

Offences involving indecent images of children

Literature Review

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Authors: Professor Melissa Hamilton, Professor of Law & Criminal Justice, School of Law, University of Surrey and Dr Ian Belton, Department of psychology, Middlesex University.

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www.scottishsentencingcouncil.org.uk

sentencingcouncil@scotcourts.gov.uk

[@ScotSentencing](https://twitter.com/ScotSentencing)

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Executive Summary

Scottish law criminalises making, distributing, downloading, and possessing indecent images of children ('IIOC'). The potential penalty ranges up to 10 years' imprisonment. The Scottish courts have adopted as an initial starting point in sentencing the framework for IIOC penalties promulgated by the Sentencing Council for England and Wales.

Current sentencing practice

- The current England and Wales sentencing guideline for IIOC is central to the sentencing of IIOC offences in Scotland, both in terms of the evaluation of image seriousness and sentence starting points and ranges. However, the Scottish courts have repeatedly emphasised that the England and Wales guideline should not be followed rigidly.
- A particular challenge is the interpretation by Scottish courts that "making" IIOC includes the original production of the content by sexually abusing a child and downloading images. This conflation impedes the ability, when reviewing sentencing statistics, to differentiate penalties given for production versus non-contact downloading.
- The Scottish courts have identified aggravating and mitigating factors relevant to the sentencing of IIOC offenders, both directly through judicial opinion and indirectly through the adoption of the England and Wales guideline. Typical aggravating factors currently used in Scotland include the severity of the image (e.g., sadistic or penetrative activity), age of children in images, acts involving production or distribution, duration of offending behaviour, and the size of the collection. Mitigating factors tend not to be unique to IIOC but generally include previous good character, lack of maturity, and steps taken to address offending behaviour.
- A major challenge for IIOC sentencing is how to address the seriousness with which the public appear to view IIOC behaviour, while weighting sentences appropriately in comparison to other sexual offences. Still, public perceptions can engage retributive and rehabilitation goals simultaneously, understanding a desire for serious punishment while believing that mandating treatment as well might mitigate risk.

Statistics on IIOC offending

- Data from the Scottish Government show that the prevalence of IIOC offences in Scotland has remained broadly consistent over the past decade. Annually, the number of convictions is less than half of the offences recorded by police. The rank order of the number of convictions based on type of crime, from most to least since 2012 is: making (combining production and downloading), distributing, and possession (with little difference in numbers between possession with intent to distribute and simple possession without such intent).
- Between 2015 and 2020, approximately 30% of IIOC offenders received custodial sentences, and custodial sentences for all categories of offending (making, distribution, and possession) were, on average, between 18 months and two years. Both of these values were lower in the five years to 2020 (2015-20) than in the five years before that (2010-15). These statistics suggest a time trend toward lesser severity in penalties in recent years.
- Of those IIOC cases given a prison term, 42% included an extended sentence.
- When breaking down the crimes by type, distributing IIOC has the highest incarceration rate of 62% over the period 2010-20. Making and simple possession cases both have a 31% incarceration rate. With Scottish law interpreting making IIOC as including true production cases (i.e., involving sexual assault of children) as well as downloading IIOC, it is not possible from the statistics to distinguish the sentences between production and downloading. Still, reports from other jurisdictions indicate that production of IIOC are far less prevalent than other IIOC activities. Hence, the similar incarceration rates of making and possession may be because there is a significant proportion of downloading cases in the making category, which may be considered as similar in severity to possession.
- Between 2010 and 2020, the vast majority of non-custodial sentences awarded were Community Payback Orders (77%). No statistics are currently available on the length of those orders or the restrictions included.

Practices in other jurisdictions

- IIOC sentencing practices in other common law jurisdictions provide information points on perspectives in addressing IIOC offences. It is common to rank

possession as less serious than distribution, with production being the most severe.

- Officials in some jurisdictions note that technology has changed IIOC offending in recent years, such that factors that had been considered aggravating in nature do not appear any longer to distinguish between offending behaviour. For example, most offences today appear to involve the use of a computer, massive collections, lengthy periods of engagement with IIOC, images of young children, and violent content.

Research on IIOC offenders

- IIOC offenders are overwhelmingly white males over 30 but are otherwise heterogeneous in terms of their motivations, facilitating situations and behaviours, and trajectories. IIOC-only offenders and dual offenders (i.e., those who also commit contact offences against children) have been found to differ across many characteristics, including degree of paedophilia and other paraphilias, levels of antisociality and self-control, presence of cognitive distortions, extent of other abusive online behaviours such as grooming and solicitation of children, level of victim empathy, and presence of psychological barriers to committing contact offences.
- There is little support in the literature for the proposition that viewing IIOC is a gateway to committing contact offences against children. For dual offenders, sexual contact with children typically precedes IIOC use. In addition, current risk assessment tools designed for contact offenders may be insensitive to the different attributes of IIOC-only offenders and so overestimate the risk of IIOC-only offenders.
- Research on IIOC victims has found that the production of IIOC can cause severe, long-term psychological, and emotional harm, including damage to a child's sense of privacy, dignity, and autonomy, all exacerbated by knowing that the images continue to be out in the world for others to view indefinitely. Victimization as a child can lead to a number of serious challenges in adult life, including shame, anxiety, suicidal ideation and relationship problems.
- The available evidence on deterrence suggests that while general deterrence is unlikely to be effective with IIOC offenders, conviction for an IIOC offence does have a specific deterrent effect, with re-offending rates amongst IIOC offenders generally found to be between zero and 10 percent (compared to rates close to

15% for dual offenders). However, it is not known whether the severity of sentences has any impact on that effect.

- The literature is relatively clear that dual offenders are at highest risk of sexually offending against a child, such that it could be appropriate to aggravate penalties for those with a history of sexual abuse, or past or current evidence of behaviour related to online grooming or solicitation of a child.
- Other potential aggravators that would be supported by research include active participation in online communities related to IIOC or grooming, distribution activities (particularly to a child), evidence of low self-control and/or self-regulation, antisocial tendencies, hostility, cognitive distortions, or trajectories toward more serious offending behaviour. Attempt to conceal the offending behaviour might be an aggravator if coupled with evidence of intent as safe Internet practices often automatically involves some type of technological protection (passwords, inhibiting tracking, encryption).
- Little is known about female offenders other than some evidence that they tend to have a history of domestic abuse or sexual assault victimisation and are more likely to commit IIOC crimes along with a male partner. When females produce IIOC, it most likely involves their own children.
- There is a small, but growing, literature about a subset of IIOC offenders with developmental disorders in which their symptoms may intersect with their offending activities. Case law, though, is inconsistent on whether the presence of such a disorder serves to mitigate culpability.

1. Summary of offences involving indecent images in Scotland

1.1. Legislative framework

This Literature Review concerns the sentencing of crimes involving indecent images of children, using the acronym ‘IIOC’ for ease of reference. Alternative terms are used in the wider literature, including child pornography, sexually explicit images of children, child sexual exploitation material, child sexual abuse material, child sexual abuse imagery,¹ child exploitation material, and online sexual offending.²

IIOC offences are covered by sections 52 and 52A of the Civic Government (Scotland) Act 1982 (the “1982 Act”). Section 52 of the 1982 Act provides that:

- (1) Any person who –
- (a) takes, or permits to be taken, or makes, any indecent photograph or pseudo-photograph of a child;
 - (b) distributes or shows such an indecent photograph or pseudo-photograph;
 - (c) has in his possession such an indecent photograph or pseudo-photograph with a view to its being distributed or shown by himself or others; or
 - (d) publishes or causes to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such an indecent photograph or pseudo-photograph, or intends to do so

shall be guilty of an offence under this section.

