recognised the mature minor in medical law (*Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112)*, there have been difficulties. It would be unrealistic for the law to consider the maturity of a child in each case of child pornography, if it were even possible by examining the photography, which some argue it is not (King 2008). As a result it is more logical for the law to use a logical determining factor such as age. However, prescribing an age is not as simple as it may appear.

Although, as discussed above, there are other ways to determine the definition of a child, the law uses the approach of prescribing an age. Whilst this can be seen as a pragmatic decision the first difficulty encountered is what age to prescribe. The age at which an individual is considered a child not only differs between jurisdictions but also the legal context. For example in England and Wales the age of majority is 18, the age of consent is 16 but the age of criminal responsibility is 10. Even when considering the age of consent there are difficulties, some jurisdictions differentiate between heterosexual and homosexual activity. In the United States there is no single age of consent instead all States are free to set the age of consent as they see fit. The transmission of images between jurisdictions via the internet has led to difficulties given that if the age of consent is lower in a particular country then what can be considered child pornography in one jurisdiction may in fact be legal in another. As a result there has been some international agreement in this area. Article 9 of the Convention on Cybercrime attempts to ensure co-operation with regard to child pornography. Article 9(3) states that the term minor should refer to all persons under 18, but that states may reduce the age limit to 16 (Council of Europe 2001). England and Wales have demonstrated a commitment to the Convention and therefore S.45(2) of the Sexual Offences Act 2003 (SOA 2003) amends S.7(6) of the Protection of Children Act 1978 (POCA 1978) to reflect a child being a person under 18. Nevertheless, the SOA 2003 also inserts S.1A into the POCA 1978 to enable individuals between the ages of 16 and 18 who are living as a married couple to take photographs or video of a sexual nature without being subject to criminal penalty.

Nevertheless using 18 as the age of majority in a number of international instruments and legislation is not without criticism as Jenkins notes

"Seventeen year olds are not children, and it is ludicrous to impose upon them the same limitations that apply to seven year olds" (2001:220).

Jenkins Continues

“We cannot carry on pretending that sexuality is a mysterious force that descends on a person suddenly on his or her eighteenth birthday, prior to which the individual remains in pristine innocence" (ibid).

Although this criticism is accurate and the law does therefore treat anyone under 18 in the same way this would be the position whatever age was prescribed in statute. However, it could certainly be argued that it does not make sense from a legal perspective to differentiate between the age of consent, which in most jurisdictions is under 18, and the age of majority since it gives rise to legal anomalies. For example it is perfectly legal for a 20 year old man to have sexual relations with a 17 year old girl and yet if she were to send him a naked photograph of herself they could both be held criminally liable for child pornography offences in a number of jurisdictions. In England and Wales the child pornography offences in both the POCA 1978 and the CJA 1988 initially recognised a "child" as being a person under the age of 16 in order to accord with the age of consent. However, this was amended by the SOA 2003 raising the age to 18 (Gillespie 2005).

There are a number of difficulties inherent in attempting to determine the age of a child who is featured in an indecent image. As Holland (2005) notes unless the producer of the image is apprehended it is very unlikely that the children in the images, especially on the internet, will ever be identified. In the UK under S.160 CJA 1988 it is an offence to possess an image of a person under 18 whether or not they look older than they are. However it is not technically illegal to possess a picture of someone over 18 even if they look younger. However, it is an offence to possess a photograph which has been digitally manipulated in order to create the impression that a child is portrayed in the image. This is a different type of child pornography, known as pseudo-images which can be seen as a separate category to virtual pornography.

However, the legislation does not require that the age of the child be known and s.2(3) POCA states

"..a person is to be taken as having been a child at any material time if it appears from the evidence as a whole that he was under the age of 18".
S.7(8) includes a similar provision with regard to pseudo-photographs. As a result therefore the prosecution need not show that the individual is a child merely that the individual appears to be a child.

This is not the case however in the US where 18 USC §2256(1) defines a minor as someone under the age of 18. There appears to be no express statement to suggest that a person is a child if they appear to be a child or are represented as a child.

The Meaning of "Photograph"

It should be noted that although there is a breadth of material which could be considered to be child pornography such as the written word and audio recordings and other visual representations, the law focuses on criminalising photographs. The use of the word photograph was deliberate at the time the legislation as drafted as it was believed to reflect the problem which needed to be dealt with. However, S.7(2) POCA 1978 states that reference to an indecent photograph includes a film, a copy of an indecent photograph or film and an indecent photograph comprised in a film. Therefore an image captured from a film is clearly a photograph. This is important as research suggests that a considerable number of still images in circulation are in fact images taken from films (Taylor and Quayle 2003). The issue of computer based child pornography first came to the attention of the court in *R v Fellows and Arnold [1997] 1 Cr App R 244.* The principal defendant Fellows argued, *inter alia*, that digitally stored images on a computer hard drive which were retrieved by others did not amount to a photograph for the purposes of S.1 POCA 1978. However the Court of Appeal disagreed and ruled that images stored on a hard disc are at the very least copies of photographs. Manchester argues that the Court of Appeal were wrong to make this determination since it is the data which is relevant and not the technology on which it is stored (Manchester 1996). Nevertheless this difficulty was rectified when the CJPOA 1994 amended S. 7(4)(b) POCA 1978 stating that reference to photographs include "data stored on computer disc or by other

electronic means which is capable of conversion into a photograph". It is important to note therefore that the law has been able to respond to technological advancement.

Pseudo-Photographs

The CJPOA 1994 also introduced the concept of the "pseudo-photograph" which was included in order to ensure that there were no legal loopholes available to those who created images of child pornography through the use of computers (Michael Howard, Hansard, HC Deb 11January 1994, Vol 235 Col 31). Therefore S.7(7) POCA 1994 states that a "pseudo-photograph" means an image whether made by a computer graphics program or otherwise which appears to be photography. Although S.7(7) refers to the "creation" of an image it is commonly acknowledged that many pseudo-photographs are manipulations of an existing image or images which have been used in order to create another photograph (Akdeniz 2001). Such pseudo-photographs generally fall into two categories. The first type comprises a picture of a naked adult which has been manipulated using image manipulation software in order to give the illusion that it is a child and the second type involves superimposing the head of a child onto the body of an adult. An additional variation of this type would be to use an innocuous picture of a child and place that picture into a sexualised context such as in the case of *R v H [2005] EWCA Crim 3037* discussed above. However, one of the difficulties with the drafting of the legislation is the phrase "appears to be a photograph" given that it could be argued that some drawings, cartoons and computer generated images would not be considered pseudo-images as they do not "appear to be a photograph".

The case of *Goodland v DPP [2000] 1 WLR 1427*, one of the few cases to specifically consider pseudo-photographs, clearly highlights the problems associated with pseudo-photographs. The case concerned an image which was made up of two separate images which had been hinged together so that when the hinge was closed it appeared to give the illusion of a naked child, the child's head having been placed on an adult's body. The Divisional Court quashed the appellant's conviction for possession noting

that the image did not "appear to be a photograph", it was clearly two separate images. The Court did note, *obiter dicta*, however that had the two images been photocopied this may have amounted to a pseudo-photograph (Ibid at 1442). Given the advances in technology there may well be some computer generated images which, although not actually photographs nor even involving real children, may be sufficiently sophisticated to "appear to be a photograph". The fact that a real child is not involved would not be a problem given that S.7(8) POCA 1978 states that an image should be considered a child where the "impression conveyed…is that of a real child".

Most recently the Criminal Justice and Immigration Act 2008 inserted S.4A into POCA 1978 which included "tracings" within the definition of photograph as there was concern that traced images were not illegal. Tracings can occur in two ways, firstly, the traditional method of tracing an actual image and colouring it in. The resultant image could not be considered a photograph previously as it was clearly not an actual photograph nor did it "appear to be a photograph" and would therefore not be considered a pseudo-photograph. Secondly, some computers can scan images in traced format and again this would not be considered a photograph for the same reason. There is some debate however whether it could be considered "a copy of a photograph" for the purposes of the Act (Manchester 1995).

<u>The Meaning of "Indecent"</u>

Of the three definitional aspects arguably "indecent" is the most problematic. The POCA 1978 did not define indecent and this was considered controversial at the time (Hansard HL Deb vol 392 Col 558, 18th May 1978). The term was chosen as it had already been used in obscenity legislation, although again it was not defined. In *R v Stamford [1972] 2 QB 391* the Court held that indecency and obscenity were the two ends of a spectrum with obscenity being more serious. As a result therefore the test is objective and to be left to the jury to determine what constitutes indecent by reference to general standards of propriety. This approach has been challenged on three separate occasions.

In *R v Graham-Kerr [1988] 1 WLR 1098*, the defendant was convicted of taking indecent photographs of a 7 year old boy. During the trial the judge stated that a recent House of Lords ruling (*R v Court [1989] AC 28)* applied and as a result the jury were entitled to consider the context in which the photographs were taken. The Court of Appeal disagreed stating that a purely objective test applied and therefore the jury must consider the photographs by reference to recognised standards of propriety. This was important in this case as the pictures were of the boy naked which in isolation would not necessarily render them indecent but the jury had been told that the defendant had admitted that he received sexual gratification when taking the photographs.

The second challenge in the case of *R v Smethurst [2002] 1 Cr App R 6* argued that a different approach should be taken in light of the Human Rights Act 1998. The defendant downloaded a number of naked images of young girls from a website which stated that all the girls were over 16. He denied there was any sexual motive and that he was a photographer interested in the female body. The jury found the photographs to be indecent and he was convicted. The defendant appealed on the basis that the objective approach to the meaning of indecency contravened the right to Freedom of Expression contained in Article 10 of the European Convention on Human Rights (ECHR). He argued that the phrase in Article 10 "in accordance with the law" required that the law is sufficiently precise so that a citizen may know when his actions contravene the law and that an objective test of indecency was not sufficiently precise to permit intervention by the State. The Court of Appeal disagreed. The Court of Appeal did not feel it appropriate to substitute a subjective test as it may result in the same photograph being considered decent or indecent depending on the circumstances (ibid at 58).

The Court did concede that the objective approach was problematic as there may be occasions where a jury may find some legitimate actions indecent. However, the Court believed that since the permission of the Director of Public Prosecutions is required before a prosecution can be commenced that this would provide sufficient protection if the actions were legitimate.

The third challenge in *R v O'Carroll [2003] EWCA Crim 2338* concerned a defendant who was convicted of importing obscene articles, namely a number of photographs of "a young naked child engaging in normal outdoor activity such as playing on a beach" (ibid at 2). The defendant appealed arguing that the objective approach was a breach of Article 7 of the ECHR in that it did not allow the context of the defendant to be taken into account. The Court of Appeal denied the appeal referring to the judgment of the European Court of Human Rights in *Müller v Switzerland (1991) 13 EHRR 212* which had noted that the concept of foreseeability is not a fixed concept particularly in a field such as obscenity "in which the situation changes according to the prevailing views of society" (ibid at 29).

Therefore it is clear that the courts have held that the objective test is to be used. However, in *R v Murray [2004] EWCA Crim 2211* the court determined that it must be the article itself that is indecent and not the original material for example editing a video which itself is not indecent could result in the creation of something indecent. In *R v Owen[1988] 1 WLR 134* the Court of Appeal was required to rule on whether knowledge of age is relevant to indecency. The appellant who took photographs of a 14 year old who wanted to be a model, some of which showed her breasts exposed, argued that the jury should not be told to take into account the age of the child but they should consider whether the photographs were indecent *per se.* The Court of Appeal disagreed stating that the word "indecent" qualified the words "photographs of a child" and therefore the jury could take into account the age of the child. Smith (1998) argues that this decision was wrong given that it means that if there were two almost identical photographs one of an 18 year old and one of a 14 year old then one would be illegal simply due to the age of the model and this was inappropriate given that the indecency would only relate to the conduct of the photographer. However, if the purpose of the POCA 1978 was to protect children from harm then the issue of age must be relevant since the 14 year old is being presented in a sexualised way which is something the law aims to prevent.

Nevertheless from a practical perspective an objective test of indecency can be problematic. Taylor et al (2001) developed a ten point taxonomy to identify the characteristics of the images contained within the database they compiled, the COPINE scale. Clearly from a legal perspective the images in level 1 would not be considered indecent. However, as Taylor and Quayle (2003:33) note the inclusion of this type of image is that "the extent to which a photograph may be sexualised and fantasised over lies not so much in its objective content, but in the use to which a picture might be put". The most problematic from a legal perspective arguably are images which depict nudism without any sexualised content or those were there is sexualised posing but the children are clothed. Adler (2001) notes that where a purely objective test is used and the context is ignored there is the possibility of everything becoming pornographic. In fact both Adler (2001) and Ost (2009) have argued that extending child pornography laws too far can actually be counterproductive and ultimately cause children harm.

In *R v Oliver et al [2003] 1 Cr App R 28* the Court of Appeal issued sentencing guidelines for child pornography offences following advice received from the Sentencing Advisory Panel (SAP). The SAP suggested a modified version of the COPINE scale which did not include the first 4 levels of the COPINE Scale as it was doubted that these images would amount to indecency (see Appendix Four). Nevertheless in *R v O'Carroll [2003] EWCA Crim 2338* the Court of Appeal upheld a conviction relating to naturist photographs and held that the comments on indecency in Oliver were said *in obiter.* The Court of Appeal did not hold that naturist photographs were by nature indecent, simply that the jury were entitled to find them indecent. Arguably the fact that nudity has been found to be indecent objectively is problematic given the inadvertent harm that may be caused when investigations are launched as a result of parents photographing their own children, as in the case of the newsreader Julia Sommerville. However, the reality is that as the law currently stands there is a risk that anyone taking a photograph of a naked child is at risk of prosecution and the jury may find that the photograph is indecent (Ormerod 2001). This is problematic in itself as there is no certainty when the law employs an objective test and although

a parent may have a defence of legitimate interest arguably it cannot be acceptable that a parent may actually have to defend themselves in court as this will surely cause inadvertent harm to the child in question. In 2014 the SAP introduced a new scale which replaced the previous scale (see Appendix Four).

In *R v M (A) [2015] 2 Cr.App.R 22* the Court of Appeal clarified the position with regard to whether the categorisation of images into levels and whether such levels could be used in determining indecency. The Court held that pre conceived categorisation of images was only relevant to sentencing and that the question of whether the images are indecent is a matter to be decided by the jury in accordance with the test in *R v Stamford [1972] 2 QB 391*, outlined above.

Defences available under S.160 CJA 1988

S.160A CJA 1988

The most straightforward defence under S.160 CJA 1988 is set out in S.160A CJA 1998 which was inserted into the 1988 Act by S.45 Sexual Offences Act 2003.

This section provides a defence to a possession charge if the defendant can demonstrate that the picture is of a person over the age of 16 with whom he was married, civil partnered or living with as a couple. The images must either depict the child alone or with the defendant. The defendant must also adduce sufficient evidence that the child consented or that the defendant reasonably believed that the child consented. Arguably this defence is more important in the age of sexting[11]. For example In 2008 in the USA 20 teenage girls were found to have been involved in sexting and the District Attorney responded by announcing potential charges of possession and distribution of child pornography (Berger 2009). It may seem extreme to

[11] Sexting is the transmission of sexually explicit images via text messages Lounsbury, K, Mitchell, K and Finkelhor, D (2011) *The true prevalence of "sexting"*. Crimes against children research Centre.
Available at https://www.unh.edu/ccrc/pdf/Sexting%20Fact%20Sheet%204_29_11.pdf

utilize child pornography laws to deal with sexting given that child pornography laws are in fact put in place to protect children and arguably should not be used to charge teenagers who voluntarily take and send pictures of themselves (Svantesson 2010). Although S.160A may not provide a defence to all those who engage in sexting it arguably demonstrates an acknowledgement by the legislature that sending potentially pornographic images is something which occurs within society, especially between parties in a relationship and especially in the age of the SmartPhone.

Legitimate Reason Defence (S.160(2)(a)

This defence may be used in limited circumstances where a defendant has evidence to support his claim that he had possession of the images legitimately, such as in the case of police officer or those involved in the prosecution of child pornography offences. Some other agencies such as the Internet Watch Foundation, who provide a child pornography hotline may also make use of this defence legitimately.

There have been a number of defendants, for example *Atkins v DPP and Goodland v DPP [2000] 2 All ER 425 and R v Wrigley [2000] (unreported)* who have argued that they were in possession of indecent images for a legitimate reason, namely as part of academic research. In Atkins, the Magistrates Court held that the defendant was not conducting "honest and straightforward research into child pornography" and the High Court (Queen's Bench Division) agreed. According to the High Court what constitutes "a legitimate reason" is a matter of fact to be determined by Magistrates or a jury. The principal question to be asked is whether the defendant has an inherent interest in children and the research claim is a pretence for having such material in his possession, or whether the defendant is conducting genuine research and has no alternative but to be in possession of such material. The Court stated that courts are to be sceptical of the claim and should not too readily conclude that such a defence has been made out. In *Wrigley* the defendant tried to argue that he had conducted an informal pilot study in order to ascertain whether there was sufficient material for a PhD and the pilot study involved him posing as a

paedophile. However, he was in possession of 32 discs of material containing 677 images of young boys and had not mentioned the study to any of his tutors and upon advice had failed to take the material to the police. He was convicted and received a custodial sentence. Although the prosecution conceded that academic research could be a legitimate reason and therefore provide a defence they maintained that in *Wrigley's* case it was for his own sexual gratification. His appeal was ultimately dismissed.

S.160(2)(b)

Pursuant to S.160(2)(b) the defendant may have a defence is he has neither seen the image(s) and did not know or had cause to suspect that the images were indecent. It was stated in *R v Atkins [2002] 2 Cr APP R 248* that the inclusion of this defence was a demonstration that Parliament did not intend to criminalize unknown possession of indecent images. In *R v Collier (Edward John) [2004] EWCA 1411* the Court of Appeal held that it would be wrong to punish someone who proves that he had images which he had not seen and did not know, or have reason to suspect, were indecent images of children. If the defendant can prove this on the balance of probabilities then he should be acquitted of the offence under S.160. It was also agreed that a defendant should be acquitted of the offence of making or being in the possession of indecent images contained in an email attachment if before he opens the attachment he does not know and has no reason to suspect it contains an indecent image (*R v Smith; R v Jayson [2003] 1 Cr App R 13).*

Unsolicited Images S.160(2)(c)

The final defence under S.160 covers the situation where the defendant receives unsolicited images. The section provides a defence provided the images were unsolicited and not kept for an unreasonable time. The issue of reasonableness is one for the jury to decide. This defence may potentially be utilized in the case of images held in the cache of a browser from a pop up window if the defendant can demonstrate that such a pop up occurred without his consent.

In 1988 when the legislation was drafted, in a time before the proliferation of home computers and the advent of the internet the phrase "he did not keep it for an unreasonable time" in S.160(2)(c) was less problematic. Physical images could be easily destroyed and such destruction more easily proven. With regard to images held in digital form the position is less straightforward as highlighted above in the section discussing what the Courts have held constitutes possession. In the context of this defence the technical knowledge of the defendant and the computer software at his disposal may be of paramount importance. In *Attorney-General's Reference (No.89 of 2004) [2004] EWCA Crim 3222* the Court of Appeal went as far as to state that the possession of evidence elimination software may well arouse suspicion that the defendant knew the material was illegal rather than assisting in arguing that a defendant had used his best endeavours to permanently delete the offending unsolicited images.

The defences contained in S.160(1)(a) and (b) discussed above are mirrored in the POCA 1978 in S.1(4)(a) and (b) respectively. Given the wording of the defence is identical no additional discussion is necessary. The conditions introduced by S.45 Sexual Offences Act 2003 which inserted S.160A CJA 1988 also apply to the POCA 1978 through the insertion of S.1A. S.46(1) of the Sexual Offences Act 2003 also inserts the following defence which appears to be self explanatory.

<u>S.161B Exception for criminal proceedings, investigations etc.</u>

"(1)In proceedings for an offence under section 1(1)(a) of making an indecent photograph or pseudo-photograph of a child, the defendant is not guilty of the offence if he proves that—

(a)it was necessary for him to make the photograph or pseudo-photograph for the purposes of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings, in any part of the world,

(b)at the time of the offence charged he was a member of the Security Service, and it was necessary for him to make the photograph or pseudo-photograph for the exercise of any of the functions of the Service, or

(c)at the time of the offence charged he was a member of GCHQ, and it was necessary for him to make the photograph or pseudo-photograph for the exercise of any of the functions of GCHQ.
(2)In this section “GCHQ” has the same meaning as in the Intelligence Services Act 1994.”

Having considered the law pertaining to images of real children the next chapter will specifically consider the development of the law pertaining to VCP, before critically evaluating the law on VCP itself.

Chapter Five: Non photographic pornographic images of children (NPPICs) and the emergence of virtual child pornography (VCP).

Defining virtual child pornography

Most of the academic literature which exists pertaining to child pornography is focused on photographs and films (O'Donnell and Milner 2007). However, it has been recognised that child pornography need not be restricted to images at all. The definition of child pornography contained in Article 2(c) of the Optional Protocol to the United Nations Convention on the Rights of a Child (UNCRC) states that

"Child pornography means any **representation**, **by whatever means**, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes" (emphasis added).

This reference to "whatever means" clearly encompasses more than just photographs and therefore would include images which have been computer generated, virtual child pornography (VCP). However, such a representation must relate to a "child" which arguably means a human child. However, the Council of Europe Convention on Cybercrime (Council of Europe 2001) expressly refers to different representations of child pornography in Article 9(2) which states

"For the purposes of paragraph 1 above, the term "child pornography" shall include pornographic material which visually depicts:

a) a minor engaged in sexually explicit conduct;

b) a person appearing to be a minor engaged in sexually explicit conduct;

c) realistic images representing a minor engaged in sexually explicit conduct.

However, The Convention does permit signatory states to opt out of this provision if they so wish (Article 9 (2)(4)). A similar provision is included in the European Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (PCASESA)(Council of Europe 2007). Article 20 (2) states that

"For the purpose of the present article, the term “child pornography” shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes".

However, Article 20(3) makes express provision for the exclusion of images of imaginary children, it states

"3. Each Party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material: – consisting exclusively of simulated representations or realistic images of a non-existent child;"

In the quotation above, paragraph 1a to e refer to a. producing child pornography; b. offering or making available child pornography; c. distributing or transmitting child pornography; d. procuring child pornography for oneself or for another person; e. possessing child pornography; These are the intentional actions which The Convention requires signatory countries to criminalise.

This is interesting as it highlights the fact that it is recognised by those who drafted The Convention that there is some doubt as to whether images of imaginary children will be treated in the same way by signatory states as images depicting the abuse of real children. Arguably therefore this could be taken to mean that VCP may not be considered as harmful as images of traditional child pornography.

According to Gillespie (2012) VCP can be broken down into two general categories, computer manipulated images and computer generated images. Computer manipulated images are photographs which have been altered using a computer. For example using appropriate software, such as Phojoe, it is possible to alter the age of a person in a photograph. From a legal perspective these images are more likely to be considered pseudo-images and would therefore be caught by POCA 1978 as amended, discussed above. Gillespie (2012) notes that the second category, computer generated images can be broken down into two sub categories; computer created images and rendered images. Computer created images are images created exclusively by computer graphics programs and therefore no photographic image is used in the creation the image, for example the images used in Japanese Manga, Hentai and other cartoon imagery. Rendered images are images where the computer has used an original image, including photographic images, but such images have been rendered into 3D computer generated images. This could result in the creation of an avatar or graphical representation of a human normally seen in a computer game. It is worthy of note however that it is possible to create computer generated avatars for use in a virtual world without the need for a image of an actual human being i.e "from scratch" (Yar 2013:123). Therefore it is impossible to know for certain whether an avatar has been created from an image of a real human or whether it is an imaginary representation. This can complicate matters legally with regard to avatars in Massively Multiplayer Online Role Playing Games (MMOROGs) such as Second Life.

Of these categories it can be argued that only one is pure VCP namely where an image is created by a computer and therefore no real child has ever been involved in creating the image (Gillespie 2012). The other types of images where photographs have been altered using computer software all involve the use of a real child to a certain degree, even if that child has not been subjected to any actual physical harm pursuant to the direct harm principle. However, it could be argued that to create such an image a child has been exploited and may have suffered emotional harm. Although the relationship between exploitation and abuse is subject to some debate (Ost

2009) it is clear that there is the potential for the child to suffer harm, as judicially recognised in *R v H [2005] EWCA Crim 3037*, even if only in the knowledge that their image and degradation is being used for the purposes of sexual gratification (Taylor and Quayle 2003).

The Coroners and Justice Act 2009

Background to the Legislation

In 2007 the Home Office produced a Consultation Paper the purpose of which was to

"consider the issues raised by computer generated images (CGIs), animated images, cartoon, drawings and other visual material depicting the sexual abuse of children not covered elsewhere by statute and to examine any shortcomings in the current criminal law and how they should be addressed" (2007:3).

The Consultation also sought to canvas views on the potential creation of a new offence aimed to criminalise sexual explicit images of imaginary children (ibid). According to the Consultation Paper the Home Secretary's Task Force on Child Protection on the Internet had been considering such images for some time prior to the Consultation given that certain children's charities and the police had made representations for such images to be criminalised. The Consultation acknowledged that the possession of visual depictions of sexually explicit fantasy images were not covered by existing legislation even though the distribution of such images may be caught under the Obscene Publications Act 1964. According to the police these types of images were often found alongside indecent images of children. The Consultation makes reference to a single case where an offender had been found to be in possession of solely fantasy images and that as a result the police had been powerless to prosecute and had to return the images to the offender as there were no powers of forfeiture. The Consultation noted that there had been increasing concern amongst child welfare groups that these images were available and would only become more prevalent as technology developed

and software became more sophisticated (2007:4). Given that a number of sites which hosted the images were located outside the jurisdiction it was difficult to target the sites hosting the images and therefore it was felt necessary to consider whether to target the individuals in possession of the images.

There is an acceptance that computer generated images and material which is created entirely by computer software does not harm real children (2007:4). However, one of the two main justifications for the criminalisation of such material is that fantasy images

"fuel abuse of real children by reinforcing potential abusers' inappropriate feelings towards children" (2007:5).

The second justification employed in the Consultation Paper is the belief that such images may be used to groom children[12]. However, as the Paper notes the offence of grooming is already criminalised by means of various sections of the Sexual Offences Act 2003. Nevertheless, the Consultation argues that the criminalisation of the possession of such images will enable the images to be taken out of circulation and therefore not used in the commission of further offences. It is worthy of note however, that even the Home Office themselves acknowledge that they are not aware of any specific research which proves that there is a direct link between possession of these type of computer generated images and the commission of sexual offences against children (2007:6)[13]. The Consultation Paper notes that there has been international concern regarding such images and that these images are already subject to criminal sanction in various countries, such as Ireland, Norway, Canada and Australia (2007:5).

The Consultation Paper proposed three options to target these images; extending the definitions within the Protection of Children Act 1978/ Criminal Justice Act 1988 to enable the legislation to encompass "any type of visual

[12]This is discussed in considerable detail in chapter seven
[13] Research is underway to explore this further see Davidson et al (2018)

representation", the creation of a standalone offence or to do nothing. The Home Office did not feel that it would be appropriate to extend the definitions within the existing statutes given that the standard of indecency within these offences is relatively low in order to encompass all acts of child sexual abuse, including sexual posing. The aim of these statutes is to target actual sexual abuse committed against real children. As a result even the Home Office believed that computer generated images would need to pass a higher threshold than indecency in order to be caught by the criminal law. The Home Office also determined that the penalties contained within the Protection of Children Act 1978 and the Criminal Justice Act 1988 were too punitive when applied to the possession of computer generated images (2007:7). The Home Office felt it was inappropriate to take no action with regard to such images and therefore their preferred option was to create a standalone offence which specifically addressed the possession of computer generated images. It is interesting to note that the Home Office stated that they expect the offence to be used rarely on its own given that

"collectors of material of this kind almost always also have indecent photographs of children" (2007:7).

There is no reference given as to how the Home Office reached that particular conclusion.

The Home Office acknowledge that the category of material covered by the proposed legislation is broad. However, they note that given the thresholds proposed (see below) it would be unlikely that works of art and other material which may be considered to be "in the public good" (2007:8) would fall foul of the new provision.

The Home Office Consultation Paper proposed two thresholds which would have to apply in order for material to be caught by the proposed offence. Firstly, the offence would only apply to material that is "pornographic". The Consultation Paper clearly states that there is no intention to capture the following

"historically important articles or images used for legitimate scientific reasons or assessment: for example, images used in the visual depiction or recreation of an offence against a child to be used in assessing an offender's level of risk. Nor is it the intention to criminalise the records of abuse necessary to provide medical treatment of children, or in the treatment of adult abusers, or the collection of forensic medical evidence" (2007:8).

Once the pornographic threshold has been passed the Consultation Paper states that there would be an expectation that the images covered by the new offence would depict the sexual abuse of children. However, the Home Office acknowledges that the indecency standard contained within the Protection of Children Act 1978 and Criminal Justice Act 1988 would be too low. Therefore there would be an expectation that the images caught by the new offence would depict more serious sexual activity and not include images at the lowest level of the scale of seriousness as set out in *R v Oliver and others [2003] 2 Cr.App R (s) 15.*

The penalties for the proposed offence are lower than those contained in the statutes pertaining to indecent images of real children and therefore the maximum sentence if convicted on indictment is 3 years imprisonment. The defences in the new offence would also mirror those contained in the existing statutes.

Reponses to the Consultation

In 2008 the Ministry of Justice provided a Summary of Responses which outlines the views of those who responded to the Consultation and the Government's response in light of the feedback received.

The first questions respondents were asked to address was whether "in the absence of research into the effects on these images on offenders and the general public, do you think the proposal to make it illegal to possess the material described in the consultation is nevertheless justified?" The responses to this question specifically will be dealt with in the chapter which

critically evaluates the justifications for criminalisation rather than this chapter which considers the law itself.

There were 87 responses to the Consultation, of which 37 were individuals and 50 were from organisations/groups. Of the three options set out above 11 respondents were in favour of extending the existing legislation in order to encompass non photographic visual images of child sexual abuse (Option 1), 31 were in favour of creating a new standalone offence (Option 2) and 21 were in favour of taking no action (Option 3). 24 respondents did not explicitly state a preference (MOJ 2008:7).

The Children's Charities' Coalition on Internet Safety (CHIS), The Child Exploitation and Online Protection Centre (CEOP), Campaign to End Rape and 2 local police forces recognised the need to tighten the law in this area but felt that this would be best accomplished by extending the definitions within existing legislation. The organisations in favour of extending existing legislation generally believed that all child abuse images should be treated uniformly regardless of whether they were photographic or non photographic. In fact, CHIS noted that existing legislation does not target exclusively photographic images given that pseudo-images are also subject to the criminal law and such images may also portray unreal children and events through the manipulation of images. Those who believed that there should be no distinction between photographic and non photographic images including the police noted that often fantasy images are more explicit and detailed than photographic depictions of abuse and that to create a lesser offence would imply a level of acceptance of such images and an acknowledgement through a lesser penalty that such images are not considered as serious as photographic images.

Support for the introduction of a new offence was expressed by a number of organisations currently working within the criminal justice systems, such as The Crown Prosecution Service and those actively engaged in child protection, for example, the Internet Watch Foundation (IWF), the Police Federation of England and Wales, 8 local police forces and the British

Association of Social Workers (MOJ 2008: 12). These organisations largely supported the view that the creation of a new standalone offence would be the more straightforward way to amend the criminal law. The new offence would also allow for a distinction between photographic and pseudo-photographic images and non photographic depictions of child sexual abuse. The IWF in particular felt it was appropriate to distinguish between depictions of the actual sexual abuse of real children and images which have not caused direct harm to children through their creation.

The standalone offence was also seen as advantageous in light of ongoing technological advancement. Arguably it would be more straightforward to amend a standalone offence in light of technological change than legislation which was drafted before the advent of such technology. Some respondents also believe that the creation of a new offence was a demonstration that the legislature was capable of keeping up to date with technological advancement and responding accordingly (MOJ 2008:15).

However, Feminists Against Censorship and the Criminal Sub Committee of the Council of HM Circuit Judges felt it was inappropriate to take any further action and therefore opposed the proposal either to extend the existing legislative provisions or create a new standalone offence. The Criminal Sub Committee of the Council of Circuit Judges felt that no action was necessary as the Obscene Publications Act 1959 would already capture any offending material. The OPA (1959) also has the power of forfeiture and would also criminalise the publication and circulation of non photographic visual depictions of child sexual abuse rather than simply focusing on its possession (MOJ 2008:16).

Respondents were also asked to comment on whether the proposed defences outlined in the Consultation were sufficient. Many of the respondents failed to consider the defences specifically but of those who did the majority found the defences to be adequate. However, a number of respondents, including the IWF, Channel 4 and the British Board of Film Classification (BBFC) highlighted the benefit of including the defence of

"public good" which is included in the OPA 1959. Certain respondents expressed concern over specific issues. The Criminal Sub Committee of HM Council of Circuit Judges highlighted the need to protect child victims of sexual abuse who may be asked to outline the abuse they suffered through drawings. It was noted that there was a need to ensure protection for social workers who were helping victims and offenders through the use of illustrative material and the IWF sought reassurance that there would be protection for those gathering evidence from potentially illegal websites. The BBC felt that the defences were not particularly specific and therefore may not cover those involved in journalism or programme making and the BBFC noted that officers of the BBFC may well be in possession of such material either legitimately or as a result of unsolicited submissions (MOJ 2008:16). The British Association of Social Workers actually favoured a system of mandatory reporting of the possession of such images even when possessed for legitimate reasons.

Feminists Against Censorship expressed concern that parents may be concerned that their children are breaking the law if they drew fantasy images and as a result this may affect the way that parents dealt with their children as opposed to dealing normally with the issue (MOJ 2008:17).

The fourth question asked in the Consultation pertained to whether the new offence would cover the appropriate type of material and whether there was any additional material which should be captured by the offence. A number of respondents did not address this question directly. However 33 generally agreed that the material was "broadly appropriate" (ibid), including a number of police and church groups, Yahoo, IWF and the CPS. 11 respondents felt that this type of material should not be covered by the new offence. However many of these respondents were opposed to criminalisation in the first place. The difficulties of determining the age of non photographic visual depictions of children was noted by a large number of respondents, particular reference was made to a number of Japanese art forms such as Manga and Anime where it is very difficult to determine age due to the stylised nature of the artwork. CHIS argued that the legislation to cover sound recording in addition

to visual images and raised concerns regarding online virtual worlds. They were keen for legislation to cover both the online and offline worlds. Difficulties were also highlighted by a number of respondents with regard to changing definitions of art and some respondents wanted to see the legislation extend to a number of everyday items such as clothing, mobile phone screensavers and all type of publication and advertising (ibid).

The Ministry of Justice (2008) note that there was a considerable discussion regarding the definition of art. The BBFC were concerned that some historical artefacts, valued as works of art, which portray indecent material may be caught by the legislation. Durham Constabulary raised concerns regarding the position of freehand drawing and yet others argued that depictions of sexual violence against adults should also be caught by the legislation (Campaign to End Rape). However, the Council of Circuit Judges argued that the material should not be considered criminal unless it could be considered pornographic and therefore fell within the Obscene Publications Act 1959.

The next question in the Consultation asked respondents if the threshold for criminalisation was workable and would capture images at the correct level of seriousness. Many respondents did not answer the question directly but of the respondents who did 25 believed that the suggested thresholds were "broadly correct" (MOJ 2008:18), believing that it was correct to have a distinction between real and fantasy images. 17 respondents disagreed with the proposed thresholds. South Yorkshire Police argued that if the threshold was too low it may result in overzealous policing. A number of organisations recognised the benefits of forfeiture but noted that even though images may be subject to forfeiture it is very easy for such images to be re-circulated and these fantasy images would be impossible to remove from the internet, as is the case for images of child sexual abuse of real children.

The BBFC noted that given the development of technology there should not be a differentiation between fantasy and real images given that "with the development of CGI and other image manipulation technologies,

distinguishing a pseudo-photograph from a non -photographic image may prove to be increasingly problematic" (MOJ 2008:18). CHIS also agreed that fantasy and real images should be treated in a uniform manner. CEOP stated that "those possessing such images should be treated and managed in the same way as those possessing other types of images" (ibid). Childnet also expressed concern with regard to there being a differentiation between real and fantasy images. The IWF required further clarification in respect of the terms and definitions of the material although broadly agreeing with the threshold of Level 3 of the Sentencing Guidelines Council. Certain police forces felt there should be a distinction between those images which were accompanied by graphic text and also images which has originally been genuine depictions of abuse and those which were pure fantasy[14]. Greater Manchester Police noted that "there is no logical reason for distinguishing the sentence for these images from that of possession of photographs of the same abuse".

The final question asked of the respondents was whether the proposed maximum penalty of three years imprisonment for possession of non photographic visual depictions of child sexual abuse is appropriate. Obviously this was a moot point for those opposed to the proposed offence. Of the respondents who actually answered this question directly 21 approved the level of penalty proposed within the new offence and 16 disagreed with the proposed penalty. Many of those who approved of the penalty were specifically in favour of the power of forfeiture afforded by the new offence. Nottinghamshire Multi Agency Public Protection Team stated that the Prison Service had intercepted a significant quantity of non photographic images of child sexual abuse on the way to serving inmates and the Probation Service had also noted that such images had been used by internet offenders who were subject to treatment programmes as part of their community sentences. This is interesting to note and will be considered further when discussing the role of VCP in the management of sex offenders.

It is not clear from the Ministry of Justice whether this means images based on real depictions of abuse or manipulated images of real abuse which would be considered pseudo-photographs

A number of respondents requested further clarification on whether the new legislation would have registration requirements pursuant to Part 2 Sexual Offences Act 2003 and in the majority there was support for a registration requirement for any offender convicted under the new offence. Some respondents proposed distinctions within the penalty depending on the severity of the behaviour to enable higher sentences for those who had been apprehended making or distributing non photographic images or for individuals who had used such images as a tool to groom children.

However, Greater Manchester Police, CHIS and CEOP, amongst others, felt that the possession of non photographic images was as serious as possession of photographic images and therefore the penalty should be equal to possession of indecent images of children. The CPS stated that the penalty should be 5 years not 3 as it would cause a discrepancy with those who had been convicted of possessing pseudo photographs and sentenced to 5 years. Arguably however, there is a legal difference given that pseudo images are digital manipulations of real images of child abuse whereas the proposed offence was simply to target fantasy images which do not involve the abuse of real children. The Council of Circuit Judges felt that the penalties should be consistent with the OPA1959, namely a maximum of 5 years imprisonment if convicted on indictment, and that such offences should be dealt with by means of the OPA 1959 and that there was no need for a new offence at all.

Many of the respondents who were generally opposed to the creation of a new offence felt that the penalties were disproportionately high for the possession of non photographic fantasy images. They also highlighted the fact that those who were convicted of such an offence would be stigmatized by being labelled as a sex offender and also be potentially subject to registration on the Sex Offender Register.

The Government's Response the Consultation

The government acknowledged that the response to the Consultation highlighted the sensitive and emotive nature of non photographic depictions of child sexual abuse. Although the government recognise that non photographic images do not involve harm caused to real children, unlike indecent images of children, the government consider these images to be problematic, especially in the light of increasing technological advancement. They note that recent advances in technology have proven challenging to existing legislation, such as the OPA 1959, and therefore the government continued to believe after the Consultation that further legislation, specifically targeting non photographic visual depictions of child sexual abuse, is warranted.

Specifically, the government acknowledged that many people who responded to the Consultation considered the definition of what would be considered "pornographic" as problematic and that such terms as "pornographic" and "pornography" were seen by some as "notoriously opaque concepts" (Professor Clare McGlynn, cited in MOJ 2008:8). Although the government noted that accurately pinpointing the age of a unreal representation of a human was considered to be difficult and that the stylised nature of graphic art and animation can often draw characteristics from a number of different age groups and therefore determining age was highly subjective, the government felt that the assessment of age of a visual depiction of a human should be a matter for the jury to assess.

Although a number of respondents asked the government to further consider a defence of "public good" similar to that found in the OPA 1959 the government decided this was not necessary given the fact that the Consultation had stated that it was not the intention to criminalise the possession of works of art or historical artefacts amongst other things.

There was some concern expressed in the response to Consultation that in the appropriate circumstances it would necessary for the creation and/or use of childlike avatars in video games to be subject to criminalisation. The

government stated it anticipated that the new offence would capture such online images provided the imagery met the criteria outlined in the new offence (MOJ 2008:9).

Although a full discussion of the justifications for the criminalisation of non photographic visual depictions of child sexual abuse is critically considered in a later chapter it is worthy of note that in the response to the Consultation Paper the government make very little comment other than to note that a series of meetings had taken place with interested parties and that the government had considered the views outlined in the responses to the Consultation. No further information is provided with regard to with whom the meetings took place or the outcome of those discussions.

Changes to the Proposed Offence

In light of the responses to the Consultation there appears to be only one amendment to the offence outlined in the Consultation Paper. The government noted that it was not the intention to criminalise material which would not otherwise be considered criminal under the OPA 1959. As a result a third element has been introduced to the offence, namely that the material caught by the offence is of an obscene character. However, no further information is provided as to whether this would be the same test for obscenity as outlined in the OPA 1959 or if the government intended to introduce a new test for obscenity.

The Offence Itself

Possession of VCP became a criminal offence as a result of the enactment of Ss.62-68 of the Coroners and Justice Act 2009 which came into force on 6th April 2010. Although the government used a harm based rationale to pass this piece of legislation there was some doubt as to the validity of the justifications put forward by the government. The Human Rights Joint Committee doubted whether, in the absence of any empirical evidence to support the harm base arguments, the offence was sufficiently necessary and proportionate (2009: para 1.75,1.78). In their response to the Second Reading of the Coroners and Justice Bill Liberty stated

" ..we fear that the proposed offence could criminalise those who do no harm to others and detract attention from those who cause genuine hurt. It would, for example, be tragic if the creation of an offence aimed at private cartoons and drawings reduced the police resources available to tackle real child pornography or other circumstances where victims are clearly forced to submit to sexual abuse" (Liberty 2009:21).

Possession of a non photographic pornographic image of a child (NPPIC), as it is known in the statute, is an either way offence. On summary conviction it is punishable by up to 6 months imprisonment or a fine or both. On indictment the offence is punishable by up to 3 years imprisonment, a fine or both. In addition, offenders over the age of 18 who receive a custodial sentence of two years or more are automatically made subject to the notification requirements under Part Two of the Sexual Offences Act 2003.

The offence focuses on the nature of the image. Rather than being considered 'indecent' the images must be 'grossly offensive, disgusting or otherwise of an obscene character'. In addition, the image must be 'pornographic' in that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal' (S.62(3) CJA 2009). In addition to meeting these requirements the image must either focus "solely or principally on the child's genital or anal region (S.62(6)(a) CJA 2009), or portray one of the sexual acts set out in the Act (S.62(7) CJA 2009). Those acts are -

(a) the performance by a person of an act of intercourse or oral sex with or in the presence of a child;

(b) an act of masturbation by, of, involving or in the presence of a child;

(c) an act which involves penetration of the vagina or anus of a child with a part of a person's body or with anything else;

(d) an act of penetration, in the presence of a child, of the vagina or anus of a person with a part of a person's body or with anything else;

(e) the performance by a child of an act of intercourse or oral sex with an animal (whether dead or alive or imaginary);

(f) the performance by a person of an act of intercourse or oral sex with an animal (whether dead or alive or imaginary) in the presence of a child.

Moving or still images are caught by the Act and this therefore encompasses computer-generated images or cartoons (S.65(2)(a) CJA 2009). A prohibited image of a child for the purposes of the offence includes "an image of an imaginary child" (S.65(8) CJA 2009). As a result it is clear that the Act will apply to NPPICs which do not depict real children, therefore the child sexual abuse depicted in the images need not actually have any real human victims. The Home Office (2007) and subsequently the law have reflected the difference between indecent photographs of real children and NPPICs. A higher standard of obscenity is required for the offence pertaining to NPPICs. The new offence also carries a lower maximum penalty when compared to the possession of indecent images of real children under S.160 Criminal Justice Act 1988. The new offence also requires the consent of the Director of Public Prosecutions before a prosecution may commence.

The Elements of the Offence

In order for an image to be caught by the offence it must meet all three elements, namely that it is pornographic, grossly offensive, disgusting or otherwise of an obscene character and focus on the child's genital or anal region or portrays one of the acts set out above. The statute specifically excludes photographs, pseudo-photographs and tracings of photographs/pseudo-photographs which are captured by the legislation discussed in the previous chapter.

Possession

Although not specifically defined in the Act possession is likely to be interpreted in a similar manner to the offence of possession of indecent images contained within S.160 CJA 1988, discussed above. Therefore a defendant is likely to be held to be in possession of an image if he has custody and control of the image *R v Porter [2006] 1 WLR 2633.*

Given that there is no equivalent offence to making an indecent image in respect of prohibited images it is possible that there may be some difficulty in establishing possession if the prohibited images in question have been deleted from the defendant's computer. According to *R v Porter [2006] 1 WLR 2633* the defendant could not be held to be in custody or control of any images which he could readily access, therefore images which had been deleted were not necessarily within the custody or control of the defendant unless he had the tools to retrieve the images. It would be possible for the defendant to be guilty of a possession offence at the time of deletion. However, this would necessitate the prosecution proving that it was the defendant who in fact deleted the images. It would also be necessary to demonstrate that the defendant knew what he was deleting. Where images are stored in the cache of a browser then it may be easier to determine that the defendant was in possession of the image but there may be inherent difficulties in establishing the requisite mens rea, knowing possession. Given that a browser automatically downloads all the images contained within a web page and stores them in the cache it is not necessarily the case that the defendant will have viewed the images in question, let alone stored them for future use. The cache will store all the images contained in a webpage so if a webpage is particularly long then the images will still be stored even if the person viewing the site did not scroll down to the bottom of the page. As a result therefore it could be argued that in accordance with the Code for Crown Prosecutors it would not be in the public interest to prosecute unless it can be proven that the defendant clicked upon the images and did not simply "possess" thumbnail images contained in the browser cache.

Another inherent difficulty is the situation where images are viewed but not downloaded and whether this would amount to possession for the purposes of the Act. Some browsers enable users to disable the cache and therefore no images would be stored there but this does not prevent a user from viewing the material online. Defendants may also utilise public internet cafes to view material and/or download it and therefore it would be difficult to demonstrate who had been in possession of the material at the time it was downloaded. In addition, some material, such as the streaming of videos is

not stored in the cache. Arguably if nothing is stored on the computer then there is no possession as there is nothing to be in possession of. If images are stored remotely, such as through the use of a cloud storage facility such as Dropbox then arguably a defendant would be in possession of the image given he has control over it. He would however arguably not have custody of it since it would be stored on a third part server. Nevertheless third party hosts such as Dropbox have been known to scan user files to check for indecent images even though they often promise anonymity to their users. This is made possible using a piece of software, developed by Microsoft, called PhotoDNA, which converts

"incoming images to grayscale and chop[s] them up into tiny squares. Each piece of image data then passes through a one-way hashing function which generates a unique number based on the square's shading pattern. Taken together, these hashes make up the "PhotoDNA signature" of an image; any future picture that generates the same signature is almost certain to be a copy of the original image" (Anderson 2015:1)

Even though PhotoDNA does not work on encrypted files, for example hosted by servers who promise encryption such as Dropbox, image files can be scanned by the hosting companies themselves who have been known to alert authorities to the presence of indecent images (ibid). This technology could therefore theoretically be utilised to scan for prohibited images hosted in cloud storage.

In the context of indecent images of children under S.1 POCA 1978 viewing an image online has been considered sufficient to commit the offence of "making" an indecent image *(R v Smith; R v Jayson [2003] 1 Cr App R 13).* It was held that viewing an image on screen resulted in a copy of the original image being created. However, there is no equivalent offence with regard to prohibited images of children, the offence under S.62 CJA 2009 purely pertains to possession. Therefore clearly someone viewing an image cannot be said to have custody or control of the image given that the image remains on the hosting server.

Arguably this creates a considerable potential loophole in the effectiveness of the offence, if the aim of the offence is to protect the morals of those who may be predisposed to view such images. If it not a criminal offence to stream films or view static images on a webpage but it is an offence to download the images and possess them then surely any offender would simply revisit a webpage rather than store an image on his hard drive. It could be argued that the solution would be greater regulation of the internet in order that sites which contain such material are shut down but this is unrealistic. It is impossible for law enforcement to keep track of websites featuring pictorial representations of child sexual abuse, therefore it would arguably be ridiculous if resources were diverted away from this task in order to police VCP.

It is worthy of note that creating and distributing prohibited images will be dealt with by the Obscene Publications Act 1959 which has been outlined previously. However, this offence pertains to those who create with a view to publication of the images to others. However, if an individual created images for his own use then he will not be guilty of an offence under the OPA 1959 but will still be guilty of the possession offence. It is not clear however whether creating images will be considered to be more serious than possessing images found on the internet. According to the Sentencing Council's Sexual Offence Definitive Guideline (2015) production of an image is consistently considered to be more serious than possession with regard to indecent images of children. Therefore it will be interesting to note whether the same approach is adopted with regard to VCP, where creating images for personal use could be argued to be less culpable than gathering images from the internet.

Image

S.65(2) defines an image for the purposes of this offence. It states that an image includes a moving or still image (produced by any means), or data which is stored by any means which could be converted into an image. It does not however include other types of images dealt with by other

legislation. Arguably this has been included to ensure that if a defendant is in possession of an image which could be considered a photograph or pseudo-photograph then proceedings would be brought under S.160 CJA 1988 instead since this offence carries a higher penalty upon conviction.

However, this is not without difficulty in the case of a pseudo-photograph. Theoretically, a defendant could utilise the wording of S.62(1) to his advantage by arguing that the image is in fact a pseudo-photograph and not a prohibited image. Therefore creating a defence to a prohibited image charge. The prosecution would then potentially bear the burden of proving that the image is not a pseudo-photograph. Although, as noted above, there has been a certain amount of case law discussing what is meant by a pseudo-photograph there has been no definitive guidance from the courts. The definition of a pseudo-photograph in S.7(7) POCA 1978 states

"Pseudo-photograph" means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph."

The reference to computer-graphics therefore may encompass VCP which has been created in a realistic manner, rather than a cartoon image. Theoretically it would be a matter for the Magistrate or jury to determine the quality of the image in question. It may be necessary in future for the courts to be more definitive as to where the line is drawn between a pseudo-photograph and a prohibited image if the law is to be clear.

Child

A "child" is stated as meaning a person under 18 (S.65(5)). However, S.65(6) states that where an image shows a person the image is to be treated as an image of a child if the impression conveyed by the image is that the person shown is a child, or the predominant impression given is that the person shown is a child even if some of the physical characteristics depicted are not those of a child.

The Act states specifically that references to a person or a child do include depictions of an imaginary person or child (S56(7) and S.65(8)).

However, given the types of material the Act seeks to regulate it is surprising that the words "child" or "person" are not more clearly defined. As Gillespie (2012) notes using a dictionary definition a person is a human being which would therefore exclude mythical creatures such as fairies and cherubs. However this may exclude a considerable body of work if this literal interpretation is applied. However, if a more inclusive definition is used which encompasses mythical creatures then arguably it is even harder to justify the creation of the offence under S.62 given that it is difficult to demonstrate how criminalising images of mythical fantasy creatures protects children from harm.

Another difficulty inherent in criminalizing cartoon images is the difficulty in determining the age of a cartoon or fictional character. If an image is that of a realistic child it may be easier to ascertain, but then if such an image could be considered realistic enough to be considered a photograph, then the image would be more likely to be considered a pseudo-photograph rather than a prohibited image. With regard to fantasy images and Manga/Hentai images in particular it is often very difficult to ascertain the age of the character. It is often clear if the character is pre or post pubescent but apart from physical indications there is little way to know if an image represents a "girl" of 15 or 18. The age of the fantasy character will be for the jury to determine as a question of fact but the jury will need to be satisfied so that they are sure, in legal terms beyond a reasonable doubt, that the character depicted is under 18. Expert evidence has been held not to be admissible with regard to indecent images of real children *(R v Land [1988] 1 Cr App R 301)* so it is reasonable to believe that the courts will take a similar approach to prohibited images. However, whereas a juror may be able to age a child from their own life experience it could be questionable as to whether the same assumption could apply to the aging of a cartoon character.

Pornographic

S.62(3) states than an image is pornographic if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purposes of sexual arousal. However, as with obscenity legislation, there is no requirement that the material is necessarily sexual, it could be violent, provided it has been produced solely or principally for the purposes of sexual arousal. According to the Ministry of Justice (2010) whether or not this threshold has been crossed will be a matter for the Magistrate or jury to determine by viewing the image. The intentions of the person who produced the image and the sexual arousal of the defendant are not relevant considerations. Arguably therefore this reinforces the fact that this legislation was enacted in order to regulate morality rather than on the basis of preventing harm to children given that the jury or Magistrates are being asked to evaluate the image objectively with a view to deciding whether society should be protected from such imagery. As with other tests in similar statutes, such as the indecency test in POCA 1978, it is unlikely that expert evidence would be permitted as to whether the image can be considered pornographic. However, as the CJA 2009 is silent on the matter of expert testimony it will be for the courts to decide. In exceptional cases under the Obscene Publications Act 1959 expert testimony has been permitted with regard to test as to whether an article could "deprave and corrupt" *(DPP v A&BC Chewing Gum Limited [1968] 1 QB 159).*

In general terms expert evidence is only permitted in specific circumstances. As Lord Justice Lawton stated in the leading case of *R v Turner [1975]1 QB 834 at 841-2*

"An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary".

Therefore in relation to VCP it is likely that a jury or Magistrates would be able to decide whether an image has been produced solely or principally for

the purpose of sexual arousal. However, this may not necessarily be the case especially if the image is taken out of context. If the image forms part of a series the question of whether the image can be considered pornographic is to be determined by reference to the image itself and the context of the other images in the series (S.62(4) and (5)). The Ministry of Justice (2010) give examples of two particular situations. For example if an image is integral to a documentary that if taken as a whole could not be considered pornographic then the image itself may be considered not to be pornographic even though in isolation it may appear to be pornographic. This is the opposite position taken with regard to indecent images where the individual image has been held to be relevant *R v Murray [2004] EWCA Crim 211*). On the other hand if a collection of images have been put together outside of their original context, such as from different individual films/cartoons, then this may be considered pornographic (when taken together) even though in the context of their original films the images would not be considered pornographic.

It was clear from the Parliamentary debates which preceded the enactment of the CJA 2009 that one of the intentions of Ss.62-8 was to criminalise certain forms of Japanese cartoon art, most frequently known as Manga and Hentai (Parliamentary Debates 3rd March 2009). There are a number of different types of Manga (comic books) and Anime (cartoons) some of which do indeed include the sexual abuse and rape of characters who bear a resemblance to young children (Klar 2014). In particular one sub genre of Manga, Hentai has been used to refer to a specific type of Japanese Manga and animation which features explicit extreme or perverse sexual content featuring different types of intercourse including rape and "tentacle sex" (Ortega-Brena 2009). However, it may be arguable as to whether the comic was in fact produced for the purposes of sexual arousal, it may instead have a different aim such as the subjugation of women or children and/or the portrayal of extreme violence, in which case it will be a matter for the jury as to whether such an image, or series of images could be considered "pornographic" for the purposes of the Act. This raises an important question in relation to depictions of rape scenes and general sexual violence as there

has been much discussion as to whether rape is considered to be a crime of violence which focuses on power and control rather than a purely sexual offence (Barber 2011). If the jury decided an image was not pornographic it may still however be illegal pursuant to the Obscene Publications Act 1959. It could be argued that expert evidence should be admissible with regard to the cultural origins of such material given that the CJA 2009 does not include an artistic merit/public good defence, unlike the OPA 1959. Any animated film which has been classified by the British Board of Film Classification will be exempt to a prosecution under S.62, (S.63).

Grossly offensive, disgusting or otherwise of an obscene character

According to the Ministry of Justice "the words "grossly offensive" and "disgusting" are not alternatives to "obscene character" but are examples of it" (2010:para 18). These words are considered to be ordinary definitions of obscenity and therefore reflect different aspects of the concept. They are not however to be confused with the technical definition contained within the Obscene Publications Act 1959, which is specifically aimed at the concept of publication for the purposes of that Act (ibid). Therefore it is likely that the common law definition will be used namely that obscene means offending against the recognized contemporary standards of propriety *(R v Stamford (1972) 2 WLR 1055*). It has also been recognized that such standards may vary from time to time *(R v Stanley (1965) 2 QB 327, Shaw v DPP (1962) AC 220)*.

The Ministry of Justice (2010) are at pains to note that an image is only caught by the legislation if it satisfies all three elements of the prohibited image test. They believe that if an image satisfies the three elements of the test then this will ensure that the images which are captured are only those which would also be caught by existing obscenity legislation. This is not necessarily true however given that, as discussed above, there is are differences between the technical “deprave and corrupt test” in the OPA 1959 and the general understanding of obscenity which is to be employed by the jury or Magistrates with regard to S.62 Coroners and Justice Act 2009.

Exclusion of Classified Films

According to the Ministry of Justice (2010) the intention of S.63 of the CJA 2009, the section which excludes classified films, is to reassure the public that they will not be subject to prosecution if they possess a film which has been classified by the British Board of Film Classification (BBFC). This is the case even if the films contains an image or series of images which would otherwise have been caught by S.62 CJA 2009. The fact of the images being contained within in a film classified by the BBFC removes them from the scope of S.62 completely.

However, should a defendant edit a section of such a film and this editing could reasonably be assumed to have been done solely or principally for the purposes of sexual arousal then this edited section would still be an offence pursuant to S.63(3). As with images under S.62(4) the context is relevant to extracts of films in that the extract must be considered to be pornographic as discussed above. The Ministry of Justice (2010) note that this is in order to distinguish between the deliberate extraction of prohibited images and extracts which have occurred inadvertently.

Mens Rea

Although the Act is silent as to the mens rea required for the offence to be committed, it is likely that the courts would adopt a similar position to that taken under S.160 CJA 1988, discussed above. Therefore it is likely that the defendant will have to knowingly possess a prohibited image in order to commit an offence under S.62 *(Atkins v DPP [2000] 2 Cr App R 248).*

Defences

S.64 CJA 2009 sets out the defences to a charge under S.62. These are exactly the same as the defences set out in S.160(2) CJA 1988 which have been discussed above.

The case law relevant to deleted images also applies to prohibited images which have been deleted. As noted above deleting an image from a computer will generally be sufficient unless it can be demonstrated that the

defendant intended to remain in control of the image through the use of specialist software. Therefore it would be important for the prosecution to establish that the defendant had the technical capability and necessary software available to him to retrieve the image *R v Porter [2006] 1 WLR 2633.* The Act is not intended to capture accidental viewing of prohibited images and again the issue will be one of custody and control. If it can be established that the defendant had custody and control of an image and knew that he had such control then he may be guilty of the offence of possession.

It is clear that there are many elements of the new offence which are yet to be tested in Court and as a result there remains much uncertainty as to the exact criteria which will be employed, especially with regard to the meaning of “grossly offensive, disgusting or otherwise of an obscene character”. At the time of writing the meaning of the provisions contained within Ss.62 to 68 have not been subject to legal challenge in the higher courts of England and Wales. As a result it is necessary to determine whether the legislation can be justified as it is written, without the benefit of judicial direction.

Having discussed the law pertaining to VCP the next chapter will consider the importance of accurately predicting risk in those who offend against children. It is only through accurate risk prediction that children can be protected and the law used effectively. Risk of reoffending and progressing from one type of offence to another is fundamental with regard to those who offend against children and in determining whether those who view virtual images can be held to pose a risk of harm at all.

Chapter Six: Predicting Risk in Sex Offenders

The aim of this chapter is to consider risk – risk of reoffending and ultimately risk of causing more harm. Arguably only through accurate risk prediction is it possible to determine how to manage particular offenders. The ability to accurately predict risk will in turn have an impact on the types of treatment and intervention offered to different types of offender. This chapter will consider whether one approach is appropriate with all types of sex offenders or whether online offenders require different risk management strategies and ultimately whether there may be a role for VCP in the risk management of a specific type of online sex offender.

How Accurately Are We Able To Predict Risk in Sex Offenders?

An examination of criminological and legal approaches to risk and "dangerous" offenders highlights an emphasis upon a technical understanding of risk within which risk and dangerousness are considered to be objectively knowable phenomena provided the correct tools can be designed and used to detect it (Kemshall 2003). As a result there has been an increasing preoccupation with developing reliable risk assessment tools which are able to identify those offenders who pose a danger to society. The accurate "capture" of risk is very much viewed as a matter of designing the correct tools and employing them with integrity (Bonta and Wormith 2007).

According to Towl and Crighton (1997) the assessment of risk is the act of estimating the probability of an action occurring with regard to a specific individual. They note that risk assessments usually comprise two elements, an estimation of the likelihood or probability of a particular event taking place and the subsequent acceptability or otherwise of the estimated risk or likelihood of the event taking place (ibid).

The identification of the risk of harm posed by sex offenders and the causes of recidivism are fundamental to an understanding of the most effective and appropriate ways to protect the public from harm (Craig et al 2008). When considering reconviction rates of sex offenders, there appears to be a

general perception that reconviction rates are particularly high. In reality, reconviction rates are relatively low when compared to reconviction rates for adult male offenders generally. However, as discussed in depth below it should be noted that reconviction rates are not the same as reoffence rates and therefore it will never be possible to determine with certainty how many offenders actually reoffend but are never apprehended. Some of the most recent reconviction studies conducted using child sex offenders will be discussed fully in the chapter which considers the justifications for the criminalisation of VCP given that the link between online offences and contact offences is one of the primary justifications for the criminalisation of virtual images.

Types of Risk Assessment

There are three types of risk assessment, clinical, actuarial and a combination of the two. A number of academics have argued that any assessment in respect of sex offenders should be broad and involve more than a simple documentation of the level of risk (Beech et al 2009). The types of risk factors identified in the general risk assessment literature are contained within four broad categories; firstly dispositional factors, such as psychopathic or antisocial personality disorders, secondly, historical factors such as previous convictions, prior history of violent outbursts, poor treatment compliance and previous hospitalisation, thirdly, contextual antecedents to violence such as criminogenic needs, deviant social networks and lack of positive support networks and finally clinical factors for example diagnosed mental illness, poor level of functioning and substance abuse problems. (McGuire 2000).

In terms of clinical risk assessment there are two main models which feature frequently in the literature namely Finkelhor's Multi Factor Model of Child Sexual Abuse (Finkelhor 1986) and Woolf's Sexual Assault Cycle (Woolf 1984).

The Multi Factor Model of Child Sexual Abuse aims to identify four possible inhibitors of offending which have to be overcome when committing offences.

In addressing these factors it is possible to gather intelligence regarding an individual's patterns of offending which can then be used to develop relapse prevention strategies for the particular offender which in turn can be compared with other offenders in the search for common variables (Grant 1998).

The four factors are:

- Motivation to abuse: For example sexual attraction to children or the need for gratification.
- Overcoming Internal Inhibitors: This includes how an offender convinces himself that his actions are acceptable; for example telling himself no one will know, he is not really doing any harm, it is the last time, it is an expression of love, it happened to me, the child wants it, or through alcohol or drug abuse.
- Overcoming External Inhibitors: For example how an offender can gain access to children, this can be accomplished by having your own, working with children, gaining the trust of the parents of a child or marrying into a family with children.
- Overcoming the Victim: Only 4% of offenders use violence (Grant 1998), more often threats of violence are used or the child is bribed, groomed to be compliant, or blamed for being provocative.

Another clinical model frequently used which places particular emphasis on the pre-offence stage of offending is Woolf's Sexual Assault Cycle (Woolf 1984). The model is best explained in diagrammatic form:

My Predisposition to abuse is……..

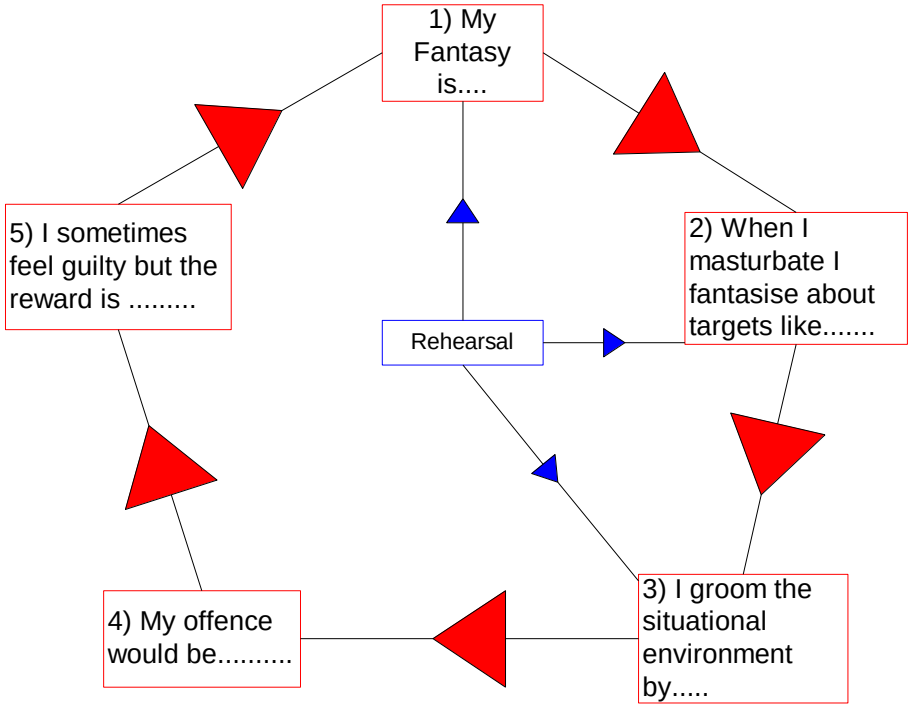

Figure 2 Woolf's Sexual Assault Cycle (Woolf 1984)

This model would be used to gather information in relation to the factors which lead the offender to abuse, placing particular emphasis on his masturbatory fantasies, which often reinforce the offender's desire to offend. The model aims to block the cycle of offending rather than addressing its cause. It is clear that offences can be rehearsed during the fantasy stage, as a result most practitioners advocated blocking the cycle after stage 2 (Grant 1998), however there are those who allow behaviour to progress to stage 3 since technically there is no illegal behaviour up to this point (ibid).

The actuarial approach to risk assessment involves discerning the variables which have been shown to be predictive of reconviction and assigning them a relative value in order to determine low, medium and high risk cases by score (ibid). However, the replicability of such factors must be questioned given that it is difficult to determine whether the identified variables can be used with other types of offenders from different offender groups rather than the group upon which the original variables were tested (Craig, Browne and Stringer 2004). A full discussion of the various actuarial scales is beyond the scope of this thesis.

The Difficulties in the Measurement of Risk

Thorough accurate risk assessment is crucial to the effective identification and management of high risk offenders (Kemshall et al 2005). However, this is an area fraught with difficulty. The focus of this section will be on the faults and difficulties inherent in risk assessment and a consideration of how these difficulties may be reduced. The general issues regarding risk assessment fall into the following categories; how to categorize risk and the systemic faults in risk assessment including the difficulties encountered with multi agency working, individual error and bias and problems specific to the actuarial scales outlined above.

Categories of Risk

It is important to note at the outset that a category of risk is not a definition, although it may be treated in practice as if it were. For example, the risk being considered may be the risk of harm to the public rather than the risk of reconviction and therefore can be divided into categories of low, medium, high and very high. These categories are essentially about degree of risk and are used to create thresholds which determine service delivery in individual cases. The Probation Service risk assessment tool OASys has been revised over time from three to four categories (Probation Circular 2006); the MAPPA categories have been revised as have the risk categories used in the sex offender assessment tool Risk Matrix 2000 (Moore et al 2007).

Assigning an offender to a risk category is not without its difficulties but it is crucial that the assessment is accurate if the public are to be adequately protected. For example the UK Inter-Departmental Liaison Group on Risk Assessment summed it up when they stated "Absence of evidence of risk should never be confused with or taken as evidence of absence of risk" (ILGRA 202:5). Practitioners have been known to avoid using the low risk category in favour of medium risk either in cases where defensive practice has resulted from media coverage inducing a culture of blame or where resources are scarce for those of lower risk (Kemshall et al 2005). In addition, confusion regarding the criteria for accurately assessing risk can be

problematic. The criteria for assessing risk are complex and make demands on the knowledge, skill and competence of those who carry out the risk assessments and practitioners often do not have the luxury of the time required to access, read and digest all the information required due to increasingly high caseloads of offenders to manage, all of whom require frequent risk assessments.

Individual Error and Faults in the System

Risk management failures are often attributed to the incompetence, negligence or poor practice of individual workers (Laming 2003). However, many risk management failures are caused by the inherent faults in the system. Sources of failure can include the transition from one way of working to another and nowhere is this more obvious than the move towards the predominance of actuarial justice in the Probation Service, given the original focus of the Probation Service was firmly rooted in the principles of advise, assist and befriend and the welfare of the offender (McWilliams 1987). The transition from "need to "risk" has been arduous and troubled (Kemshall 2003) and this has resulted in controversial debates regarding the value and purpose of the Probation Service (Robinson and Raynor 2006). As a result Probation Officers interpret risk policies and procedures using their existing work based cultures and values and this has resulted in significant practical difficulties when applying risk management tools in practice (Kemshall 2000).

There are also significant difficulties in multi agency working with regard to risk assessment and management. The most significant faults are the failure to exchange critical information, the failure to communicate changes in the risk status of an offender, lack of communication between those who assess risk and those who manage it and a lack of accountability for decisions made and any subsequent failures (Reder and Duncan 1999). Recent case management failures have alerted the public, as well as the criminal justice agencies, to the flaws in the system and therefore it is necessary to consider the underlying strategic management of the system as well as individual error.

Clearly in an ideal world practitioners would have sufficient time and information available to be able to make accurate risk assessments. However, working with offenders often does not take place in the most conducive surroundings and practitioners often have to make decisions based on incomplete information in a climate of increased blame and accountability (Ruszczyski and Greengard 2002).

Criticisms of Actuarial Scales

Although research has demonstrated some usefulness in using actuarial scales to measure risk of reconviction in sex offenders there are a number of criticisms of the actuarial approach (Hart, Laws and Kropp 2003). Firstly, there is a considerable difference between the various risk scales and as a result applying aggregate group data to the individual whose characteristics may be different from the sample group may be problematic. It is not therefore clear to what extent actuarial scales can be used to generalise across the various different sub categories of sex offender, for example female sex offenders and those with learning and developmental difficulties. Most actuarial scales use variables such as number of previous convictions and prior non sexual violence to assist in predicting risk whereas for sex offenders with learning difficulties the predictive variables are different. Therefore as Green, Grey and Wilner (2002) note actuarial scales may actually underestimate the risk of those offenders who have been diverted from the criminal justice system and who are dealt with by mental health professionals.

It is clear that actuarial scales can only really be applied to individuals who share the characteristics of the original sample group of offenders and any deviation from this will have a considerable impact on the predictive accuracy of the scale. Grubin and Wingate (1996) argue that empirical evidence from one population does not necessarily translate to another and that therefore the predictive accuracy is lowered to around 40%. Beech et al (2003) have made the following observations regarding actuarial risk assessment scales. Firstly, actuarial scales provide the user with a probability not a certainty of

future reconviction. Secondly, since the existing scales have been developed using official recidivism figures the reality is that the reconviction rates are likely to be considerably underestimated, for example in a case where an offender is classified as low risk but still has contact with a victim it is likely that reoffending will occur and it may never be reported and therefore there is no actual reconviction. Thirdly, if the practitioner relies solely on actuarial scales then it may lead the practitioner to overlook clinical matters which are particularly relevant to a specific individual. Fourthly, actuarial risk assessment estimates may be deceptive for individuals with particularly unusual characteristics which do not frequently feature in the populations used to construct the scales. Actuarial scales only seek to predict long term risk of offending and therefore do not take into account any particularly acute risk factors which may result in immediate reoffending. Finally, actuarial scales do not alert a practitioner to the factors which need to be addressed if risk is to be reduced and therefore they do not assist a practitioner ultimately in risk management.

The predictive accuracy of a risk assessment scale depends on a comparison of the sensitivity or hit rate with the specificity or false positive rate. However, the probability that a positive result is a true positive varies depending upon the base rate of the group to which the test is being applied. As Janus and Meehl (1997) note in certain circumstances even the most accurate test will produce a number of false positives. The probability of a result actually being a true positive will depend upon the base rate of the sample group. Kemshall states that "the base rate is the known frequency of a behaviour occurring within the population as a whole (2002:16). If the base rate for a particular population is low, as is the case with sex offenders, then it is accepted that predicting risk of reoffending is more problematic. In a study reviewing Static-99 which had a base rate of 4.3% Hood et al (2002) noted that the actuarial scale over-estimated risk in 49 cases out of a total of 50. Similarly in another study pertaining to Static-99 with a base rate of 2% on this occasion Craissati and Beech (2003) reported an over prediction of risk in 29 cases out of 30.

The implications of over predicting risk can have considerable implications for the offender especially when his sentence may require the Parole Board to be satisfied that he is no longer a risk of harm to the public. It may also result in the offender having to undergo extended supervision and unnecessarily participate in sex offender treatment programmes (Mailloux et al 2003). In the Hood et al study (2002) the research determined that in three quarters of the cases out of a sample of 162 offenders, the Parole Board had overestimated the offenders' level of risk to the community. However, at the same time it is clearly necessary to balance the risk of false negatives whereby an offender is actually assessed as low risk but in fact they go on to commit further offences.

Risk can also vary depending upon the setting in which the scale is used, for example in prison, the community or in a hospital. Craig, Browne and Stringer (2004) evaluated the application of six risk assessment tools on a sample of 139 sex offenders, 51 of whom were in the community and 88 who were in prison. The tools assessed were SACJ-Min, RRASOR, Static-99 and Risk Matrix 2000, both RM2000/s and RM2000/V. In the sample of offenders in prison between 1% and 42% were classified as low risk, compared with between 1% and 66% which were classified as high risk depending upon the actuarial scale used. In the community sample 8% - 43% were classified as low risk and 4% to 70% were classified as high risk again depending upon the scale used. This variability between different scales may be partly due to a systemic flaw which is referred to as the "statistical fallacy effect" (Dingwall 1989).

Bartosh et al (2003) analysed the validity of Static-99, RRASOR and SORAG in predicting recidivism and found that the effectiveness of each actuarial instrument varied depending on the type of offender. For example when examining those who sexually abused children outside the home Static-99 and SORAG were both significantly predictive of sexual and/or violent recidivism. However, although RRASOR was significantly accurate in predicting sexual recidivism for the group as a whole, it was less consistent than Static-99 for specific offender types. In fact, none of the instruments

analysed established consistent predictive accuracy over all offender types. Clearly this is problematic when such actuarial scales are using frequently by the criminal justice agencies who have responsibility for making accurate risk assessments upon which decisions are made as to whether an offender remains a risk of serious harm to the public.

A further limitation of actuarial scales is their heavy reliance upon officially recorded rates of reconviction which typically underestimate the true level of reoffending. It is clear that reconviction is not the same as reoffending and there is no way to ascertain the true picture of exactly how many further offences are committed and not detected. A study was conducted which compared the difference between the rate of recidivism recorded in the Police National Computer (PNC), the Home Office Offender Index (OI) and the results of a sex offender treatment programme. Falshaw et al (2003) found that the recidivism rate figures from the sex offender treatment programme were 5.3 times greater than the rate calculated from the OI and 1.8 times higher than the figures from the PNC. As Grubin (1998) notes given that reoffending rates are unknown if those who are considered low risk continue to offend but avoid apprehension then in actual fact measuring rates of reconviction achieves very little. In addition, the scales do not attempt to predict the type of offence that the offender may go on to commit and therefore it is completely impossible to actually ascertain the level of potential harm to the public (Kemshall 2001). Furthermore those who are convicted of an offence for the first time clearly do not have any previous convictions which are instrumental in calculating risk in all actuarial scales, therefore predicting risk of harm in those with no criminal history is very problematic indeed (Grubin 1998).

There is some academic research which suggests that risk assessment may be most successful when actuarial and clinical methods are combined and a number of dynamic risk factors, those factors which change over time, are included to again increase predictive accuracy. However, this research is in its infancy and therefore little data is available at present (Hanson and Thornton 2000, Beech et al 2009). Other academics have argued that risk

assessment models may be enhanced by using idiographic (person specific) risk factors. Idiographic risk factors include clinically determined criminogenic factors, facilitators and inhibitors of risk and psychometric assessments of psychopathology. However, it is not yet known whether idiographic factors will increase or decrease predictive accuracy (Craig et al 2004a).

Risk Prediction in Online Offenders

Research has shown that progression from image offending to contact offending generally appears to be rare. As Seto et al (2011) note less than 5% of online offenders were reconvicted within a 6 year follow up period and only 2% reoffended by committing a contact offence. Faust et al (2015) states that during a follow up period of 9 years 3% of offenders committed a contact offence and 1.6% committed an additional image offence. As a result of studies such as these it is likely that the existing risk prediction methods may require reconsideration, as according to Osborn et al (2010) they are unlikely to make accurate or reliable risk predictions. As a result some research has been undertaken in order to determine which predictive factors could be used to help isolate those image offenders who may go on to contact offend.

Although the research in this area is not conclusive one factor which has been considered important is the level of sexual deviance shown by the offender. There is a relatively large amount of research to suggest that those who image offend are aroused by sexually explicit images of children. This has been demonstrated through self reporting and also through phallometric assessments (Seto et al 2006), leading some to believe that having a sexual interest in children may be a valid diagnostic indication of paedophilia (Seto et al 2010). However, although this may be an indicator of sexual interest in children it does not assist in predicting which offenders may go on to become contact offenders. Goode (2010) discusses the fact that there are those men who acknowledge a sexual interest in children but who do not act upon that attraction or condone such action in others. As noted above Seto et al (2011) examined sexual offence histories and recidivism rates among online

offenders and found that there is likely to be a subgroup of image offenders who are online only offenders and therefore pose a lower risk of committing contact offences against children.

Eke et al (2011) and Seto and Eke (2005) studied how traditional risk assessment methodologies could be applied to online offenders. Offenders who had prior or concurrent violent offences and/or contact sexual offences, were significantly more likely to contact offend when compared to other types of offenders. Those who had only been convicted of image offending were far less likely to be convicted subsequently of a contact offence. They also found that those who were younger than 24 at the time of their first detected offence were at greater risk of contact offending. In 2012 an additional study by Eke and Seto increased the risk factors to include a low level of education, those who were single, individuals with substance abuse issues and those with a sexual interest in children. Lee et al (2012) found that those who had committed a contact offence and an image offence could be distinguished from those who has only committed one type of offence. Image offenders scored highly with regard to internet preoccupation but low on antisocial behaviour whereas it was the opposite for contact only offenders. Those who had committed both scored highly with regard to both internet preoccupation and antisocial behaviour. A comprehensive meta analysis of the risk factors for cross over offending was carried out by Babchishin et al in 2015. They compared 2284 known image offenders with 1086 offenders who had been convicted of both image offending and contact offending and determined that the image offenders who were most at risk of becoming contact offenders were those with a sexual interest in children, those who had access to children, those with few psychological barriers preventing them acting on impulse and those who scored comparatively highly with regard to anti social behaviour. The authors noted that opportunity was an important factor and offenders were more likely to cross over to contact offend if there was consistent access to children. Those who did not have access were more likely to remain image only offenders (ibid).

Although it has been possible to determine some of the risk factors for cross over offending from image offences to contact offence there is no definitive solution. It has become clear however that there are distinct types of offenders, those who are driven by contact, those who are driven by fantasy (Meridian et al 2013) and those who can be considered dual offenders. Arguably the fantasy driven offenders display different characteristics from contact sex offenders and therefore it is necessary to determine distinct risk assessment and management strategies (Seto et al 2010). It is these offenders who could potentially benefit from the use of VCP in order to assist in breaking the cycle of offending.

Implications for Treatment

This section will look specifically at the offending behaviour programmes currently being employed both within prison and in the community which target sexual offending and will consider whether the programmes are effective in reducing reoffending in sex offenders. It is worthy of note that the majority of treatment programmes have not differentiated between the types of sex offender who take part. As a result it is necessary to engage in a general discussion of the treatment programmes offered before considering whether any specific treatment options have been developed for image only offenders.