Section 52A(1) of the 1982 Act criminalises the possession of IIOC.³

¹ Marcus K. Rogers, Kathryn C. Seigfried-Spellar, Sienna Bates, and Kayla Rux, ‘Online Child Pornography Risk Assessment Using Digital Forensic Artifacts: The Need for a Hybrid Model’ (2021) 66(6) J. Forensic Sci. 2354.

² Elizabeth Eggins and others, ‘Criminal Justice Responses to Child Sexual Abuse Material Offending: A Systematic Review and Evidence and Gap Map’ (2021) 623 Trends Issues Crime Crim. Justice 1.

³ This crime was introduced by the Criminal Justice Act 1988, s 161(1)(2).

For ease of reference, this review will refer to these IIOC offences textually in this manner:

- 52(1)(a): making
- 52(1)(b): distributing⁴
- 52(1)(c): possession with intent to distribute
- 52(1)(d): advertising
- 52(A)(1): simple possession

A “child” is any person under the age of 18.⁵ An “indecent photograph” is further referred to as one that “shows a child and is indecent”.⁶ No further guidance on the meaning of “indecent” is provided in the 1982 Act or in Scottish reported case law. The Scottish Jury Manual’s possible form of directions to a jury states:

“How do you judge if something is indecent? You simply examine the material and decide, using your common sense and experience of life, if it’s indecent. If it affronts your sensibilities, applying the standards of the average citizen in contemporary society, it’s indecent. If it lies outside what you think of as recognised contemporary standards of common propriety, it’s indecent. In deciding that you can take the age of the child into account. The same picture of an adult might not be indecent, whereas one of a child might be.”⁷

⁴ Under the Civic Government (Scotland) Act 1982, distribution of an indecent image is defined in subsection 52(4) as parting with possession of it or exposing or offering it for acquisition by another person. If a person has images in a shared folder online, they have demonstrated intent to distribute (satisfying s 52(1)(c)). When another person accesses those images, that amounts to distribution (s 52(1)(b)).

⁵ Civic Government (Scotland) Act 1982, s 52(2). Section 52B provides some exemptions where photographs are of a 16-17-year-old (or the accused reasonably believed them to be so) and for consenting spouses or civil or “established” partners.

⁶ Civic Government (Scotland) Act 1982, s 52(8)(b). While the word photograph is used in the main sections of the IIOC criminal statutes, the law also expressly indicates that the term includes the photograph’s negative, a film, videorecording, data stored on a computer disc or other electronic means which is capable of conversion into a photograph, and a tracing or other image that is in whole or in part derived from the photograph. Civic Government (Scotland) Act 1982, ss52(2C), (8)(a), (8)(b), (8)(c), (9).

⁷ Judicial Institute for Scotland *Jury Manual* (2019) 65.4.

<https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/jury-manual-2019.pdf?sfvrsn=6883b1a6_4> accessed on 16 December 2021. The Crown Prosecution Service, ‘Indecent and Prohibited Images of Children’ <<https://www.cps.gov.uk/legal-guidance/indecent-and-prohibited-images-children>> accessed 23 February 2022 notes that it is not the defendant’s conduct which must be indecent but the photograph which results from it, citing *R v Smethurst* [2002] 1 Cr. App. R. 6.

The IIOC crimes also include a pseudo-photograph, defined to be “an image, whether produced by computer-graphics or otherwise howsoever, which appears to be a photograph.”⁸

The terms “takes” and “makes” in s 52(1)(a) of the 1982 Act were clearly meant to address the production of the IIOC, as in the fact of creating an original indecent photograph or filming a child. Still, courts in Scotland have interpreted the law such that “makes” also now includes downloading IIOC from the Internet.⁹ One court explained that downloading served to extract the data and thus made the image available for further proliferation.¹⁰ A critic cautions that such a conflation fails to adequately distinguish the act of sexually abusing a child and capturing the assault on camera from the one who downloads a previously created image of the abuse.¹¹ Another observer notes that sentencing an offender for “making” images (when what they have really done is download and view the images) may cause the public reading about the case to think that it relates to the much more serious offence of producing images of children – and so conclude that the sentence given is overly lenient.¹² As regards sentencing in Scotland, the consequence is that penalties assigned to making (s 52(1)(a)) crimes will be a mix of production and downloading cases.¹³

“Possession” cases require both knowledge (awareness of the existence of the images, for example on a hard drive or DVD, but not necessarily awareness of the nature of the images) and control of the images.¹⁴ Case law indicates that possession does not require that the IIOC be “readily within reach”; they can be stored elsewhere, and in some circumstances can be within a person’s control even if they have been deleted and software would be needed to recover them.¹⁵

⁸ Civic Government (Scotland) Act 1982, s 52(2A).

⁹ *HM Advocate v Graham* [2010] HCJAC 50. A court in England and Wales has likewise interpreted “make” to include downloading images: *R v Jayson* [2002] 1 Cr. App. R. 13.

¹⁰ *Longmuir v HM Advocate* [2001] SCCR 447.

¹¹ Christopher Henning, ‘An Assessment of Routinely Collected Information on Internet Sex Offenders by Criminal Justice Social Workers and the Police in Scotland: An Exploratory Study’ (thesis, University of Edinburgh, 2014) <<https://era.ed.ac.uk/bitstream/handle/1842/31028/Henning2016.pdf?sequence=2>> Accessed 5 March 2022.

¹² Lyndon Harris, ‘Indecent Images of Children’ (2014) 178 CL&J 327.

¹³ This state of affairs is likely to continue unless changes are made to the current legislation in both Scotland and England and Wales. Of course, the issue only arises if, in practice, individuals are still charged under s.52(1)(a) for downloading images (and nothing else) rather than under s 52A. From the case law, however, it appears that this is so at present.

¹⁴ *Redpath v HM Advocate* [2019] HCJAC 38.

¹⁵ *Harris v HM Advocate* [2012] HCJAC 5 (distinguishing *R v Porter* [2006] EWCA Crim 560). It should also be noted that pursuant to s 54A(1) and Part 2 of Schedule 4 to the Sexual Offences (Scotland) Act 2009, if a habitual resident of Scotland does an act elsewhere in the United Kingdom which, if done in Scotland, would be an offence under ss 52 or 52A of the 1982 Act, that will also constitute an offence under Scottish law. In addition, s 55(1) provides that if a UK national does an act in a country outside the UK which would, if done in Scotland, be an offence under ss 52 or 52A of the 1982 Act, then that will constitute an offence under Scottish law. Under s 55(2), a UK resident can also be prosecuted in

It is noted that this Review does not utilise “online sex offender” in connection with the crimes covered herein as the term more broadly can include other offences, such as solicitation of minors for sexual contact, solicitation of minors to take self-portraits, or live-streaming the sexual abuse of a child. Other criminal behaviours that are likewise outside the scope of this report, despite potentially involving indecent images in some way, include “sexting”, “revenge porn”, and procuring self-created indecent images.

1.2. Penalties for indecent images crimes in Scotland

Under the 1982 Act, a person convicted of an offence of making, distributing, possession with intent to distribute, or advertising can be sentenced summarily or on indictment. On summary conviction, the maximum penalty is six months’ imprisonment, or a fine, or both.¹⁶ The maximum penalty for a conviction on indictment is 10 years’ imprisonment, or a fine, or both.¹⁷

Offenders convicted of an offence of simple possession can also be sentenced summarily or on indictment. On summary conviction, the maximum penalty is six months’ imprisonment, or a fine, or both.¹⁸ If convicted on indictment, the maximum penalty is five years’ imprisonment, or a fine, or both.¹⁹

1.3. The starting point for sentencing IIOC crimes

The Scottish courts have affirmatively adopted the framework set forth by the Sentencing Council for England and Wales as being informative to determining sentence starting points and ranges for IIOC crimes generally. The first such adoption was in 2010 whereby the guideline judgment in *HM Advocate v Graham* stated that the England and Wales guideline for sentencing IIOC offences “should be used in all cases for as long as it remains the pre-eminent classification of such offences in the United Kingdom... The Crown narrative in [such cases] should contain an analysis of the images in accordance with the definitive guideline.”²⁰ At the time of *Graham*, the then-prevailing sentencing framework issued by the Sentencing Council for England and Wales regarding IIOC offences was contained in a broader guideline published in 2007

Scotland for committing an offence under ss 52 or 52A of the 1982 Act abroad if the act done is also an offence in the country where it was done.

¹⁶ Civic Government (Scotland) Act 1982, s 52(3)(a).

¹⁷ Civic Government (Scotland) Act 1982, s 52(3)(b).

¹⁸ Civic Government (Scotland) Act 1982, s 52A(3)(a).

¹⁹ Civic Government (Scotland) Act 1982, s 52A(3)(b).

²⁰ *Graham* (n 9) [29].

to cover a variety of sexual offences (the “2007 Guideline”).²¹ The 2007 Guideline has since been superseded. From April 2014, a new sexual offences guideline was introduced, which included a section covering IIOC offences. This section has since been converted to a stand-alone document dealing just with IIOC offence sentencing (referred to as the “IIOC Guideline”).²² The Scottish courts have since adopted the newer IIOC Guideline as an appropriate reference document for sentencing IIOC crimes in Scotland.²³

Despite the accepted helpfulness of the work of the Sentencing Council for England and Wales on IIOC sentencing, Scottish courts have clarified that judicial discretion remains an important normative foundation, such that the 2007 Guideline should not be applied too rigidly or taken to identify the correct sentence.²⁴ A similar perspective exists regarding the newer IIOC Guideline, with courts noting that while the document is a useful starting point to draw comparisons between the severity of cases, the advice therein should not be followed too mechanistically.²⁵

One of the main methods to distinguish the severity of cases that the England and Wales guidelines on IIOC have selected is to focus on the type of images contained in the offender’s collection by grading the seriousness of the sexual imagery or sexual assault of the child that is portrayed. The two generations of England and Wales guidelines contain different frameworks for categorizing the seriousness of indecent images. The original 2007 Guideline contained five different “Levels” while the IIOC Guideline has collapsed these into three “Categories” (see Table 1).²⁶

²¹ Sentencing Guidelines Council, *Sexual Offences Act 2003: Definitive Guideline* (Sentencing Guidelines Secretariat 2007). England and Wales have a system of mandatory sentencing guidelines (see the Sentencing Act 2020, ss 59-62). Over the past 20 years, separate definitive guidelines have been issued for each offence category, all of which are now maintained online by the Sentencing Council for England and Wales: Sentencing Council for England and Wales’ website < <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-sentencing-guidelines/> > accessed 14 January 2022.

²² Sentencing Council for England and Wales, *Possession of indecent photograph of child/photographs of children* (2022) (IIOC Guideline) < <https://www.sentencingcouncil.org.uk/offences/crown-court/item/possession-of-indecent-photograph-of-child/> > accessed 4 March 2022. This link is to via the Crown Court sentencing guidelines but the version listed as part of the magistrates’ courts guidelines contains the same material.

²³ *Wood et al. v HM Advocate* [2017] HCJAC 2.

²⁴ *Graham* (n 9) [22].

²⁵ *Wood et al.*(n 23); *Moore v HM Advocate* [2018] HCJAC 40; *Archer v HM Advocate* [2013] HCJAC 162.

²⁶ The five levels in the 2007 were taken from the Court of Appeal judgment in *R v Oliver and others* [2002] EWCA Crim 2766, which in turn was based on the COPINE scale discussed further in Section 6.1.2.1.

Table 1. Categories of indecent images of children in the 2007 Guideline and IIOC Guideline.

2007 Guideline Levels 1 – 5	IIOC Guideline Categories A - C
1. Erotic posing but no sexual activity.	C. Not in category A or B.
2. Non-penetrative sexual activity, between children or solo child.	B. Non-penetrative sexual activity.
3. Non-penetrative sexual activity between children and adults.	
4. Penetrative sexual activity.	A. Penetrative sexual activity; sexual activity with an animal or sadism.
5. Sadism or penetration of or by an animal.	

The penalties under the two guidelines are broadly equivalent, with some minor exceptions. Notably, the 2007 Guideline had different starting points and ranges depending on whether collections of images were large or small in size, whereas the IIOC Guideline makes no such distinction.²⁷ In addition, the lowest level of sentence in the IIOC Guideline is restricted to acts involving the lowest category of images (Category C in IIOC, Level 1 in 2007) whereas in the 2007 Guideline the lowest level of sentence included cases involving a small number of Level 2 images (placed into Category B in IIOC).

Table 2 provides the sentence starting points and ranges under the (current) IIOC Guideline by offence type and image category. The IIOC Guideline distinguishes between three offence types: production, distribution, and possession. Possession with intent to distribute is meant to apply under the distribution category.²⁸ Regarding the issue of interpreting “making” IIOC to also include some form of downloading, the Sentencing Council for England and Wales’ solution in the IIOC Guideline is to expressly direct that downloading cases are meant to utilize the framework for possession cases.²⁹ Scottish courts have followed this approach in applying the starting points in Table 2 under the ‘Possession’ column for cases charged with making IIOC

²⁷ For a discussion of the treatment of collection size as an aggravating factor, see Section 6.1.1.

²⁸ See Step One of the IIOC Guideline (n 22) < <https://www.sentencingcouncil.org.uk/offences/crown-court/item/possession-of-indecent-photograph-of-child/> > accessed 4 March 2022.

²⁹ IIOC Guideline (n 22).

when the actual acts involved downloading (i.e., rather than using the ‘Production’ column).³⁰

Table 2. Sentence starting points and ranges under the IIOC Guideline by offence type and image category.

		Possession	Distribution	Production
Category A	<i>Starting point</i>	1 year custody	3 years’ custody	6 years’ custody
	<i>Range</i>	26 weeks’ – 3 years’ custody	2-5 years’ custody	4-9 years’ custody
Category B	<i>Starting point</i>	26 weeks’ custody	1 year custody	2 years’ custody
	<i>Range</i>	High level CO* – 18 months’ custody	26 weeks’ – 2 years’ custody	1-4 years’ custody
Category C	<i>Starting point</i>	High level CO	13 weeks’ custody	18 months’ custody
	<i>Range</i>	Medium level CO – 26 weeks’ custody	High level CO – 26 weeks’ custody	1-3 years’ custody

* CO = Community Order.

After selecting the relevant starting point and range, sentencers then evaluate any aggravating and mitigating factors present in the case and determine the final sentence by adjusting upwards or downwards from the starting point, within the category range, as appropriate.³¹ As regards collections containing images of different categories, the

³⁰ *Morrison v HM Advocate* [2019] HCJAC 14; *Wood et al.* (n 23).

³¹ See Step Two of the IIOC Guideline (n 22). Strictly speaking, a sentencer’s legal obligation is only to sentence within the “offence range” (i.e., the whole range covered by the guideline for that offence), not the category range (Sentencing Act 2020, ss 62(2) and 62(4)); Coroners and Justice Act 2009, s 121(4)(a)). The obligation to sentence within the offence range is subject to exceptions for guilty plea and other statutory sentence reductions, and extended sentences (Sentencing Act 2020, ss 62(3) and 62(6)). It has been noted that there are “custodial zones” between guideline range ceilings for offences and the relevant statutory maxima. For IIOC possession offences, the zone is two years (three years’ custody vs

general approach taken is that an offender should be sentenced based on the highest category of image(s) present in the collection.³²

Scottish courts at times draw on the aggravating and mitigating factors listed in the England and Wales IIOC guidance, though their application is discretionary to individual courts.³³ The IIOC Guideline includes a non-exhaustive list of 18 aggravating factors. Several of these aggravating factors are common to most or all of the England and Wales guidelines, namely previous convictions, committing an offence whilst on bail or on licence, and failing to comply with current court orders. The following factors are more specifically applicable to IIOC offences.