The Sex Offender Treatment Programme in Prison

In the 1980s there was a considerable increase in the profile of sex offender treatment in England and Wales (Friendship et al 2003:1). In 1991 a co-ordinated approach to the assessment and treatment of sex offenders was announced by the then Home Secretary and the prison based sex offender treatment programme (SOTP) was born (Brown 2005:56). The programme was initially targeted at those who were serving sentences of four years or more and who volunteered for the programme; it later included those who were serving a sentence long enough for them to complete the programme (ibid:56). The SOTP has undergone a number of changes over the last ten years and is now running in 26 establishments in England and Wales with approximately 1000 men undertaking treatment each year (Beech et al

2005:5). In 2008/9 the actual number of men who completed the programme was 1114 (Ministry of Justice 2010:12). The SOTP accepts offenders whether they have offended against adults or children and past estimates have suggested that 80% of those undergoing treatment are child sex offenders, 15% rapists and 5% sexual murderers, although these categories are not necessarily mutually exclusive (Beech et al 2005:5).

The Primary objectives of the Core SOTP Programme are to "increase offenders' motivation to avoid reoffending and to develop the self management skills necessary to achieve this" (Ibid:5), this is generally known as relapse prevention (Beech et al 1998:10). SOTP is based on a cognitive behavioural model following the "what works" principles and covers offence focused targets such as the reduction in the extent to which offenders minimise and justify their offending, the development of victim empathy and the development of ways in which to manage personal risk factors (Friendship et al 2003:2). The following risk factors are seen as the main targets for change as part of the treatment programme; sexual preoccupation, sexual preference for children, preference for sex involving violence or humiliation, rare sexual predilections, attitudes which support offending, seeking emotional intimacy with children rather than adults, impulsivity, poor problem solving skills, resistance for authority and consorting with other offenders (Ministry of Justice 2010:1).

The SOTP is made up of the Core Programme with other available programmes for those considered to be higher risk or those offenders with additional needs.

The Core Programme

The Core SOTP is the main programme for medium and high risk offenders with an IQ of 80 or above (Brown 2005:62). The Offending Behaviour Programme Unit recommend that the treatment group should run for approximately 91 sessions of two hours (plus or minus 10 sessions) with 9 offenders per group, meeting between 2 and 5 times per week. The average for the 55 Core Programmes considered in the main research study

conducted by Beech et al was 188 hours over 94 sessions (2005:6). As Beech et al 1998 summarize the programme is divided into 20 blocks which cover the key target areas in detail. The key target areas are "Minimisation" which includes encouraging the offender to take responsibility for his offending and to recognise the harm caused to the victim. It also involves helping the offender to recognise how they make excuses for their own behaviour. "Distortions", sex offenders frequently have distorted thinking regarding their offending behaviour and the programme identifies and challenges the behaviour, enabling the offender to acknowledge that they have a distorted view of their offending. "Victim Empathy", it is well known that many sex offenders do not empathise with their victims. Therefore victim empathy is a fundamental component of any cognitive behavioural treatment programme, since it is believed that if an offender understands the impact of their offending on the victim they are less likely to reoffend. "Risk Factor Awareness", although the primary goal is to prevent reoffending it is important for offenders to be aware of the factors which put them in danger of reoffending and therefore work at dealing with risky situations. "Coping Strategies" having acknowledged the risk factors associated with their offending it is necessary that an offender develops a strategy to cope with risky situations. It is important that the offender practises and develops these strategies in advance so that they can be used when confronted with the temptation to reoffend when released from prison. "Coping Skills", treatment should focus on assisting an offender to develop the skills needed to prevent reoffending and work on the relapse prevention techniques developed in the coping strategies element of the programme. "Maintenance", it is important to maintain the skills learnt as part of the programme and be able to apply the coping mechanisms learn to real life situations. Offenders are encouraged to develop a relapse prevention plan and if they remain in custody to undertake other programmes available. Those serving long sentences may attend the Booster Programme in the year prior to their release (Beech et al 1998:11).

In addition to the treatment areas specifically covered it has been shown that the fact that the treatment is delivered in a group setting is often in itself

beneficial to the offenders. Group work is essentially about interaction with other people, and the interaction between individuals can be used to facilitate change. "[Group work] may help the offender to become less secretive, begin to deal with previously unresolved guilt, anger or anxiety, and move towards more socially acceptable behaviour. With the support of the group, individuals within the group environment can feel safe to practise and discuss the new skills and ways of thinking that have been developed during therapy" (Perkins et al 1998:10).

The Effect of the Prison-based Programmes on Reconviction Rates

In order to effectively evaluate whether an offending behaviour programme is having a positive effect on those who undertake it is important to consider two particular factors the "treatment impact" and "treatment outcome" (Perkins et al 1998:12-15). Treatment impact describes "the extent to which treatments have had an effect (or impact) on aspects of the offenders' behaviour which they would be predicted to modify according to the model of treatment being delivered" (Perkins et al 1998:12), in this case cognitive distortions, victim empathy and relapse prevention skills for example. However, a full discussion of this impact of the SOTP on these factors is beyond the scope of this chapter, as a result the chapter will focus on treatment outcome. Treatment outcome, in the context of sexual offending, is the extent to which the treatment has reduced longer term reoffending rates, measured in terms of reconviction, when comparing offenders who have received treatment to those who have not (Ibid:12).

Treatment outcome is most frequently measured by using reconviction rates in order to analyse whether a programme has ultimately been successful. As Beech et al state "the ultimate test of the effectiveness of the Core Programme is the extent to which it reduces further offending" (1998:94).

The study conducted by Friendship et al in 2003 examined the difference between the officially recorded reconviction rates of 647 sex offenders who completed the SOTP between 1992 and 1994 and 1910 sex offenders who had not completed the programme. There was no major difference between

the reconviction rates of the two groups, 2.6% and 2.8% respectively. The effect of the treatment was more evident amongst the medium to low risk offenders, 1.3% having been reconvicted in the treatment group compared to 3.4% of the non treated group. Also in the medium to high risk offenders 2.8% of the treatment group were reconvicted compared to 5.2% of the non treated group. The low risk offenders appeared to be reconvicted at a very low rate for both samples and in fact the high risk offenders in the treatment group had a higher risk of reconviction than those who had not been treated, 16% and 14% respectively (Friendship et al 2003:3). These results appear to show therefore that treatment can have a positive effect on the reconviction rates of medium and low risk offenders but appears not to be effective in reducing the reconviction rates of high risk offenders.

However, given that rate of reconviction for sex offenders is very low in any event, Falshaw et al argue that "any reduction would be so small it would be impossible, statistically, to attribute it to the effectiveness of treatment rather than chance factors" (Falshaw et al 2003:2). The solution to this difficulty would be to assess reconviction rates over a longer period of time as Falshaw et al suggest. However, this is both time consuming and politically difficult. The public are fearful of sex offenders being released into the community without concrete evidence that they can be "treated", therefore it will always be difficult for any elected administration to undertake a long term study, both in terms of being elected for a sufficient period for the study to be completed and also for fear of media reprisals should something go horribly wrong.

In 2017 Mews et al conducted a critical evaluation of the prison-based Core Sex Offender Treatment Programme (SOTP). This evaluation compared the recidivism rates of sex offenders who had completed the prison based treatment programme with sex offenders who had not completed the programme. There were 2562 sex offenders who completed the programme between 2000 and 2012 and these offenders were compared with 13,219 sex offenders based on 87 matching factors from the Police National Computer, the SOTP records and the Offender Assessment System

(OASys). The researchers used propensity score matching in order to match sex offenders who had completed the Core SOTP with similar offenders who had not undertaken the programme.

The key findings from the evaluation are not encouraging. It would appear that over a follow up period of an average of 8.2 years a greater percentage of offenders who had undergone treatment reoffended when compared to those who had not undergone treatment, 10% and 8% respectively. In addition 4.4% of the offenders who had received treatment committed at least one image related offences compared to 2.9% of those who had not undergone treatment. The conclusion to the study suggests that either the Core SOTP does not reduce offending as had been previously hoped or that the true impact of the study was not detected due to methodological limitations and issues with sampling and matching criteria (ibid:4).

As discussed below there are a large number of difficulties in effectively evaluating treatment programmes, especially when the main measure of success is recidivism. Nevertheless Mews et al 2017 acknowledge that effective treatment may need to include more individualised sessions rather than focusing on group work. There have also been some positive treatment outcomes through community based interventions. These are discussed below. It may be that the time has come to abandon the “one size fits all” approach to treatment and develop more tailored interventions which specifically target types of offender based on their motivations for offending. Arguably the time has come to recognise that like other types of offences, such as murder, there are a myriad of reasons for committing sexual offences against children and until this is addressed it is likely that risk management will continue to be a very difficult task.

Although treatment programmes are offered in the community to varying types of sex offenders this next section will specifically consider treatment for online offenders rather than general community programmes as arguably these programmes are of more relevance to those individuals who are convicted of images offending which may include VCP.

Treatment for Online Offenders

The allocation of online offenders to community based treatment programmes may depend upon the level of risk such offenders are deemed to pose, either or committing another image offence or of committing a contact offence. However, as Wakeling, Howard and Barnett (2011) note traditional risk assessment measures often fail to take into account internet specific variables and therefore internet offenders are often found to pose a low risk of committing another offence. This may therefore result in treatment not being offered and therefore there is little intervention with regard to their motivations for sexual offending.

By 2005 and it was clear that nearly a third of all convictions for sexual offending in England and Wales were for internet related offences (Middleton et al 2009). As a result in late 2006 a specific community based internet related treatment programme (i-SOTP) was given accreditation to be used in throughout England and Wales and administered by the National Probation Service.

Prior to the development of the programme consideration was given to the dynamic risk factors which were present for internet offenders. In 2007 Laulik et al determined that there were significant differences between internet offenders and the general population with regard to both interpersonal functioning and affective difficulties. Internet offenders also reported higher levels of intimacy deficits and emotional dysregulation (ibid). They also reported higher level of depression in the sample and that this was linked to increased internet usage. This research provided support for previous studies which had determined that viewing indecent images online may provide a mechanism to escape a negative mood providing temporary psychological and physical relief (Morahan-Martin and Schumacher 2000).

As a result the programme developers believed that it was necessary to discuss the treatment approach with the individual offenders in order to determine the context of the behaviour. It was also considered appropriate to

address sexual compulsivity, problematic internet use and obsessional thinking; however it was acknowledged that not all offenders would have the same treatment needs and therefore some flexibility was very important (Middleton 2009). The i-SOTP programme was designed for internet offenders who had been convicted of an internet related offence and who had been assessed using the Risk Matrix 2000 actuarial scale as low, medium or high risk but who were also considered "low deviance" (Beech 1998). Those offenders who were considered very high risk or who were considered "high risk" were deemed more suitable for the general longer term treatment programme administered with the community discussed above. The programme was originally designed to be administered on a one to one basis but after some revision the programme was further developed in order to enable it to be delivered in a group setting (Middleton 2009).

In 2009 Middleton et al published an evaluation of the i-SOTP programme. The sample comprised 264 offenders used in the evaluation all of whom completed the i-SOTP programme between 2006 and 2008. Risk assessment data was available for 161 of the offenders and 51% were assessed as low risk, 39% as medium risk, 9% high risk and 1% very high risk (ibid). Of the sample offenders 70% were classified as low deviance and 30% high deviance. Although it has been noted that the programme was best suited to low deviance offenders Middleton et al stated that it is likely that those administering the programme believe that it was better for the high deviance offender to undergo some form of treatment rather than no treatment (ibid). 88% of the offenders had been convicted of viewing indecent images of children outside the home and 12% had viewed images from within their family.

The results of the evaluation show that offenders demonstrated increased self esteem and a greater ability to accept responsibility for their behaviour after completing the treatment programme. It was also noted that there had been improvements in offenders' self management issues particularly in relation to impulse control and assertiveness. The largest change could be seen in the offenders' responses to the victim empathy scale as developed

by Beckett and Fisher (1994). The study also reports a reduction in cognitive distortions amongst offenders which support offending behaviour. The aim of the study was to measure how many of the sample could be considered to have achieved a "treated profile". In order to accomplish this the offender must demonstrate that they are psychometrically indistinguishable from the general population across of number of criteria which measure pro-offending attitudes and socio-affective functioning (Middleton 2009). 53% of the sample were considered to have achieved a treated profile.

As a result the data appears to demonstrate a positive change amongst some offenders after completing the programme. However, as Middleton (2009) argues it would be advantageous to conduct a larger scale reconviction study to measure the reconviction rates of those who had completed the programme when compared to a sample who had not undergone treatment. Middleton also acknowledges that positive change may have been influenced by other factors which occurred outside of the treatment programme (ibid).

A more recent evaluation of a community based programme conducted by Gillespie et al took place in 2016. This study aimed to evaluate a community based psycho-educational programme offered by the Lucy Faithfull Foundation[15] to image offenders entitled "Inform Plus". The majority of men taking part in the programme did not have an existing conviction for image offending even though they admitted accessing child abuse images, as a result the researchers refer to those taking part in the programme as participants rather than offenders (ibid:8). Many of the participants had volunteered to take part and had referred themselves to Lucy Faithfull via their Stop It Now helpline. A number of these participants were under investigation by the police, some of the participants had been cautioned or convicted and some had been referred via Probation or children's services.

[15]A UK Based Charity

The aim of the “Inform Plus” programme is to assist offenders in desisting from offending behaviour. However, the programme differs from other cognitive behavioural programmes in that attendance is voluntary and most participants have contributed financially in order to take part. As a result Gillespie et al (2016) note that the group is likely to contain participants who are particularly motivated to change their behaviour. The study sample contained 92 male image offenders who ranged in age from 25 to 70. The study calculated change before and after the programme across a number of mental health issues, social competence, emotion regulation, empathy and offence supportive attitudes (ibid:29). The analysis showed a significant positive change in relation to depression, anxiety, stress, social competency and offending supportive attitudes. Although there was not a significant positive change with regard to victim empathy it has been argued that online offenders do not demonstrate deficiencies in victim empathy and that a lack of victim empathy does not affect rates of recidivism (Hanson and Morton-Bourgon 2005). Middleton et al (2009) also found that offenders fell within the normal range for victim empathy. As a result Gillespie et al question whether an increase in victim empathy is a necessary treatment target for online offenders (2016:32).

The main limitation of this study is the lack of examination of the impact of the treatment on rates of recidivism. However as Gillespie et al (2016) note “establishing the effectiveness of interventions for online offenders on the basis of official recidivism rates is complicated by low base rates of reoffending among this type offender, meaning that very large sample sizes would be required over a long follow-up period” (ibid:33). Nevertheless they argue that the results are not only statistically significant but also clinically significant. However, it is difficult to know whether the positive outcomes are the result of the type of motivated participants especially given the lack of a control group with whom to compare results. The authors also note that some results may be the result of changes which would naturally occur over time and may be affected by the circumstances of the participants, such as increased stress levels during the investigative stage. Another limitation of

the study is the reliance on self reporting in the absence of any other outcome measure (ibid:34).

Nevertheless the results do suggest that psych-education programmes do have the potential to make a difference to the offending behaviour of image offenders both self referrals and those who have been convicted and therefore such programmes are worthy of further research and development.

As has been alluded to earlier there are a number of limitations of evaluating any offending behaviour programme in terms of the impact upon reconviction rates and the next section will provide a discussion of these limitations and of some of the general difficulties associated with measuring the effectiveness of offending behaviour programmes.

The Difficulties Inherent in Measuring the Effectiveness of Offending Behaviour Programmes

Firstly, it is usually the case that the effectiveness of a treatment programme on the offenders who have undertaken the programme is measured either when they are released from custody or have completed a community order. However, this approach ignores the vital differences between individual participants and the way they respond to the treatment itself, "it makes the assumption that all offenders are benefiting equally from the therapeutic process" (Friendship et al 2003a:119). Friendship et al argue that by grouping all of the offenders together and assessing reconviction rates collectively could result in masking the true effect of the treatment and therefore it would be useful to monitor those individuals who had benefited from the treatment compared with those who did not show improvement as this may result in a more accurate reflection of the effectiveness of the programme (ibid).

Environmental factors can also affect whether or not a programme that is effective in one setting is effective in another, for example each prison establishment, whilst working towards the same goal can promote a different culture and environment, some will assist the treatment process, others will

detract from it. Treatment in prison is certain to be affected by the types of regime run at the establishment, the level of resourcing, the level of contact between offenders on the same programme, the continuity of the staff delivering the programmes and the attitudes of the programme facilitators and other staff to those taking part in the treatment process (Friendship et al 2003a). Factors relating to the individual offender will also affect the effectiveness of the programme and as Hough argues "there is a failure to recognise that work with offenders is a highly reflexive process in the sense that meanings attributed to the process by those involved in it will affect the outcomes. This means that the effectiveness of interventions will be highly context specific. What works in one culture at one time may well be ineffective in other settings at other times" (Hough 2008:5).

In conclusion it has been shown that there is some evidence that offending behaviour programmes can have a positive impact in terms of reducing reoffending, but that there are methodological problems with being solely reliant upon reconviction data as a measure of effectiveness. It is clear that by incorporating other sources of data it may be possible to produce a more accurate measure of levels of reoffending by those who have undertaken treatment programmes. It is evident that more research needs to be conducted with larger groups of offenders and over longer periods of time but this is both costly and time consuming. Finally, it is important to note that there will always be a number of variables which impact upon the effectiveness of any intervention and those variables fundamentally relate to fact that those being treated are complex human beings with individual thoughts and feelings, who will respond to the same treatment programme in a myriad of different ways. It is also important to remember that not all types of child sex offender are the same as discussed above.

Having discussed the necessity of accurate risk prediction amongst those who offend against children and in light of what is known about the accuracy of predicting risk, the next chapter will discuss whether the criminalisation of VCP can be justified in light of the information provided in previous chapters.

Chapter Seven: The Justifications for the Criminalisation of Virtual Child Pornography

The aim of this chapter is to consider the justification for the criminalisation of images of child sexual abuse featuring imaginary children. The chapter will first consider the prevalence of sexual attraction to children within the general population; it will then review whether it has been possible to establish a link between those who view images, both of real and imaginary children, and those who commit contact offences. In order to accomplish this, a critical evaluation of the empirical research in this area will be conducted. This section will be followed by a brief consideration of the treatment of VCP in various other jurisdictions. The chapter will then consider the harm based arguments pertaining to pseudo images and virtual images in order to determine whether the criminalisation of such images can be justified on the basis of the harm principle. Finally the chapter will consider the responses to the Consultation on the criminalisation of virtual images in order to determine whether there are any additional arguments in favour of or against the criminalisation of such images.

The Prevalence of Sexual Attraction to Children Amongst the General Population

There has been little research conducted into the levels of sexual attraction to children within the adult population and the role that child pornography plays for those who have a sexual interest in children including the factors which distinguish between those individuals who go on to commit contact offences and those that do not. In 2014 Wurtele et al conducted an online study the aim of which was to establish the prevalence of sexual attraction to children within the general population. 173 men and 262 women completed the online survey and 6% of men and 2% of women who responded to the questionnaire indicated some degree of likelihood of having sexual relations with a child if it were guaranteed that they would not be apprehended or punished. In addition 9% of males and 3% of females indicated some likelihood of viewing indecent images of children on the internet. Overall, nearly 10% of males and 4% of females reported some likelihood of having

sex with children or viewing child pornography (Wurtele et al 2014). This study is not without limitations given the fact that it was a convenience sample. However, the perceived anonymity of the internet may have resulted in more honest results.

There are a number of previous studies which have also sought to determine the prevalence of sexual attraction to children within the general population. In 1989 Briere and Runtz conducted a survey of 193 male college students of which 9% had had fantasies involving children, 5% of these had masturbated to these fantasies and 7% indicated some likelihood of engaging in sexual activity with a child if they were certain not to be apprehended or punished. A number of additional studies took place within the 1990s, Templeton and Stinnett (1991) and Bagley, Wood and Young (1994) both reported that 5% of their respondents, again male university students, reported a sexual interest in children. In 1998 Byers, Purdon and Clark conducted a survey amongst male university students and found that 19% had experienced thought of engaging in sexual acts with minors. However, in this case the study did not differentiate between pre and post pubescent children which is arguably why the figures were considerably higher. It is not particularly surprising that male university students may have had sexual thoughts about teenage girls given the potentially minimal age difference. In 2010 a study in Finland questioned a representative community sample of 1312 males with regard to the age groups with whom they had had sexual activity. The study also asked about the age groups which featured in the sexual fantasies of the men in the sample and whether or not they had masturbated to these fantasies (Santilla et al 2010). The study reported that 3.5% of the sample expressed a sexual interest in children below the age of 16. In a German study conducted in 2011 367 males from the community were asked similar questions with regard to children under 13. 9% of the men reported fantasies about children of whom 6% masturbated to those fantasies and nearly 4% of the sample admitted having sexual contact with a child (Ahlers et al 2011). Very few studies exist which have attempted to ascertain child sexual interest among females. In 1992 Briere et al found that 4% of a sample of female university students expressed a hypothetical

interest in engaging in sexual activity with a child if there were no possibility of being apprehended or punished. In 1996 a similar smaller study of 180 female university students found that 3% of females reported being sexually attracted to a child (Smiljanich & Briere, 1996). Similar findings were recorded in another study which questioned 546 female university students found that 2% reported sexual fantasies involving young girls, 3% had fantasies involving young boys, 1% admitted masturbating to fantasies involving young children and 1% also reported being sexually aroused by young children. (Fromuth and Conn 1997).

It can be seen therefore that a small number of men and women report having a sexual interest in children ranging from 3% to 9% of males and 1% to 4% of females. However, these studies relied upon self reporting so it is difficult to determine the actual level of accuracy. Nevertheless it is clear that there is a distinct section of the population for whom sexual attraction to children is a reality.

Establishing a Link Between Viewing Images and Contact Offending

The debate as to whether those who view images will go on to commit contact offences against children has been the subject of debate for many years. As noted in the introduction, a sexual attraction to children does not automatically equate to an individual abusing a child and some of the research in this area has reflected this. However, it has also been acknowledged that for some individuals their sexual interest is expressed by committing contact abuse offences (Neutze et al 2011).

In 2002 Quayle and Taylor identified a number of different reasons for viewing indecent images of children including sexual arousal; as collectibles; facilitating social relationships; as a way of avoiding real life and as therapy. However, it remains unclear to what extent those who collect or view indecent images of children are actually sexually attracted to children. Arguably therefore it is important to distinguish between those who view images, those who contact offend and those who view images and also commit contact offences. Lowenstein notes how important it is “not to

believe that one can predict with any degree of certainty anything based on the downloading of images from the internet" (2005:14).

The Empirical Research on the Existence of a Link between Viewing Images and Contact Offending

This section will review the existing literature which considers whether a link between viewing images and contact offending can be established.

The public, the media and also the judiciary appear to accept that there is a causal link between viewing pornography and contact offending. Tate (1990) uses the harm thesis as the basis for the regulation of child pornography and yet offers no evidence of its existence. A study conducted by Marshall (1988) found that 67% of 51 child abusers used "hard core sexual stimuli". However again the study failed to show a causal relationship, in fact there was no differentiation between adult and child pornography and no difference between those who committed offences against adults or children. Elliott et al (1995) found that 21% of child sex offenders interviewed had used pornography as a method of disinhibition prior to offending against children and 14% admitted using pornography to develop strategies to approach children. As Marshall (1988) notes the focus on pornography may in fact be providing offenders with an opportunity to blame offending on pornography rather than looking inwards to the inherent cause of the offending. It would therefore appear that a causal link is far from certain. Williams et al (2004) suggest that pornography may be a link to offending for certain personality types and Knudsen (1988) states it may be a minor and indirect influence. Some of the most eminent psychologists working in child sex offending are not convinced the link exists (Taylor and Quayle 2003) and there is definitely little clinical support for the proposition that any link is causal (Knudsen 1988). In addition, it should be noted that often offenders fantasise using everyday items such as television, children's clothing or by watching children themselves (Howitt 1995) and clearly the law would not seek to prohibit these activities. The Court of Appeal has also shown a reluctance to determine that possession of child pornography equates to contact offending. In *R v Bowden [2000] 2 WLR 1083*, the Court of Appeal reduced the

sentence imposed on the basis of the risk assessment of the defendant and actively therefore appeared to consider whether Bowden was simply a user of pornography or whether he was in fact likely to sexually abuse a child himself.

On 11th March 2004 as part of House of Lords Hansard Written Answers Lord Hylton asked

“What correlations have they found between individuals with access to child pornography and offences of sexual abuse of children, whether in the United Kingdom or overseas?”

Baroness Scotland of Asthal replied

“People who sexually abuse children are often found to be in possession of indecent images of children. There is evidence to suggest that child pornography can be used in an attempt to legitimise their sexual activities with children and to "groom" or encourage compliance from their victims. However, we are not currently aware of any evidence to support a direct causal link between access to child pornography and the commission of sexual offences against children”. (HL Written Answers (11th March 2004) vol. 658)

More recent research conducted by Wolak, Finkelhor and Mitchell reviewed the criminal histories of 1713 males arrested for possession of child pornography in the USA. They found that of these offenders 11% had previously committed a sexual offence against a child. Nevertheless the authors accept that the research does not explain how or to what extent the use of pornography contributes, if at all, to the commission of contact offending (Wolak, Finkelhor and Mitchell 2005). Other studies specifically considering internet offenders have found previous conviction levels to be considerably lower. Webb et al (2007) found that in a sample of 90 internet offenders convicted in England and Wales only 8% had any previous convictions. This is echoed by O’Brien and Webster (2007) who determined

again that in a sample of 123 internet offenders both in prison and the community the previous conviction levels were low.

There are of course specific cases in which the use of pornography has been acknowledged as being a contributory factor in contact offences. In *R v Briere [2004] O.J No.5611*, a case before the Canadian Superior Court of Justice, the prosecution argued that it was the presence and ease of access to child pornography which motivated the defendant to kidnap, rape and murder Holly Jones. The prosecution also argued that this case was a prime example of the societal cancer that is child pornography. However, cases such as these are rare and other commentators argue that viewing child pornography does not necessarily result in contact offending. Seto and Eke (2005) conducted empirical research on 201 Canadian male offenders placed on the Canadian sex offender register who had been convicted of possessing, distributing or producing child pornography. Over a 2.5 year period in total 17% of the total sample were reconvicted however only 6% committed a new image offence and only 4% committed a new contact offence. They concluded that the likelihood of pornography offenders progressing to contact offending was unknown, but that those who had a prior criminal record were significantly more likely to reoffend. This is consistent with current theoretical perspectives on sexual offending and reoffending which suggest that those offenders who had committed a prior or concurrent contact sexual offence at the time of the pornography offence were far more likely to reoffend either sexually or generally (Seto, Cantor and Blanchard 2006). In 2006 Seto and Eke extended the follow up period to 3.5 years for 198 men from the original sample. Of these it was discovered that 6.6% of offenders had committed a new contact sexual offence during the extended follow up period and 7.1% had committed a new image related offence.

In 2012 The Child Exploitation and Online Protection Centre (CEOP) conducted a thematic assessment in order to attempt to understand the link between possession of indecent images of children and committing contact offences. Through conducting a review of the relevant literature CEOP noted

that there are two main opposing theories as to why individuals possess indecent images of children; firstly that offenders view indecent images of children as a result of being sexually attracted to children. These offenders use images as a way of managing their attraction to children and provide a release and a way to control their urges. The use of images enables the offender to engage in fantasies and therefore reduces the likelihood of committing contact offending against a child. The studies CEOP cite as evidence are Elliott and Beech (2009), Elliot et al (2009), Seto et al (2011), Sullivan and Beech (2003) and Wolak et al (2008). The second reason for possession is that offenders who possess indecent images are reinforcing cognitive distortions in order to justify their offending and desensitise themselves to the harm caused by contact offending. This theory suggests that viewing images will increase the desire to commit contact offences and therefore those who view images are ultimately more likely to commit contact offences. The studies cited as evidence for this theory are Bourke and Hernandez (2009), Carr (2003) and Lanning, (2010).

CEOP (2012) make reference to a number of studies which they argue demonstrate the correlation between viewing images and contact offending. In 2011 a meta analysis conducted by McManus et al determined that when levels of contact offending were ascertained by means of previous convictions, arrests or through being charged the percentage of image offenders with contact offences varied from 4.8% to 43% (ibid). Where the percentage of image offenders with contact offences was determined through self report the figures increased to between 32.8% and 84.5%. However these particular figures may be somewhat misrepresentative as highlighted through the critique on two particular studies conducted by Bourke and Hernandez (2000 and 2009) outlined below.

Even though CEOP do cite research studies which they argue demonstrate a link between viewing images and contact offending they do acknowledge

“There is a clear correlation between IICO (indecent images of children) offending and contact sex offending against children although causation cannot be established” (CEOP 2012: para 24)

There are arguably two main pieces of research frequently cited to demonstrate a link between viewing images and contact offending. The first study was conducted by Hernandez in 2000 and the second was a follow up study conducted by Bourke and Hernandez, published in 2009.

The results of the first study were presented at a conference in 2000 (Hernandez 2000). The study included offenders who had been admitted to the Butner residential sex offender treatment programme. The research sought to examine the previous convictions for contact sex offences committed by the participants. Participants were assigned to one of three groups depending on the offence of which they were convicted. The three groups comprised child pornography or travelling across state lines to sexually abuse a child, contact sex offences against an adult or a child and other non sexual offences (ibid:3). The study reported that of the 62 offenders who were placed in the first group 36 had no known contact offences. 21 of those 36 went on to admit having at least one previous contact offence victim which was otherwise unknown to the authorities. At the end of the programme the number of disclosed contact offences had risen from 55 at the beginning of the programme to 1434 (ibid:4). Therefore the author of the study concluded that 77% of internet sex offenders were also contact offenders. He went on to state that many internet offenders “can be equally predatory and dangerous as extra-familial molesters” (ibid:6).

The follow up study was published in 2009. The researchers, Bourke and Hernandez were affiliated with the US Marshall Service and US Bureau of Prisons. In this study they examined the victim list prepared by 155 men who had been convicted of child pornography offences (these did not include producing child pornography). The men were all in Federal Prison and had voluntarily participated in the prison treatment programme for at least 6 months at the time of the study. They compiled the victim list as part of the

ongoing treatment. Of the 155 men, 115 had no history of contact offending whereas the remaining 40 had such previous convictions. By the end of the treatment programme 85% (131 offenders) admitted having previously sexually abused one of more children, 15% (24) denied committing contact offences. Of these 24, 9 were asked to take a polygraph test and it was determined that only 2 were being truthful about their lack of contact offending. This resulted in an average of 1.8 victims per offender at the time of sentencing which increased to an average of 19.4 victims per offender after the treatment programme. The dramatic increase in the number of contact offences disclosed by the offenders during the treatment programme, an increase of 2,369%, led Bourke and Hernandez to conclude that

"The dramatic increase (2,369%) in the number of contact offenses acknowledged by the treatment participants challenges the often repeated assertion that child pornography offenders are 'only' involved with pictures. It appears that these offenders are far from being innocent, sexually 'curious' men who, through dumb luck, became entangled in the World Wide Web" (ibid:188)

Bourke and Hernandez (2009) note that less than 2% of the participants who had entered the treatment programme without previous convictions for contact offences were actually truly image only offenders and they state that

"It is noteworthy that both of these offenders[16] remarked that while they had not molested a child prior to their arrest for the instant offense, with access and opportunity they would have been at risk for engaging in hands-on molestation" (ibid:188).

They concluded that

"Our findings suggest that online criminal investigations, while targeting so-called "Internet sex offenders," likely have resulted in the apprehension of

[16] Both refers to the two participants who were determined to have been telling the truth about their lack of history of contact offending.

concomitant child molesters. In fact, if it had not been for their online criminality, these offenders may not otherwise have come to the attention of law enforcement" (ibid:189).

The results of these studies were reported in the press prior to their official publication. The Guardian reported that the research "shattered the myth" that image offenders were only viewing images and instead noted "It is opportunity more than anything that dictates how many internet offenders also rape and molest children" (Ibbotson 2008:1). This view was echoed by Marsh who argued that offenders would molest children whenever the opportunity arose (2011:466).

This study has been used in criminal cases by the prosecution in order to argue for extended sentencing and restrictive supervision requirements (Hansen 2009; *United States v. Johnson, 588 F. Supp. 2d 997, 1005 (S.D. Iowa 2008), United States v. Crisman, No. CR 11-2281 JB, 2011 WL 5822731*), the argument being that a previous conviction is more likely to result in reoffending and therefore that person should receive a longer sentence.

However, these studies has been heavily criticised by commentators as misrepresentative. Ewing (2011) notes that the 85% of offenders who disclosed a contact offence post treatment are often cited as admitting contact offences against children whereas the contact offences disclosed were against both adults and children which arguably changes the impact of the statistics considerably. In addition the researchers combined various types of offences into a single category for example in the 2000 study Hernandez used the variable "any type of sexual assault or molestation of an adult or a child" (2000:2) which arguably is incredibly broad. In the 2009 study Bourke and Hernandez used "any fondling of the genitals or breasts over clothing, as well as skin to skin contact" (2009:186). Again this is a broad category which arguably includes some types of behaviour which are considerably less serious and may even have been consensual albeit below the age of consent and therefore technically criminal or include being

involved in soliciting a prostitute. This is very different indeed from the impression given that offenders were admitting penetrative offences against children. The researcher made a public statement at the time the research was first published in which they stated that the median age for the onset of committing contact offences was 16, whereas it was 24 for child pornography offences (Hernandez 2009:8). This arguably suggests that some of the contact offences may well have been part of adolescence rather than predatory behaviour. Finkelhor et al note that the majority of sexual offences committed by juveniles against other juveniles are not penetrative offences but are more likely to be fondling and touching which is clearly extremely different from an adult committing a penetrative offence against a child (2009:7).

Another criticism levelled at the study is the lack of generalisability as a result of the very specific set of participants who took part in the studies. As noted earlier the participants were part of an intensive sex offender treatment programme within the Federal Prison system. Offenders were only accepted if they volunteered to take part in the study; they were individually screened by prison officials and each participant had to have been given a sentence of at least 3 years to be eligible to take part (Bourke and Hernandez 2009:185). Prior to the publication of the 2009 study there was some concern that the results may be misrepresentative and according to an article in the New York Times

“The prison bureau in April ordered the paper withdrawn from a peer-reviewed academic journal where it had been accepted for publication, apparently concerned that the results might be misinterpreted” (Sher and Carey 2007:1)

The article continues and quotes one Bureau official who had written to a local law enforcement conference and stated:

“We believe it unwise to generalize from limited observations gained in treatment or in records review to the broader population of persons who engage in such behavior,” (ibid).

The study was published after the authors had resigned from the Federal Bureau and Prisons and in response to the criticism with regard to whether the study could be considered generalizable Hernadez initially stated that it was simply a case of not knowing the extent to which the results could be applied to others but this was soon retracted. In 2009 Hernandez stated

“Some individuals have misused the results to fuel the argument that the majority of [child pornography] offenders are indeed contact sexual offenders and, therefore, dangerous predators. This simply is not supported by the scientific evidence. The incidence of contact sexual crimes among [child pornography] offenders, as we reported in our studies, is important and worthy of considerable empirical examination. However, it is not a conclusive finding that can be generalized to all [child pornography] offenders” (Hernandez 2009:4-5).

Methodological criticisms may also be leveled at the studies, in particular the reliance on self reporting, especially given that there was no additional information given to verify the identity of the victims. This is not particularly surprising given that the offenders were not given immunity so providing specific information may have resulted in additional prosecutions. There are also incentives for participating in prison based programmes and these can include prison relocation and subsequent decisions made by the parole board (Taylor 2011). Also it has been noted that often the rules of the programme resulted in the fact that offenders had a considerable incentive to admit contact offences even if they were not true and that staff expected participants to make new disclosures on an ongoing basis (Wollert et al 2011:2-11). Therefore as O’Brien and Webster note it is possible that the participants of the study made admissions of contact offences simply because they perceived this as being what those who administer the programme wanted them to say (2011:167). This would in turn potentially

result in those administering the programme treating such participants more favourably if it is believed that such offenders are fully engaged with the treatment programme (Wollert et al: 2011).

In addition, the potential fear of expulsion may have resulted in the over reporting of contact sex offences (*United States v. Johnson, 588 F. Supp. 2d 997, 1006 (S.D. Iowa 2008*). It was well known that participants could be removed from the programme for breaking any of the rules and this appeared to include accepting responsibility for undetected contact offences and it had been noted that any of the participants who were expelled may face prison transfer and other consequences (*United States v. Phinney, 599 F. Supp. 2d 1037, 1045 (E.D. Wis. 2009*). The final criticism levelled at these particular studies is the fact that the researchers were also clinicians and not subject to any additional oversight and this has resulted in the Study not being considered persuasive by the judiciary (*United States v. Johnson, 588 F. Supp. 2d 997, 1006 (S.D. Iowa 2008:C*). It is therefore fair to conclude that in many respects studies conducted by Bourke and Hernandez have largely been discredited.

More recent studies have helped further clarify the link between viewing images and contact offending. Eke et al (2011) conducted a study which considered the long term offending of 541 child pornography offenders. They found that 30% of the sample had been involved with the police in relation to a contact offence during their lifetimes. The majority of these dual offenders had committed contact offences against children prior to or concurrently with the child pornography offence (18% and 8% respectively) but only 3.9% were found to have committed a contact sex offence in the follow up period of 5.9 years after their original offence. In 2015 the same authors conducted another study to test a potential new risk assessment tool and their study found similar results. Over the 5 year follow up period which had monitored 266 adult male image offenders in the community, 29% committed a new offence of some kind, 11% committed a new sexual offence, with 3% committing a new contact offence against a child and 9% committing a new image offence (Seto and Eke 2015). A previous meta analysis conducted by

Seto et al in 2011 reached similar conclusions through the analysis of both the contact offence history of online offenders and also recidivism studies for online offenders. They found that 1 in 8 online offenders had a history of contact sex offending at the time of their index offence based on official records but that 55% of offenders had admitted to contact offending if the study was based on self reporting. The meta analysis of recidivism concluded that 4.6% of online offenders committed a new sexual offence during the follow up periods ranging from 1.5 to 6 years and of those 3.4% committed a new online offence and 2% committed a contact sexual offence (Seto et al 2011).

It is worthy of note that although self report studies such as Bourke and Hernandez cited above have often been criticised for the reasons outlined, in particular where offenders have different motivations for admitting additional offences, it may well be the case that official reports underestimate the level of offending considerably (Gelb 2007). Recent research by Bourke et al (2015) concluded that there were high levels of contact offences which had not been detected in those who had been apprehended for child pornography offences. The admitted levels of contact offences amongst 127 offenders with no conviction history of contact offending rose from 4.7% to 52.8% after offenders had undertaken a polygraph test. Although polygraph testing is not 100% reliable by any means this still suggests that approximately half of image offenders do not commit contact offences. There may therefore be a discreet section of image offenders who limit their offending to viewing images online and therefore it may be necessary to assess the risk of these offenders differently to the risks posed by contact sex offenders. This is discussed in more detail in the chapter on risk. It is also worthy of note that if image offending directly encouraged contact offences to be committed it would arguably be reasonable to expect levels of contact offending to have risen at the same rates as images offences over the last 20 years since the internet increased the availability of child pornography. However, official statistics have not reflected such an increase (Brennan 2012, MOJ personal correspondence 2017).

It may also be the case that it is necessary to differentiate between different types of image offenders in order to determine which image offenders may go on to commit a contact offence. McManus and Almond (2014) reviewed the correlation between types of image offender and type of contact offence over a 7 year period and found that those who had been convicted of making, taking or distributing indecent images of children were more likely to contact offend. There were no correlations between those who possessed images of child pornography and the types of contact offence studied.

Therefore from the review of the studies carried out above it is possible to conclude that some image offenders may go on to commit contact offences but it is certainly not possible to prove a causal link between the two types of offences. There may also be a discreet group of internet offenders who would only ever view images and display fewer risk factors for contact offending. According to a meta analysis conducted by Babchishin et al in 2015 higher levels of both sexual deviance and antisociality are more likely to result in recidivism. However, some image offenders appear to have lower levels of antisociality and this may act as a safeguard against committing contact offences (Seto 2013).

There is no direct research with regard to whether there is any form of link between viewing virtual images of children and contact offending. Arguably it is likely that virtual image offenders may form part of the group of child pornography offenders who are less likely to contact offend given the imaginary nature or virtual images. However, until such research has been conducted it is impossible to draw definitive conclusions. Nevertheless given the very small numbers of prosecutions and the lack of a causal link between viewing images of real children and contact offending it does beg the question whether criminalising virtual images was the correct approach to take. It is to the arguments for and against criminalisation of virtual images specifically that this thesis will now turn.