- Age and/or vulnerability of the child depicted.³⁴
- Discernible pain or distress suffered by child depicted.
- Period over which images were possessed, distributed or produced.
- High volume of images possessed, distributed or produced.³⁵
- Placing images where there is the potential for a high volume of viewers.³⁶
- Collection includes moving images.³⁷
- Attempts to dispose of or conceal evidence.³⁸
- Abuse of trust; child depicted known to the offender.
- Active involvement in a network that produces indecent images.
- Commercial exploitation and/or motivation.

five years), for distribution, five years (five years' custody vs 10 years), and for production, one year (nine years' custody vs 10 years). A small number of very serious cases may warrant sentencing within these custodial zones, but a court must provide suitable justification in order to sentence outside the offence range. See Julian V. Roberts, 'Sentencing guidelines in England and Wales: Recent developments and emerging issues', (2013) 76 Law & Contemp. Probs. 1.

³² More information on methods of matching content to these categories is discussed below in Section 3.1.2.

³³ *Graham* (n 9); *Archer* (n 25); *Wood et al.* (n 23).

³⁴ The IIOC Guideline notes that this factor should be given significant weight and in cases where the actual age of the victim is difficult to determine, sentencers should consider the development of the child (infant, pre-pubescent, post-pubescent).

³⁵ The IIOC Guideline provides no guidance on actual numbers that might constitute a large or small collection. Also, unlike image severity, number of images is only included at Step Two of the IIOC Guideline, which means it can only move a final sentence within the range selected at Step One and cannot not influence the starting point and range.

³⁶ This factor appears to have replaced the factor "Images stored, made available or distributed in such a way that they can be inadvertently accessed by others", which was included in the 2007 Guideline and cited in *Graham* (n 9).

³⁷ The Sentencing Council's 2012 consultation noted, in recommending moving images as an aggravator, that a video could contain more than one abusive incident and "[p]otentially, hundreds of still images may be taken from the one 20-minute film". See Sentencing Council for England and Wales, *Sexual Offences Guideline Consultation* (2012) < https://www.sentencingcouncil.org.uk/wp-content/uploads/sexual_offences_consultation_guideline_web1.pdf > accessed 17 December 2021, 83.

³⁸ This aggravator is evidently targeted at the "increasingly sophisticated efforts to prevent images being discovered" – *ibid* 83).

- Deliberate or systematic searching for images.³⁹
- Large number of different victims.
- Child depicted intoxicated or drugged.

Several aggravating factors that had been listed in the 2007 Guideline are not present in the newer IIOC Guideline, presumably because of a recognition of changes in IIOC offending. The deleted aggravators include showing or distributing the images to others (especially children), cultivating a systematically organised collection, maintaining IIOC in a way that others may inadvertently access, threats to prevent the victim from reporting, and threats to disclose the victim's activity. The 2007 Guideline also suggested that pseudo-photographs should generally be treated less seriously than real photographs, but the IIOC Guideline no longer contains this suggestion.

The IIOC Guideline lists six mitigating factors (none of which are unique to IIOC offences):

- No previous convictions.
- Remorse.
- Previous good character and/or exemplary conduct.
- Age and/or lack of maturity.
- Mental disorder or learning disability.
- Steps taken to address offending behaviour.⁴⁰

Several mitigating factors in the 2007 Guideline version that were more relevant to IIOC offending were not carried over into the IIOC Guideline, namely holding a few images solely for personal use and if images were viewed but not stored.

1.4. Sentencing options

As a general rule, Scottish courts have several options in determining an appropriate sentence. Where a court intends to sentence an offender to a custodial sentence for a sexual offence (including IIOC) and it considers that the licence period which the offender would normally receive “would not be adequate for the purpose of protecting the public from serious harm from the offender”,⁴¹ it may choose to award an extended sentence composed of the custodial period already determined plus an additional period of up to 10 years on licence. The total sentence must not exceed the statutory maximum for the relevant offence. In addition, an Order for Lifelong Restriction provides

³⁹ The 2012 guideline consultation notes that offenders may be shown to have been searching for higher level images than those recovered, which can help the court evaluate an offender's culpability; *ibid* 83.

⁴⁰ In *R v M* [2014] EWCA Crim 2384 [19], voluntarily embarking on a treatment programme was judged to be a “significant and exceptional mitigation”.

⁴¹ Criminal Procedure (Scotland) Act 1995, s 210A(1)(b).

for life-long post-release supervision of high-risk, violent, and sexual offenders. It is noted that while an Order for Lifelong Restriction is available, in fact it has been employed in just three IIOC cases between 2010-20.⁴²

Several non-custodial sentencing options are also available for offenders convicted of IIOC offences, in particular, the Community Payback Order (CPO) and the Sexual Offence Prevention Order (SOPO). For an example of typical restrictions included in a CPO for an IIOC offender, see *Ryder v HM Advocate*.⁴³ For examples of appropriate SOPO conditions, see *Connall v Dunn*⁴⁴ and *Moore*.⁴⁵ A Restriction of Liberty Order is another option, which requires a person to remain within a location (usually their home) at times specified by the court and be monitored using an ankle or wrist tag.

An offender convicted of an IIOC crime is subject to notification requirements, provided certain conditions are satisfied.⁴⁶ The notification period ranges from five years to an indefinite period, depending on the length of sentence imposed.⁴⁷ Notification involves providing various details including name, address, date of birth, and national insurance number.⁴⁸

⁴² This statistic is based on the Scottish Government sentencing data provided for this report.

⁴³ [2013] HCJAC 63.

⁴⁴ [2014] HCJAC 77.

⁴⁵ *Moore* (n 25).

⁴⁶ Where (a) the child was under 16 and the offender (i) was 18 or over, or (ii) is or has been sentenced for a term of at least 12 months, or (b) the court determines that it is appropriate. Sexual Offences Act 2003, s 80(1), sch 3.

⁴⁷ There is a detailed table in s 82(1) of the Sexual Offences Act 2003.

⁴⁸ Offenders must notify the police of any changes to their details and re-confirm the details annually and must also notify the police at least seven days before any intended foreign travel. Sexual Offences Act 2003, ss 83-86. Breach of the notification requirements is itself an offence.

2. Scottish sentencing law and practice on indecent images

This section presents a summary of statistics relating to IIOC offences passing through the criminal justice process in Scotland, and a commentary on leading Scottish case law dealing with sentencing for IIOC offences.

2.1. Scottish sentencing statistics: cases investigated, prosecuted, and sentenced

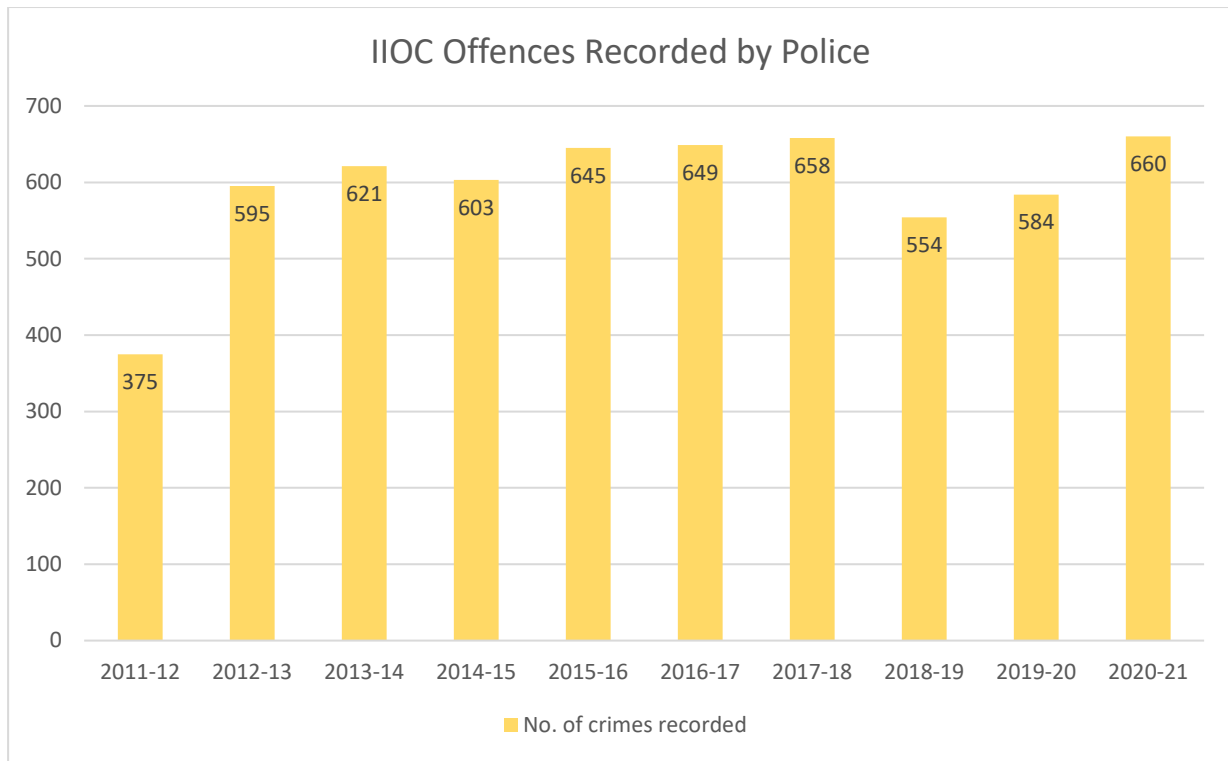
Official statistics provide a perspective on the prevalence of IIOC offences in Scotland and any time trends. Data are provided at four stages: (1) cases recorded by police, (2) case proceedings (which include those for which the individual was formally prosecuted, whether or not found guilty or the government later abandoned adjudicating),⁴⁹ (3) conviction, and (4) sentencing.

2.1.1. Cases involving IIOC offences recorded by police

Figure 1 lists the number of IIOC offences officially recorded by police per fiscal year over the last decade.

⁴⁹ Scottish Government, *Case Proceedings in Scotland, 2019-20 (2021) Annex C* <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/48/>> accessed 5 March 2022.

Figure 1. Number of IIOC offences recorded by police in Scotland, 2011-21.



Source: Scottish Government.⁵⁰

The relevant Scottish Government document warns that these numbers may reflect variations in police activity over time and thus do not necessarily represent the existence of all crimes committed.⁵¹ Further, recording an event does not necessarily mean the police affirmatively concluded that a crime did occur or that they located a possible perpetrator. With these caveats, there does not appear to be any particular trend over the decade, with the number of IIOC crimes recorded fluctuating but not in any distinct direction. The one salient observation is the jump in cases from 2011-12 to 2012-13. The number of cases was at its highest in the last fiscal year (2020-21), but only two to 15 cases greater than the highest counts in previous years.

A special report published by the Scottish Government in 2017 included a random sample of 349 police records in IIOC cases in the periods of 2013-14 and 2016-17.⁵² The analysis provides some, limited, information on the characteristics of IIOC offences:

⁵⁰ Scottish Government, *Recorded Crime in Scotland 2020-2021* (2021) <<https://www.gov.scot/publications/recorded-crime-scotland-2020-2021/pages/22/>> accessed 3 March 2022.

⁵¹ *ibid.*

⁵² Scottish Government, *Recorded Crime in Scotland: Other Sexual Crimes, 2013-14 and 2016-17* (2017) <<https://www.gov.scot/publications/recorded-crime-scotland-sexual-crimes-2013-14-2016-17/>> accessed on 24 November 2021.

- Almost all IIOC crimes recorded were cyber-enabled, rising slightly from 97% to 98% across the two annual periods reviewed. Offences were most often facilitated using a PC or laptop (as opposed to a mobile phone).
- A substantial majority of the IIOC cases (over 80%) were discovered by police, as opposed to being reported by the victim, a relative, or another person. The victims themselves were twice as likely to report their offence in 2016-17, though the proportions are relatively small (6% versus 3% in 2013-14). The low rate of victim reporting may be due to another fact in the report, namely that few of the children in the IIOC were identifiable.
- The median age of IIOC perpetrators (where identifiable) was 37 years in the earlier year and 39 years in the latter year. Notably, there were distinct subsets of young offenders. In the later year of the study, 7% of perpetrators were age 13-15 and 11% were age 16-19. The proportions of young offenders in the earlier year were substantially less with 3% each in age groups 13-15 and 16-19.
- The vast majority of perpetrators of IIOC offences were men (93% and 96% in the two years studied).
- Almost all of the IIOC cases came to the attention of the police within a year of the commission of the crime (92% in 2016-17 and 95% in 2013-14).

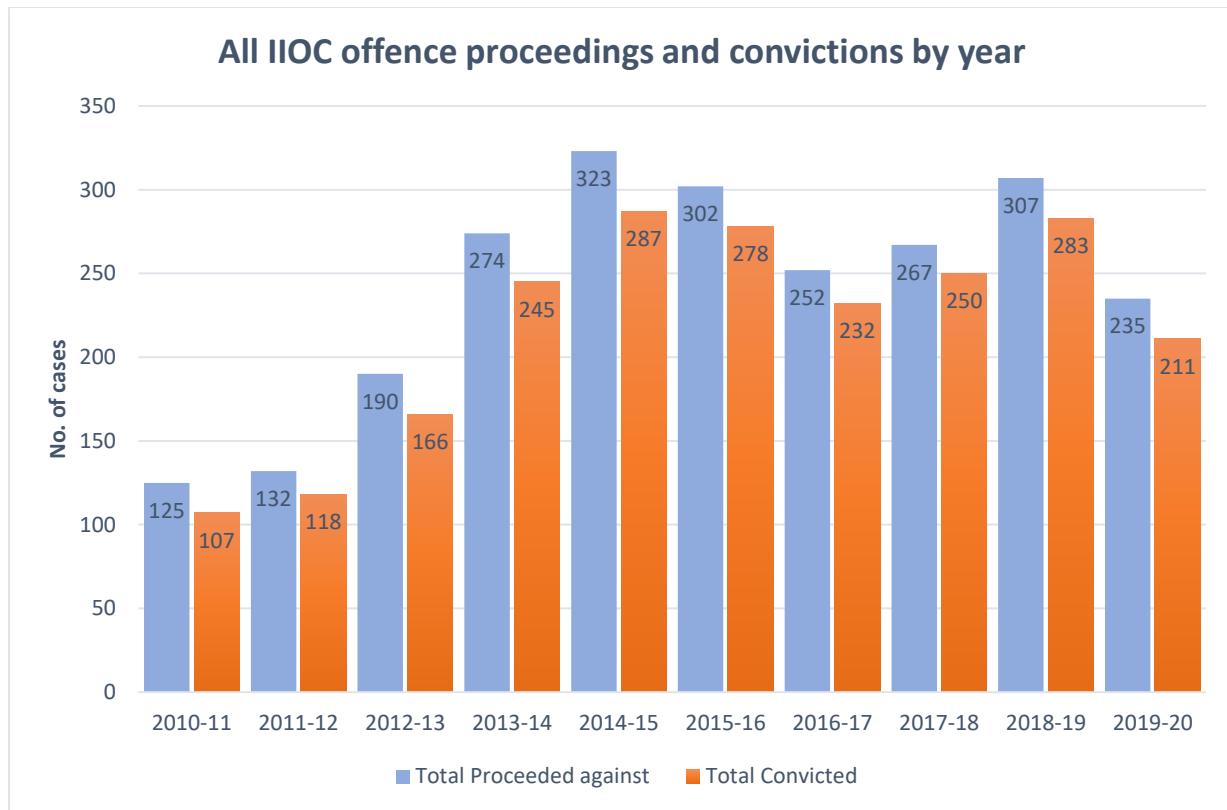
2.1.2. Cases passing through the Scottish criminal justice system

Statistics provided by the Scottish Government's Justice Analytical Services for the purpose of the present report include all proceedings and convictions in Scottish criminal courts between 2010-11 and 2019-20 where the "main charge"⁵³ was either making, distributing, possession with intent to distribute, or simple possession. There were no cases of advertising IIOC recorded between 2010-20. Appendix 1 contains the full data provided by the Justice Analytical Services.⁵⁴ Figure 2 shows the number of offenders proceeded against and convicted with an IIOC offence as the main offence in Scotland between 2010 and 2020.