The Arguments for and against the criminalisation of Virtual Child Pornography

In the Explanatory Report to the Protection of Children against Sexual Exploitation and Sexual Abuse (Council of Europe 2007) it was noted that the justification for the prohibition of virtual child pornography was the potential that it "might be used to encourage or seduce children into participating in [sexual] acts". In the Consultation Paper which preceded the Coroners and Justice Act 2009, the Home Office put forward two harm based arguments to justify the criminalisation of VCP which does not include the use of human children. Firstly, that the images could be used in grooming in a similar way to pseudo-photographs and secondly that such images could encourage the abuse of real children by reinforcing potential abusers' deviant feelings towards children (Home Office 2007). Nevertheless these arguments were not based on any empirical evidence of a link between VCP and contact offending. The Consultation Paper actually stated

"We are unaware of any specific research into whether there is a link between accessing these fantasy images of sexual abuse and the commission of offences against children, but it is felt by the police and children's welfare organisations that the possession and circulation of these images serves to legitimize and reinforce highly inappropriate views about children." (ibid: 5).

The question therefore is whether the potential harm foreseen by the government is sufficient to criminalise possession of computer generated images which do not involve real children.

Responses to Question One of the Consultation Paper which preceded the enactment of S.62 Coroners and Justice Act 2009

When asked whether the proposal to criminalise non photographic visual depictions of child sexual abuse was justified in light of the lack of research into the effect of the images on offenders and the general public, the majority, albeit a small majority, felt that the lack of evidence of any causal link between such images and the commission of sexual offences against

children was not a sufficient reason to justify criminalisation. Of the 34 respondents who expressed concern at the lack of empirical research 31 were individuals and the other three were Feminists Against Censorship, Cyber rights &Civil Liberties and the BBC (MOJ 2008:13).

Although the Ministry of Justice fail to attribute the quotations they set out in the Summary of Responses it was argued by some respondents that "while there may be behaviours of which most of us disapprove, these should not be criminalised unless they directly cause harm to others in society" and that "an unsupported 'concern' cannot be sufficient to justify restricting the liberty of citizens" (MOJ 2008:13).

Many of the respondents who were opposed to the criminalisation of non photographic visual depictions of child sexual abuse argued that the proposed new offence was the equivalent of "thought crime" and were therefore considerably concerned that those who viewed such images may be subject to criminal sanction even though they had not harmed a child and had no intention to cause harm to a child. A number of respondents referred the government to the principle of freedom of expression and argued that this should not simply be limited to expression of which the government approved, in fact that the true test of free expression was whether the government sought to criminalise activity which could not be shown to do harm but which was nevertheless considered abhorrent or distasteful. Some respondents also noted that the proposed offence, which was acknowledged to be based on no empirical evidence of any harm caused by the viewing of such images, actually contravene the government's own policy of "evidence based policy making".

Some respondents raised the possibility of such visual depictions being utilised as a legal outlet for sex offenders, a release for some paedophiles who suffered from an inherent medical condition and this material would therefore work as an urge suppressant in order to help manage the risk of offending against real children, either through the use of traditional child pornography or through contact offending. It was argued that the

criminalisation of non photographic visual depictions of child sexual abuse could actually result in an increase in traditional child pornographic images and a potential greater harm to more real children (ibid:13).

The Ministry of Justice state that "many individual respondents cited different pieces of research to corroborate their view that the material in question does not cause harm to those who view it" (ibid:13). Unfortunately the Ministry of Justice do not make reference to any specific research cited, somewhat unhelpfully. Reference is made however to Japan where there is no prohibition on this type of material and yet there is a low incidence of sexual offending. However, some respondents did note that these types of visual depictions are often found alongside collections of traditional child pornography. As stated earlier Nottingham MAPPA noted that the prison service had reported incidents of this material being intercepted on its way into prison and into the hands of convicted sex offenders. However, it has to be acknowledged that there is a community of people who are collectors of such images and yet do not offend against children (ibid:13).

There were a large number of organisations who believed that it was necessary to criminalise non photographic visual depictions of child sexual abuse even in the absence of empirical research. These organisations included CEOP, CHIS, the British Association of Social Workers, the British Psychological Society, Childnet, South Essex Rape & Incest Crisis Centre (SERRIC), Nottinghamshire Multi-Agency Public Protection Service (MAPPA), BBFC, NICCY, 5 councils in NI, 1 Health Board in NI, PPSNI, Lord Chief Justices Office Northern Ireland, CARE, the NEXUS Institute, Campaign to End Rape, CPS, 12 police forces or groups, 2 Church groups and 4 Local Safeguarding Children Boards (MOJ 2008:14).

Many of those in support of criminalisation argue that there was a type of material which should not be tolerated even in the absence of evidence of any harm being caused. According to the Ministry of Justice many organisations offered anecdotal evidence for example Jim Gamble of CEOP stated

"we know from working with child sex offenders that many use images of child sexual abuse in order to become sexually aroused and for masturbatory fantasy…it is absolutely clear to us that any adult viewing any visual depiction of child sexual abuse presents a risk to children" (ibid:14).

The Ministry of Justice gave examples of such anecdotal evidence but their presentation of this "evidence" is far from clear. It also noted that these type of images were often found on the computers of those suspected of committing offences and that the "Spiral of Abuse" model suggests that sexual fantasy and distorted thinking may in turn potentially progress into sexual offending and that "there is evidence (e.g. from COPINE) that a large percentage of sex offenders have access to images of child abuse, and indeed use such images to "groom" their victims", no further citation is given however so it is difficult to understand to whom this quote is to be attributed. The Ministry of Justice state that CEOP had suggested that some offenders had said that the material had been an initial factor in offending, however no clarification is given as to what "material" they are referring to.

According to the Ministry of Justice Professor Clare McGlynn expressed doubt as to whether any such research could be conducted effectively which would produce reliable results. She argued this was highly unlikely given the ethical challenges of conducting the research in the first place. She is stated as arguing that such research should not be conducted in any event since it would "mean exposing individuals to potentially harmful material with a risk of harm to children" (MOJ 2008:14). Professor McGlynn also questioned the concept of a "direct link" since "human behaviour is seen as not reducible to only once [sic] influence, but is the result of many different factors" (ibid).

Given the selective nature of the Ministry of Justice's summary of the responses to the consultation, the researcher made a Freedom of Information Act 2001 request to the Ministry of Justice in order to acquire the full responses to the consultation. The following section includes material supplied as a result of the Freedom of Information Act request. Therefore

any page references relate to the pages of the documents supplied by the Ministry of Justice to the researcher by email on 13th July 2017.

Responses from Individuals with Personal Concerns

There were a number of responses from individuals who viewed material which would be captured by the proposed legislation. Mr C stated “I have been looking at these images for about 5 years now and I am not even remotely attracted to children”. He goes on to note that in any event would it not be better if a potential sex offender could satisfy his desires with cartoons rather than look at images of real children being abused or commit contact offences. This view was echoed by one author who wished to remain anonymous but noted

“Currently the existence of fantasy images could be considered a legal outlet for the unwanted desires of paedophiles. The legality of such images provides a strong rational incentive for paedophiles to use these, rather than illegal photographs of abused childen (sic) (the purchase of which funds further criminal acts). The Government even asserts that such fantasy images are used by psychiatrists treating paedophiles, so the logic of preventing paedophiles from seeking such harmless images to treat themselves seems rather lacking. Furthermore, by removing the incentive to use fantasy images rather than real abuse images, the proposal could *increase* the usage of the latter, resulting in *more* danger to children rather than less” (page 8).

Another individual Mr B expresses concern that his own collection of spanking drawings may become illegal after the passage of the Act. He notes that many are over 100 years old and from all over the world and some do depict children being spanked. Without seeing the collection it would be difficult to ascertain whether some of the depictions would fall foul of the law and whether they would be sufficiently explicit to be considered pornographic. However, this does raise the question again of whether an artistic merit defence should have been included within the Act in order to protect depictions which could be considered art. Concern for a collection is

echoed by Ms R who states that she enjoys this type of animation and drawing and again is not remotely attracted to children, she states “I have never seen real child pornography and if i ever came accross it, i would probably be sick and have nightmares for weeks” (sic) (page 11). Her response continues and she expresses genuine concern for her collection of cartoon/drawings and the fact that she may have no option but to destroy the collection or risk “going to prison for three years, paying a fine, being branded a sicko who likes children and being put on the sex offenders register” (ibid). Mr T of Lincolnshire echoes Ms R’s concerns specifically with regard to Anime and Manga. He notes that these are art forms in Japan and it appears to him that “the government is trying to apply British standards to works from a foreign culture which, again in this instance, I don’t believe it has any business doing” (page 29).

One particular response worthy of note is from an anonymous individual who considers himself to be a paedophile. Without the considerable ethical difficulties involved in interviewing those who are sexually attracted to children reading reports from individuals such as this man are an invaluable source of information from those directly affected by the legislation. Much of his response offers a very unique perspective not often found in research and therefore it is very helpful to replicate the majority of the response verbatim. He states

“I am a paedophile. I have accessed examples of these Images on several occasions and have had a chance to reflect on my experiences. I found myself more satisfied sexually when I was using the Images, and therefore less likely to seek sexual pleasure from elsewhere. Plainly, making such Images less available is not going to make someone cease being a paedophile, and all paedophiles deprived of such Images for their use are going to seek sexual enjoyment by other means. Such other means are bound to be less satisfactory (given that most people naturally tend to seek the best sexual experience they can get, so it follows that if a person was using these Images, their use was obviously the best sexual experience he could get). The question is this: given a reduction in the quality of sexual

experience a paedophile is able to get by legal means, some are inevitably going to turn to illegal ways of satisfying their desires. If one is already resigned to breaking the law, then I cannot imagine many people giving much consideration to the severity of the offence, particularly as the very midest (sic) offences now carry prison sentences of several years; for example, rather than continuing to access the Images except by illegal means, one may decide to take a step up and access photographic images, or another step up and try to engage in sex with a real child (and, frankly, with increased police monitoring of websites and file trading networks I am not even sure which of the above options is less risky). I am not saying I would do such a thing myself, nor am I advocating breaking the law, but paedophiles with weaker wills may find themselves too tempted by what is available illegally, once there is more restriction on what is available legally. A nice analogy is this: how many people would give up smoking if we made nicotine patches illegal?

You may not necessarily agree that paedophiles may be less tempted to abuse a child given a supply of such Images, as indeed the police and the various organisations mentioned in the Consultation document do not, but having used the Images myself I am convinced". (Page 79).

This particular individual goes on to discuss the issue raised by the government that images may be used to assist in grooming children. He makes the point that the best way to protect children is through education, by making children aware that sexual activity between adults and children is not a usual occurrence. He notes that if children are educated and therefore appreciate that society does not expect them to perform sexual acts then they may be more prepared in a dangerous situation and would reach out to another adult or the police to make it known that they were being made to feel uncomfortable (Page 80).

He asks the question "If a person is in possession of these Images, but has no photographic images and has not abused a real child, is that person not therefore exercising his sexual desires responsibly? Has that person not

taken the decision to manage his sexuality in a way that does not hurt others, and should he not be commended for it? (ibid).

He concludes by stating that in his opinion criminalising virtual images will not have a positive effect on the number of incidences of child sexual abuse in the UK, if it has any effect at all. He notes his disappointment with the government's willingness to assume that criminalisation will have a positive effect rather than seeking to offer any actual proof (ibid).

Child Protection

Mr B of London is concerned that the legislation sanctions "thought crime". He notes

"People with pedophile thoughts can not be wiped out of the map, this sexual disorder has no cure, by allowing people with pedophiliac thoughts to possess fantasy cartoons where no real children have been harmed it helps to protect children because they have no need to possess real images of abuse. Not every pedophile is a criminal, some can control their impulses and stop themselves from abusing children, if fantasy images are put in the same basket as real images, some pedophiles will choose to possess real child abuse images because they both will be a criminal offense, if fantasy depictions are allowed some people with pedophile thoughts will find it easier to stay on the right side of the law, the proposal will in fact contribute to a greater risk to children encouraging the trade of images where real children are abused and giving no alternative to pedophiles who are aware about the evil of child abuse images but find hard to control their actions" (page 50).

Ms M echoes this sentiment with some anger

"THIS IS ANOTHER EXAMPLE OF AN ATTEMPT TO CREATE A "THOUGHT-CRIME" WITHOUT A SHRED OF EVIDENCE TO SUPPORT THE THEORY THAT THERE IS A DIRECT AND UNAVOIDABLE CONNECTION BETWEEN POSSESSION OF SUCH MATERIAL AND A

LIKELIHOOD OF COMMITTING A "HANDS-ON" OFFENCE (Page 51) (emphasis in original).

One anonymous respondent highlights a particular issue when considering the criminalisation of certain types of material. He/she states

“It is felt by certain people that computer-generated depictions of child sexual abuse may lead a person to commit an offence. There is no evidence to verify this assertion. Furthermore, the people who sexually abuse children (molestation, gross indecency) are usually not paedophiles (people who are primarily/exclusively attracted to children), rather they are situational offenders who cannot find their preferred, appropriate partner. Those people would almost certainly have no interest in images depicting sexual activity involving children and would likely look at adult pornography rather than the images discussed here.

He/she continues

“Although the number of child molestation offences committed by paedophiles totals around 5-20% - much lower than often suggested - some paedophiles clearly do abuse children. This number may be kept low by using non-abusive images (such as those which do not involve real children) to relieve sexual urges. Removing this outlet may increase the number of paedophiles who do abuse real-life children. Considering the number of paedophiles in society, which may be over 20% of the population (Hall et al, 1995), this would present a serious risk to the welfare of children. From the point of view of the Home Office, a rise in offences where real-life children are sexually abused would be extremely difficult to explain to a public which rightfully finds such offences abhorrent and appalling” (Page 55).

The other point made by this particular respondent is the fact that essentially paedophiles are being discriminated against through the introduction of this legislation and such discrimination of those with a diagnosed condition as

defined by the American Psychiatric Association may fall foul of the Disability Discrimination Act (ibid).

Feminists Against Censorship argue that the proposed legislation will do little to assist in child protection. They believe that it is “wrong in principle, unworkable and would restrict freedom of expression and artistic endeavour” With regard to the harm caused by viewing such images they state

“Some of our associates who have worked within the psychiatric profession can recall that, before the Criminal Justice Act 1988, it was, on occasion, recommended that patients who had previously offended with children look at pornography as a release and alternative to having sexual relations with children. With this in mind, we'd say it is preferable for paedophiles to be able to keep sexual drawings of children, inspired by fantasy, than it is for them to have sexual relations with them” (Page 75).

They also note that the Consultation document only makes reference to one case of virtual images being found in the absence of indecent images of real children and therefore make the point that there is no compelling reason why this should warrant further legislation (ibid).

Feminists Against Censorship also raise the fact that the majority of child sexual abuse takes place in the home and that in such cases child pornography of any sort is rarely present. They also argue that the proposed legislation could hinder the development and expression of children. They question what would happen if a child (over the age of criminal responsibility) were to draw an image of themselves with another child. They argue this would create a difficult situation for the parents and could potentially result in the child feeling shame and that “demonstrating such needless guilt and shame over sexual imagery is not a good example to set to a child” (page 76). It could also potentially result in a prosecution under the right circumstances. In addition, they question the motivation of the legislation

“We would say public vilification of paedophiles (who seem to be largely viewed to be exempt from even the most basic human rights) is already at a level where rational debate about child abuse is often rendered impossible. Our concern is that this law will simply add to that mentality. The message coming through is that it is acceptable to crack down on any behaviour that could rouse even the slightest suspicion of paedophilia (regardless of whether any abuse has actually taken place). As well as possibly encouraging dangerous situations where disliked individuals could be wrongly hunted down, much like "witches" used to be, we would say this constitutes a genuinely slippery slope with regard to private sexual activity that doesn't even involve other people (let alone the abuse of them). An even more frightening outcome of this law would be that, with no acceptable outlet or toleration for even their preferences and fantasies, paedophiles would be driven even further underground. This, of course, would not protect children from abuse” (page 77).

Mr P of Essex makes this point himself to conclude his response to the consultation.
“The protection of children is arguably the most important point:

It is an unavoidable fact that there exist people whose disposition makes them more sexually aroused by prepubescent children than by adults. They are called paedophiles. These people cannot be removed from the population by legislation, and neither can their sexual feelings. They cannot be "cured", by even the most invasive methods used. Even the "chemical castration" spoken of in the news recently only reduces the libido; the treatment has no effect on the preference for children. There is no reason to suppose - and no evidence to support the idea - that taking away their picture collection would have any dampening effect on a paedophile's sexuality. Paedophiles need to release their sexual feelings just as anyone else does. If they are to be prevented from offending against children, they need methods of release that do not involve real children. If you remove their legitimate means of sexual release, they will only have illegitimate means left.

Depriving a paedophile of their pictures, which previously they may have been perfectly happy with, using them for sexual release in the privacy of their bedrooms, will only give them more of an incentive to go out looking for real children" (Page 173).

Another anonymous respondent implores the government to help protect children by providing non practising paedophiles a legal outlet for their sexual desires. He/She states

"These non-photographic depictions provide the only safe outlet for people suffering from paedophilia or ephebophilia and could be the only thing preventing a frustrated paedophile from abusing a child. Please protect the children of today by continuing to allow non-offending paedophiles to view these depictions, as they in no way harm a single child" (Page 224).

The response from the Lucy Faithfull Foundation, one of the main charities involved in working with internet offenders, highlights the potential difficulties of criminalisation. They note one particular individual who had been viewing images of real teenage girls and in order not to commit an offence he started to view drawings and cartoons. Lucy Faithfull highlight the fact that if such images were criminalised and that individual disclosed viewing such images as a way to manages his urges then they would be required to report such illegal behaviour which arguably does not assist the individual seeking help (Page 221).

Issues with Age

There were a number of responses to the consultation which questioned the legitimacy and highlighted the practical difficulties with trying to assess the age of a non realistic depiction of a "child". The anonymous author cited above questions the difficulties in assessing age especially if the age used is 18 (as it would be with other image related legislation) given that it is almost impossible to discern any difference anatomically between a character who is depicted as post pubescent – the image may well portray a character of 16

or 17 but it would be impossible to know with any certainty. The same author also makes the following points

“[E]ven if the apparent age threshold is more extreme, such as 11 or 12, it is still impossible to accurately determine what age a fictional character "is". This is not just a practical consideration but a philosophical one -- the "age" of a character is entirely determined by the intent and imagination of the artist; there exists no "objective truth" which can be obtained through any means.

Will the assessment be made based on the intent of the artist? The fictional context? The size of the character? The existence of neotenic features, underdeveloped breasts or genitalia? The wearing of "childish" clothes or features such as bows in the hair? What if the character is supposed to be a midget, or a non-human alien being that happens to look similar to a human child? What if they are a shape-shifter, or a ghost, or a cyborg, or a hallucination of another character? What if a character is depicted remembering their own abused childhood? No matter how the law is written, it will be both easy to avoid by not drawing (or blanking out) the chosen defining features, and will end up covering vast swathes of legitimate artistic works that have nothing to do with child abuse” (page 10).

Mr T of Lincolnshire who discussed the difficulties inherent in the potential criminalisation of Japanese Anime and Manga notes the problems with attempting to determine the age of the characters depicted in Anime and Manga. He acknowledges that many of the characters are drawn with large expressive eyes and child like features but this is combined with the body of an adult (page 29). This sentiment is reiterated by Mr M of Hampshire who is a serving Detective Constable in the role of a computer forensic examiner. He notes the difficulties inherent in attempting to ascertain the age of real victims of child sexual abuse stating that “there seems to be very little discussion about how I, as a police officer, would tell the difference between a picture of a 19 year old, and a picture of a post-pubescent 13 year old. This can be an immensely difficult task when considering real pictures, but to

have to consider an artists representation would be fraught" (sic) (Page 33). This police officer also notes that one of the most common picture groups that may fall foul of the legislation are depictions of the Simpsons who are clearly not real and again impossible to age (although Bart and Lisa Simpson are depicted as children).

Mr R makes an interesting point about the difficulties inherent in the potential criminalisation of Japanese Anime and Manga. Although he reiterates the points made by others with regard to the cultural differences between the UK and Japan particularly with regard to sex, he does highlight one category of Manga which may genuinely cause some concern, "Lolicon". Mr R notes that Lolicon is cartoon child pornography in which the characters are drawn with child like bodies and put in sexual situations and there is little doubt that the images are meant to portray children. However, he states that at times it is difficult to distinguish between mainstream Manga and Lolicon and that could result in a situation where an individual is not certain whether their collection of Manga contains illegal material (Page 53).

In the absence of any requirement for a realistic depiction of a child Mr T draws an interesting analogy between cartoon sex and cartoon violence. He argues that if the characters are purely cartoon like then it appears odd to criminalise the possession of images of carton sex when images of cartoon violence are completely permissible (Page 83). He also reiterates the points made by others with regard to the difficulties inherent in determining the age of cartoon characters (ibid).

The British Board of Film Classification (BBFC) has considerable concerns with regard to the difficulties inherent in determining age in cartoon images. They note

"Given that the age of a child is under 18 in POCA, it seems likely that the same definition would apply to the current proposal. Even if a different age was chosen, a very difficult problem arises: how can one establish the age of a person who does not exist? Under POCA, no conviction is possible if the

person in question can be shown to be 18, even if they look much younger. Clearly it is not possible to produce a birth certificate or a passport for a drawing or a CGI image and so the matter will inevitably rest on a subjective judgement as to whether the character appears to be under 18. This is a hard enough judgment to make with real people, even in the flesh, but with a non-photographic image the difficulty is multiplied many times. Animated representations are often highly stylised, deliberately avoiding the sort of details that give clues to age in real life. For example, the standard Disney characterisation (hugely influential throughout the world, and a model for much Japanese animation) involves huge 'child like' eyes and smooth skin even if the representation is of a young man rather than a boy. In other words, how old exactly is Aladdin in the 1992 Disney film of the same name?" (Page 167). These concerns are echoed by Channel 4 (Page 202).

From a film perspective the BBFC also note the difficulties with regard to consistency. They state that "a live action scene of a 16 or 17 year old simulating sexual intercourse with an adult is not necessary indecent under POCA provided the images are sufficiently discreet". They give examples of films such as "The Name of the Rose" and "Notes on a Scandal". However they are concerned that cartoon imagery depicting the same thing could be illegal given that it could be considered to show penetrative sex between an imaginary adult and child character. They are also very aware of the potential anomalies which may arise if the judgment as to whether something is "pornographic" or "grossly offensive" is left to juries throughout the country. They draw an analogy to the early 1980s when there were very different judgments in obscenity trial relating to "video nasty era" (Ibid).

Technology

Mr M of Hampshire, the Detective Constable questions whether the technology the government alludes to to change real life abuse into cartoon format actually currently exists. He notes that his officers have not come across any instances of this happening and he notes that such technology would have to be very advanced. One anonymous respondent raises the question of the legality of "age play" in the light of the proposed legislation.

Age play is a type of role play where one party appears to be underage. This respondent notes

“They may express their fantasy with non-realistic images. Another example would be role-playing sexual acts in online environments such as Second Life - if one of their online "avatars" depicts an underage person, then no matter how unrealistic or cartoonish that depiction is, they would be guilty of possessing or producing child pornography” (Page 67). This particular respondent argues that in the case of age play if the people involved are two consenting adults then the law has no place in regulating their fantasies (page 68).

The Lack of Empirical Research

It is interesting to note that when asked if it was justifiable to criminalise VCP in the absence of any research into the effect of such images on offenders the Internet Watch Foundation (IWF) used the words “no comment” (Page 155). The IWF advocates the criminalisation of VCP even though they accept the lack of research and note that very little of this type of content is hosted in the UK. As a result they state that depending on the legislation in the hosting country it may not be possible to remove images even if they are reported to them. They noted that of the sample of child depictions that had been reported (74 incidents) 76% which could be considered level 3 or above on the seriousness scale appeared to be hosted in the US. As discussed below such images are only illegal if they are a realistic depiction of a child.

Many of the respondents make reference to the lack of empirical research upon which to base the legislation. However the response from Northamptonshire Police is somewhat concerning. They state “The issue that there is no research, and as such evidence that the possession or production of this type of image has on offenders or members of the public, is in my view irrelevant in this case”. The lack of consideration of research is echoed by Cleveland Police who state “I do not feel it is necessary to conduct research to demonstrate why people want these images and the types of

offending they may lead on to". With the great respect to whoever wrote this particular response to the consultation it shows an incredible amount of ignorance. It would be hoped that anyone tasked with law enforcement would wish to develop a greater degree of understanding with regard to why individuals commit particular offences.

Mr D notes that the police who are "concerned" are not even considering their own research. Mr D cites Dr Stuart Kirby who is a Detective Superintendant with Lancashire Police who made the following statement at an International Investigative Psychology Conference

"When you look at all the research that has been done nationally, the consensus is that there has not proven to be a link between the viewing of pornography and the committing of hands-on offences." (page 37)

Mr D also cites research by David Finkelhor who completed a study which found that reported child sexual abuse cases had dropped by 30% over the last 10 years, noting that the internet had not resulted in an explosion of new offences and that pornography does not appear to be one of the major causal factors. Although Mr D concedes that there may be an argument for the criminalisation of such images if they are used as part of another offence such as grooming or found alongside images of real children he concludes his consultation response as follows

"Cartoons are ideas and no one should be locked up for looking at an idea, however repellent that idea may be, this indeed would be true 'thought-crime'" (page 40).

The lack of evidence was also a concern to Ms S who states

"Censoring and criminalizing fictional works is a step so extreme that any supposedly democratic government should only consider it when there is overwhelming evidence that those works cause harm". (Page 43).

Ms S argues that not only is there no empirical evidence to justify criminalising virtual images but that the government has fundamentally misunderstood the nature of Anime and Manga. Ms S notes that adult characters are often drawn “chibi-style” as an artistic device. This is used to depict childlike qualities and can often be used to represent the character’s inner self even though the character is an adult and engages in adult behaviours (ibid).

Ms S also makes another very valid observation. She refers to friends of hers who are survivors of child sexual abuse and rape. She notes that some of them work through their issues through art by drawing depictions of scenarios involving abuse. This enables them to take back the power and control that their abusers took from them. She expresses concern that the legislation will therefore turn genuine victims into offenders. Mr M of Hants notes that such images may prevent abuse by “providing a cathartic outlet for such feelings” (page 57). He suggests that this can be demonstrated by comparing England and Wales with Japan where such images are legal and the level of sexual abuse of children is considerably lower than in England and Wales (ibid). Mr M also takes issue with the government argument that such images may be used to groom children. He argues that children were abused long before such imagery were available and that sweets have been used as a grooming tool for a very long time and yet the government would not seek to ban them simply on the basis that in they may be used in grooming a child (ibid).

Mr D argues that “pointing out something can be used as a grooming tool is not, in my mind, a sufficient criteria (sic) to then argue its possession should be made illegal” (Page 180). His response to the consultation makes the general point that many everyday items could be used to groom children and therefore it is necessary to ask the question as to whether “it is demonstrable that cartoon/drawn depictions of child sexual abuse are so much more potent a tool in this respect, that allowing their very possession passes beyond the limit of acceptable risk? If not, it is hard to see how the banning of said material would be a fair implementation of the law” (Page 181).

Even those who advocate the criminalisation of virtual images and other virtual imagery not covered by the proposed legislation for example 3D holographic images and computer game avatars such as the Churches Child Protection Advisory Service cannot offer any evidence to suggest that such images could be used to groom a child (Page 189).

It is interesting to note that even when an organisation is in favour of criminalising virtual images it is often acknowledged that there is evidence to suggest that such images may not have an impact upon the level of contact offending. For example Wirral Local Safeguarding Children Board states

“Having lived in the far-east I am aware that this kind of material has been available from street vendors and is thus easily obtainable in some countries. 'Comic' books depicting children in sexual contexts are read openly in public. I am not aware that this cultural acceptance has led to an increase in the abuse of children in those communities” (Page 205).

Human Rights Infringement

A number of respondents have shown concern that the proposed legislation has human rights implications and most notably infringes the right to freedom of expression and the right to privacy. Mr P of Essex states that

“Despite your belief to the contrary, the absence of evidence of harm makes the criminalisation of possession of fantasy images a clear violation of Article 10 of the European Convention of Human Rights:

Everyone has the right to freedom of expression; this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The making of fantasy images is an example of personal expression. The relevant restrictions on freedom of expression allowed by Article 10 are those made in the interests of public safety, for the prevention of disorder or crime,

for the protection of health or morals. In the absence of evidence that the possession of such images has any link to the commission of offences against children, none of these interests apply. There is no evidence that possession of fantasy images creates a danger to the public, encourages the commission of crimes, or affects any person's moral values. In fact, as I shall argue at the bottom of page 3 of this response, there is a good reason to believe that free access to fantasy images would make the commission of crimes against children less likely" (Page 170).

He continues to outline the infringement of Article 8, Right to Private and Family Life given that the possession of images can be considered a private matter. He argues that in the absence of research there is no justification for these rights to be infringed. It is largely argued that such an infringement is based on the "the protection of health or morals" but it is difficult to see how such an infringement can be justified if there is no empirical evidence to suggest a link between viewing virtual images and actual sexual abuse against a real child. As is highlighted above there is very little evidence that viewing images of real depictions of child sexual abuse contributes to sexual offending and even then only for certain types of offenders, there is certainly no empirical evidence which specifically considers virtual imagery.

Mr P of Essex argues that images of sexual abuse do not legitimise that abuse any more than images of violence legitimise real world violence. Given that there is no suggestion that cartoon violence should be prohibited Mr P finds it difficult to understand why cartoon sexual activity should be criminalised given that, as with violence, the viewer realises that it is not real (Page 171). He believes that the real reason for the proposed criminalisation of sexual cartoon imagery is because there are those who find it distasteful.
With regard to the government's justification that such images may promote "inappropriate feelings" with regard to children Mr P of Essex makes the following point

"It is not the business of government to determine what is or is not an "inappropriate feeling". This sounds like an attempt at thought-policing, which

is something that no government can countenance and call itself democratic. There is no such thing as an "inappropriate feeling". Feelings are ethically neutral; it is only actions that cause problems. The business of legislation is to regulate actions, not feelings".

Arguably this has to be correct. All legislation should only be enacted on the basis of criminal behaviour. As noted elsewhere there is arguably too little distinction being made between thought and action. There are those in society who are sexually attracted to children but that is not a crime, it only becomes an issue when criminal behaviour takes place. Even the Crown Prosecution Service express concern that the legislation would need to be drafted very carefully in order that the scope not be considered "unnecessarily wide" (Page 210).

A number of respondents make reference to the fact that the police are tasked with enforcing the law and not lobbying for new legislation simply because imaginary images are sometime found alongside child pornography. Mr M of Hants states

"I also find it disappointing that repeated references are made to the Police requesting that powers of confiscation be given to them. It is my understanding that it is the job of the Police to *enforce* the law, not *make* the law and it is the job of our elected representatives to
decide what the law should be. I cannot recall the Police ever asking for fewer powers, but simply because they want more power or they don't like the material certainly does not mean that it should be granted to them". (Page 56).

Having considered the full responses to the consultation is some detail this Chapter will now consider the approaches taken by other jurisdictions with regard to virtual images in order to ascertain whether any lessons could be learned.

The Criminalisation of VCP – Lessons from other Jurisdictions

The main question is whether the potential harm foreseen by the government is sufficient to criminalise possession of computer generated images which do not involve real children. This section will consider the position on VCP in other jurisdictions in order to determine whether the stance of the government in England and Wales can be justified.

The United States of America

This criminalisation of VCP was tested in the United States Supreme Court in the seminal case of *Ashcroft v Free Speech Coalition 122 S. Ct 1389 (2002) (hereafter Ashcroft).*

In the USA VCP was included in the definition of child pornography contained in the Child Pornography Prevention Act 1996 (CPPA). However, the inclusion of VCP was challenged on the basis that it was unconstitutional and offended against the First Amendment to the US Constitution.

The CPPA as drafted had extended the definition of child pornography to include “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct” (CPPA §2256(8)(B)). However, the Court held that this particular section of the Act was overly broad and therefore unconstitutional. The Court held that specifically the section was inconsistent with the standard previously outlined in *Miller v California 413 U.S. 15,(1973)*. and *New York v Ferber 458 U.S. 747, (1982).* In accordance with Miller v California the Court held that lewd and obscene speech did not receive First Amendment protection. In order to be considered obscene material must meet the three stage test outlined in Miller which provides the following questions to be asked in order to determine obscenity

“(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . .

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;
and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (*Miller v California 413 U.S. 15, (1973) at 24).*

The Court held that the CPPA did not regulate obscenity given that it extended the definition of child pornography to virtual images or images which are made to appear as minors. However, it has been held that child pornography involving real children does not necessarily have to be obscene to lack the protection of the First Amendment. In *New York v Ferber 458 U.S. 747 (1982)* the Court held that obscenity had not been considered a necessary criterion when considering child pornography involving real children and therefore depictions of child pornography may be prohibited even though the images do not meet the test set out in *Miller*. However, given that the CPPA sought to criminalise material which did not depict real children the Act was also held not to comply with the principles set out in *Ferber.*

The evidence and arguments put before the Supreme Court are interesting as this is one of the few cases in which the highest Court of any jurisdiction has considered whether the criminalization of virtual images is justified.

In Ashcroft the US Attorney General (AG) attempted to justify the criminalisation of VCP on four grounds. Firstly, that the images may be used in grooming, secondly that VCP might "whet an offender's appetite", thirdly, that VCP would make it impossible to eliminate the market for all child pornography and finally that VCP would hinder the prosecution of those who created pornography using real children. However, these justifications can be considered problematic. As Gillespie (2004) notes firstly the use of the term grooming belies the fact that the majority of child sexual abuse takes place within the home environment. There is some evidence that child pornography has been used to desensitise children (Renold and Creighton 2003), or normalise sexual activity (Taylor and Quayle 2003) but there is no empirical evidence, thus far, that this has included VCP. The AG sought to

argue that VCP could be used more effectively if images had been created which depicted the child's favourite cartoon characters engaged in sexual activity. However the Supreme Court were not impressed with the arguments stating that many items could be used for immoral purposes but it did not justify their criminalisation *(Ashcroft: 1402)*. The Court favoured apprehending those who sought to solicit children and criminalising the steps taken to do so. This is already covered in England and Wales pursuant to S.12 and S.15 Sexual Offences Act 2003.

As far as the justification of "whetting the appetite of offenders" is concerned Paul and Linz (2008) reported some evidence that those who use VCP may go on to commit contact offences. However, their research was not based on VCP and although those who took part in the study were aroused by the images there was no actual evidence of offending after the experiment had taken place. Seto et al (2006) conducted research to determine whether child pornography offences were linked to a diagnosis of paedophilia. They reported that the use of child pornography was an indicator of cognitive distortion and paedophilia even without any contact offending taking place. Nevertheless justifying criminalisation on this basis this could simply be considered the criminalisation of fantasies. As the Supreme Court noted

"First amendment freedoms are in most danger when the government seeks to control thought or to justify its laws for that impermissible end." (Ashcroft: 1403)

Therefore there is no established research which can categorically demonstrate that VCP would "whet" an offender's appetite therefore it is hard to justify criminalisation. In fact, there is considerable evidence to suggest that most offenders initially use adult pornography (Sheldon and Howitt 2007). If similar logic were followed it would be necessary to criminalise adult pornography in England and Wales and the US in order to prevent progression to sexual offending and that is unlikely.

The Supreme Court was also not persuaded by the argument that VCP should be criminalised in order to eliminate the market for other child pornography. The Court stated

"The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes" (Ashcroft: 1404).

The Court also failed to accept the fourth argument that VCP made other prosecutions more difficult. The prosecution argued that it would be necessary to ban all types of image so that there was not an opportunity for the defence to argue that the material was in fact virtual. The Court was not impressed and held that the Government was not entitled to suppress lawful speech as a means to suppress unlawful speech; in fact The Constitution required the opposite position. “[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted … .” (*Broadrick* v. *Oklahoma,* 413 U.S., at 612).

As a result the Supreme Court upheld the constitutional challenge by the FSC and therefore the present position in the US is that only images which are indistinguishable from actual human children are criminalised as no direct harm could be found with regard to VCP (18 USC §2256(11). In fact the Court went further and noted in relation to child pornography using real children that until the connection between content and harm is proven then freedom of speech must be protected against any unlawful interference.

<u>Japan</u>

Manga is essentially a type of Japanese graphic novel or comic. These graphic novels are often made into cartoons or animations known as Anime (Albert 2017). Manga became very popular during the 20th Century and against a background of increased consumerism in the 1970s there emerged the *shojo* ideal which embodies the romantic notion of innocence cuteness and the illusion of beauty (Galbraith 2011). As with many types of graphic

novel particular sub genres developed in Manga and some of these have caused particular concern. Two sub genres of Manga have been subject to considerable discussion, *Lolicon* and *Hentai.* Lolicon is the term used to describe Manga which features very young girls, often prepubescent, in sexual and violent situations which some people consider pornographic (Takeuchi 2015). The other type of Manga to come under scrutiny is *Hentai* which outside of Japan is essentially pornographic Manga, often featuring mythical creatures engaging in sexual acts using their tentacles to penetrate young female characters.

2007 saw the first obscenity trial in Japan which involved Manga, the Misshitsu Trial. This case featured the work of a specific Manga artist known as Beauty Hair whose work included depictions of sexual intercourse and genitalia which were drawn in a detailed manner (Galbraith 2014).

Article 175 (Distribution of Obscene Objects) of the Japanese Criminal Code 1907 states

“A person who distributes, sells or displays in public an obscene document, drawing or other objects shall be punished by imprisonment with work for not more than 2 years, a fine of not more than 2,500,000 yen or a petty fine. The same shall apply to a person who possesses the same for the purpose of sale”.

However, the Criminal Code does not define the word “obscene”. Nevertheless the case of *Koyama and Ito v Japanese Supreme Court 1953 (A) 1713* determined a three stage test to assess the obscenity of material. The questions to be asked are whether (a) the content arouses sexual desire; (b) the content offends a common sense of modesty or shame; and (c) the content violates proper concepts of sexual morality.

In the Misshitsu trial the court found the material to be obscene on the basis that it was potentially harmful as it graphically depicted sexual violence

against women and may be seen by children potentially turning Japanese youth into sex offenders (Gabraith 2014).

In 2014 Japan closed a loophole within the Criminal Code and criminalised the possession of child pornography. However, the amendment specifically excluded the criminalization of virtual child pornography in the form of Manga and Anime (Takeuchi 2015). During the various readings of the Bill to amend the relevant child pornography law the legislators determined that there was insufficient evidence of the harm caused by VCP to warrant any human rights restrictions such as restricting the right to freedom of expression (Watanabe 2017). As noted earlier depicting sexual acts involving characters representing minors is part of mainstream Japanese culture and therefore it is somewhat unsurprising that ultimately these arts forms have been protected.

South Africa

The primary statutes prohibiting child pornography related offences are the Films and Publications Act (No 65 of 1996) and the Criminal Law (Sexual Offences and Related Matters) Amendment Act (No.32 of 2007). The Films and Publications Act criminalises

“any image, however created, or any description of a person, real or simulated, who is or who is depicted, made to appear, look like, represented or described as being under the age of 18 years”

The Sexual Offences Act defines child pornography as

“any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years”

Clearly these pieces of legislation encompass VCP and arguably are drafted very broadly. Inevitably the Court had to determine whether such a broad description would violate constitutional rights such as the right to privacy and

freedom of expression. These matters came before the court in the case of *De Reuck v DPP (Witwatersrand Local Division) [2003] ZACC 19.* In this particular case De Reuck argued that the definition contained within the Film and Publications Act was too broad and vague and therefore the limitation to his right to privacy and freedom of expression, afforded to him by the Constitution, could not be justified.

In the first instance the Court considered the scope of the definition and held, inter alia, that the term "person" did indeed cover an imaginary depiction of a child (ibid at 23). The Court did determine that child pornography is protected under the freedom of expression and that criminalization does in fact impact upon this freedom. However, the Court had to determine whether such an inference with these rights was reasonable and could be justified in an open and democratic society based on equality, dignity and freedom (ibid at 56). The Court considered the nature of the expression and determined that it had very little intrinsic value. Although the Court accepted that there was no unanimous evidence to suggest that such images were used to groom children or that there was a link between viewing images and contact offences the Court noted that this may occur in some cases and therefore a reasonable risk of harm was sufficient to limit an individual's constitutional rights of freedom of expression and privacy (ibid at 70).