⁵³ Defined as the charge receiving the most severe penalty (or disposal) if one or more charges are proved in a case. See Scottish Government (2021). *Criminal Proceedings in Scotland 2019-20* (2021) 13. <<https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2021/05/criminal-proceedings-scotland-2019-20/documents/criminal-proceedings-scotland-2019-20/criminal-proceedings-scotland-2019-20/govscot%3Adocument/criminal-proceedings-scotland-2019-20.pdf>> accessed 21 November 2021.

⁵⁴ The authors thank the professionals with the Justice Analytical Services for their generous cooperation in generating the statistics that are provided herein.

Figure 2. Number of IIOC offence proceedings and convictions, 2010-20.



As Figure 2 reflects, between 2010 and 2015, there was a steady increase in both prosecutions and convictions. Since then, the number of cases has remained relatively stable but with some fluctuation, most notably 27.4% and 30.9% drops in proceedings and convictions respectively from 2018-19 to 2019-20. The conviction rate has remained consistently high – around 90% – throughout the period.⁵⁵

2.1.3. Prevalence by specific offence

Figures 3 and 4 show the number of proceedings and convictions, respectively, for IIOC offences between 2010 and 2020, broken down by specific offences under the 1982 Act.⁵⁶

⁵⁵ I.e., the proportion of people with charge proved as a proportion of people proceeded against for a specific offence.

⁵⁶ One case in 2017-18 involved a charge listed only as “s 52(1)”. This case has been excluded from the analysis.

Figure 3. Number of IIOC offence proceedings by specific offence, 2010-20.

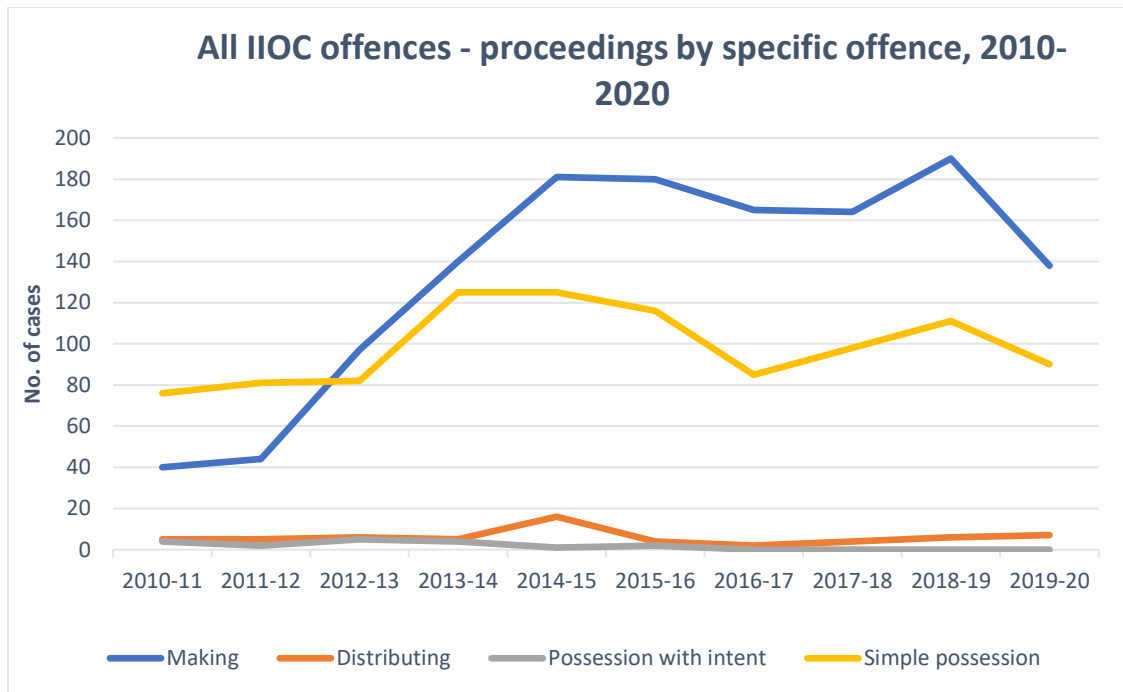
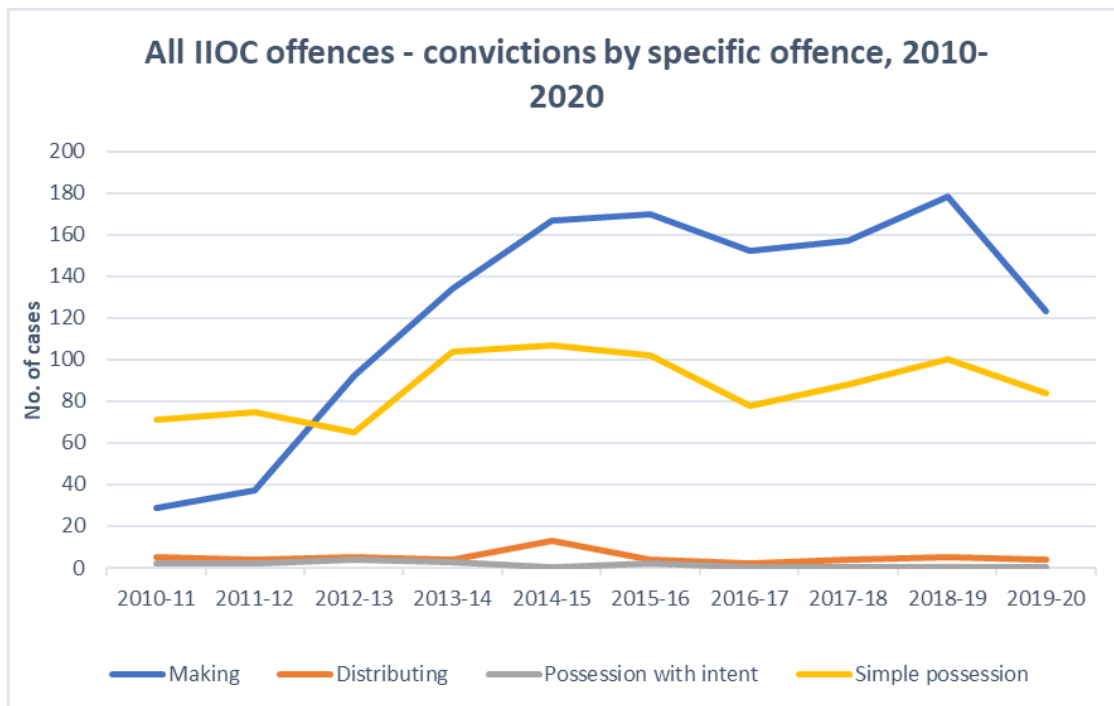


Figure 4. Number of IIOC offence convictions by specific offence, 2010-20.



Figures 3 and 4 show that proceedings are most commonly brought and convictions obtained for offences involving making photographs, followed by simple possession

offences (but see 2.2.4 on the confusion between these two offences in practice). Offences of distributing and possession with intent to distribute are far less common. The two graphs indicate similar case number trajectories over time for each of the listed offences. Presumably, this is because most cases where proceedings are officially commenced are resolved with guilty pleas and sentences quickly follow.

2.1.4. Sentence type received

The Scottish Government has also provided data on the types of sentences imposed for IIOC crimes. Between 2010-11 and 2019-20, an overall average of 68.0% of IIOC offence cases resulted in a community order or other non-custodial offence, with the remaining 32.0% resulting in custody. As Figure 5 shows, sentencers have relied on non-custodial sentences more heavily in the last six fiscal years compared to the first four, with the proportions ranging from a low of 54.2% in 2010-2011 to a high of 78.6% in 2015-16.

Figure 5. Percentage of IIOC convictions receiving custodial and non-custodial sentences, 2010-20.

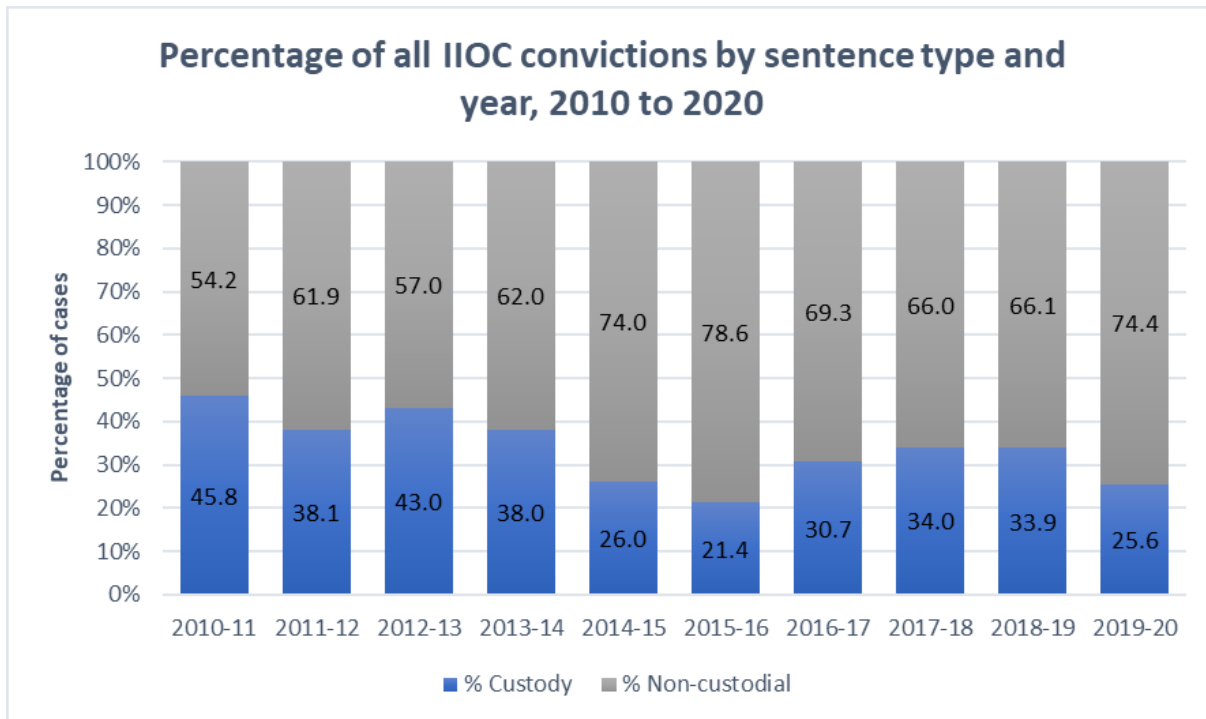


Figure 6 breaks down the numbers with the proportions of custodial versus non-custodial sentences given for each specific IIOC offence (excluding advertising), between 2010-11 and 2019-20.

Figure 6. Percentage of IIOC convictions receiving custodial and non-custodial sentences by specific offence, 2010-20.

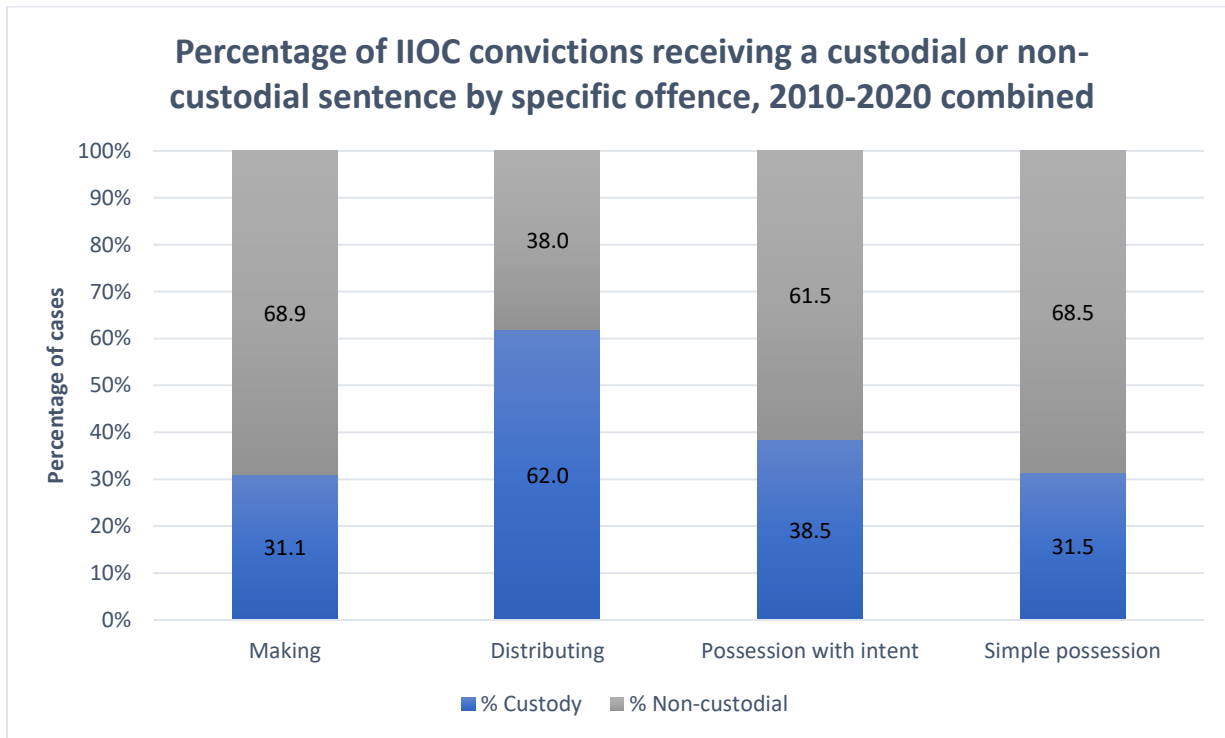
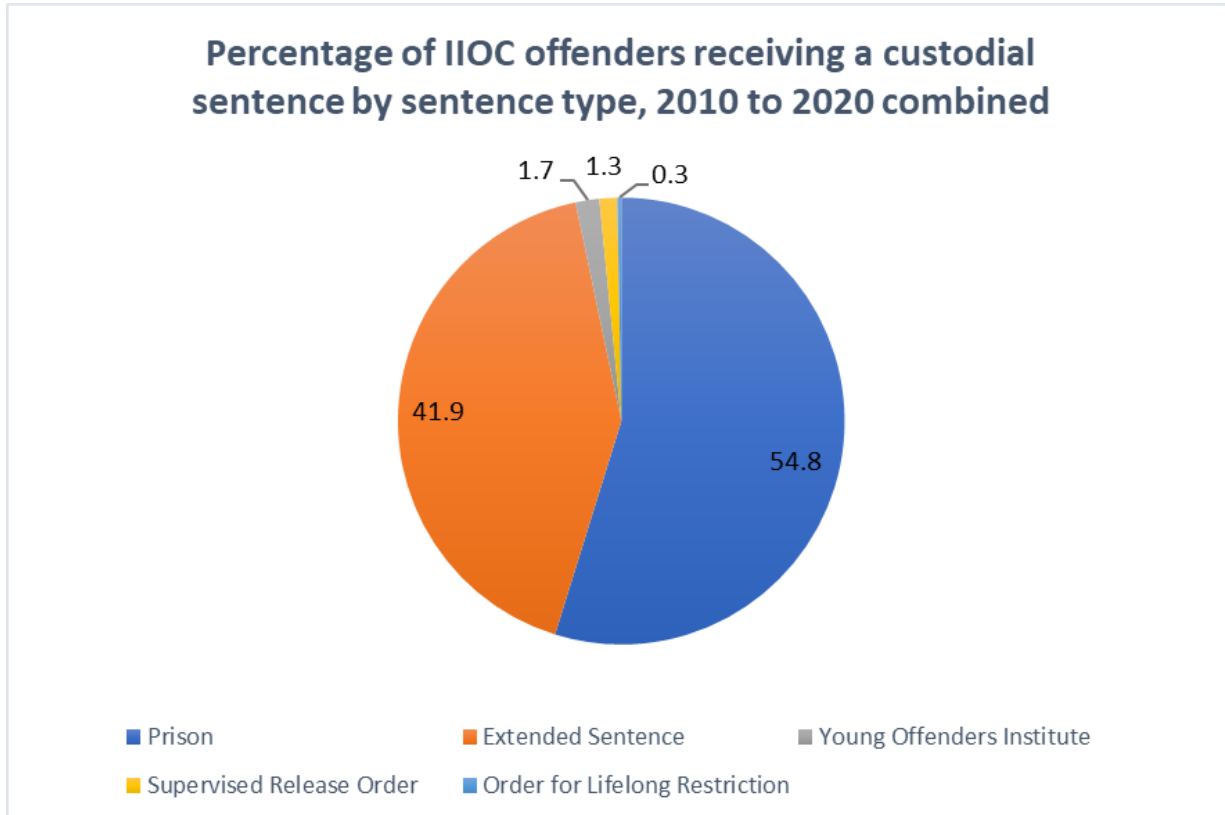