In light of the approach of the US, in particular, it seems difficult to justify the criminalisation of VCP in England and Wales given that if images are indistinguishable from real children then they would be caught by S.160 CJA 1988 in any event. There is no evidence of any harm being done to children and some may even argue that VCP could be used effectively to manage the risk of sex offenders by using VCP instead of child pornography where there is evidence of harm being caused (Taylor and Quayle 2003). Even the Human Rights Joint Committee (2009) agreed that the government has not provided any evidence to demonstrate the need for the offence. They believe that legislation should be evidence based and although they fully support legislation which protects children from abuse and any violation of

their human rights, they were disappointed at the lack of empirical evidence provided by the government.

Justifications on the grounds of morality

Chapter three of this thesis discussed the philosophical justifications for criminalisation in a general sense. This section will now apply those principles to VCP, with particular reference to the offence principle and harm principle.

The Offence Principle

The use of the terms “grossly offensive” and “disgusting” in S.62 Coroners and Justice Act 2009 suggest that one of the justifications for the criminalisation of VCP is the fact that it may cause offence to others and therefore engages the offence principle.

As noted in chapter three Feinberg (1985) acknowledges that it is legitimate to criminalise on the basis of offence provided that the offence caused is “profound offence” (ibid: 58-9) and not simply distasteful given that “the offended mental state in itself is not a condition of harm. From the moral point of view, considered in its own nature (apart from possible causal linkages to harmful consequences), it is a relatively trivial thing” (ibid:3).

Feinberg sets out a number of requirements for profound offense which are outlined in chapter three in more detail and replicated here for the ease of the reader;

1) It must have a different tone to an ordinary nuisance in that it must be deep, profound, shattering or serious;
2) People must be offended by the mere thought of the behaviour taking place regardless of whether they personally witness it and even if the behaviour takes place in private;
3) Profound offense cannot be avoided simply by looking away
4) Given that profound offense arises from an affront to the general standards of propriety it is offensive because it is believed to be

wrong. It is not simply believed to be wrong because it causes offence.

5) Profound offense tends to be impersonal and as a result individuals do not personally feel they are victims of the offensive behaviour.

Arguably given the public's reaction to child pornography in general and potentially any image which appears to depict a real or imaginary child engaged in sexual activity it could be argued that VCP meets the criteria set out above and could therefore cause profound offence, especially given that S.62 is only supposed to prohibit images which could be considered "grossly offensive" which is a higher standard than indecency.

Nevertheless it could also be argued that given S.62 criminalises private possession of such images then it is difficult to determine to what degree the public at large would be offended. If someone were to place a virtual image in a public place or include it as part of a poster then the public might be affected. As a result it could easily be argued that this is an unreasonable interference with individual liberty and therefore infringe an individual's human rights. If this is an activity taking place within the privacy of his own home then it is clear that this may violate Article 8 of the ECHR as enacted via the Human Rights Act 1998. Some individuals may also argue that the possession of such material is a way of preventing sexual offending either by viewing images of real children or through the commission of contact offences. The fact that the behaviour may ultimately be socially useful would be a factor to be taken into account when assessing the reasonableness of the offensive conduct (Feinberg 1985).

Using the principle of "bare knowledge" it may be possible to argue that the possession of VCP causes offence simply as a result of another person knowing that such possession is possible. Feinberg addresses the question of bare knowledge noting that "The offended party experiences moral shock, revulsion, and indignation, not on his own behalf of course, but on behalf of his moral principles or his moral regard for [the matter]" (ibid:68). Arguably offending someone's moral principles would be insufficient to justify

criminalization given the potential consequences of such criminalization. Therefore the only justification for criminalization is purely on the basis of morality and arguably this is a demonstration of legal moralism in the extreme.

S.62 Coroners and Justice Act 2009 uses the term "obscene character" in the definition of what would constitute pornographic for the purposes of the Act. As McGlynn and Rackley (2009) note (in the context of extreme pornography) theoretically this could permit the use of the test for obscenity contained within the Obscene Publications Act 1959, namely the "deprave and corrupt test". This is also acknowledged by the Consultation Paper which stated "It is not our intention to criminalise possession of material . . . which would not fall foul of the Obscene Publications Act. To that end we envisage the offence having a third element to it, namely that the material caught is of an obscene character" (Home Office 2008:11)[17]. Arguably the principles of the deprave and corrupt test are also purely moral given that it is not necessary to establish that the depravity or corruption would actually result in criminal conduct (*DPP v Whyte [1972] AC 849*). The Court stated "bad conduct may follow from the corruption of the mind . . . [but] it is not part of the [deprave and corrupt test] that it must induce bad conduct" (per Lord Pearson at 864). However, as Devlin argues if society takes no action against immoral conduct then society's moral values will come under threat as members of society become desensitized to immoral conduct (Devlin 1968).

However if the deprave and corrupt test is applied to virtual images then this could be considered problematic (Ost 2010). There is a considerable difference between the dissemination of obscene publications, which by necessity requires publication and distribution and the private possession of virtual images. Therefore it would be necessary to argue that the individual should be prevented from depraving and corrupting himself by possessing

[17] It should be noted that the Home Office stated in a circular that the meaning of the words "obscene character" was distinct from the technical test contained within the Obscene Publications Act 1959 (MOJ 2010). However, given obscenity is such a vague concept there is no reason why case law should not be referred to.

the images (ibid). However, this would arguably be an extreme version of moral paternalism as it would essentially be arguing that the State is justified in protecting someone from having impure thoughts which may corrupt him. If an individual has created their own virtual images then as Ost (2010) argues the individual may have already had the impure thoughts and is therefore already corrupted before coming into possession of the image. However, in *DPP v Whyte* (cited above) the Court held that "The Act is not merely concerned with the once and for all corruption of the wholly innocent; it equally protects the less innocent from further corruption" (per Lord Wilberforce at 863). Arguably therefore the law would be attempting to protect someone further who has envisaged an image but has not yet committed that image to paper/computer. However, this hardly seems justifiable given that no harm is caused to anyone and it begs the question is it possible to be corrupted more than once. Even if continuing corruption is possible it seems incredibly paternalist to legislate on the basis of protecting an individual's moral principles. Arguably as a society the more appropriate principle on which to justify legislation is the harm principle and it is to these arguments this thesis will now turn.

Justification for the criminalisation of VCP on the basis of harm

In the Consultation the Home Office discussed the possibility of harm being caused if photographs of real children were manipulated into virtual images. They noted

"Technological advances mean that current software can allow a user to photograph an image (or download one onto a computer) and manipulate it to look like a drawing, a tracing, a painting or cartoon. It is possible to manipulate a real photograph (or video recording) of real child abuse into a cartoon or drawing format, be it still or animated. In that scenario the image/s would appear to be merely a fantasy cartoon or drawing, etc, but would in fact be a distinct record of an actual abusive and illegal act". (Home office 2007:5).

It is difficult to dispute the harm caused in this case given it is essential the depiction of the abuse of a real child which has been manipulated by means of computer in order to appear as a fantasy image.

This situation is similar with regard to pseudo-images. Both England and Wales and the US criminalise pseudo-photographs on the basis that harm is caused to children as a result of the photographs being created. However, there is an argument to say that only the distribution of such images should be criminalised as at the time of creation there is no evidence of direct harm being caused to a child (Akdeniz 2008). In some cases there may not even be any indirect harm if a pseudo-photograph has been created using computer software and does not therefore involve a real child but simply a picture of an adult which has been morphed into that of a child (ibid). Nevertheless some argue that those who create pseudo-photographs will inevitably abuse children themselves and therefore the criminalisation of pseudo-photographs is a preparatory act to attempt to prevent child abuse occurring (Williams Committee Report 1979). The justification for criminalisation is that the picture itself may be associated with danger which is distinct from harm related to the original making of the image.

In addition, with regard to both pseudo-images and virtual images depicting real children the child would arguably suffer additional psychological harm from the knowledge that someone had manipulated images of their abuse into a cartoon or fantasy depiction which would remain online forever. Arguably the more recognizable the cartoon child in the image the more harm suffered by the child depicted in the virtual Image.

However, it is difficult to determine why it would be necessary to draft a new piece of legislation to cover virtual images which depict real children being abused given that such conduct has already been criminalised by means of an amendment to the Protection of Children Act 1978 which was introduced by means of the Criminal Justice and Immigration Act 2008.

S.7(4A) of the Protection of Children Act states

“References to a photograph also include—
(a)a tracing or other image, whether made by electronic or other means (of whatever nature)—
(i)which is not itself a photograph or pseudo-photograph, but
(ii)which is derived from the whole or part of a photograph or pseudo-photograph (or a combination of either or both); and
(b)data stored on a computer disc or by other electronic means which is capable of conversion into an image within paragraph (a);
and subsection (8) applies in relation to such an image as it applies in relation to a pseudo-photograph

Arguably therefore given that the digital manipulation of photographs of real child abuse into virtual images was already conduct prohibited by law it was difficult to see how these types of images based on real children being abused were the primary focus of S.62 Coroners and Justice Act 2009.

Therefore it is necessary to consider the harm caused by images which depict imaginary children which have been created without reference to a real child. It was acknowledged by the Home Office that these types of images were the primary focus of the legislation. With regard to the lower penalty for the new offence (S.62) the government noted

“There is a need to provide an appropriate maximum sentence that balances the nature of the content of the images against the fact that they do not depict actual abuse of a real victim” (ibid:9).

It is clear that no direct harm can come to a real child in the production of a virtual image involving an imaginary child. It is difficult to ascertain how, even with considerable manipulation of Mill’s Harm Principle, that harm could be extended to the depiction of imaginary beings engaged in sexual acts (Harcourt 1999). Therefore it is necessary to consider whether indirect harm could be caused through the possession of non photographic prohibited images of children.

In the Explanatory Notes attached to the Coroners and Justice Bill the government stated that “The offence is required to protect children. The images can be used as a grooming tool, preparing children for acts of abuse” (Coroners and Justice Bill Explanatory Notes 2009:para 857) . There is some evidence to suggest that some of those offenders who abuse children use pornographic images to groom children prior to abusing them (Tate 1990), however this is disputed by some academics (Williams 2004). In a study conducted by Elliot et al (1995) 14% of the offenders interviewed admitted that they had used pornography as part of a strategy to abuse a child. Taylor and Quayle also note that pornography may be used to “de-sensitise [children] to sexual demands and encourage [them] to normalise inappropriate activities” (Taylor and Quayle 2003:25). Nevertheless at the time of writing there has been no specific research evidence to suggest that images of imaginary children have been used in such a way. Under the present law an individual who shows a prohibited virtual image would not result in that individual committing the offence of grooming unless he were to arrange or actually meet a child as a result (S.15 Sexual Offences Act 2003). However, it is likely that such action would result in the commission of an offence pursuant to S.12 Sexual Offences Act 2003 which states

(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.

The Courts have held that the sexual gratification element of this offence may happen in the future and provided the defendant intends to receive sexual gratification at some point then the offence is committed (*R v Abdullahi* [2007] 1 WLR 225). Although there was no evidence put forward to suggest that offenders use virtual images as part of the grooming process

the Consultation Paper did note that virtual images are often found alongside images involving real children (Home Office 2007:4). As a result using images as a means to engage a real child in sexual activity is already covered by the law and therefore this is arguably again not the purpose of S.62 Coroners and Justice Act 2009.

Indirect harm in the form of normalizing the sexualisation of children

Some academics argue that virtual images can assist in the promotion of child abuse and the sexualisation of children (Ost 2010). It can then theoretically be argued that the objectification of children as sex objects will encourage actual sexual abuse of children (ibid). This viewpoint was reiterated in the Explanatory Notes released with the Coroners and Justice Bill. It stated "Viewing such images can desensitise the viewer to acts of child abuse, and reinforce the message that such behaviour is acceptable. Banning possession is justified in order to establish clearly and in accordance with the law that it is not" (Explanatory Notes para 861). A similar view has been put forward by the NSPCC who stated in a Briefing on the Coroners and Justice Bill that "the existence of these images serves to rationalize sexually abusive behaviour towards children in the real world and potentially serves to legitimise it in abusers' minds" (NSPCC 2009:3). This view has often been cited with regard to adult pornography however, arguably it is not verifiable and there is no specific research which suggests that those who view virtual images sexually objectify children especially when considering the offence of possession. The distribution of such images may potentially add to the sexual objectification of children but S.62 Coroners and Justice Act 2009 specifically addresses the possession of such images.

Of course it has been argued that the possession of such images may escalate to other type of offending but again as discussed above there is little empirical evidence to suggest that this is true and in fact it has been argued that the use of virtual images may assist in the risk management of online offenders.

During the Parliamentary Debate Jennifer Willott MP stated

“That leads to a dilemma: there are two opposing arguments as to how we should react to this particular case. One is that non-photographic images legitimise abusive behaviours in the minds of offenders, leading them to act out the images and display abusive behaviour—the images, therefore, pose a risk to children. The other view is that they are not photographic, so there is no victim as such, and they act as an outlet for individuals who have those tendencies and predilections—they act as a release, and therefore reduce the risk of abusive behaviour towards children

There is not enough evidence to show us which way we should make the judgment. I understand that there is evidence on both sides, but not enough to work out which side is in the majority and therefore which we should follow”(HC Deb 3rd March 2009).

Even though there are those who believe that the use of virtual images may result in an escalation in offending to crimes involving real children there is little evidence to support this. It has been noted that images which do not depict the sexual abuse of a child such as certain types of pseudo-image and all types of fabricated virtual image may actually be beneficial given that they have the potential to help assuage offenders' desires therefore rendering the offender less harmful. As a result it may therefore be possible to use pseudo-photographs and VCP in a therapeutic context to assist in the management of risk (Taylor and Quayle 2003). It must also be questioned whether the law as it currently stands has the correct focus. There is no definitive empirical research which demonstrates a causal link between child pornography and contact offending. As Williams (2004) notes many offenders utilise child pornography as an aid to sexual arousal and an aid to masturbation. While many may consider this activity abhorrent there is arguably no justification for criminalising the material on this basis. As a result it is even more questionable that law enforcement resources may be used in targeting those who use VCP, in which only imaginary children are used, especially given the position in the US that to criminalise VCP is

actually a breach of the Constitutional right to freedom of speech unless the image is indistinguishable from that of a human child. Kutchinsky's (1985) research has found that VCP may be used in a therapeutic context and may therefore actually assist in the protection of children.

The time has come to accept that child pornography exists in our society and as a result it may be sensible to decriminalise the possession of pornography which depicts imaginary children if there is any way in which the use of these images helps to prevent real children being abused, even if the thought of doing so is distasteful to the general public.

Having discussed whether the criminalisation of VCP can be justified the next chapter will consider the research findings from the interviews with experts and practitioners to determine their views on criminalisation.

Chapter Eight: Findings form Interviews with Experts and Practitioners

The aim of this chapter is to provide an overview and subsequent discussion of the research findings arising from the semi structured interviews. The chapter will be split into three distinct sections, a brief overview of the findings from the conceptual framework analysis, a more in depth discussion of these findings and finally a discussion of the themes arising from a general thematic analysis conducted using fresh interview transcripts. A significant amount of consideration was given as to whether to present an overview of the findings separately, rather than in the context of a discussion, and it was decided that it would be useful for the reader to be given an overview of the findings prior to their discussion in context. As a result the first section will provide a relatively simple outline of the findings from the interview transcripts, based on the questions asked.

General Overview of the Responses to Interview Questions

Do you believe that possession of pornographic computer generated images of imaginary children (virtual child pornography) should be illegal in principle?

Of the 13 experts interviewed 4 believed that VCP should be illegal in principle, 4 believed it should not be illegal and 5 stated that their answer would depend on a number of other factors.

Does your view change if the images contain images of real people for example consenting adults whose pictures have been morphed into pictures of children?

All respondents' views reflected their initial view on illegality, whether or not the image had been morphed from an adult to a child with the consent of the adult did not affect their view.

The Coroners and Justice Act 2009 made the possession of VCP illegal but did not criminalise distribution or production of VCP what do you think of this?

The majority of the respondents believed that the law had taken the wrong approach. Even those respondents without specific legal knowledge believed that targeting those who possess images as opposed to those who produced and distributed such images seemed anomalous. Many of the respondents wondered why the legislature had not simply included the more serious offence of creation and distribution in the same statute.

What is your general view of the criminalisation of behaviour of the grounds of morality?

Only a couple of the respondents felt strongly that criminalisation on the grounds of morality was unacceptable. These respondents tended to be those from the legal profession. The other respondents, especially from the police, tended to not have a particularly strong view on morality based arguments other than to add that the primary reason for criminalisation should be harm based.

There is considerable debate as to whether there is a link between child pornography and those who commit contact offences - what is your personal view on this?

Almost all respondents felt that thus far research had failed to establish a link between those who view images and those who contact offend. The practitioners had worked with offenders who had viewed images in isolation, had committed contact offences in isolation and those who had done both. All respondents noted that it would be extremely difficult to establish a definitive link between the two given the varying reasons for offending and types of offenders.

Do you believe the situation is the same if an individual uses VCP?

A number of respondents believed that the situation would be similar for those who utilised VCP. There were no respondents who believed that the

use of VCP would present a greater degree of risk to children than the use of other types of images. There were several respondents who believed that the use of VCP would be considerably better than utilising traditional images and that this would result in a lowering of the degree of risk posed by the offender.

Have you come across offenders who have utilised VCP?

The majority of respondents had not encountered anyone who had utilised VCP and of those who had the VCP had been accompanied by traditional images of child pornography.

Do you believe that VCP could ever be used to help paedophiles manage their sexual attraction to children and therefore minimise the risk of contact offending?

The vast majority of the respondents did not offer a specific view on this particular question and many stated there were lots of factors upon which their answer were dependent. Of those who believed it could be used the majority were legal professionals and of those who did not believe VCP should be used in therapy the majority were police officers.

Discussion of the findings of the conceptual thematic analysis

This section will provide a relatively brief discussion of the findings from the interviews with specific reference to the questions asked. It was considered useful to provide a general discussion of the answers to the questions but acknowledged that to only conduct a thematic analysis on this basis could have been considered overly simplistic. As a result a greater discussion of the general themes arising from the interview transcripts will take place subsequent to the findings from the questions asked.

As noted in the methodology chapter it was considered necessary to completely anonymise the respondents to the extent that they were not even allocated a respondent number. Due to the nature of the responses some

respondents asked that it not be possible that quotations be attributable to any particular respondent. They were however happy to be identified as a member of a particular profession, for example a police officer.

Illegality

"We don't usefully address most social problems by criminalising them there is little merit in criminalising PI and it does feel like that legislation was driven by moral necessity rather than any pragmatic reason". (One of the practitioners)

Prior to undertaking the semi structured interviews the researcher had no particular preconceived ideas as to which of the respondents would believe that VCP should be illegal in principle given that there has been very little research conducted into VCP and the fact that S.62 Coroners and Justice Act 2009 is a largely unknown section of a statute which specifically targets unrelated topics such as assisted suicide and the reform of the law pertaining to Coroners in order to attempt to prevent another serial killer such as Harold Shipman.

It was interesting to note that opinions as to whether VCP should be illegal in principle were divided and that often respondents did not have a definitive view on illegality and that their view was dependent upon a number of other factors. For those who believed that VCP should be legal in principle the majority stated that the basis for their opinion was the lack of evidence of direct harm being caused to any real child. For example one of the legal professionals stated:

"The law has to consider what is the purpose of criminalisation and why it needs to step in to moderate behaviour and if there an actual risk to the public or if it is more of a moral and social dilemma. In relation to virtual child pornography if that is possessed by someone for their own private use and no children were harmed in the making or creating of that image (because it is virtual) I cannot see that the state can justify prevention of possession of that image when the image is not of a real child".

The concept of harm was one of the main themes which became evident during the general thematic analysis and therefore a full discussion of this theme will feature below.

For those respondents who believed that VCP should be illegal in principle the primary reason given was the general sexualisation of children and the motivation of offender. For example in answer to the question of whether VCP should be illegal in principle one of the police officers stated:

"Yes because for me the level of an image should that be a real child or not does not give any indication of the level of risk that that person poses to children and so it for me it’s an indication that they have a sexual interest in children and that is then the opportunity for us and other social services or other bodies to provide intervention and reduce the risk that that person poses to children."

The motivation of the offender was one of the main themes of the general thematic analysis and will therefore be discussed in full below. However, it is interesting to note that for some the image is largely irrelevant and instead the primary consideration should be the potential risk posed by any particular offender. This is borne out by the response to the same question by one of the practitioners, a senior probation officer who said:

"I appreciate the legal arguments in relation to the fact that these images do not feature real children, however, having worked with sexual offenders I am used to the principles of desistance being based on offenders not reinforcing their child abuse fantasies through the use of pornography."

One of the police officers noted that it would be helpful if the law could be applied on a case by case basis rather than being prescriptive given that "one size doesn't fit all". With regards to general illegality he added:

"Yes but that said it has to be on a case by case basis as well because the law as you know is an ass, whilst the law says it is illegal I think it needs to be more prescriptive under what circumstances, and to clarify that, the example is Hentai images, if we come across a person who just has, is an art collector we are not after criminalising people who just fall into that bracket when their interest is that they are just collecting that kind of imagery. If there is no other suggestion they have a sexual interest in children I can understand we may have to make allowances and not criminalise the innocent.

Again arguably the motivation of the offender is of primary importance rather than the nature of the image itself. With regard to illegality there were some comparisons made with other types of image and the approach of the legislature which highlighted an interesting aspect of the debate. One of the legal practitioners stated:

"An analogy would be that I don't think it is illegal to possess images of virtual bestiality (I may be wrong) but it would be offence to commit bestiality. I think the law prevents the possession of extreme pornography if you would believe that person or animal to be real. If it is a cartoon sheep this would not be illegal. If I am correct isn't this the same thing?!"

This is an interesting point but it is certainly clear that images of children are viewed differently. This is in part arguably due to reluctance to accept sexual interest in children as being a reality to be faced and certainly there is a considerable desire not to "normalise" or "condone" such activities. This again is a general issue which permeates all interviews and will be discussed to a greater extent during the general thematic analysis below.

The Legislation

During the interviews the respondents were given an overview of the law and were therefore told that S.62 Coroners and Justice Act 2009 criminalises the possession of prohibited images (referred to within the thesis as VCP). The Act however is silent with regard to creation and distribution of such images.

The respondents were asked for their views on whether the law had taken the correct approach in essentially targeting consumers, rather than the producers or distributors. For clarity the creation and distribution of prohibited images would be caught by the Obscene Publications Act 1959 which is outlined in Chapter 2.

One of the Academics who is also legally trained noted that the existence of the Obscene Publications Act 1959 would largely explain why the Coroners and Justice Act did not make reference to creation or distribution he stated:

"if you look at the definition of Prohibited Image it has to be obscene because the criteria, although it goes through kind of what a child looks like what the acts portrayed are but there is that overall caution that it must be of - I love that phrasing - a disgusting or otherwise obscene character. Well that's the definition of obscenity for The Obscene Publications Act, so ….. if somebody distributed it, a prohibited image of children, they would be prima facie guilty under The Obscene Publications Act 1959, so therefore there was no need to include distribution in the Coroners and Justices Act because its already covered."

However, as discussed previously there is one significant distinction between the Obscene Publications Act offence and the offence as outlined under S.62 Coroners and Justice Act 2009, namely the defence of public good. This provides a defence to someone charged under the Obscene Publications Act "if it is proved that publication of the article in question is justified as being for the public good on the grounds that it is in the interests of science, literature, art or learning, or of other objects of general concern". (Obscene Publications Act 1959 S.4(1)). As a result if someone is charged with distribution of VCP rather than possession the individual charged with distribution could argue that an image has artistic merit and could therefore be acquitted, whereas someone charged with possession does not have the opportunity to raise such a defence. As one Academic noted:

"If you decide there is a wrong, and that is premised in the question that there is a wrong, which one of us has done the greater wrong? The person who distributed or the person that has it? So I think that's where the illogicality of the Coroners and Justice possession is, is that they left it to another piece of legislation and what they've actually done is created a situation where the possessor is arguably at greater risk of conviction than the distributor".

Morality

The respondents were asked for their general views on the concept of criminalisation on the grounds of morality. It was to be expected that such a question would result in a considerable discussion of harm as a justification for criminalisation as opposed to morality, this will be discussed below, however it was interesting to note that some of the respondents highlighted the fact that anything to do with child sexual offending is treated differently to other types of behaviour. For example one of the legal practitioners noted:

"The knee jerk reaction is to think that just because someone might be sexually aroused by a fake image of a child that this somehow makes this person an actual risk to children. I think this assumption is fundamentally flawed as most persons keep their sexual fantasies private and don't actually act on them. The law cannot simply intervene on moral grounds alone there needs to be a reason that the public needs to be protected for the possession to be criminalised and I cannot see a concrete reason for criminalising such behaviour".

It was apparent from the interview transcripts that the majority of respondents however did not have a particularly strong view on the principle of criminalising activity on moral grounds which was somewhat surprising. Although as noted above many clearly believed that a harm based justification for criminalisation would appear to be the most sensible approach there was little outrage expressed.

One particular academic stated when asked whether the law should legislate on the grounds of morality stated:

"That is one of the things that I don't really have a massive view on. I think the answer is it does and always has. So therefore it's ultimately up to us if we decide we believe in parliamentary democracy, and that's a big if, but if you decide you do then ultimately they are the representatives of society who have to decide if this is right of wrong. It's that whole Devlin argument isn't it - how to balance morality against expression? If everyone decides they don't wasn't to see it maybe that's legitimate. I don't have any strong view, I think it's hard, I think it can only be done for reserved things, but I think there are a number of examples over the years where we have criminalised on morality and indeed still do, I think most of the anti terror stuff that we do at the moment is more about morality than it is about harm and all the rest of it, I think we're increasingly doing that, whether it's right or not - yeah, two people who do jurisprudence will argue it left right and centre. There's no doubt the government has the right to do it because it has done it for donkey's years; whether it should do it is I think a more open question".

During a discussion of the legislation on the grounds of morality and government inadequacy the same academic noted:

"Sex workers are an interesting example - if it was harm based actually allowing for mini brothels would actually be a better way of preventing harm than anything else what people are actually worried about is that property prices would go down and therefore it's a morality issue".

There was considerable discussion in the transcripts of the parallels between S.62 Coroners and Justice Act 2009 and S.63 Criminal Justice and Immigration Act 2008 the statute outlining the offence of the possession of extreme pornography, the possession of which is again arguably criminalised on the basis of morality. In the context of the discussion of extreme pornography one police officer stated:

"But this is what I said about the fun police, let's face it the government is making law but the police apply the law it comes down to, what are the police doing here? Why have they gone for us etc and we be seen to be policing smaller communities who engage in that type of activity and just because they then take a picture of it for whatever purpose because they are a lovely couple, a loving relationship if you want or because they've had a great party and are having a great time and want a memory of it, or they want to use it as pornographic material to masturbate at a later stage, whatever, we suddenly become the fun police because you're allowed to do it but you can't take a picture of it. It does seem a nonsense and it certainly needs addressing because I can tell you now half the police are confused about it".

Clearly the position is often viewed differently in the context of any sexual contact with children. However, many of the respondents found it difficult to distinguish between the criminalisation of VCP in the form of cartoon pornography and the criminalisation of some forms of extreme pornography, especially in the context of activities which are legal to participate in but not to photograph such as fisting or extreme female domination. For example one of the police officers who categorically believed that VCP should be illegal had this reaction when asked about VCP in the form of cartoon images:

"That is a really difficult one, which clearly just contradicts what I've just said. I don't know. I really don't know because they are clearly not children. I don't know".

The legislation makes no mention of the images having to be a realistic depiction of a child. Therefore although it would be hoped that a prosecution would not be commenced simply on the basis of the possession of cartoon imagery it would be entirely possible to prosecute someone on this basis. Although there is no intention to discuss the law in the US in any detail here, it is interesting to note that in Section 2256 of Title 18, United States Code child pornography is defined as any visual depiction of sexually explicit conduct involving a minor (a person under 18 years of age). Visual

depictions include photographs, videos, digital or computer generated images which are indistinguishable from an actual minor. Clearly the law in the US has made a distinction between the criminalisation of cartoon images and those which would be considered VCP but are indistinguishable from a real child. Arguably it would have been better if the legislature in England and Wales had sought to make such a distinction. As one of the police officers interviewed notes:

"You've got to careful of not being the fun police as well, I think we've all seen the tee-shirts and the little gifs as well, the little cartoons that are basically humorous, they do portray children but we gotta look for – why is that being generated, and my view is we wouldn't even be looking at charging if that's all someone had in a way and even if he had other stuff you still wouldn't be charging on it. That material I would say is almost ignored in reality, in practice".

Again this raises the question of offender motivation which is one of the major themes arising from the general thematic analysis. This will be discussed below but in this context it does highlight one major deficiency in any piece of legislation, the inability to take into consideration the motivation of the person who contravenes the statute and commits an offence. Therefore arguably it is even more important that criminal justice practitioners make pragmatic decisions when it comes to charging individuals in order to compensate for the arbitrary nature of legislation.

The Link between Viewing Images and Contact Offending

This section will discuss the specific responses to the question of whether those who were interviewed believed there was any evidence of a link between viewing images and contact offending. The reader will note that the current research in this area has been discussed in the chapter considering the justifications for criminalisation and there is no intention to repeat those research findings here. However, the findings from the interviews and research will be combined in the summary and conclusion at the end of this thesis.

When responding to the question as to whether viewing images is linked to contact offending it was interesting to note that those with similar occupations tended to have a similar view. For example the majority of academics did not believe it would be possible to establish a link between viewing images and offending. One academic stated:

"To be perfectly honest I think it is very, very difficult to suggest that there's a pathway from viewing images into contact offending on the basis of current evidence. There are two schools of evidence so there's evidence largely from the US ….which suggests there probably is a link but there is also work from Canada and I'm thinking of Michael Seto's work particularly here that perhaps there isn't a link. No the difficulty with the studies is that most of the research is based on small clinical populations so over 100 would be a large sample, so sample are often very small and they are often convicted populations so we don't know if they are representative of the general population and so what you have are really skewed findings. I would say it is very difficult to say with any certainty that there is a link".

This particular academic went on to discuss a study they had conducted noting specifically that:

"We found in that study was that there seemed to be to us a group of men who you could call fantasists who were they were very well networked with the wider sex offender community they tended to have quite large image collections and they were very sexually active in terms of their discussions about young people and very well networked. They were not convicted for contact offences so it could be the case that there is a group of people who are really fantasists and whose aim in grooming is to network with other offenders and to share conversations and to share images but they didn't seem to be as contact focused as some of our lone groomers".

The idea that there is more than one type of offender was borne out by the responses from the police officers and practitioners who had worked directly

with offenders. Several police officers highlighted a number of different types of offender, those who indulge in peer to peer file sharing but who do not engage with other offenders or children. There are those offenders who view images but also need human interaction to discuss the images either with children or with like minded individuals but there is no contact in the real world. There are individuals who befriend children online again with no contact in the real world but potentially have contact via webcam which again is seen as less serious than having real world contact and then there are those who may use the internet but simply to make contact with a view to making real world contact with children.

As one of the academics notes:

"We've got about 43,000 sex offenders on the register at the moment probably about 70% of them have been convicted for child abuse related offences now what we don't know is how many of them are using digital media to contact children and how many of them have image collections so is it right to talk about an Internet sex offender that is the question in my mind so are we just working with the same group of people who have a different modus operandi? Everybody is using digital media why shouldn't it be the case that the majority are using digital media in some way to support their offending? It could be the case but we don't know because the research has focused on those men and they are mostly men who have been convicted for internet related offences so in terms of establishing a link between image collecting and contact abuse if we are looking for a trajectory a pathway I think it is very difficult to say with any certainty that that is the case. And it could be the case that there are a group of people who are simply fantasists, who've got no intention of abusing a child but who simply want to network with other offenders and who are using images for masturbation."

Several of the academics highlighted the difficulty of conducting effective research in this area given the ethical difficulties. One of the main difficulties is that most research is based on samples of convicted offenders as it would be impossible to ask individuals if they had ever viewed images or committed

a contact offence or both if they were not already known to the Criminal Justice System as the individuals would be unlikely to be truthful for fear of being apprehended. Even if individuals were informed that anonymity were assured again it would arguably be unlikely that any individual would disclose potentially criminal behaviour again on the basis of a belief that they could not be traced and subsequently prosecuted. When asked if there were a link between viewing images and contacting offending one particular academic made reference to the difficulty in determining this accurately given the variety of reasons why offences against children are committed:

"If we look at why people abuse children there are a number of different reasons why they do it, some of those will be that they find children sexually attractive as a commodity, that is the true clinical paedophile and some of those will use child pornography and not get a hit out of it and go on to the others but similarly there will be others that don't in the same way that we know there are clinical paedophiles that have never ever offended….Michael Seto a few years ago did a famous piece that got completely misrepresented because it showed that there was a direct link between the possession of CP and clinical paedophilia….but everyone talked about that and said that shows a link for all of them because everyone took the societal definition of paedophile i.e. someone who's abused a child, of course he's not saying that what he's saying is 'do you meet DSM 4's requirement for paedophilia?' 'yes' and there was a high link between that, but we'll never know how many paedophiles abuse children so I think we've always got these unknown questions and I think the answer is I would be amazed if some people didn't but I'd be amazed if everyone did".

This quotation does highlight a current problem which arguably needs to be addressed more widely, as discussed in the Introduction, the issue that not all individuals who offend again children have same motivation and until this is widely acknowledged it is difficult to devise effective treatment and risk management strategies. It is quite bizarre that there is a general lack of discussion of the motivations for child sex offending whereas it would be

ludicrous to suggest for example that all murderers had the same motivations for taking the life of their victims.

One of the legal practitioners made this particular point and clearly recognises the potential harm that introducing legislation targeting virtual images may cause to individuals

“I think overall a better understanding and research into the possession of such items, the reasons for its possession and therefore any links to the possession of actual pornography or contact offences would assist us to better informed choices about what the need for legislation actually is. I would imagine the most likely reasons behind such possession would just be pure private personal fantasy and not anything that most people would actually act on or even think of acting on. The risk of intrusive and inappropriate and unnecessary intervention into people’s lives is increased by this type of legislation”.

It is very clear that until it is possible to gather large scale reliable data on whether or not a link between viewing images and contact offending can be established then practitioners and academics alike will have difficulty in allaying the fears of the public that children are at risk from those who view images be they images of the abuse of a real child or a virtual image.

When asked whether it would ever be possible to establish a link between viewing images and contact offending, one of the practitioners who has worked extensively with individuals who have viewed indecent images of children said:

“I wouldn’t argue that there is any necessary link so the simple fact that of viewing sexual images of children whether they are of real children or not is not itself sufficient to mean that that person is going to commit a contact offence it is certainly not true for everyone who looks at these images that they are likely to want to commit a contact offence but there would be some individuals for whom the viewing of sexual images and thinking about

children in a sexual way and masturbating to those images etc that would increase their risk I suppose".

This particular practitioner suggests what may be required from a psychological perspective in order for an individual to move from viewing images to contact offending

"My view would be in terms of contact sexual offending there would be two broad – I don't know whether psychological dispositions is the right word, but two broad traits anyway one would be about someone's sexual deviancy, their level of sexual interest in children in this context and the other would really be their anti-sociality so how focused are they on their own needs what's their impulse to control that, how empathic are they and it really feels like you need both of those for people to go on and commit contact sexual offences and I suppose with that in mind there are some people who have a sexual interest in children would look at sexual images of children be they legal or not I'm not sure but that doesn't really matter but who wouldn't go on to commit a contact sexual offence because they know that is harmful and they don't want to harm a child so you know that just tells me it is not sufficient in and of itself for someone who has been looking at this material to therefore present the risk of contact sexual offending".

Having discussed whether the internet has had a massive impact on the level of offending this particular practitioner noted:

"I think that has changed things significantly in the sense that if you've got a sexual interest in children there's so much more readily…it's so much easier to access that content online so that is a big change I still think there is a significant proportion of people who are sexually abusing children who are not looking at child pornography for want of a better phrase, on the Internet at the same time their abuse of that child or children is specific to that relationship with that child and that context".

At the present time there are no published studies which specifically consider whether viewing virtual images can be linked either to viewing actual child abuse images or contact offending. It is difficult to envisage how such a study could be conducted from an ethical perspective, especially given the fact that the possession of virtual images of imaginary children engaged in sexual activity is illegal. When asked whether, in their opinion, the use of virtual images or playing online role-playing games which simulate sex with child avatars could be linked to other offending one academic stated:

“I think it’s very difficult to know at this stage. I always like speak on the basis of research on empirical evidence and as you know there is just no research evidence but if you asking me to speculate then it could be the case that VCP is going to attract a whole other group of people who it’s not beyond the realms of possibility that you could have your geeky boys who are using online games who perhaps are using virtual adult pornography could actually become involved in the use of VCP particularly where if you are looking at adolescent images it is very difficult isn’t it to tell if a person is a 17 or 15 if we are talking about the age of consent so you could have a situation where you are talking about a very different group of people using those kind of images a group of people who are really different from those actively seeking out child pornography because they have a sexual attraction to children.”

Real Life Experience of VCP

As noted above many of the respondents had not had any direct contact with offenders who had used VCP, with the exception of Japanese Hentai images and certainly none of the offenders encountered had solely used VCP. This was not particularly surprising given the levels of prosecution and the fact that the majority of VCP encountered tends to accompany more traditional child sexual abuse images as one of the practitioners notes:

"Not many people and no-one who has been exclusively prosecuted, to my knowledge anyway, for looking at prohibited images everyone who I have ever worked with who has come to my attention as a result of their online behaviour is because they have been looking at images of real children and

there a handful of those people who have also been under investigation for actually I don't know if they were subsequently charged or not, but for looking at cartoons or Manga, so never has it been exclusively around the prohibited images".

Therapy

The final direct question asked of the respondents was whether or not they could ever envisage a situation in which VCP was used as a therapeutic aid in the treatment or risk management of child sex offenders. This particular question itself raised a number of additional questions which would also need to be considered, such as would this be used with all sub types of child sex offender, there were also a number of logistical issues raised such as how to prevent such images being circulated on the internet and what it would mean if they were. It became apparent that one of the limitations of asking such a question was the difficulty inherent in answering the respondents' questions prior to some of them feeling able to give a well reasoned answer. For example one practitioner stated:

"I like the idea because there should be more creative thinking around how these people are helped. However, my current knowledge/understanding of the motivations of this group of offenders is that it is not going to solve all the problems or prevent re-offending/contact offending in some cases. I suppose you could argue that anything that helps some is better than nothing. However, I think if it was going to be done there would need to be rigorous monitoring/support around these individuals and research into the effects/benefits. Morally it does sit uncomfortably, but I accept this is my own view of something I can never truly understand as I haven't experienced it. There are some very dangerous and predatory sex offenders and I would be very concerned that anything which offers them some legitimacy for their sexual preferences may allow them to justify other offences they may commit".

Another practitioner noted:

“I can’t quite envisage a scenario where we would be prescribing them Manga drawings of children –I wouldn’t be sure, one of the evidence base of why that would be helpful, but also ethically how comfortably that would sit with staff being asked to do that either”.

Nevertheless, one of the police officers was also particularly open to the possibility of using VCP to help in the risk management of known sex offenders which was very encouraging.

When asked the specific question as to whether they could ever envisage a scenario in which virtual images could be used in the risk management of those with a sexual interest in children this particular officer continued:

“It would be something I’d be in favour of and I don’t think it would add fuel to the fire and I don’t think it would increase their risk of offending and it would obviously be much better than showing them real children who have been abused. I mean, I personally, I don’t necessarily agree with punishment of these people because if we are saying it is a sexuality then I think we need to be looking at more control and management for these people than punishment. I’ve put forward a number of times can’t we just have an amnesty we got investigations where we’ve got hundreds of people need arresting we can’t cope as an organisation with the amount of people that need arresting”.

The same officer argued that using virtual images may be a way of actually reducing the demand for real images of children being abused

“We could say to people if you are on the Sex Offender’s Register we know you have a sexual interest in children we’ll help you manage that, in order to do that here is a CD for your use not for anyone else’s use and if their understanding is they can use that and nothing else the demand should therefore reduce for actually children being abused and videoed or photographed and the that would be a good thing”.

It was refreshing to hear that someone who has spent a considerable amount of time within law enforcement would still be open to the possibility of using a new approach when it comes to risk management in child sex offenders.

One of the academics questioned whether it might be possible to use VCP to disrupt the cycle of offending given that breaking the cycle of offending often forms part of sex offender treatment programmes.

“I’m not sure what kind of therapy they are using at the moment but certainly when we were using CBT back in the old days of the 1990s before the Sex Offender Treatment Programme was developed when probation services were really doing some grass roots therapeutic work with sex offenders Wolf’s cycle of abuse was very much part of the therapeutic process and they actually asked offenders to use adult pornography to try to interrupt the cycle of offending to modify their behaviour….you’d start with the thought that they might like to abuse a child and then that would often move on to fantasy which would be fuelled by pornography and then that would move on to masturbation and then the goal would be to go out and abuse a child so you have this cycle, and you can see within this cycle where the internet might fit and it might be about networking with other people it might be about swapping images as part of that preparation for abuse. Now the question is could you interrupt it with VCP?”

Arguably therefore VCP could become part of the clinical risk prevention models such as Finkelhor’s Multi Factor Model of Child Sexual Abuse (Finkelhor 1986) and Woolf’s Sexual Assault Cycle (Woolf 1984).

It may be potentially possible to use VCP within a relapse prevention strategy in order to prevent offending reoccurring. If an offender had a legal outlet which could be used within masturbation then potentially a need may be satisfied. It is acknowledged that this would not apply to all types of offenders and as discussed in the introduction it is very important that those who sexually offend against children are not all treated in a similar manner

as they would have diverse relapse prevention needs. The use of VCP would arguably be best used with those who had been diagnosed as paedophiles, although it is acknowledged that this would not be without difficulty. If VCP were legalised it may also provide a means of sexual release for non practising paedophiles although this idea was met with considerable revulsion by some of the respondents who believed that it would normalise sexual interest in children. One police officer stated:

"It's the promotion of abuse of children full stop. And again you've got to look at the material if it depicts the image of a child and it is pornographic – the law says it has to be for pornographic purposes – so, if you are masturbating to that I think that's harmful".

The promotion of abuse and normalisation of having a sexual interest in a child were definite themes which featured throughout the interview transcripts and will be discussed more fully below.

One legal practitioner raised the issue of whether VCP would be sufficient or whether this would ultimately result in an individual's appetite for such things increasing

"There is no guarantee that supplying those with a sexual interest in children with VCP will in any way stop them from accessing other material. The other point here is whether the material can be kept to clinical use? With the Internet and the proliferation of images that are collected and swapped by those with a sexual interest in children could clinicians be sure that those images would not be traded for others? And would the appetite for images grow more extreme?"

This legal practitioner continued:

"I would be greatly surprised if clinicians would be at all happy about supplying their clients with VCP because in doing so they might feel as if they were condoning or normalising it among other ethical concerns".

This view was echoed by one of the police officers

“It’s very difficult, but as soon as you start saying it’s ok to give them computer generated images, that’s OK isn’t it almost promoting it in itself within a medical sense so it is an establishment approved approach to child sex abuse?”.

However, in the context of some form of therapeutic assistance the officer makes the following point:

“If someone goes to their GP and says I‘ve got a sexual interest in children I totally agree there should be confidentiality towards that person and it shouldn’t be a case of ‘*this guys has a sexual interest in children!*’ He’s seeking help, there should be somewhere he should be able to get relevant support and help but I don’t know whether that, for me, I don’t know whether [using VCP would be] appropriate”.

One of the academics makes an interesting point regarding the use of images in therapy.

“I think it was probably Michael Seto said at one point it’s a flawed logic – it makes it sound as if it’s a medicinal problem instead of a psychological problem it’s used in this kind of way to kind of excuse why people are doing it - I’m doing it cause I‘ve got a problem kind of thing which medicalizes it rather than anything else – it’s a perverse argument ‘cos you’ve to resolves the two haven’t you, you see if you decide there’s a link between child pornography and offending and you believe that then you’re not gonna want to use child pornography as part of therapy - ‘cos you believe what the consequences are. If you don’t believe there’s a link then what’s the point in giving it to them as therapy ‘cos its not therapy. So it’s difficult to see how it could be used for therapy”.

This particular academic continued:

“[The issue of therapy] is wrapped up in the debate whether paedophilia is deviant or whether it is a form of sexuality and I think that is where it becomes more difficult - it’s still a long way off people thinking that that is valid, the preponderance of evidence seems to be that it’s a psychological perversion in its clinical sense, its listed under DSMs [Diagnostic Statistical Manuals] - It’s viewed as a deviant psychology and then it becomes more difficult to argue therapy because in essence what you’re saying then is it’s not that they need this it’s that they crave this, and that’s where it becomes more interesting so I agree the question is whether or not you believe it’s a form of sexuality or whether you think it’s a form of deviant psychology”.

This does raise and interesting point with regard to whether having a sexual interest in children is seen as a medical or psychological issue.

One of the police offers offered the following opinion on this topic:

“I’ve got differing views on that I actually believe it is a sexuality for some people but I don’t believe it is a sexuality for a lot of people we are now dealing with. There are plenty of paedophiles out there (and I use the term paedophiles generally) there are people out that I am aware of who can’t walk into McDonalds because they will get an erection etc so they run again because they don’t want to harm children, they can’t help that and someone with those strong feelings will very often manage themselves. Going back to that book I mentioned about how the brain’s working etc when we start pushing our boundaries online and offline things start becoming acceptable and I think we’re in a society because thing are acceptable online - I’m not going to talk about the real world and the online world, that’s wrong the online world and the offline world are both real, but people are getting exposed to other things that they hadn’t previously thought of and they are believing that is their own sexual interest including people who are heterosexual who start believing the only way they get turned on is looking at gay porn and thinking they are gay which they are not it is because they are

getting addicted to pushing their own boundaries and they'll end up interested in illegal material such as child pornography".

Another police officer noted the difficulties with inter familial abuse:

"I think it is a form of sexuality in some people for others it may be a choice I think a lot of parents get confused over love and boundaries and that sort of thing because I think as a parent your love for your child is all consuming and I think for some that goes into a sexual, the lines get blurred for them".

Another police officer raised the issue of whether abusing children was a result of being abused themselves or bearing witness to abuse within a family environment

"When I used to do work with paedophiles I was very much of the people are just a product of their environment whereas my colleague I was working with was very much of the no, people can be born evil and we spent a lot of time with individuals, perhaps one or two years with one individual so we did get to know them, having said that we were aware they wouldn't necessarily always be telling us the truth and we were aware they might perhaps be manipulating us for their own gain, but in their stories there always seemed to be something that was different in their life but whether that was in childhood or perhaps slightly later and when they talked about it I would think ah! That must have been different or I bet that was tough. There was one guy who was a rapist of very young boys and got to know him over a couple of years and he always portrayed his family life as what everyone would want and my mate said, 'told you [officer name] people are born evil', and he was his example; and a couple of years later we're driving him to a prison I think somewhere and he started to talk about his sister and we hadn't really talked about his sister and he said and then she got pregnant, so I said I'm sorry she got pregnant, how old was she when she got pregnant? Oh she was twelve. And this is the guy that had been portraying the most wonderful family life and he goes and everyone blamed my Dad and so I'm not necessarily of the school of thought that all paedophiles have been abused I

don't think that's the case; but I wonder if there is a significant factor in their life that's meant they've chosen – I don't know if chosen's the right word- that they've gone in a certain direction".

As discussed in chapter one there are varying views and current empirical research is being conducted to determine whether there is a neurobiological cause for having a sexual interest in children and being a diagnosed "paedophile". However, it has been evident from a number of interview transcripts that there is a trend for some people to access child pornography as a way of pushing the boundaries of sex as it remains one of the final taboo subjects. It is therefore clear that the underlying motivation for offending does need to be established before the most appropriate type of management or therapeutic intervention can be determined.

On this topic one officer notes:

"What I think worries me I think that some people think my God, the only way I can get hard these days is by looking at kids whereas that's not really the issue, it's actually the use of porn they use it too much, so that is what I would be worried about – wrong diagnosis….. Having a sexual interest in children and having only a sexual interest in children are two different things".

However, as noted elsewhere arguably there will never been a singular solution to manage the risk of reoffending in all those who sexually offend against children given there are so many different reasons why those offences take place.

Overview of the Themes which Emerged from the General Thematic Analysis

Having reviewed the transcripts with a view to determining the answers to the specific questions asked of the respondents, the researcher decided to start again with completely blank interview transcripts in order to categorise

and code the data to determine whether any themes emerged from the data which were not directly related to the questions asked. It was evident immediately that the emerging themes were very much associated with the topics inherent in the questions asked but it was interesting to note the issues which had arisen which had not necessarily been foreseen at the outset of the interviews.

The Themes

Motivation, Normalisation and the Gateway Principle

"I suppose what is troubling about such images – lifelike images of child abuse -is the reason why they are created, and the appetites of those for whom they are created". (Legal Professional)

One of the principal themes arising from the interview transcripts was the concern expressed by many of the respondents as to the motivation of the person utilising the images. Amongst many of the respondents there appears to be a level of discomfort with regard to the fact that there are individuals who utilise images which depict the sexual abuse of children. One particular legal practitioner also expressed a level of discomfort with the use of the phrase "virtual child pornography" but then goes on to acknowledge the difficulties inherent in using other terminology

"I personally have some concerns with term VCP, since children are unable to consent to sex it can only ever be abuse, virtual child abuse seems a more accurate description. However I do realise that label is not particularly helpful in terms of a therapeutic application, but that is the crux of the matter; that which is natural and pleasurable to the paedophile is unnatural and unpleasant (to put it mildly) to the object of their desire. It is a dreadful dichotomy, we criminalise to protect children and I accept that for non-offending paedophiles this means there is no help, counselling or risk management strategies available without risk of stigma or social rejection, vilification etc. Declaration of paedophilic sexuality comes at a price and many people would prefer to keep it to themselves. So whilst I wonder if

terming it VCP gives it a veneer of normalisation it doesn't merit I do realise that the images have to be called something and punishing someone for their (unacted upon) sexuality is rather harsh".

Even though this is a very well rounded argument it does demonstrate that this particular topic is difficult even for those who are practitioners.

For one particular police officer the principal issue is the motivation of the offender as the officer believed that the most important factor is to determine the level of risk posed by the individual to an actual child. When asked whether VCP should be criminalised the officer stated:

"Yes because for me the level of an image should that be a real child or not does not give any indication of the level of risk that that person poses to children and so it for me it's an indication that they have a sexual interest in children and that is then the opportunity for us and other social services or other bodies to provide intervention and reduce the risk that that person poses to children."

The officer continued:

"I've always argued against using that *(the guidance as to the seriousness of images)* as an indication of what risk someone poses to children, so for me, because someone's got a level 5 image which may show torture of a child and someone has a level 1 image or even a CGI image which would be indicative of sexual abuse of a child that doesn't give any indication of what risk that person poses and whether they would be a contact offender".

However, the officer did concede the following point with regard to seriousness

"I do agree that people collecting mages of real children that is a more serious offence than someone collecting Hentai-type images because there is a real child being abused and the fact that there are people collecting that

type of images means that more children are going to be abused, so I do look at it as more serious if real children are being abused, I don't necessarily look at it as increasing the risk factor of them being a contact abuser because they're real children they are collecting."

Another police officer added:

"Some people will generate it and not make it look like someone else because they think that is an excuse for having an interest in that type of material without being - basically making it victimless in their eyes, but in my view, they still have the underlying issue of having a sexual interest in children, which isn't an offence per se, but I would say that is encouraging it, acting on it to a degree".

This quotation clearly shows that having a sexual interest in children is seen as inherently problematic regardless of whether or not an individual acts upon it.

For some the possession of VCP was also potentially seen as a gateway to other offending much like cannabis has been seen as a gateway to other drugs. There is no empirical evidence to suggest that those who view virtual images of children will progress to viewing images of real children or ultimately contact offending as discussed above but until this possibility can be ruled out it was clear that VCP would be seen by some as problematic. One officer stated:

"I liken it to cannabis because I think somebody may be satisfied by that for a period of time maybe a couple of years but I think as time goes on they will want to look at something- it will lead to them looking at images of children so I think it's the first step on the ladder".

Later in the interview the officer continued:

“I think for some people the images are enough there are a lot of people who they get their thrill from searching for images online then for others I think it s gateway for other things I don’t think all people who look at images go on to be contact offenders”.

One of the legal practitioners expressed concern that even though they acknowledged that there was little empirical evidence which could establish a link between viewing images and contact offending that images may still act as a gateway to other types of offending:

“I suppose it might be seen as sharpening and extending an appetite for child abuse, and it is really a misnomer to draw a distinction between images or videos of a child being abused and abusing a child in person. In each case a child has been abused. Watching a video of a two year old child being raped and doing it yourself are not widely different - the child is still raped. The more appetite for the videos/images the more children are abused”.

Another of the police officers highlighted the importance of understanding the motivation of those who are using or viewing any type of image be it of a real child or of an imaginary child. Arguably by establishing the motivation for offending it may be possible to implement the most appropriate method of risk management based on motivation

“For me the law is there to assist us with managing people with a sexual interest in children that pose a risk to children so if someone’s viewing something where no harm has come to children because it’s been created if you like, and the motivation is humour albeit you might question their humour, they wouldn’t necessarily fall into the same category as someone whose motivation is sexual”.

This officer raises an interesting point about harm and it is to that particular theme this chapter will now turn.

Harm

As discussed in chapter three, one of the principal bases for criminalisation is the Harm Principle which, in simple terms, states that an action should not be criminal unless it can be proven that someone is harmed.

The theme of harm permeates through all the interview transcripts. This is not surprising given that there is considerable debate as to whether virtual images can be considered to cause harm if the child depicted within the image is imaginary.

As one of the academics notes:

"There is a great deal of research that focuses on the harm done in images where real children are depicted and the role they play in the offending cycle the link between collection and contact abuse there is no research to demonstrate in my view that VCP is in anyway harmful and in fact in my view from work I've conducted with sex offenders in the past it could be that VCP could be used as part of the therapeutic process particularly in terms of trying to disrupt the fantasy cycle the kind of cycle that Wolf described around offending behaviour so there could be a role for the use of VCP in treatment programmes for sex offenders and in fact for people who have perhaps identified that they have a sexual attraction to children but who haven't committed a criminal act and who aren't part of the criminal justice system but who present themselves to organisations like Lucy Faithful there is a role I think for using VCP in those kinds of cases with people it may even be preventative in terms of contact abuse the problem is that this isn't a view that would sit very well with the public".

However, as noted above the lack of research did not prevent the government from enacting the law even though the government themselves acknowledged that there was no research to suggest a link between viewing fantasy images and contact offending

“We are unaware of any specific research into whether there is a link between accessing these fantasy images of child sexual abuse and the commission of offences against children, but it is felt by police and children’s welfare organizations that the possession and circulation of these images serves to legitimize and reinforce highly inappropriate views about children” (Home Office 2007:1)

Again it is clear that the criminalization of VCP has far more to do with a general abhorrence for those who have a sexual interest in children rather than be based on the harm principle or any empirical evidence. As one academic notes:

“I know there is another camp that would say actually depicting a child in that way kind of contributes to the general victimisation of children through images so I think because I have worked extensively with offenders it seems to me preferable to be using that kind of approach in a therapeutic way with offenders because ultimately what you are trying to do is to prevent contact abuse”.

However, one of the practitioners noted:

“I don’t agree that criminalising those accessing the images is useful or productive. Generally these perpetrators need help not conviction. I would also agree that as there are no real children involved there is no harm caused to children. However, it does concern me that encouraging people to reinforce these fantasies may lead to contact offending in some cases. As with users of real child pornography, offenders’ accounts tell us that they sometimes are not able to manage this by the use of images alone”.

This particular practitioner continued:

“I also understand that people with this sexual interest are not that easily able to change it. Having said that it is not acceptable for harm to others to be caused by these people. In theory VCP is a good idea because it

minimises the harm and gives offenders a way to manage their sexual interest".

In addition to the focus on harm, many of the respondents were very wary of anything which could be seen as the "promotion" of child abuse even if there were no actual children involved in the creation of an image. As noted above this largely appeared to be the view of the police who were generally hesitant with regard to imaginary images being used with offenders even though it was acknowledged that there is no direct harm caused. One legal practitioner took a different view stating

"It strikes me as bizarre that there seems to be considerable reluctance to acknowledge that there are those who have a sexual interest in children and accept this without somehow thinking that this acceptance is some kind of promotion of the idea that it is ok to view children sexually. It is unrealistic in my opinion to think that if we ignore the problem it will go away or that we can incarcerate all those who pose a risk so although it may appear distasteful to some sure we should be encouraging people to use virtual images, child sex dolls and virtual reality if it means that fewer actual children are abused. It is time to accept that non practising paedophiles exist and live among us".

However, this view was not shared by all respondents. For some there appeared to be a certain difficulty in accepting that an individual may be sexually attracted to children and yet not be a sex offender. This in turn led to a lack of acceptance that it may be the case that in order to prevent contact offending then some concessions may need to be made. One legal practitioner noted:

"VCP and child sex dolls are a challenging concept; the NSPCC have recently spoken in condemnation of the dolls, primarily I understand because it would appear to normalise what is in fact an abusive act. So overall I would be concerned about endorsement and what that might lead to".

One particular academic noted that the law needs to be more transparent as to the reason for criminalisation and acknowledges that criminalising VCP cannot really be based on the harm principle but instead is based on the offence principle.

"So where it involves a real child I think you can show harm even if not primary harm in terms of sexual assault I think you would have what we now deem the secondary harm; that knowledge or that worrying that people believe you did it which we kind of accept in terms of, I don't like the terminology, in the 'real child pornography' we understand there is secondary victimization and now secondary victimisation in terms of virtual child pornography where it's a real child. Where it's pure fantasy then it becomes more interesting because you have to decide whether or not we criminalise on the basis of reality, and actually there is a number of occasions where we do criminalise on morality so it's not that I object to it but I think you have to clear what it is I think what I get annoyed with is people saying that prohibited images is an example of us protecting children, because there's no evidence for that; but if you wanted to say virtual child pornography is a really disgusting horrible thing that we don't think anyone should see, then that's difficult to say well no that's - you know that's true. And therefore if you want to criminalise bloody horrible stuff, which is the whole basis of the Obscene Publications Act, then actually there is an issue there. You know and I think that is the thing, it's whether you decide that obscenity should be criminalised, you have to separate it from the indecency of child pornography which is a much lower threshold because of the harm to a child, against obscenity. It seems to me you've either got to criminalise obscenity or you don't criminalise virtual child pornography because it's got to be one or the other.

There were parallels drawn by respondents to the criminalisation of extreme pornography under S.63 Criminal Justice and Immigration Act 2008 which is arguably another example of legislation which has been introduced on the basis of the offence principle rather than on the basis of harm. This particular piece of legislation results in the situation where a lawful act can

become subject to criminal sanction if that act is captured as an image and possessed by an individual.

Law Reform

As a result of such discussions another theme which was clear from the interview transcripts was the difficulty inherent in drafting legislation which can be sufficiently specific. This following quotation from one of academics outlines the difficulties

“I’ve always said law is a blunt instrument because it has to be you can’t use law to do something finesse wise, law is a big sledgehammer, and therefore actually if you ask the people who pass the law if they were worried about cartoons of Bart and Lisa Simpson having sex they would probably say no, but how do you write a virtual child pornography law that criminalises depictions of children, but exempts Lisa and Bart? And that’s the thing, it’s very difficult to see how you could write legislation for it, but it does mean you’ve got this absurd situation whereby you criminalise perhaps the thing which we might agree with which is the depiction of a real child but also the criminalisation of Lisa and Bart having sex”.

When this particular academic was asked what could have been done to enhance the legislation he stated:

“I think one of the big mistakes they may have made is not borrowing part of the language of the pseudo photographs in what they could have said is ‘appears to resemble a child’ which would have got rid of Bart Simpson, Lisa Simpson and the pixie porns because they’re obviously not”.

This view is echoed by one of the practitioners who noted:

“I feel one of the criteria for me would be it being a reasonably realistic depiction of a human being in terms of the image”.

As discussed elsewhere in this thesis it does seem strange that no reference is made within the legislation that the image should bear some kind of resemblance to a real child. Also as noted above S.62 of the Coroners and Justice Act is firmly based on obscenity and yet does not afford a defendant charged with possession of VCP the opportunity to utilise the defence of public good which is open to those who have produced or distributed VCP.

There have been considerable difficulties in this area with regard to art which has featured child nudity and there is considerable debate as to whether such images should be protected as art given the cultural value of the piece, or whether the images should be destroyed. Theoretically this situation could arise with images of imaginary children in provocative poses. However, whether or not there would be the opportunity to argue that the graphic arts should be preserved would rest upon whether a charge was brought under S.62 Coroners and Justice Act 2009 or the Obscene Publications Act 1959 again due to the lack of inclusion of the defence of public good in the former.

This issue came to light in the case of *R v Graham Stuart Ovenden [2013] EWCA Crim 2574.* Ovenden was a photographer and artist who had been convicted of a number of counts of indecency with a child. Ovenden had a number of images in his possession, some photographs and some pseudo images/prohibited images. Upon conviction there was considerable discussion as to whether the images in question and other images and works in his possession should be subject for forfeiture which would result in their potential destruction. The Judge, District Judge Elizabeth Roscoe determined that the works belonging to Ovenden were indecent and therefore she ordered the destruction of the works including photographs taken by a French artist, Pierre Louys which were taken in the 1860s and 70s. As the Guardian notes:

“Her decision led one writer this week to compare her decision to “an act of medievalism to match any of the statue-smashing antics of the Islamic State”. Outside the court, Ovenden said: “I am a famous artist. I am an

equally famous photographer, and they are destroying material which has been in the public domain for over 40 years." (Saner 205:1).

Commenting on this case one of the academics noted:

"See, you had this thing that had he sold them to somebody he would have had a defence,….but because he held them that was that. It was interesting what to do with them because the material was of considerable artistic merit……You have these kind of absurdities" (in the law).

The difficulties inherent in the law become ever more evident in the context of the age of a child. It is clear, as have been discussed above, that the age of consent varies across a number of different countries and yet the statutes which deal with indecent images of children use the age of majority as the cut off point, that being 18 in England and Wales. This therefore results in considerable difficulties where a person of 16 or 17 can engage in sexual activity perfectly legally but if the same activity is captured as an image or video then there is a possibility of prosecution for making, taking or possessing an indecent image of a child. This also applies to imaginary images. It is incredibly difficult to ascertain the age of a young person in a photograph and arguably more difficult when it comes to an imaginary image. As one academic notes:

"The concept of what a child is, is probably looked at very strangely by a lot of people now – it is a strange area and the more you know about it the stranger it seems because of all the inconsistencies".

This particular academic has written extensively on the difficulties inherent in this area and continues

"Virtually all my writings conclude with the law's not very good at doing this, because yes we can deal with the pre-pubescent stuff that's really easy but my article on sexting was a classic example; why are we criminalising adolescents taking pictures of each other when Polaroid made quite a lot of

money in the 1970s from our parents doing that kind of thing, you know we don't really want to think about that but Polaroid mainly made their money from that kind of aspect. I'm not saying it is right, I'm not saying we should go into schools and say hey 14 year olds get your bits out, but we need educational strategies, or child protection strategies, the law cannot deal with this kind of thing. The fictitious VCP images are a classic example of that, it's a nuance that the law can't handle, which is one of the reasons I've always said we have never had text now people keep saying why don't we criminalise text the UN's CRC says we should criminalise text, and I've said; can anyone design a law which criminalises all the NAMBLA [North American Man Boy Love Association] stuff which is pretty horrendous but doesn't criminalise Nabokov's Lolita? And the answer is we can't because we're not subtle enough to do that we would have to put a defence of artistic meriting, as soon as you put a defence of artistic meriting anything is up for grabs. And that's the same with this then you've got that situation whereby how do you do that?"

The lack of subtlety of the law was raised by one of the other legal professionals who commented on how the law intends to deal with technological advancement

"The thing that worries me is the approach of the law to all things technological. If the police are struggling to adequately deal with the numbers of people downloading indecent images of real children then how on earth will they have the time to deal with images of non real children? When you add to that the advances in technology with regard to robotic sex dolls, including child sex dolls, and sexual activity in virtual reality, it begs the questions how will society legislate acts which take place in virtual reality or with an inanimate object? Again it comes down to the purpose of criminalisation and whether the law makers can ever see a role for these technological advancements in the management of offenders as no humans are harmed or whether society will remain short sighted and only see something morally distasteful".

In the context of a discussion of the Obscene Publications Act 1959 and the role of this legislation with regard to the prosecution of the production and distribution of VCP one of the police officers made the point that given the age of the Obscene Publications Act and the advances in technology there would have been a perfect opportunity for the legislature to implement new legislation which would be more effective and prescriptive with regard to VCP and other related computer generated images.

"[The law] needed to be more prescriptive and the OPA is a very old legislation things have moved on we're in a digital age and there was the perfect opportunity to address the modern world problems….The law should be there not just for the negative and this is what we must prosecute but also what a defence is, what we're allowed to do and not allowed to do and it does seem to concentrate on what we're not allowed to do without being any more prescriptive, it needed really to be drilled down, but there's a lot of legislation as well like that".

In addition, to more effective, more prescriptive legislation, the same police officer highlights the importance of education into online dangers especially given the advances in technology and the way that technology is being used by children.

"I do think there is an issue in this country about what our youngsters get up to online which is perpetuating the increase in indecent images of children a lot of adults will speak to children online and there is not a lot of grooming - the kids are very ready to get their bits out, and it's not to say - well listen it is the adults' responsibility here they know when they are looking at a 14 or 15 year old child even younger, I've seen all sorts of ages on webcam and they might say do this do that but what I'm getting at is if our society has become like that we've got to look at ourselves and say if the issue is children are doing that it shouldn't be a policing problem first and foremost it should be an education issue and it isn't being addressed at the moment".

The approach of parents to online danger can often be very different to the approach parents take in the offline world and it is clear that many aspects of society, including the law, are not currently adequate in terms of addressing these issues. One officer notes:

"I gave the analogy when you have a child you take it out you say look left look right find a safe place to cross the road until your safe. Then you go to the park and you get Stranger Danger and all the rest of it and that all seems to be common sense to prepare you for later in life when you're 8 or 9 years of age and you say to your Mum can I go to the park with my mates it's only across the road and Mum says Yes but don't forget what I've told you in the past for the last however long and you're prepared for that. But when it comes to technology parents' and carers' minds go to mush and often they will say to the kids here's your laptop speak to anyone in the world you want to. We don't tell them not to do that, we say you probably know better than me hahaha it's funny and we don't check what our child's doing yet it would be preposterous in the offline world to think we'd be introducing those individuals to our children".

Technology in the Future

There were no respondents who specifically addressed the question of the future of technology and how the law might deal with advances in technology such as virtual reality. However, one of the practitioners had recently been to a conference on this particular topic and noted that the question had been raised as to how as a society we might feel if one person's virtual avatar sexually abused another person's avatar, would that ultimately be criminalised. The practitioner noted

"but I suppose it made me think that the whole medium of the Internet…. but who knows how that technology might develop in the long run and I suppose it feels like the border between the offline world and the online world is becoming so permeable that I don't know how much longer that distinction will hold water for and so it was sort of in that context that it made me think about the drawings of prohibited images that if these things become

particularly available how different is that sort of content from images of a child and when avatars exist which are so lifelike then how will that leave us feeling and I guess these are things we are thinking about already. I work with lots of young people, their reality they don't see in the same way that I do talking about offline and online environments there's so much in their social life they experience as via the internet via the smart phones and social media so I just feel like the trend's changing so quickly and it's so difficult to grasp and legislation is always going to be behind the curve inevitably because it is always reactive to some degree that it just raises all sort of philosophical dilemmas about reality is and who victims are and what an experience is and what a real experience is that are very difficult to answer.

One of the legal practitioners specifically addressed this point from a slightly different perspective:

"In my opinion future technology could provide the key to assisting people to manage their sexuality in a completely different way. If it is possible to engage in activity in the virtual world which would not be possible in the real world then is it not time that we began as a society to embrace that? I know many people don't like the idea of sex robots, let alone child sex robots but if someone can satisfy their desires with a robot rather than harming another human being surely that is preferable. Also if virtual reality/augmented reality brings with it the possibility of interactive sexual activity which is physically satisfying then it would be great if the powers that be embraced the positive potential of a new reality rather than simply wondering how people can use it to commit crime or indulge in activities that most people find distasteful. Virtual reality is currently being used with end of life patients in hospice care to enable the dying to visit the beach etc so why not use it to manage the risk of those who sexually abuse children".

Although arguably distasteful to many, there may be possible technological advances which could be used to assist those specific image offenders who are of lower risk of contact offending. Given that it is now possible to

differentiate between types of offender surely the time has come to determine whether there are viable alternatives to criminalisation.

Having outlined the research findings from the interviews with experts and practitioners the thesis will conclude with a summary and then a final discussion of whether technology could ever be used in the future to assist in the risk management of those who are sexually attracted to children.

Chapter Nine: Summary, Further Research and Conclusion

Summary

There is little doubt that advances in technology have had a considerable impact on certain types of offending and this has certainly been the case with regard to those who offend against children. New technology has enabled offenders to interact with children in ways which were not possible in the relatively recent past. This has resulted in sexual interaction with children over webcams and the live streaming of abuse across the world. The internet and related technologies have also had a considerable impact on the accessibility and proliferation of images and videos of child sexual abuse, often referred to as child pornography. In 2016-17 over 20,000 people were prosecuted for image offending in the UK alone (Crown Prosecution Service 2017). Nevertheless even though Ss.62 to 68 of the Coroners and Justice Act 2009 were enacted in 2010 there have been very few convictions for the possession of virtual images. At the time of writing there has not been a reported case of the possession of virtual images in isolation and although there may have been cases in Crown Courts which have not been reported, the law remains to be challenged by the higher Courts of England and Wales.

There has been a full discussion of the definitional difficulties of the term “child pornography” and “VCP” in chapters four and five respectively. As has been seen in chapter four there is no legal definition of "child pornography". Many find the term offensive as it appears to suggest that images of child sexual abuse are to be considered in the same way as traditional adult pornography (Ost 2009). Many of the statutes dealing with illegal imagery use different terminology and during the research stage of this thesis it became apparent that within the interview transcripts respondents used a number of different terms to mean the same thing. As a result the following terms were aggregated to mean "virtual child pornography" or "VCP", namely virtual images, prohibited images, CGI images, virtual pornography and cartoon pornography involving characters depicted as children. Although no doubt there are many arguments for and against using the term "virtual child

pornography" it was felt that a general term would be more beneficial in a thesis such as this, rather than constantly utilising different terminology.

As discussed in chapter one, VCP can be broken down into two general categories, computer manipulated images and computer generated images. Gillespie (2012) notes that the second category, computer generated images can be broken down into two sub categories; computer created images and rendered images. Computer created images are images created exclusively by computer graphics programs and therefore no photographic image is used in the creation of the image, for example the images used in Japanese Manga, Hentai and other cartoon imagery. Arguably, this is the type of image which can be considered VCP. Images which have been created through the use of any photographic image, however manipulated, would be considered to be a pseudo image, as discussed in chapter four. Rendered images are images where the computer has used an original image, including photographic images, but such images have been rendered into 3D computer generated images for example an avatar in a video game. However, it is possible to render an image without the use of a photograph which as has been seen can complicate matters legally with regard to which statute the image breaches.

In real terms VCP can consist of a number of types of images ranging from depictions of cartoon characters who are portrayed as children such as Bart and Lisa Simpson, or Stewie from Family Guy, who is drawn as a baby, engaged in sexual acts to realistic images of imaginary children which could be mistaken for photographs but bear no resemblance to any real human child alive or dead. Japan is also known for producing some particularly stylised cartoons known as Manga or animations known as Anime and there are sub genres of these which contain sexualised content. Two sub genres of Manga have been subject to considerable discussion, Lolicon and Hentai. Lolicon is the term used to describe Manga which features very young girls, often prepubescent, in sexual and violent situations which some people consider pornographic (Takeuchi 2015). The other type of Manga to come under scrutiny is Hentai which outside of Japan is essentially pornographic

Manga, often featuring mythical creatures engaging in sexual acts using their tentacles to penetrate young female characters[18]. In addition VCP in the form of avatars has been used in online role playing games, such as Second Life, which feature scenarios in which adult avatars engage in sexual activity with other avatars depicted as children. These interactions can then be captured as either still images or videos for future use.

The aim of this thesis has been to critically evaluate whether the criminalisation of VCP can be justified. In order to do this is has been necessary to critique both the law as it currently stands and the justifications for the enactment of the law pertaining to VCP given the overlaps between existing legislation and the language used in S.62 Coroners and Justice Act 2009.

As seen in chapters four and five a critical evaluation of the law pertaining to both indecent images of children and virtual images was necessary in order to highlight the areas of the current law which overlap, which areas of legislation are in need of clarification and which are in need of reform. This has been achieved through the use of doctrinal analysis, a legal methodology which enables lawyers to critically evaluate the law as drafted through reference to decided case law.

Although law reform relating to indecent images is discussed in considerable detail in chapter four, in summary, it is clear that reform is needed especially in light of developing technology. For example there has been considerable charging confusion and overlap between the offences outlined in S.1 POCA 1978 (making or taking an indecent image of a child) and S.160 Criminal Justice Act 1988 (possession of an indecent image of a child). This has been highlighted by the fact that The Court of Appeal has stated that as far as sentencing is concerned the offenders should be sentenced similarly for downloading images or possession regardless of which statute was actually utilised when the defendant was charged (*R v Oliver [2003] 1 Cr App R 28*).

[18]Hentai images which would fall foul of the legislation are easily available simply by conducting a search on Google.

Gillespie (2005) suggests that the law should be redrafted in order to draw a distinction between personal use possession which includes downloading images for personal use and the creation and distribution of images which is clearly a more serious offence. Arguably as a result of the difficulties seen *R v Smith; R v Jayson [2003] 1 CR App R 13* with regard to viewing images online and what constitutes downloading, the law in is in need of revision in light of how technology and computer software have developed. There needs to be a greater degree of clarification as to the levels of severity of offence and the technological processes involved in those offences. It would seem ludicrous that someone who actively downloads images could be treated similarly to someone in circumstances where images are stored in the browser memory of his machine.

With regard to VCP specifically, Ss.62- 68 Coroners and Justice Act 2009, discussed in considerable detail in chapter five, there are a number of definitional difficulties within the statute which remain unresolved, most notably the meaning of "grossly offensive, disgusting or otherwise of an obscene character". Arguably the statute is overly broad and would benefit from the requirement for an image to be "indistinguishable" from a real child as was determined in the US case of *Ashcroft v Free Speech Coalition 122 S. Ct 1389 (2002)*, in which the issue of VCP came before the US Supreme Court. Also the law on VCP could arguably have benefited from the inclusion of an artistic merit or public good defence similar to that in the Obscene Publications Act 1959. As the law currently stands although there are defences included there is no opportunity for a defendant to argue that the virtual images in question have some form of artistic or cultural merit which may well be the case with regard to Japanese Anime or Manga which is avidly collected by some in the UK.

In addition to critically evaluating the law, the thesis has critically evaluated whether the arguments put forward by the government in the Consultation prior to the enactment of the Coroners and Justice Act 2009 can be justified. This has been achieved by means of an analysis of the full responses to the consultation which were obtained through a Freedom of Information Act

request and a of number of semi structured interviews with experts and practitioners in order to ascertain their views as to the merits of the criminalisation of virtual images.

The government put forward two main arguments to justify the criminalisation of VCP namely that such images may "fuel abuse of real children by reinforcing potential abusers' inappropriate feelings towards children" (Home Office 2007:5) and that these images may be used to help "groom" children (ibid). The Consultation also expresses some concern that real images of child abuse may be manipulated through the use of computer software resulting in a fantasy depiction of real child abuse.

A critical analysis of these justifications has been achieved through a systematic consideration of the reasons for criminalisation both philosophically and specifically with regard to VCP. Chapter three has considered the philosophical arguments for and against the criminalisation of any wrongdoing by means of a discussion of the harm and offence principles and the concept of obscenity. The issue of the harm caused by viewing virtual images has been a central theme throughout this thesis. There is no intention to outline the harm principle again here but suffice to say that many believe that behaviour should not be subject to criminal sanction unless it can be demonstrated that the behaviour causes harm to another person (Mill 1993). It is true to say that legislation is also enacted as a result of the offence principle; the idea that a behaviour or article is so offensive that it is likely to cause offence to anyone who comes into contact with it and therefore the correct course of action is criminalisation; however arguably S.62 Coroners and Justice Act 2009 was enacted on the basis of potential harm and for many that is not considered justifiable. The crux of the matter is that there are those who believe that viewing images of child sexual abuse (both featuring real and imaginary children) will result in an increase in the number of children being abused through contact offences as it will reinforce inappropriate thoughts about children and normalise sexual abuse.

There are a number of misconceptions that need to be addressed namely that not all those who offend against children would be considered paedophiles and not all paedophiles commit offences against children. In addition, it is important to recognise that not all individuals who sexually offend against children are the same either in terms of motivation for offending or in type of offending. Research has revealed that there are essentially three types of offender, those who view images, those who commit contact offences and those who do both (Babchishin et al 2015). These different types of offenders have different levels of recidivism and differing psychological characteristics. If it is possible to determine the type of offender then it may also be possible to tailor treatment interventions to meet the needs of the individual groups. This will also arguably have an impact on the accuracy of risk prediction in terms of determining the risk of reoffending and ultimately the risk of causing direct harm to children.

Image only offenders have been shown to demonstrate a greater degree of victim empathy and lower levels of antisociality which arguably means that although these individuals may engage in fantasies about children they appreciate that it is not morally right to act upon such fantasies (Elliott and Beech 2009). If this is the case then arguably it may be possible for these individuals to find satisfaction in using fantasy images which do not depict real children. Although to society at large this may seem distasteful there is a definite argument that if individuals exist who have a sexual interest in children and as a society this is accepted then surely it is better if there are ways to manage these desires without causing harm, after all desire is one of the most powerful emotions and as such is it really fair to expect a section of society to live in a way in which they can never satisfy their desire.

<u>The link between viewing images and contact offending – one of the main justifications for criminalisation</u>

In order to accomplish a critical evaluation of the justifications for the criminalisation of VCP, discussed in detail in chapter seven, it has been necessary to undertake a critical analysis of the empirical research which considers whether a link can be demonstrated between viewing images and

contact offending. It has also been important to consider the potential risk posed by differing types of child sex offender and the impact that this may have upon the type of treatment they receive and the nature of that treatment. The necessity of accurate risk prediction is discussed in detail in chapter six. The importance of understanding the difficulties of accurate risk prediction cannot be underestimated if, as a society, the aim is to manage those who pose a risk to children.

The empirical research which has considered the link between viewing images and contact offending has produced the following results. Seto et al (2011) found that 12.5% (1 in 8) image offenders had a history of contact offending and that 2% of image offenders were reconvicted of a contact offence and 3% of a new image offence. Goller et al (2010) found that 0.2% of image offenders were reconvicted of a contact offence as opposed to 6% of those who had committed both image and contact offences. Harris and Hanson (2004) found that 13% of contact only offenders were reconvicted of a contact offence compared to 6% of those who committed both types of offences. Seto and Eke (2015) found that over a 5 year follow up period 29% committed a new offence of which 11% were sexual offences. Of the 11%, 3% committed a new contact offence and 9% committed a new image offence. It is interesting to note that when studies have relied on self reported data the figures for contact offences among image offenders has increased considerably, for example Seto et al (2011) reported that the number of image offenders who disclosed contact offences rose to 55% where self reporting were used. However, even if as Gelb (2007) believes official reports underestimate levels of offending there are still a large number of image only offenders. This has been corroborated by recent research conducted by Bourke et al (2015) who found that levels of contact offences among those with no prior conviction for contact offending rose from 4.7% to 52.8% after the individuals had been subject to a polygraph test. Even taking into account the questionable reliability of a polygraph test again the figures suggest that a large proportion of image offenders do not contact offend.

As has been noted in chapter three there is a balance which needs to be struck between the criminalisation of harmful behaviour and an individual's right to freedom of expression as enshrined within the Human Rights Act 1998. Although the right to freedom of expression and the right to privacy are not absolute rights and can be interfered with if necessary in a democratic society for, inter alia, the protection of health or morals it is questionable as to whether the criminalisation of cartoon images of children has struck the correct balance of whether it could be argued to be too punitive with regard to the harm caused in the creation of such images. It is also worthy of note that there may be some therapeutic benefit to virtual images and had there been a "public good" defence written into the statute then it may have been possible to argue that there could be a therapeutic value to such images in managing the risk of a very specific type of image offender. Although it has been noted that the Courts have not looked upon pornography favourably in the context of the Obscene Publications Act 1959 (*DPP v Jordan [1977] AC 69*) that decision was reached over 40 years ago and as such the courts may come to a different decision if it could be demonstrated that access to virtual images could help those who might otherwise view images of real children being abused. Although many would argue that providing sexualised images of any type of childlike character is inappropriate, it may well be that the time has come to accept that there are those for whom a sexual attraction to children is not a choice and as a result, rather than vilifying such individuals, the time has come to assist them in living a law abiding life.

In addition to critically evaluating the law and the justification for the criminalisation of VCP a number of semi structured interviews were conducted with academics, police officers, practitioners and legal professionals in order to ascertain their views on the legislation given that they are experts in the area. Of the 13 experts interviewed 4 believed that VCP should be illegal in principle, 4 believed it should not be illegal and 5 stated that their answer would depend on a number of other factors. When asked whether their view differed if the imaginary images were created using images of consenting adults and manipulated through age altering software the views of the respondents remained the same.

When asked if criminalising possession rather than creation or distribution of virtual images was the correct approach to take the majority of the respondents believed that the law had taken the wrong approach. Even those respondents without specific legal knowledge believed that targeting those who possess images as opposed to those who produced and distributed such images seemed anomalous. Many of the respondents wondered why the legislature had not simply included the more serious offence of creation and distribution in the same statute.

With regard to their general view of criminalising behaviour on the basis of morality rather than harm, only a couple of the respondents felt strongly that criminalisation on the grounds of morality was unacceptable. These respondents tended to be those from the legal profession. The other respondents, especially from the police, tended to not have a particularly strong view on morality based arguments other than to add that the primary reason for criminalisation should be harm based.

When considering whether there was a link between viewing images and subsequent contact offending almost all respondents felt that thus far research had failed to establish a link between those who view images and those who contact offend. The practitioners had worked with offenders who had viewed images in isolation, had committed contact offences in isolation and those who had done both. All respondents noted that it would be extremely difficult to establish a definitive link between the two given the varying motivations for offending and types of offenders.

When asked if the situation would be similar for those who possessed virtual images a number of respondents believed that the situation would be the same for those who utilised VCP. There were no respondents who believed that the use of VCP would present a greater degree of risk to children than the use of other types of images. There were several respondents who believed that the use of VCP would be considerably better than utilising

traditional images and that this would result in a lowering of the degree of risk posed by the offender.

The majority of respondents had not encountered anyone who had utilised VCP and of those who had, the VCP had been accompanied by traditional images of child pornography. At least one of the police officers noted that they would be unlikely to take action against someone who only collected virtual images as there simply were not the resources to police such images in the absence of images depicting real children.

As can be seen from the overview of research findings in chapter eight those who participated in the semi structured interviews, even the police officers, generally believed that there is no evidence to suggest a link between viewing images and contact offending for ALL offenders. It is accepted that there are different types of offender, those who view images, those who contact offend and those that do both. As a result it would be naïve to suggest that it will never be the case that someone who views images may go on to commit a contact offence if the circumstances presented themselves. However, research has shown that this is quite rare and that there are a distinct group of individuals who are considered to be at very low risk of committing a contact offence.

Having conducted a Freedom of Information Act 2000 request it has been possible to also include a number of arguments for and against criminalisation which were provided by individuals and organisations to the Home Office in response to the Consultation prior to criminalisation. This has proved invaluable given that the Home Office only provided a summary of the responses and this did not arguably include some of the most relevant information. For example there were a number of responses from individuals who identified as having a sexual interest in children. Given the ethical difficulties involved in interviewing such individuals, especially those who have not been convicted of any offence, the information provided by such individuals has proven incredibly important. It has become clear that the general consensus is that fantasy images are often used as a way to avoid

offending and therefore the criminalisation of such images may well do more harm than good in many respects. There were a number of individuals who responded to the Consultation who believe that fantasy images may assist in the reduction of offending.

It is likely that there are those who would argue that of course someone with such desires would hold this opinion but that is not necessarily the case. Given the availability of computer software which is capable of anonymising an IP address making it almost impossible to trace a particular individual viewing images of real children being abused, arguably there is no reason to highlight the advantages of imaginary images if real images are accessible unless there is a genuine desire not to cause harm by viewing images of real children.

A critical evaluation of the information gathered from the semi structured interviews and the full responses to the Consultation obtained by means of the Freedom of Information Act request, in conjunction with the other arguments for and against criminalisation certainly concludes that S.62 Coroners and Justice Act 2009 is a poorly drafted piece of legislation which was enacted without any empirical evidence as to its necessity. Given the potential to criminalise individuals for possessing images which cause no demonstrable harm, arguably the time has come to question the validity of the legislation and ask the question as to whether such images and related technologies could be used to help reduce offending behaviour.

Further Research

VCP as a way of managing risk in image only offenders and the future role of technology

In addition to critically evaluating the reasons provided by the government it is important to determine to what extent VCP, and other virtual technologies, could be utilised in a therapeutic context to assist in the risk management of a specific type of image offender who makes use of child pornography involving real children. At this stage it is impossible to offer any type of

empirical evidence that such technologies may assist offenders in the future but through use of semi structured interviews with experts in the field it has been possible to ascertain that the use of this technology is certainly not beyond the realms of possibility.

In terms of future research when asked whether the respondents who took part in the semi structured interviews could envisage a situation in which VCP could ever be used in a therapeutic process or as part of a treatment programme the vast majority of the respondents stated there were lots of factors upon which their answer were dependent. Of those who believed it could be used the majority were legal professionals and of those who did not believe VCP should be used in therapy the majority were police officers. One particular legal professional accepted that the time had come to accept that individuals with a sexual attraction to children exist and that such an acceptance did not result in condoning illegal behaviour. Nevertheless the point was made that although distasteful the time may have come to investigate whether virtual images and child sex dolls could be used with certain offenders if it could help individuals to satisfy their sexual needs without committing a criminal offence against a child.

At the present time those who identify as having a sexual interest in children but who do not wish to actually harm a child either directly or indirectly are in a difficult position. There is no known way to eradicate such desires and little in the way of medical or psychiatric intervention which will assist. As a result it may be time to consider whether there are alternative options which may assist in the risk management of certain individuals who have not committed contact offences or who have not offended at all.

One particular individual who identified as having a sexual interest in children, but at the same time wanted to protect children, founded a company called Trottla in Japan which manufactures and exports life like child sex dolls (although the company are at pains to point out on their website that the dolls are not sex toys). For more than 10 years Trottla has exported these dolls around the world. Although there is no empirical

research as to the efficacy of these dolls in reducing reoffending or preventing offending opinion appears to be divided as to whether they have the potential to be able to assist in the management of those with a sexual interest in children. According to an article written in the New Scientist in 2016 Ron Arkin, a robotics engineer at the Georgia Institute of Technology and one of the panellists in the “Sexual Deviance: Can Technology Protect our Children” segment of the “Forbidden Research” event held at MIT on 21st July 2016 argued that individuals with a sexual interest in children should not only be permitted to legally possess such a doll but that it could even be the case that people were issued prescriptions for the dolls (Rutkin 2016). Arkin believes that sex robots and virtual reality may act as an outlet for those with such tendencies and help to redirect desire away from real children. This may then assist with the risk management of known offenders and potentially prevent some individuals from ever offending at all. However, Peter Fagan from John Hopkins Medical School believes that instead of preventing offending behaviour such dolls may in fact have a “reinforcing effect” on people with a sexual interest in children causing them to act out their fantasies with a greater degree of urgency (Morin 2016:2). However, this view was based on cognitive behavioural principles and work with offenders and it is not clear whether those who had never offended against a child would act in the same way especially given the likelihood that they possess a greater degree of self control. Michael Seto, noted that the effective use of such dolls or technology may very much depend on the type of offender, he stated

“for some pedophiles, access to artificial child pornography or to child sex dolls could be a safer outlet for their sexual urges, reducing the likelihood that they would seek out child pornography or sex with real children. For others, having these substitutes might only aggravate their sense of frustration” (ibid:2).

Seto goes on to note that it is impossible to know at the present time as there has been no empirical research conducted but he believes that such research would be of considerable importance (ibid).

Dr Beier and his colleagues in Germany have been investigating the differences between those who act upon their sexual interest and those who do not. He stated “We can detect pedophilia by examining the activation patterns associated with sexual arousal through neuroimaging,” the sexologist noted. “The far more interesting question is—is the person able to control this behavior?” (Morin 2016:3). As a result of the use of functional MRI scans Dr Beier has noted that those who do not act on their sexual desire show stronger impulse controls. Dr Beier therefore concluded “Just because a person is pedophilically inclined, doesn’t mean he is a danger”. If this research continues it would be interesting to determine whether through functional MRI scans it is possible to differentiate between types of individuals with a sexual interest in children and manage them accordingly.

The Legality of Child Sex Dolls

In England and Wales possession of a child sex doll is not necessarily illegal given that at the time of writing it is not specifically covered by any legislation. However, the importation of such a doll is illegal pursuant to S.50(2) Customs and Excise Management Act 1979 when combined with S.42 Customs Consolidation Act 1876. These statutes essentially prevent the importation of an obscene article. There have reportedly been 7 convictions in England and Wales for the importation of child sex dolls (BBC 2017) although it has been reported that Border Force have seized 123 dolls since 2016 (Rawlinson 2017). In 2017 David Turner was convicted of the importation of a child sex doll at Canterbury Crown Court. He was sentenced to 8 months imprisonment for the importation of the doll and was also sentenced for the making of indecent images of children and the possession of extreme pornography. He was placed on the sex offender register for 10 years and made the subject of an indefinite sexual harm prevention order. Officers also found 29 fictional stories describing the rape of children in his possession, however the accounts fell outside the jurisdiction of the Obscene Publications Act 1959 (BBC 2017). There has been one reported Court of Appeal case concerning the importation of a sex doll R v Dobson [2017] EWCA Crim 2435. In this case the defendant appealed against sentence.

However, the most interesting aspect of the case is the Court of Appeal noting that it is questionable as to whether or not the trial judge was right in his sentencing remarks when he determined that there was sufficient evidence before him to conclude that there was a risk of the defendant moving from viewing images to contact offending. Dobson was in fact considered to have a low risk of reoffending by the Probation Service. The Court also noted that although it was recognized that videos of young children being sexually abused cause actual harm to real children "the position may be different for people whose activities are restricted to using dolls or other devices for their own private pleasure" R v Dobson [2017] EWCA Crim 2435 at 15. Given that the Court of Appeal is potentially prepared to accept that the harm caused is different when the items concerned do not cause harm to real children, it may be that there will be some possibility of limited acceptance of the use of virtual images and inanimate objects such as dolls to assist in the management of the desire of certain types of offenders.

With regard to the legal position in other jurisdictions it is not surprising that possession of such dolls is legal in Japan. In Canada there is an ongoing legal battle currently taking place as to whether a child sex doll constitutes child pornography under the Canadian Criminal Code. At the time of writing the case had not been concluded and it will be interesting to see whether such a doll is deemed to be child pornography. In the US as noted above virtual images of imaginary children are not outlawed unless the image is indistinguishable from a real child (Ashcroft v Free Speech Coalition 122 S. Ct 1389 (2002). Ryan Calo, a law professor at the University of Washington stated "What appears to be child porn, but isn't, is not illegal," Calo noted that in 2002, the Supreme Court drew a line between child pornography and "virtual child pornography" where the "child" is actually a young-looking adult or a computer-rendered image (Tracey 2014). The issue of a child sex doll has not yet been determined by the Court system in the US so it will be interesting to note whether possession of such a doll is treated in a similar way to virtual images or considered to be more akin to actual child pornography. As noted above at the present time possession of such an item

in England and Wales should not be subject to legal sanction as arguably it would fall outside the scope of any existing legislation including S.62 Coroners and Justice Act 2009.

Virtual Reality

As noted in the introduction virtual reality (VR) is already being used by some researchers in order to assess whether individuals have a paedophilic interest. In a series of experiments Renaud et al (2010) have utilised VR in order to determine sexual preference in a way which is arguably more accurate and less morally problematic than using images of real children. Renaud et al have exposed both sex offenders and a control group to computer generated images in order to measure how their bodies responded. The patterns of response generally matched the individual's sexual preference and these results may be deemed to be more accurate given the less clinical setting for the test resulting in a more accurate record of behaviour. Although at the present time the lab utilises VR to assess those with a sexual interest in children Renaud has expressed a desire to use virtual images as part of a treatment regime for those with a diagnosed sexual interest in children. VR is currently being used in the treatment of phobias and schizophrenia (Moore 2010). VR has also been used as part of the treatment for post traumatic stress disorder (PTSD), known as exposure therapy, particularly amongst veterans. Exposure therapy is a type of psychological treatment in which an individual confronts distressing thoughts, images or memories associated with a past traumatic event with the aim of decreasing the emotional distress associated with the traumatic event. It is thought that the process of increasing exposure will ultimately result in a decreased response to that particular image or memory (Moore 2010). This type of treatment therefore places an individual in the same type of situation that caused the disorder initially in the hope that if the brain receives sufficient exposure to that scenario it will enable the brain to develop new and ultimately less harmful ways of reacting to that situation. They question therefore becomes could this be applied to those with a sexual interest in children under the right conditions.

If it is acknowledged that paedophilia is a sexual preference or even a sexual orientation then arguably it is necessary to use any method possible to assist individuals to live law abiding lives. Renaud suggests that VR in conjunction with cognitive behavioural therapy may help individuals learn to manage their sexual desire (Rutkin 2016). Renaud is currently working on a project which will offer an individual the opportunity to walk through a computer simulated park which is full of opportunities to offend and the idea is to help an individual resist the temptation to engage in offending behaviour (ibid). Renaud also suggests that it may be possible to combine VR with neurofeedback to the sections of the brain which deal with empathy in order to assist an offender to understand the victim's experience in the hope it will prevent reoffending. It may even be possible to combine this experience with the use of dolls or robots in a controlled environment in order to truly enhance an offender's understanding of the offence through the extra dimensions of touch and texture (ibid). However, Renaud is sceptical regarding the general use of child sex robots given that although it may be sufficient for some offenders it may encourage others to take their offending to the next level and commit a contact offence. However, as noted above the risk of this happening would arguably depend on the type of offender, their level of deviance and level of antisociality.

Although it is acknowledged that conducting research in this area is fraught with difficulty arguably the time has come, especially in light of recent technological advances, to explore options which until recently may not have seemed possible.

Sexual Ageplay in Online Games

Another potential option for the management of desire is the use of online role playing games. There are a number of online worlds which enable users to create avatars and interact with each other without the constraints of the real world. Second Life is an example of one of these games. Second Life is a Massively Multi-Player Online Role-Playing Game which was established in 2003 and is owned and operated by Linden Labs (Yar 2013). Those who play the game create avatars which they use to navigate the virtual world

and interact with other players in real time (ibid). It is possible to communicate with other users by means of instant message or through voice or video call. As Reeves (2012) notes Second Life is not a game with particular rules it is an online environment in which users are not bound by any laws or restrictions found in the real world. Second Life is an adult environment and those registering to play have to state that they are over 18. Within games such as Second Life there is a phenomenon which takes place known as ageplay (Meek-Prieto 2008) in which an adult user creates an avatar which represents a child. This is often for the purposes of engaging in sexual relations therefore enabling virtual sex between an adult and a child. Reeves notes that "sexual ageplay is not simply an image of virtual child sexual abuse (a sophisticated drawing of abuse), but it is the act of simulated virtual child sexual abuse: sexual ageplayers manipulate their avatars to interact and engage in sexual acts within the online world. (2012:6).

However, although there are those who might argue that ageplay should be criminalised alongside virtual images, at the present time it is not currently illegal and would fall outside the scope of Ss. 62 to 68 Coroners and Justice Act 2009 as it is not an image but an interactive game. As a result there have been discussions as to whether such interaction could provide a useful outlet for those with a sexual interest in children given that the individuals playing the game are consenting adults engaged in fantasy role play and therefore no children are harmed in playing the game. As has been noted in the chapter discussing the justification for criminalisation sometimes individuals with a sexual interest in children have been known to use fantasy images and role plays in order to manage the risk of committing a crime. Johnson and Rogers (2009) suggest that fantasy images and role plays may be used and collected precisely because they are legal and therefore the individuals doing this were making a conscious decision not to utilise illegal material or engage in criminal activities.

In 2016 D'Anastasio conducted interviews with a number of individuals who acknowledged a sexual interest in children and used online role playing games as a way to manage their behaviour. Her report notes

“In lieu of therapy, behavioral treatment, or other preventative measures, this is how Camryn attempts to manage his illicit temptations. For more than a decade pedophiles have done this, arguing that it is a victimless platform to engage in sex with children. Some say it even acts as an outlet for their physical desires” (D’Anastasio 2016:3).

It is clear that many individuals who identify as having a sexual interest in children do not seek assistance or therapy for fear of being reported to the authorities even if they have not offended. As a result it is becoming more apparent that such individuals are forming their own support groups, such as the “Virtuous Pedophiles” forum for those who do not act on their desires in addition to finding alternative ways to manage their sexual feelings including playing online role playing games. In the virtual world individuals can socialise without being vilified in the knowledge that they will not be imprisoned if they do engage in ageplay. However, it is inevitable that there will be those who believe that engaging in ageplay will again encourage inappropriate thoughts about children and may make it harder for some individuals not to give in to temptation to commit a contact offence against a real child.

Nevertheless the situation is more complex and will ultimately be determined by how pro social an individual can be seen to be. It has been acknowledged above and throughout this thesis that there are a number of different types of offenders with differing psychological character traits and levels of impulse control. If it is possible to determine the types of offender and the personality traits of individuals through the use of functional MRI scanning then it may be possible to distinguish those offenders who demonstrate greater levels of self control and victim empathy in short the non offending paedophiles. If this is possible then it may ultimately be possible to utilise technology to manage potentially offending behaviour in new ways that do not cause any direct harm to children. After all as Nair states “A mere notion or perception of harm is distinct from clear and present danger of harm (2010:231).

Conclusion

In conclusion it is clearly far too soon to determine the efficacy of using VCP, VR or online role playing games as a formal treatment option for those who identify as having a sexual interest in children. However, arguably the time has come to recognise that there are different types of offenders and that not all child sex offenders are paedophiles and not all paedophiles commit offences. It is also time to acknowledge that criminalising behaviour, such as the possession of VCP, on the basis of perceived harm, as opposed to actual harm is simply not acceptable. It is inevitable that technology will continue to develop and that the legislature will find it difficult to keep up with such advances by means of legislation therefore arguably the time has come to investigate whether technology can assist in the risk management of those with a sexual interest in children instead of assuming that the most appropriate approach is to criminalise the possession of images which do not cause any demonstrable harm to a real child.

Bibliography

Adler, A (2001) "The perverse law of child pornography" *Columbia Law Review,* 101 209-273

Ahlers, C, Schaefer, G, Mundt, I, Roll, S, Englert, H, Willich, S and Beier, K (2011). “How unusual are the contents of paraphilias? Paraphilia-associated sexual arousal patterns in a community-based sample of men”. *Journal of Sexual Medicine*, *8*, 1362-1370.

Akdeniz, Y (2001) "Governing pornography and child pornography on the internet: the UK approach" *University of West Los Angeles Law Review* 32, 247-275

Akdeniz, Y (2008) *Internet Child Pornography and the Law: National and International Responses*, Aldershot, Ashgate Publishing Limited, Kindle Edition

Akdeniz, Y (2016) *Internet Child Pornography and the Law: National and International Responses*, Aldershot, Ashgate Publishing Limited, Kindle Edition

Albert, A (2017) *Manga 101 - Basic Walk-through of the Manga World*, available at https://www.thoughtco.com/manga-world-101-805003 [Accessed 25th July 2018]

Allen, B, (2003) "Freedom of expression and the protection of public morals in the United Kingdom and the United States" Coventry Law Journal, 8(2)

American Psychiatric Association (2000) *Diagnostic and Statistical Manual of Mental Disorders DSM-IV-TR*, 4th Edition, American Psychiatric Association

American Psychiatric Association (2013) *Diagnostic and Statistical Manual of Mental Disorders DSM-V*, 5th Edition, American Psychiatric Association

Anderson, J, Reinsmith-Jones, K and Mangels, N (2011) “Need for triangulated methodologies in criminal justice and criminological research: exploring legal techniques as an additional method” *Criminal Justice Studies*, Vol 24, No.1 83-103

Anderson, N (2015) "After Dropbox finds a child porn collector, a chess club stops his knife attack" Ars Technica UK http://arstechnica.co.uk/tech-policy/2015/11/how-dropbox-found-a-child-porn-collector-and-a-chess-club-stopped-his-rampage/

Antoniou, A (2013) "Legislative comment: Possession of Prohibited Images of Children, Three Years On", *Journal of Criminal Law*, 77(4), 337-353

Arthurs, H (1983) *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* by the Consultative Group on Research and Education in Law, Information Division, Social Sciences and Humanities Research Council of Canada, Ottawa

Attorney General's Commission on Pornography (The Meese Commission) (1986) *Final Repor*t, 2 volumes, Washington DC, US Government Printing Office

Attride-Stirling, J (2001) "Thematic Networks: An analytic tool for qualitative researchers", *Qualitative Research* 1(3) 385-405

Babchishin, K, Hanson, R and Hermann, C (2011). “The characteristics of online sex offenders: A meta-analysis”. *Sexual Abuse: A Journal of Research and Treatment*, 23, 92–123.

Babchishin, K, Hanson, R and VanZuylen, H (2015). “Online child pornography offenders are different: A meta-analysis of the characteristics of online and offline sex offenders against children”. *Archives of Sexual Behavior*, *44*, 45-66.

Bagley, C, Wood, M, and Young, L. (1994). “Victim to abuser: Mental health and behavioural sequels of child sexual abuse in a community survey of young adult males”. *Child Abuse & Neglect*, 18, 683-697.

Barber, N (2011) "Is rape really about control or sex?" *Psychology Today* https://www.psychologytoday.com/blog/the-human-beast/201104/is-rape-about-control-or-sex

Barbour, R (2008) *Introducing Qualitative Research*, London, Sage

Bartosh D, Garby T, Lewis D and Gray S (2003) "Differences in the predictive validity of actuarial risk assessments in relation to sex offender type" *International Journal of Offender Therapy and Comparative Criminology*, 47, 422-438

Bates A, Falshaw L, Corbett C, Patel, V and Friendship C (2004) "A follow-up study of sex offenders treated by Thames Valley Sex Offender Groupwork Programme, 1995-1999". *Journal of Sexual Aggression*, Vol 10(1) pp 29-38

Bazemore, G (1985) "Delinquency reform and the labelling perspective", *Criminal Justice and Behavior*, 12, 131-169

BBC (2017) *Ex-school governor who imported child sex doll is jailed*, 8th September 2017 Available at https://www.bbc.co.uk/news/uk-41203239. [Accessed 28th July 2018]

Beckett, R, and Fisher, D (1994). *Assessing victim empathy: A new measure*. Paper presented at the 13th Annual Conference of the Association for the Treatment of Sexual Abusers, San Francisco, California

Beech A, Fisher D and Beckett R (1998) *STEP 3: An Evaluation of the Prison Sex Offender Treatment Programme*. London. Home Office

Beech A, Erikson M, Friendship C and Ditchfield J (2001) *A six year follow up of men going through probation-based sex offender treatment programmes.* Home Office Research Findings No.144, London, Home Office

Beech A, Fisher D, and Thornton D (2003) "Risk assessment of sex offenders" *Professional Psychology: Research and Practice*, 34, 339-352

Beech A, Oliver C, Fisher D and Beckett R (2005) *STEP 4: The Sex Offender Treatment Programme in prison: addressing the offending behaviour of rapists and sexual murderers,* London, Home Office

Beech, A, Elliot, I, Birgden, A and Findlater, D (2008) "The Internet and Child Sexual Offending: A Criminological Review" *Aggression and Violent Behaviour*, 13, 126-228

Beech A, Craig l and Browne K (2009) (eds) *Assessment and Treatment of Sex Offenders: A Handbook,* Chichester, John Wiley & Sons

Bell, J (1986) "The acceptability of legal arguments" in MacCormick, N and Birks, P (eds) *The Legal Mind: Essays for Tony Honore*, Oxford, Clarendon Press

Berg, B (2007) *Qualitative Research Methods for the Social Sciences*, London, Pearson

Berger, V (2009) “Stop prosecuting teens for 'sexting'”, *The National Law Journal* available at https://www.law.com/nationallawjournal/almID/1202432510633/?slreturn=20181129215040

Berlin, F (2014) "Pedophilia and DSM-5: The Importance of Clearly Defining the Nature of a Pedophilic Disorder" *The Journal of the American Academy of Psychiatry and the Law* Vol 42, No. 4, 404-7

Blaxter, L, Hughes, C And Tight, M (2006) *How to Research*, 3rd Edn, New York, McGraw-Hill Education

Bonta J and Wormith S (2007) "Risk and Need Assessment" in McIvor G and Raynor P (eds) *Developments in Social Work with Offenders*, London, Jessica Kingsley Publishers

Bourke, M, and Hernandez, A (2009) “The ‘Butner Study’ redux: A report of the incidence of hands-on child victimization by child pornography offenders”, *Journal of Family Violence*, 24, 183-191

Bourke, M, Fragomeli, L, Detar, P, Sullivan M, Meyle, E and O'Riordan, M (2014). “The use of tactical polygraph with sex offenders” *Journal of Sexual Aggression*. 21, 1-14

Brennan, S. (2012). *Police-reported crime statistics in Canada, 2011*. Available at http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11692-eng.pdf [Accessed 25th July 2018]

Briere, J, and Runtz, M. (1989). “University males’ sexual interest in children: Predicting potential indices of “pedophilia” in a nonforensic sample”. *Child Abuse & Neglect*, 13, 65-75.

Briere, J, Henschel, D and Smiljanich, K (1992). “Attitude toward sexual abuse: Sex differences and construct validity”. *Journal of Research in Personality*, *26*, 398-406.

Brown S (2005) *Treating Sex Offenders: An Introduction to Sex Offender Treatment Programmes.* Cullompton, Willan Publishing

Bryman, A (1988) *Quality and Quantity in Social Research*, London, Routledge

Bryman, A (2008) *Social Research Methods*, 3rd Edn, Oxford, Oxford University Press

Bryman, A (2012) *Social Research Methods*, 4th Edn, Oxford, Oxford University Press

Byers, E. S., Purdon, C., & Clark, D. A. (1998) “Sexual intrusive thoughts of college students” *Journal of Sex Research*, 35, 359-369.

Campbell, C and Wiles, P (1976) "Study of Law in Society in Britain" *Law and Society Review*, 10(4), 547-578

Campbell, C (1974) "Legal Thought and Juristic Values" *British Journal of Law and Society*, 1(1), 13-30

Card, R (2002) The Legal Scholar, The Reporter: Newsletter of the Society of Legal Scholars, 25, 5-12

Carr, J (2003) *Child abuse, child pornography and the internet,* London: NCH

Charmaz, K. and Bryant, A. (2011) "Grounded theory and credibility". In D. Silverman (ed.), Qualitative Research: Theory, Method and Practice, 3rd Edn (pp. 291–309). London, Sage.

Child Exploitation and Online Protection Centre (2012) *A Picture of Abuse A thematic assessment of the risk of contact child sexual abuse posed by those who possess indecent images of children*, Child Exploitation and Online Protection Centre

Cohen, L, Manion, K and Morison, K (2007) *Research Methods in Education*, 6th Edn, London, Routledge

Coroners and Justice Bill Explanatory Notes (2009), London, The Stationery Office

Council of Europe (2001) *Convention on Cybercrime*, European Treaty Series, No.185 (Budapest, 2001): http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm

Council of Europe, (2001a) *Explanatory Report to the Convention on Cybercrime*, European Treaty Series, No.185 (Budapest, 2001)

Council of Europe (2007) *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, CETS 201 available at http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm

Council of Europe, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse — Explanatory Report (2007)

Cownie, F, Bradney, A, and Burton, M, (2013) *English Legal System In Context*, 6th Edition, Oxford, Oxford University Press

Craig L, Browne K and Stringer I (2004) "Comparing Sex Offender Risk Assessment Measures on a UK Sample" *International Journal of Offender Therapy and Comparative Criminology*, 48, 7-27

Craig L, Browne K, Hogue T and Stringer I (2004a) "New directions in assessing risk in sexual offenders" in Macpherson G and Lawrence J (eds) *Clinical Risk Assessments and Risk Management: Issues in Forensic Psychology*, Leicester, The British Psychological Society Press.

Craig L, Browne K, Stringer I and Hogue T (2008) "Sexual Reconviction Rates in the United Kingdom and actuarial risk estimates" *Child Abuse and Neglect* 32(1) 121-138

Craissati J and Beech A (2003) "A Review of Dynamic Variables and their Relationship to Risk Prediction in Sex Offenders" *Journal of Sexual Aggression* 9, 41-55

Cresswell, J (2015) *A Concise Introduction to Mixed Methods Research*. Los Angeles, California, Sage

Crow, I and Semmens, N (2008) *Researching Criminology*, Maidenhead, Open University Press

Crown Prosecution Service (2017) Violence against women and girls crime report 2016-7 available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2017_1.pdf [Accessed 28th July 2018]

Crown Prosecution Service (2018) *Obscene Publications, Legal Guidance, Sexual Offences,*
Available at http://cps.gov.uk/legal/l_to_o/obscene_publications/

D'Anastasio, C (2016) "Can Virtual Sex Prevent Pedophiles from Harming Children in Real Life?" *Broadley* available at https://broadly.vice.com/en_us/article/d7am4w/can-virtual-sex-prevent-pedophiles-from-harming-children-in-real-life [Accessed 28th July 2018]

Davidson, J (2002). *The Context and Practice of Community Treatment Programmes for Child Sexual Abusers in England and Wales.* Department of Social Policy. London, London School of Economics and Political Science

Davidson, J (ed) (forthcoming) *Child Abuse and Protection: Contemporary issues in research, policy and practice,* London, Routledge

Denzin, N (1970) *The Research Act*, Chicago, Aldine

Devlin, P, (1965) *The Enforcement of Morals*, Oxford, Oxford Paperbacks

Dingwall G (1998) "Selective Incapacitation after the Criminal Justice Act 1991: A Proportional Response to Protecting the Public?" *Howard Journal* 37(2), 177-87

DuBoff, L and King, C, (2006) *Art Law*, Minnesota, Thomson West

Dworkin, R (1986) *Law's Empire*, Cambridge, Massachusetts, Harvard University Press

Egan, R and Hawkes, G (2010) *Theorizing the Sexual Child in Modernity*, Basingstoke, Palgrave-Macmillan

Edwards, S (2000) "Prosecuting child pornography: possession and taking of indecent photographs of children" *Journal of Social Welfare and Family Law*, 22, 1-21

Elliott, I and Beech, A (2009) “Understanding online child pornography use: Applying sexual offender theory to Internet offenders”, *Aggression and Violent Behaviour*, 14, 180-193.

Elliott, I, Beech, A, Mandeville-Norden, R and Hayes, E (2009) “Psychological profiles of Internet sexual offenders: comparisons with contact sexual offenders”, *Sexual Abuse: A Journal of Research and Treatment*, 21(1), 76-92.

Elliott, I, Beech, A and Mandeville-Norden, R. (2012). “The psychological profiles of internet, contact, and mixed internet/contact sex offenders”. *Sexual Abuse: A Journal of Research and Treatment* Volume: 25 issue: 1, 3-20

Elliott, M, Browne, K and Kilcoyne J (1995) "Child Sexual Abuse Prevention: What Offenders Tell Us" *Child Abuse and Neglect*, 19, 579-594

Eke, A, Seto, M and Williams, J. (2011). “Examining the criminal history and future offending of child pornography offenders: An extended prospective follow-up study” *Law and Human Behavior*, 35, 466-478

Evans, D (1993) *Sexual Citizenship: The Material Construction of Sexualities*, Abingdon, Routledge

Ewing, C (2011) *Justice perverted: sex offense law, psychology, and public policy*, Oxford University Press, USA

Falshaw L, Friendship C and Bates A (2003) *Sexual Offenders - measuring reconviction, reoffending and recidivism.* Home Office Research Findings No.183. London, Home Office

Faust, E, Bickart W, Renaud, C, and Camp, S. (2015). “Child pornography offenders and child contact offenders: A multilevel comparison of demographic characteristics and rates of recidivism” *Sexual Abuse* Vol 27 Issue 5

Feinberg, J (1985) *The Moral Limits of the Criminal Law*: *Harm to Others,* New York, Oxford University Press

Feinberg, J (1988) *The Moral Limits of the Criminal Law*: *Offense to Others,* New York, Oxford University Press

Feinberg, J (1990) *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, New York, Oxford University Press

Feinberg, J (2014) *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy*, Princeton, Princeton University Press.

Fielding, N and Fielding, J (1986) *Linking Data*, Beverley Hills, California, Sage

Fink, A (2007) "Conducting Research: Literature Review: From the Internet to Paper" in McConville, M and Chui, W (eds) *Research Methods for Law*, Edinburgh, Edinburgh University Press

Finkelhor, D (1986) *A Sourcebook On Child Sexual Abuse*, Beverly Hills, California, Sage

Finkelhor, D, Ormrod, R and Chaffin, M (2009) *Juveniles Who Commit Sex Offenses Against Minors*, Juvenile Justice Bulletin Dec. 2009, available at http://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf

Foster, S, (2011) *Human Rights and Civil Liberties*, 3rd Edn, London Pearson Education

Friendship C, Mann R and Beech A (2003) *The Prison-based Sex Offender Treatment Programme - An Evaluation*. Home Office Research Findings No 205. London. Home Office.

Friendship C, Falshaw L and Beech A (2003a) Measuring the real impact of accredited offending behaviour programmes, *Legal and Criminological Psychology*, 8, 115-127

Fromuth, M and Conn, V (1997). “Hidden perpetrators: Sexual molestation in a nonclinical sample of college women”. *Journal of Interpersonal Violence*, *12*, 456-465.

Galbraith, P (2011) "The Reality of ‘Virtual Child Pornography in Japan’" *Image & Narrative*, 12, 83

Galbraith, P (2014) "The Misshitsu Trial: Thinking Obscenity with Japanese Comics" (2014) *International Journal of Comic Art* 16,125

Garfinkel, H (1956) "Conditions of successful degradation ceremonies" *American Journal of Society*, 16, 1-20

Gelb, K. (2007). Recidivism of sex offenders: Research paper. Available at http://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Recidivism%20of%20Sex%20Offenders%20Research%20Paper.pdf [Accessed 21st July 2018]

Gibson, W and Brown, A (2009) *Working with Qualitative Data*, London, Sage

Gillespie, A (2004) "'Grooming': definition and the law, *New Law Journal* 154, 586-7

Gillespie, A (2005) "Indecent Images of Children: The Ever-Changing Law" *Child Abuse Review,* vol 14, 430-443

Gillespie, A (2006) "Indecent images, grooming and the law" *Criminal Law Review* 412

Gillespie, A (2012) *Child Pornography: Law and Policy*, Abingdon, Routledge

Gillespie, S, Bailey, A, Squire, T, Carey, M, Eldridge, H and Beech A (2016) "An Evaluation of a Community-Based Psycho-Educational Program for Users of Child Sexual Exploitation Material", *Sexual Abuse*, Volume 30 Issue 2, 169-191

Goller, A, Graf, M, Frei, A, and Dittmann, V (2010). "Recidivism of internet sex offenders—An epidemiological study on more than 4600 offenders in Switzerland". *European Psychiatry*, 25(Suppl. 1), 1533.

Goode, S (2010) *Understanding and addressing adult sexual attraction to children: A study of paedophiles in contemporary society*, Abingdon, Routledge

Grant D (1998) “Change, Monitoring and Containment: A Selective Overview of the Nature and Efficacy of Professional Interventions with Child Sexual Abusers” In Deacon L and Gocke B (1999) *Understanding Perpetrators, Protecting Children: A Practitioners Guide to Working Effectively with Child Sexual Abusers,* London, Whiting & Birch

Green G, Grey N and Wilner P (2002) "Factors associated with criminal convictions for sexually inappropriate behaviour in men with learning disabilities" *Journal of Forensic Psychiatry*, 13, 578-607

Grubin D (1998) *Sex Offending against children: understanding the risk*. Police research Series Paper 99, London, Home Office

Grubin, D (2008) "The Use of Medication in the Treatment of Sex Offenders" *Prison Service Journal*, 178, 37-43

Grubin D and Wingate S (1996) "Sexual Offence Recidivism: Prediction versus Understanding" *Criminal Behaviour and Mental Health* 6(4) 349-59

Hammersley, M and Gomm, R (2008) Assessing the radical critiques of interviews In M Hammersley (ed) *Questioning Qualitative Inquiry: Critical Essays* (pgs 89-100), London, Sage

Hansen, M (2009) A Reluctant Rebellion, http://www.abajournal.com/magazine/article/a_reluctant_rebellion/

Hanson R and Bussiere M (1998) "Predicting Relapse: A meta-Analysis of Sexual Offender Reconviction Studies" *Journal of Consulting and Clinical Psychology*, 66(2) 348-62

Hanson R and Thornton D (2000) "Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales". *Law and Human Behavior* 24 (1) 119-136

Hanson, R and Morton-Bourgon, K (2005) “The characteristics of persistent sexual offenders: a meta-analysis of recidivism studies” *Journal of Consulting and Clinical Psychology*, *73*, 1154-1163.

Harcourt, B (1999) “The collapse of the harm principle” Journal of Criminal Law and Criminology, 90, 109

Harris, A and Hanson, R (2004). *Sex offender recidivism: A simple question (user report 2004-03).* Ottawa, ON: Public Safety and Emergency Preparedness Canada

Harrison, K (2011) *Dangerousness, Risk and the Governance of Serious Sexual and Violent Offenders*, London, Routledge.

Hart, H.L.A, (1961) The Concept of Law, Oxford, Oxford University Press

Hart, H.L.A, (1968) *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford, Oxford University Press

Hart S, Laws D and Kropp R (2003) "The promise and the peril of sex offender risk assessment" in Ward T, Laws D and Hudson S (eds) *Sexual Deviance: Issues and Controversies*, California, Sage

Hedderman C and Sugg D (1996) *Does Treating Sex Offenders Reduce Reoffending?* Home Office Research Findings No.46. London. Home Office

Hennick, M, Hutter, I and Bailey, A (2011) *Qualitative Research Methods*, London, Sage

Herman-Giddens, M and Slora, E (1997) "Secondary sexual characteristics and menses in young girls seen in practice" *Paediatrics*, 99, 505-512

Hermanowicz, J, (2002) The Great Interview: 25 Strategies for Studying People in Bed, *Qualitative Sociology*, 25(4) 479-499

Hernandez, A (2000) *Federal Bureau of Prisons, self-reported contact sexual offenses by participants in the federal bureau of prison's sex offender treatment program: implications for internet sex offenders*, available at https://ccoso.org/sites/default/files/import/Hernandez-et-al-ATSA-2000.pdf

Hernandez, A (2009) *Psychological and behavioral characteristics of child pornography offenders in treatment* available at http://www.iprc.unc.edu/G8/Hernandez_position_paper_Global_Symposium.pdf.

Hill, K (2014) "Are Child Sex-Robots Inevitable?" *Forbes* July 14th 2014 Available at https://www.forbes.com/sites/kashmirhill/2014/07/14/are-child-sex-robots-inevitable/#3c0a8f2ee460

Hirschi, T (1975) "Labelling theory and juvenile delinquency: An assessment of the evidence in Gove, W (ed) *The labelling of deviance: Evaluating a perspective*, California, Sage

Holland, G (2005) "Identifying victims of child abuse images: an analysis of successful identifications" in Quayle E and Taylor, M (eds) *Viewing Child Pornography on the Internet*, Lyme Regis, Russell House

Holliday, W (2003) *Governmental Principles and Statutes on Child Pornography*, New York, Nova Science Publishers

Home Office (2007) *Consultation on the Possession on Non-photographic Visual Depictions of Child Sexual Abuse,* London, Home Office

Home Office (2008) *Consultation on the Possession of Non-Photographic Visual Depictions of Child Sexual Abuse – Summary of Responses and Next Steps* London: Home Office

Hood R, Shute S, Feilzer M and Wilcox A (2002) "Sex Offenders Emerging from Long-Term Imprisonment. A study of their Long-Term Reconviction

Rates and of Parole Board Members' Judgements of Their Risk" *British Journal of Criminology*, 42, 371-94

Hough M (2008) *Reducing Reoffending: getting off the treadmill*. London. National Audit Office.

Howitt, D (1995) "Pornography and the Paedophile: Is it Criminogenic?" *British Journal of Medical Psychology,* 61, 15-27

Human Rights Joint Committee (2009) *Eighth Report, Legislative Scrutiny: Coroners and Justice Bill* , London, The Stationery Office

Hutchinson, T (2013) "Doctrinal Research: Researching the Jury" in Watkins, D and Burton, M (eds) *Research Methods in Law*, London, Routledge

Ibbotson, P (2008) The hidden offenders available at https://www.theguardian.com/society/2008/sep/03/childprotection

Janus E and Meehl P (1997) "Assessing the legal standard for predictions of dangerousness in sex offender commitment proceedings" *Psychology, Public Policy and Law*, 3, 33-64

Jenkins, P (2001) *Beyond Tolerance: Child Pornography on the Internet*, New York, New York University Press

Jewkes, Y (2010) "Much ado about nothing? Representations and realities of online soliciting of children" *Journal of Sexual Aggression*, 16, 5-18

Johnson, M and Rogers, K (2009) “Too far down the Yellow Brick Road – Cyberhysteria and Virtual Porn.” *Journal of International Commercial Law and Technology.* Vol. 4 (1): 61-70.

Inter-Departmental Liaison Group (ILGRA) (2002) *The Precautionary Principle: Policy and Application*, London, Health and Safety Executive

Kaplowitz, P, Slora, E, Wasserman, R, Pellow, S and Herman-Giddens, M (2001) "Early onset of puberty in girls" *Paediatrics*, 108, 347-353

Kearns, P, (2003) "Controversial Art and the Criminal Law" 8(1) *Art, Antiquity and Law* 27

Kelly, J and de Castella, T (2012) “Paedophile net: Did Operation Ore change British society?” *BBC News Online* 17th December, available at https://www.bbc.co.uk/news/magazine-20237564

Kelsen, H (1967) *The Pure Theory of Law* (translated from German by M Knight), Berkeley, University of California Press

Kemshall H (2000) "Conflicting Knowledges on Risk: The Case of Risk Knowledge in the Probation Service" *Health, Risk and Society*, 2(2), 143-58

Kemshall H (2001) *Risk Assessment and Management of Known Sexual and Violent Offender: A Review of current issues*, Police Research Series Paper 140, London, Home Office.

Kemshall H (2002) *Risk Assessment and Management of Serious Violent and Sexual Offenders: A Review of the Current Issues*. Edinburgh. Scottish Executive Social Research.

Kemshall H (2003) *Understanding Risk in Criminal Justice*. Maidenhead, Open University Press.

Kemshall H, Wood J, Mackenzie G, Bailey R and Yates J (2005) *Strengthening Multi-Agency Public Protection Arrangements*, London, Home Office.

King, M (2007) "Concepts of Childhood: What we know and where we might go" *Renaissance Quarterly*, 60, 371-407

King, N and Horrocks, C (2010) *Interviews in Qualitative Research*, London, Sage

King, P (2008) "No plaything: Ethical issues concerning child pornography" *Ethic Theory and Moral Panic*, 11, 327-345

Klar, E (2014) "Tentacles, lolitas and pencil strokes: The parodist body in European and Japanese erotic comics" in Berndt, J and Kümmerling-Meibauer, B (Eds) *Manga's Cultural Crossroads (Routledge Advances in Art and Visual Studies)* London, Routledge

Knudsen, D (1988) "Child sexual abuse and pornography: is there a relationship" *Journal of Family Violence*, 3, 253-267

Kress, K (1989) "Legal Indeterminacy", *California Law Review*, 77(235), 283-337

Kuflik, A (2005) “Liberalism, Legal Moralism and Moral Disagreement”, *Journal of Applied Philosophy*, Volume 22, Issue 2, 185-198

Kutchinsky, B (1985) "Pornography and its effects in Denmark and the United States: a rejoinder and beyond" *Comparative Social Research*, 8, 301-330

Kvale, S (1996) *InterViews: An Introduction to qualitative research interviews*, Thousand Oaks, CA, Sage

Kvale (2003) *The Psychoanalytic Interview as Inspiration for Qualitative Research* In P Camie, J Rhodes and L Yardley (eds) *Qualitative Research in Psychology* (pgs 275-297), Washington, American Psychological Association

Laming Lord (2003) *The Victoria Climbié Inquiry*, London, Crown Copyright available at www.victoria-climbie-inquiry.org.uk

Lanning, K (2010) *Child Molesters: A Behavioral Analysis,* 5th edition, Alexandria: National Center for Missing and Exploited Children

Laulik, S., Allam, J., & Sheridan, L. (2007) “An investigation into maladaptive personality functioning in Internet sex offenders” *Psychology, Crime & Law*, Volume 13, 2007, Issue 5 Page 523-535

Lee, A, Li, N, Lamade, R, Schuler, A and Prentky, A (2012) “Predicting hands-on sexual offenses among possessor of internet child pornography” *Psychology, Public Policy and Law*, 18(4) 644

Lemert, E (1951) *Social Pathology*, New York, McGraw-Hill

Liberty (2009) *Liberty's Second Reading Briefing on the Coroners and Justice Bill in the House of Commons*, London, Liberty

Liberty Central (2010) “Coroners and Justice Act 2009” The Guardian, 23rd March,
Available at
https://www.theguardian.com/commentisfree/libertycentral/2009/jan/19/coroners-justice-bill

Link, B, Cullen, F, Frank, J and Wozniak, J (1987) "The social rejection of former mental patients: Understanding why labels matter" *American Journal of Sociology*, 92, 1461-1500

Long, M, Alison, L and McManus, M (2013). “Child pornography and likelihood of contact abuse: A comparison between contact child sexual offenders and noncontact offenders”. *Sexual Abuse: A Journal of Research and Treatment*, 25, 370–395

Lounsbury, K, Mitchell, K and Finkelhor, D (2011) *The true prevalence of "sexting"*. Crimes against children research Centre. Available at https://www.unh.edu/ccrc/pdf/Sexting%20Fact%20Sheet%204_29_11.pdf

Lowenstein, L (2005) "Recent research into the downloading of child pornographic materials from the internet". *Community Safety Journal* , 4(3), pp.14-24

MacCormick, N (1994) *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press

Mailloux D, Abracen J and Serin R (2003) "Dosage of treatment of sex offenders: Are we overprescribing?" *International Journal of Offender Therapy and Comparative Criminology*, 47, 171-184

Manchester, C (1995) "Criminal Justice and Public Order Act 1994: Obscenity, Pornography and Videos" *Criminal Law Review*, 123-131

Manchester, C (1996) "Computer pornography and the Court of Appeal's decision in Fellows", *Criminal Law Review*, 5-8

Mandeville-Norden, R, Beech, A, and Hayes, E (2008) "Examining the effectiveness of a UK community-based sexual offender treatment programme for child molesters". *Psychology, Crime and Law,* Vol 14, Issue 6 Pages 493-512

Marques J , Nelson C, West and Day D (1994) "The Relationship Between Treatment Goals and Recidivism among Child Molesters" *Behavior, Research and Therapy*, 21(1) 28-54

Marsh, J (2011) "Masha's Law: A Federal Civil Remedy for Child Pornography Victims", *Syracuse Law Review* 61, 459

Marshall, W (1988) "The Use of Sexually Explicit Stimuli by Rapists, Child Molesters and Non Offenders" Journal of Sex Research, 25, 267-288

Marshall W and Barbaree H (1988) "The Long-Term Evaluation of a Behavioral Treatment Program for Child Molesters" *Behavior, Research and Therapy* 26(6) 499-511

Mathews, B and Ross, L (2010) *Research Methods: A Practical Guide for the Social Sciences*, Harlow, Pearson Education Limited

McHarg, A, (1999) "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" 62(5) *Modern Law Review* 671

McGlynn, C and Rackley, E (2009) 'Criminalising extreme pornography: A lost opportunity' Criminal Law Review 245.

McGuire J (2000) "Explanations for criminal behavior" in McGuire J, Mason T and O'Kane A (eds) *Behavior, Crime and Legal Processes: a Guide for Legal Practitioners*, Chichester, John Wiley & Sons

McManus, M and Almond, L (2014). "Trends of indecent images of children and child sexual offences between 2005/2006 and 2012/2013 within the United Kingdom". *Journal of Sexual Aggression*, *20*, 142-155.

McManus, M, Long, M and Alison, L (2011) "Child pornography offenders: towards an evidenced-based approach to prioritizing the investigation of indecent image offences", In Alison, L and Rainbow, L (Eds.), Professionalizing Offender Profiling, Oxford, Routledge

McWilliams W (1987) "Probation, Pragmatism and Policy" *Howard Journal of Criminal Justice*, 25, 97-121

Meek-Prieto, C (2008) "Just age playing around? How second life aids and abets child pornography" *North Caroline Journal of Law and Technology,* 9, 88-109

Meridian, H, Curtis, C, Thakker, J, Wilson, N and Boer, D (2013) “The three dimensions of online child pornography offending” *Journal of Sexual Aggression*, 19(1) 121-132

Merton, R (1968) *Social Theory and Social Structure*, New York, Free Press

Mews, A, Di Bella, L and Purver, M (2017) *Impact Evaluation of the Prison Based Core Sex Offender Treatment Programme*, Ministry of Justice Analytical Series, London, Ministry of Justice

Middleton, D. (2002). *Accredited programmes for sex offenders in the community: An overview from the National Probation Service*. NOTA News, July 2002.

Middleton, D. & Hayes, E. (2006). *Internet Sex Offender Treatment Programme Theory Manual*. London: National Offender Management Service (NOMS) Interventions Unit, Ministry of Justice.

Middleton, D, Mandeville-Norden, R and Hayes, E (2009) "Does Treatment work with internet sex offender? Emerging findings from the Internet Sex Offender Treatment Programme" *Journal of Sexual Aggression*, 15, 5-19

Miles, M and Huberman, M (1994) *Qualitative Data Analysis*, 2nd edn, London, Sage

Mill, J (2017) *On Liberty*, (Amazon Classics Edition) Kindle Edition

Mill, J (1993) *Utilitarianism, On Liberty and Considerations on Representative Government* London, Dent

Ministry of Justice (2008) *Consultation on the Possession of Non-Photographic Visual Depictions of Child Sexual Abuse: Summary of Responses and Next Steps*, London, Ministry of Justice.

Ministry of Justice (2009) *Possession of Extreme Pornographic Images and increase in the maximum sentence for offences under the Obscene Publications Act 1959: Implementation of Sections 63-67 and Section 71 of the Criminal Justice and Immigration Act 2008*, Circular No: 2009/1, London, Ministry of Justice

Ministry of Justice (2010) Coroners and Justice Act 2009 (Provisions coming into force on 6 April 2010) Circular 2010/06, London, Ministry of Justice

Ministry of Justice (2010a) *What Works with Sex Offenders?* London. Ministry of Justice.

Moore R, Howard P and Burns M (2007) "The further development of OASys: realising the potential of the Offender Assessment System", *Prison Service Journal*, 167, 36-42

Moore, B (2010) “Video Game or Treatment for PTSD?” *Psychology Today*, 24th May 2010 available at https://www.psychologytoday.com/gb/blog/the-camouflage-couch/201005/video-game-or-treatment-ptsd [Accessed 28th July 2018]

Morahan-Martin, J and Schumacher, P (2000). “Incidence and correlates of pathological internet use among college students”. *Computers in Human Behavior*, 16, 13-29.

Morin, R (2016) “Can child dolls keep pedophiles from offending?” *The Atlantic* available at https://www.theatlantic.com/health/archive/2016/01/can-child-dolls-keep-pedophiles-from-offending/423324/

Morris, N and Hawkins, G (1970) *The Honest Politician's guide to Crime Control*, Chicago, University of Chicago Press

Moyser, G and Wagstaffe, M (1987) Research Methods for Elite Studies (Contemporary social research), London, Harper Collins

Murphy, W and Roberts, S (1987) "Introduction (To the Special Issue on Legal Scholarship)", *Modern Law Review*, 50(6), 677-678

Murphy, L, Ranger, R, Fedoroff, P, Stewart, H, Dwyer, G and Burke, W (2015) "Standardization of Penile Plethysmography Testing in Assessment of Problematic Sexual Interests" *Journal of Sexual Medicine*, Vol 12 (9) 1853-1861

Neuman, W (2006) *Social Research Methods: Qualitative and Quantitative Approaches*, Boston, Pearson Education

Nair, A (2010) “Real porn and pseudo porn: the regulatory road.” *International Review of Law, Computers and Technology.* Vol 24 (3) 223-232.

National Offender Management Service (NOMS) (2008). *Interventions News*, Issue 28, February. Ministry of Justice.

Neutze, J, Seto, M, Schaefer, G, Mundt, I and Beier, K (2011) “Predictors of Child Pornography Offenses and Child Sexual Abuse in a Community Sample of Pedophiles and Hebephiles” *Sexual Abuse: A Journal of Research and Treatment* , 23(2), pp.212–242

Neutze, J, Grundmann, D, Scherner, G, & Beier, K (2012) “Undetected and detected child sexual abuse and child pornography offenders” *International Journal of Law and Psychiatry,* 35,168–175.

NSPCC (2009) *NSPCC Briefing: Coroners and Justice Bill*, available at

http://www.nspcc.org.uk/Inform/policyandpublicaffairs/Westminster/briefings/CoronersandJustice_wdf63084.pdf.

O'Brien, M, and Webster, S (2007) The Construction and Preliminary Validation of the Internet Behaviours & Attitudes Questionnaire (IBAQ) *Sexual Abuse: A Journal of Research and Treatment*, 19, 237-256

O'Brien, M, and Webster, S (2011) "Assessment and Treatment Approaches with Online Sex Offenders" in Davidson J and Gottschalk, P (eds) *Internet Child Abuse: Current Research and Policy*, London, Routledge

O'Donnell, I and Milner, C (2007) *Child Pornography: Crime, Computers and Society*, Cullompton, Willan Publishing

Office of National Statistics (2006) *Internet Access* at htpp://www.statistics.gov.uk/pdfdir/intao806.pdf

Ormerod, D (2001) "Commentary on R v Smethurst" *Criminal Law Review,* 657-659: 658

Ormerod, D (2001) "Commentary on R v Bowden" *Criminal Law Review*, 381-383

Osborn, J, Elliott, I, Middleton, D and Beech A (2010) "The use of actuarial risk assessment measures with UK internet child pornography offenders" *Journal of Aggression, Conflict and Peace Research*, 2(3) 16-24

Ormerod, D (2001) "Commentary on R v Smethurst" *Criminal Law Review,* 657-659

Ormerod, D (2001) "Commentary on R v Bowden" *Criminal Law Review*, 381-383

Ormerod, D (2009) *Smith and Hogan Criminal Law: Cases and Materials*, 10th Edn, Oxford, Oxford University Press

Ortega-Brena, M (2009) "Peek-a-boo, I see you: Watching Japanese hard-core animation", *Sexuality and Culture*, 13:17-31

Osborn, J, Elliott, I, Middleton, D and Beech, A (2010) "The use of actuarial risk assessment measures with UK internet child pornography offenders", *Journal of Aggression, Conflict and Peace Research,* Vol. 2 Issue: 3, pp.16-24,

Ost, S (2002) "Children at Risk: Legal and Societal Perceptions of the Potential Threat that the Possession of Child Pornography Poses to Society" *Journal of Law and Society*, 29(3) 436-60

Ost, S (2009) *Child Pornography and Sexual Grooming: Legal and Societal Responses*, Cambridge, Cambridge University Press

Ost, S (2009) “Criminalising fabricated images of child pornography: a matter of harm or morality?” *Legal Studies*, 30, 2, 230-256 27

Patton, M (1990) *Qualitative Evaluation and Research Methods*, 2nd Edition, London, Sage

Patton, M (2002) *Qualitative Research and Evaluation Methods*, 3rd Edition, Thousand Oaks, Sage

Paul, B and Linz, D (2008) "The effects and exposure of virtual child pornography on viewer cognitions and attitudes towards deviant sexual behaviour" *Communications Research*, 35, 3-38

Perkins D, Hammond S, Coles D and Bishopp D (1998) *Review of Sex Offender Treatment Programmes*. Broadmoor Hospital: High Security Psychiatric Services Commissioning Board.

Petersen, T, (2011) What is Legal Moralism? SATS 12: 80–88

Probation Circular (2006) PC36/2006 *OASys Manual Revised Chapter on Risk of Serious Harm*, London, National Probation Directorate

Quayle, E and Taylor, M (2002) "Child pornography and the internet: perpetuating a cycle of abuse" *Deviant Behaviour* 23(4), 331-362

Rawlinson, K (2017) "Child sex doll imports expose previously unknown offenders" The Guardian, 31st July 2017 available at https://www.theguardian.com/society/2017/jul/31/child-sex-doll-imports-expose-previously-unknown-offenders [Accessed 28th July 2018]

Reder P and Duncan S (1999) *Lost Innocents: A Follow Up Study on Fatal Child Abuse*, London, Routledge

Reeves, C (2012) "Fantasy depictions of child sexual abuse: The problem of ageplay in Second Life" *Journal of Sexual Aggression* 1 -11.

Renaud, P, Rouleau, J, Proulx, J, Trottier, D, Goyette, M, Bradford, J, Federoff, P, Dufresne, M-H, Dassylva, B, Cote, G and Bouchard, S (2010) "Virtual characters designed for forensic assessment and rehabilitation of sex offenders: standardized and made to measure" *Journal of Virtual Reality and Broadcasting*, Volume 7, No 5

Renold, E and Creighton, S (2003) *Images of Abuse: A Review of the Evidence on Child Pornography,* London NSPCC

Richards, R and Calvert, C (2009) "When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case" *Hastings Communication and Entertainment Law Journal* 32 (1), 1-39

Richards, L (2009) *Handling Qualitative Data*, 2nd Edn, London, Sage

Richardson, P (ed) (2018) *Archbold Criminal Pleading Evidence and Practice*, London, Sweet and Maxwell

Roberts, L and Indermaur, D (2003) "Signed Consent Forms in Criminological Research: Protection for Researchers and Ethics Committees but a Threat to Research Participants", *Psychiatry, Psychology and Law*, Volume 1, Issue 2, 289

Robertson, G (1979) *Obscenity*, London, Weidenfeld and Nicholson

Robinson G and Raynor P (2006) "The Future of Rehabilitation: What Role for the Probation Service?" *Probation Journal*, 53(4), 3345-46

Robson, C (2002) *Real World Research: A Resource for Social Scientists and Practitioner-researchers*, 2nd Edn, London, John Wiley & Sons

Robson, C (2011) *Real World Research: A Resource for Social Scientists and Practitioner-researchers*, 3rd Edn, London, John Wiley & Sons

Rubin, H and Rubin, I (2005) *Qualitative Interviewing: The Art of Hearing Data*, 2nd Edn, London, Sage

Ruszczyski A and Greengard C (2002) *Decision Making Under Conditions of Uncertainty*, London, Springer

Rutkin, A (2016) “Could sex robots and virtual reality treat paedophilia?” New Scientist available at https://www.newscientist.com/article/2099607-could-sex-robots-and-virtual-reality-treat-paedophilia/

Ryan, A. (2008) "Hart and the Liberalism of Fear" in Kramer et al (2008) *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* Oxford, Oxford University Press

Saldana, J (2009) *The Coding Manual for Qualitative Research*, London, Sage

Salter, M and Mason, J (2007) *Writing Law Dissertations: An Introduction and Guide in the Conduct of Legal Research*, Harlow, Longman

Sampson, R (1986) "Effects of socioeconomic context on official reaction to juvenile delinquency" *American Sociological Review*, 51, 876-885

Sandelowski, M (1995) "Sample size in qualitative research" *Research in Nursing & Health,* Vol 18, 179-183

Saner, E (2015) From Caravaggio to Graham Ovenden: do artists' crimes taint their art? The Guardian Online, 17th October 2015
Available at https://www.theguardian.com/artanddesign/2015/oct/17/from-caravaggio-to-graham-ovenden-do-artists-crimes-taint-their-art [Accessed 27th July 2018]

Santtila, P, Mokros, A, Hartwig, M, Varjonen, M, Jern, P, Witting, K, and Sandnabba, N (2010). "Childhood sexual interactions with other children are associated with lower preferred age of sexual partners including sexual interest in children in adulthood" *Psychiatry Research*, *175*, 154-159.

Savage, A and Hyde, R (2012) "Using freedom of information request to facilitate research" *International Journal of Social Research Methodology*, Vol 17, No, 3 202-317

Schmidt, D (2004) "The analysis of semi-structured interviews" in Flick, U, Von Kardoff, E and Steinke, I (eds) *A Companion to Qualitative Research*, London, Sage

Schur, E (1965) *Crimes without victims: Deviant behavior and public policy,* New Jersey, Prentice Hall

Schur, E and Bedeau, H (1974) *Victimless Crime: Two sides of a controversy*, New Jersey, Prentice Hall

Schauer, F (2009) *Thinking like a lawyer: A new introduction to legal reasoning, Boston*, Harvard University Press.

Sentencing Council (2015) *Sexual Offence Definitive Guideline,* London, Sentencing Council https://www.sentencingcouncil.org.uk/wp-content/uploads/Aug-2015-Sexual-Offences-Definitive-Guideline-web.pdf

Seto, M (2004) "Pedophilia and sexual offences involving children" *Annual Review of Sex Research*, 15, 321-361

Seto, M (2008) "Pedophilia: Psychology and Therapy" in Laws, D and O'Donohue, W (eds) *Sexual Deviance: Theory Assessment and Treatment*, 2nd Edn, London, Guildford Press

Seto, M (2013) *Internet sex offenders*. Washington, DC, American Psychological Association

Seto M, Cantor J and Blanchard R (2006) "Child pornography offences are a valid diagnostic indicator of pedophilia" 115 *Journal of Abnormal Psychology*, 610-615

Seto, M and Eke, A (2005) “The criminal histories and later offending of child pornography offenders” *Sexual Abuse: A Journal of Research and Treatment*, 17, 201-210.

Seto, M and Eke, A (2006) Extending the Follow-up of Child Pornography Offenders Reported by Seto and Eke (2005) poster presented at the 25th Annual Conference of the Association for the Treatment of Sexual Abusers (ATSA), Chicago

Seto, M and Eke, A (2015). “Predicting recidivism among adult male child pornography offenders: Development of the Child Pornography Offender Risk Tool (CPORT)”. *Law and Human Behavior, 39*(4), 416-429

Seto, M, Hanson, R and Babchishin, K (2011) “Contact sexual offending by men with online sexual offences”, *Sexual Abuse: A Journal of Research and Treatment*, 23.1, 124-145.

Seto, M, Reeves, L, and Jung, S (2010) “Motives for child pornography offending: The explanations given by the offenders” *Journal of Sexual Aggression*, 16, 169-180

Sheldon, K and Howitt, D (2007) *Sex Offenders and the Internet*, Chichester, Wiley

Sher, J and Carey, B (2007) Debate on Child Pornography’s Link to Molesting, New York Times, July 19, 2007 available at https://www.nytimes.com/2007/07/19/us/19sex.html

Silverman, D (1985) *Qualitative Methodology and Sociology*, Aldershot, Gower

Silverman, D (2005) *Doing Qualitative Research*, 2nd Edition, London, Sage

Simester, A and Sullivan, G (2008) *Criminal Law: Theory and Doctrine*, 3rd Edn, Oxford, Hart Publishing

Simmonds, N (1984) *The Decline of the Juridical Reason: Doctrine and Theory in the Legal Order*, Manchester NH, Manchester University Press

Simpson, G and Charlesworth, H (1995) "Objecting to Objectivity: The Radical Challenge to Legal Liberalism" in R, Hunter, R, Ingleby and R, Johnstone (eds) *Thinking about Law: Perspectives on The History, Philosophy and Sociology of Law*, Sydney, Allen and Unwin

Smiljanich, K and Briere, J, (1996) “Self-reported sexual interest in children: Sex differences and psychosocial correlates in a university sample,” *Violence & Victims*, vol. 11, no. 1, 39-50

Smith, J (1998) "Commentary on R v Land" *Criminal Law Review*, 120-121

Solon, O (2017) Polygraph for pedophiles: how virtual reality is used to assess sex offenders available at https://www.theguardian.com/technology/2017/jun/07/virtual-reality-child-sexual-abuse-pedophile-canada-research

Statistics How To (2018) *Purposive Sampling* https://www.statisticshowto.datasciencecentral.com/purposive-sampling/

Stott, D (1998) *Legal Research*, 2nd Edn, London, Routledge

Sullivan, J and Beech, A (2003) “Are collectors of child pornography a risk to children?” in MacVean, A and Spindler, P (eds), Policing Paedophiles on the Internet, London, John Wiley & Sons Limited

Svantesson, D (2010) “Sexting and the Law - How Australia Regulates Electronic Communication of Non-Professional Sexual Content”, *Bond Law Review*, Vol 22 Issue 22, Article 3

Sykes, G and Matza, D (1957) "Techniques of neutralization: A theory of delinquency" *American Sociological Review*, 22, 664-673

Takeuchi, C (2015) "Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography" *Georgia Journal of International and Comparative Law* 44 ,195

Tate, T (1990) *Child Pornography: An Investigation*, London, Methuen

Taylor, J (2011) “Policing Social Networking Sites and Online Grooming” in Davidson J and Gottschalk, P (eds) *Internet Child Abuse: Current Research and Policy*, London, Routledge

Taylor, M and Quayle, E (2003) *Child Pornography: An Internet Crime*, Hove, Brunner-Routledge

Taylor, M, Holland, G and Quayle, E (2001) "Typology of paedophile pictures" *Police Journal*, 74, 97-107

Taylor I, Walton, P and Young, J (1973) *The new criminology: For a social theory of deviance*, London, Routledge

Templeton, T. L., & Stinnett, R. D. (1991). “Patterns of sexual arousal and history in a normal sample of young men”. *Archives of Sexual Behavior*, 20, 137-150.

Thomas, G (2009) *How to do your research project: a guide for students in education and applied social sciences*. London, Sage

Thomas, C and Bishop, D (1984) "The effect of formal and informal sanctions on delinquency: A longitudinal comparison of labelling and deterrence theories " *Journal of Criminal Law and Criminology*, 75, 1222-1245

Towl, G and Crighton, D (1997) "Risk Assessment with Offenders" *International Review of Psychiatry*, 9, 187-93

Tracey, J (2014) “Will we someday use child sex dolls to treat pedophiles?” *Outer Places*. Available at https://www.outerplaces.com/science/item/4851-robot-experts-may-create-child-sex-robots-to-treat-pedophiles

Tuckett, A (2005) "Applying thematic analysis theory to practice: A researcher's experience", *Contemporary Nurse*, 19(1-2) 75-87

Twining, W (1976) *Taylor Lectures 1975 Academic Law and Legal Development*, Lagos, University of Lagos Faculty of Law

Ward, D and Tittle C (1993) "Deterrence or labelling: The effects of informal sanctions", *Deviant Behavior*, 14, 43-64

Wakeling, H, Howard, P and Barnett, G (2011). Comparing the validity of the RM2000 scales and OGRS3 for predicting recidivism by Internet sexual offenders. *Sexual Abuse: A Journal of Research and Treatment, 23,* 146-168.

Walter, M (2010) *Social Research Methods*, South Melbourne, Oxford University Press

Watkins, D, (2005) "Freedom of Artistic Expression and the Human Rights Act 1998" 10(2), *Art, Antiquity and Law* 147

Watanabe, M (2017) "An Analysis of the Japanese viewpoint on regulatory policy of virtual child pornography", Conference Paper presented at the 14th International Telecommunications Society (ITS) Asia-Pacific Regional Conference: "Mapping ICT into Transformation for the Next Information Society", Kyoto, 24-27 June 2017 available at https://www.econstor.eu/bitstream/10419/168547/1/Watanabe.pdf

Webb, L, Craisatti, J, and Keen, S. (2007) “Characteristics of Internet child pornography offenders: A comparison with child molesters” *Sexual abuse: A Journal of Research and Treatment*, 19, 449-465

Williams Committee Report (1979) *Obscenity and Film Censorship*, Cmnd 7772, London, HMSO

Williams, K, Howell, T, Cooper, B, Yuille, J and Paulhus, D (2004) "Deviant Sexual Thoughts and Behaviours: the role of personality and pornography

use" Presentation at the Annual Conference of the American Psychological Society, Chicago, May 2004

Williams, K (2004) "Child Pornography Law: Does it Protect Children?" *Journal of Social Welfare and Family Law,* 26(3), 245-261

Wolak, J, Finkelhor, D and Mitchell K (2005) Child Pornography Possessors Arrested in Internet Related Crimes: Findings from the National Juvenile Online Victimization Study, National Center for Missing and Exploited Children available at http://www.missingkids.com/en_US/publications/NC144.pdf

Wolak, J, Finkelhor, D, Mitchell, K and Ybarra, M (2008) "Online "predators" and their victims: Myths, realities, and implications for prevention and treatment", *American Psychologist*, 63.2, 111-128.

Wolfenden, J, et al (1957) *The Report of the Committee on Homosexual Offences and Prostitution,* Cmd 247, London, Stationery Office

Woolf, S (1984) "A Model of Sexual Aggression/Addiction" *Journal of Social Work and Human Sexuality* Vol. 7 (1), 131-148.

Wollert, R, Waggoner, J and Smith J (2011) Federal Internet Child Pornography Offenders Limited Offense Histories and Low Recidivism Rates in Schwartz, B (ed) The Sex Offender Current Trends In Policy And Treatment Practice Volume VII available at https://sites.up.edu/waggoner/wp-content/uploads/sites/84/2012/02/Federal-Internet-Child-Pornography-Offenders.pdf

Wurtele, S.K, Simons, D.A and Moreno, T (2014) "Sexual Interest in children among an online sample of men and women" *Sexual Abuse: A Journal of Research and Treatment* , 26(6) 546–568

Yar, M (2013) *Cybercrime and Society*, London, Sage

Table of Cases (In Alphabetical Order by Country)

England and Wales

Atkins v DPP [2000] 1 WLR 1427

Attorney-General's Reference (No.89 of 2004) [2004] EWCA Crim 3222

Calder v Powell (1965) 1 QB 509

DPP v Jordan [1977] AC 69

DPP v Whyte [1972] AC 849

Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112

Goodland v DPP [2000] 1 WLR 1427

Knuller v DPP [1973] AC 435

Loutchansky v Times Newspapers Ltd (No 2) [2001] EWCA Civ 536

R v Atkins [2000] 2 Cr APP R 248

R v Barker [1962] 1 WLR 349

R v Bowden [2001] QB 88

R v Cader and Boyars Ltd [1969] 1 QB 151

R v Clayton and Halsey [1963] 1 QB 163

R v Collier (Edward John) [2004] EWCA 1411

R v Court [1989] AC 28

R v Dobson [2017] EWCA Crim 2435

R v Fellows and Arnold [1997] 1 Cr App R 244

R v Gibson and Sylverie [1991] 1 All ER 441

R v Graham-Kerr [1988] 1 WLR 1098

R v GS [2012] 2 Cr App R 14.

R v H [2005] EWCA Crim 3037

R v Harrison [2008] 1 Cr.App.R 29

R v Hicklin (1867-68) L.R. 3 Q.B. 360

R v Koeller [2001] EWCA Crim 1854

R v Land [1999] QB 65

R v M (A) [2015] 2 Cr.App.R 22

R v Monument [2005] EWCA Crim 30

R v Murray [2004] EWCA Crim 2211

R v O'Carroll [2003] EWCA Crim 2338

R v Oliver et al [2003] 1 Cr App R 28

R v Owen [1988] 1 WLR 134
R. v Penguin Books Ltd [1961] Crim.L.R. 176
R v Porter [2006] 1 WLR 2633
R v Rowe [2008] EWCA Crim 2712
R v Sharpe (2001) unreported, SCC 2 File No. 2 27376 26th January 2001
R v Skirving, R v Grossman [1985] QB 819
R v Smethurst [2002] 1 Cr App R 6
R v Smith; R v Jayson [2003] 1 CR App R 13
R v Stamford [1972] 2 QB 391
R v Toomer and Others [2001] 2 Cr App R (s) 30
R v Wrigley [2000] (unreported)

Hansard

Parliamentary Debates, House of Commons, Official Report, Public Bill Committee, Coroners and Justice Bill, Twelfth Sitting, 3rd March 2009 at col 487
Available at:
https://publications.parliament.uk/pa/cm200809/cmpublic/coroners/090303/pm/90303s07.htm

House of Lords Written Answers (11th March 2004) vol. 658
Available at
https://hansard.parliament.uk/Lords/2004-03-11/debates/c110f910-d26a-45f7-994e-d3e7b728860c/ChildPornographyAndSexualOffences

European Court of Human Rights

Handyside v UK (1976) 1 EHRR 737
Hoare v UK [1997] EHRLR 678
Otto-Preminger Institute v Austria (1994) EHRR 34
Müller v Switzerland (1991) 13 EHRR 212
S and G v UK (Application No 17634)
Scherer v Switzerland (1994) 18 EHRR 276
Wingrove v UK(1996) 24 EHRR 1

United States of America

Ashcroft v Free Speech Coalition 122 S. Ct 1389 (2002)

New York v Ferber 102 S.Ct 3348 (1982)

United States v. Johnson, 588 F. Supp. 2d 997, 1006 (S.D. Iowa 2008).

United States v. Phinney, 599 F. Supp. 2d 1037, 1045 (E.D. Wis. 2009)

United States v Villard 885 F.2d 117 (1989)

Websites

https://www.virped.org

Appendix 1

Recommendations for Practice

- The decriminalisation of Ss62 to 68 Coroners and Justice Act 2009 in respect of individuals who are discovered to be solely in possession of images which do not depict real children for example Japanese Anime or Hentai or cartoon pornography.

- Such individuals to be diverted away from the Criminal Justice System and referred to charities such as The Lucy Faithfull Foundation in order to determine whether the possession of such material can be considered to be problematic behaviour.

- If Ss62 to 68 Coroners and Justice Act 2009 are to remain in force then the Crown Prosecution Service should produce guidance akin to the Guidelines produced in respect of assisted suicide in order to add clarity to the scope of a law which remains largely unclear and is unlikely to be the subject of legal determination in the higher Courts at any time in the near future.

- For the government, media, academia and all other law enforcement agencies to cease using the word paedophile as synonymous with child molester.

- Continued empirical research should be conducted into determining whether there is a distinct group of image offenders who are unlikely to ever progress to contact offending. This research should be conducted with a view to exploring alternative risk management strategies.

- The exploration of alternative risk management strategies, primarily aimed toward image offenders, which utilise burgeoning technologies such as virtual reality and the use of dolls and online role playing games.

Appendix 2

Interview Schedule

Points to be discussed

Professional Background of interviewee

General Questions to be covered

1) Do you believe that possession of pornographic computer generated images of imaginary children (virtual child pornography) should be illegal in principle?

1a) Please give reasons for your answer

2) Does your view change if the images contain images of real people for example consenting adults whose pictures have be morphed into pictures of children?

2a) Please give reasons for your answer

3) The Coroners and Justice Act 2009 made the possession of VCP illegal but did not criminalise distribution or production of VCP what do you think of this?

4) What is your general view of the criminalisation of behaviour of the grounds of morality?

5) There is considerable debate as to whether there is a link between CP and those who commit contact offences - what is your personal view on this?

6) Do you believe the situation is the same if an individual uses VCP?

For those in a therapeutic role

7)Have you come across offenders who have utilised VCP?

8)Have those offenders been self referrals or have they been through the criminal justice system?

9)Are you aware of anyone who has been prosecuted for the possession of VCP and no other CP?

10)Do you believe that VCP could ever be used to help paedophiles manage their sexual attraction to children and therefore minimise the risk of contact offending?

Appendix 3

Consent Form: Justification for the Criminalisation of Virtual Child Pornography (VCP)

Doctoral Researcher	Sam Jenkins, BA (Hons), PGDL, BVC, MSc University of Middlesex
Contact information	mssamjenkins@gmail.com SJ812@live.mdx.ac.uk

Purpose:

1) To consider whether the criminalisation of VCP can be justified by reference to the harm principle.

2) To consider whether there is a potential role for VCP in the therapeutic treatment of convicted sex offenders

3) To consider whether VCP could be used as a risk management tool for individuals who are sexually attracted to children who have not committed any related criminal offence.

Ethical and data protection principles

- Participation in this study is voluntary and without compensation

- You may withdraw from this study at any time for any reason and without giving a reason

- You may stop the interview at any time and withdraw anything you have said up to that point

- You may refuse to answer any of the questions

- Your confidentiality will be strictly respected. Your name, as well as any details that could identify you personally will be removed from the written transcript

- A final analysis will be produced to which you will have access

- The researcher will address any questions or concerns you may have about this study before and/or after the interview

- This study is conducted in accordance with the ethical guidelines published by the British Society of Criminology and the Middlesex University Ethical Guidelines

Please sign below to indicate that you have understood your rights as listed above and that you give your consent to participate in this study.

Signed……

Date……

Your participation, knowledge and opinions expressed as part of this research are greatly appreciated. Thank you.

Appendix 4

The COPINE Scale[19]

1 Indicative

Non-erotic and non-sexualised pictures showing children in their underwear, swimming costumes from either commercial sources or family albums. Pictures of children playing in normal settings, in which the context or organisation of pictures by the collector indicates inappropriateness.

2 Nudist

Pictures of naked or semi-naked children in appropriate nudist settings, and from legitimate sources.

3 Erotica

Surreptitiously taken photographs of children in play areas or other safe environments showing either underwear or varying degrees of nakedness.

4 Posing

Deliberately posed pictures of children fully clothed, partially clothed or naked (where the amount, context and organisation suggests sexual interest).

5 Erotic Posing

Deliberately posed pictures of fully, partially clothed or naked children in sexualised or provocative poses.

6 Explicit Erotic Posing

Pictures emphasising genital areas, where the child is either naked, partially clothed or fully clothed.

7 Explicit Sexual Activity

[19] Taylor, M, Holland, G and Quayle, E (2001) "Typology of paedophile picture collections" Police Journal, 74, 97-107.

Pictures that depict touching, mutual and self-masturbation, oral sex and intercourse by a child, not involving an adult.

8 Assault

Pictures of children being subject to a sexual assault, involving digital touching, involving an adult.

9 Gross Assault

Grossly obscene pictures of sexual assault, involving penetrative sex, masturbation or oral sex, involving an adult.

10 Sadistic/Bestiality

a. Pictures showing a child being tied, bound, beaten, whipped or otherwise subject to something that implies pain.

b. Pictures where an animal is involved in some form of sexual behaviour with a child.

The SAP Scale	
1	Nudity or erotic posing with no sexual activity
2	Sexual activity between children, or solo masturbation by a child
3	Non-penetrative sexual activity between adult(s) and child(ren)
4	Penetrative sexual activity between child(ren) and adult(s)
5	Sadism or bestiality

The Current Sentencing Council Scale (effective from 1st April 2014) [20]

	Possession	**Distribution***	**Production****
Category A	Possession of images involving penetrative sexual activity. Possession of images involving sexual activity with an animal or sadism.	Sharing images involving penetrative sexual activity. Sharing images involving sexual activity with an animal or sadism.	Creating images involving penetrative sexual activity. Creating images involving sexual activity with an animal or sadism.
Category B	Possession of images involving non-penetrative sexual activity.	Sharing of images involving non-penetrative sexual activity.	Creating images involving non-penetrative sexual activity.
Category C	Possession of other indecent images not falling within categories A or B.	Sharing of other indecent images not falling within categories A or B.	Creating other indecent images not falling within categories A or B.

** Distribution includes possession with a view to distributing or sharing images.*

*** Production includes the taking or making of any image at source, for instance the original image. Making an image by simple downloading should be treated as possession for the purposes of sentencing.*

[20] https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/possession-of-indecent-photograph-of-child/