Figure 5 shows that when IIOC cases are combined, a majority received non-custodial sentences in every fiscal year covered. However, this is not the case when the offences are ungrouped. As seen in Figure 6, custodial sentences were the most likely option for distribution cases, being given in 62.0% of cases. Custodial sentences were used in less than half of cases for the other types of IIOC crimes. Notably, the proportions of custodial sentences were almost identical between making and simple possession cases (31.1% and 31.5% respectively) and lower than possession with intent to distribute (38.5%). While ‘making’ is generally considered a more serious crime than simple possession (the maximum penalty on indictment for making is 10 years compared to five years for simple possession), the two offences have equivalent custodial rates. The likely explanation is the case law interpretation of ‘making’ to include downloading (and consequent practice of charging cases of possession by downloading as making offences), which renders the behaviour akin to simple possession in terms of judgments on severity. In sum, the 31.1% incarceration rate for

making cannot be read to apply only to true production cases; in fact, there may be very few true production cases within this category.⁵⁷

For those receiving a custodial penalty, Figure 7 shows the percentage of offenders assigned to each type of custodial arrangement in the combined years between 2010 and 2020.

Figure 7. Percentage of IIOC offenders receiving a custodial penalty assigned to each sentence type, 2010-20.

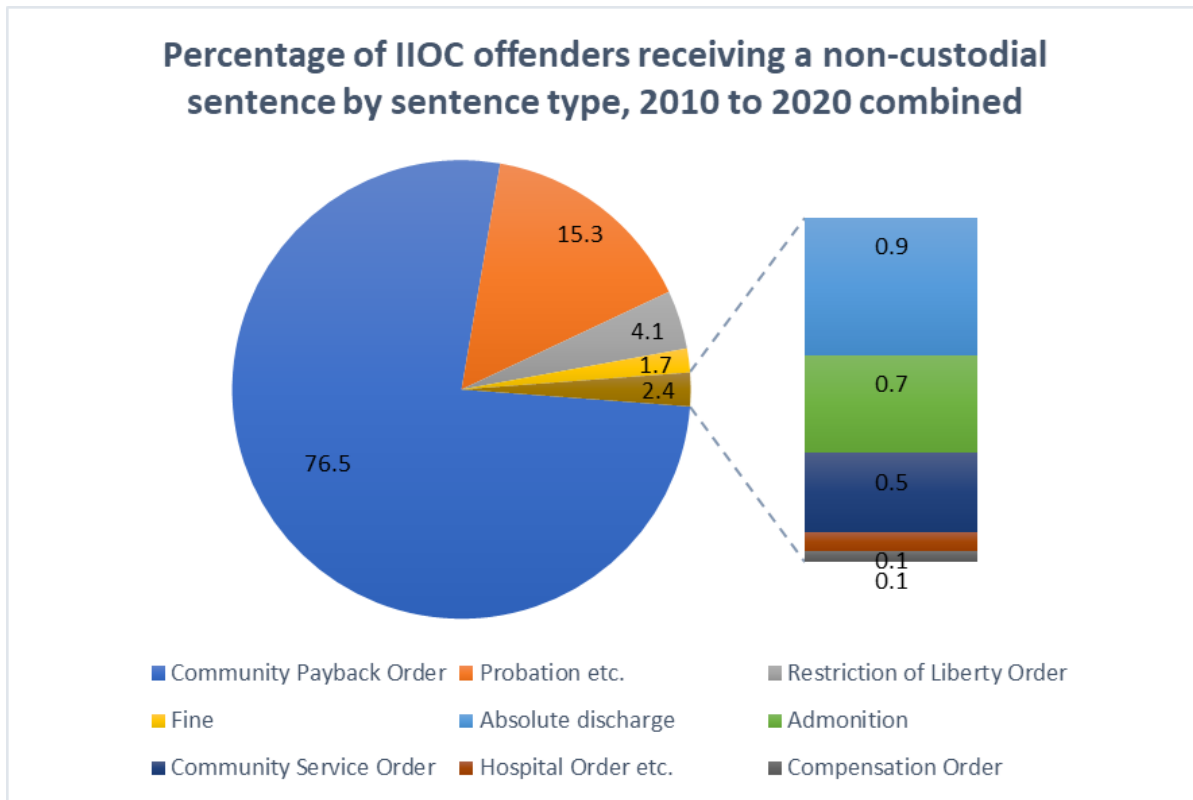


The vast majority of IIOC cases resulted in either a standard prison sentence (54.8%) or an extended sentence (41.9%). The high proportion of extended sentences is perhaps surprising, given the somewhat conflicting case law on the circumstances in which an extended sentence is appropriate for IIOC offenders (see Section 2.2.2). Fewer than 4% of offenders received any other type of custodial sentence.

⁵⁷ Comparable data on IIOC offences from Queensland, Australia, where production and possession are clearly distinguished in the legislation, suggest that the frequency of true production offences sentenced may be very low (3% of a sample of 1541 male offenders sentenced in Queensland for IIOC offences between 2006-07 and 2015-16): see Queensland Sentencing Advisory Council, *Sentencing Spotlight on child exploitation material offences* (2017) 8 <https://www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0010/519535/Sentencing-Spotlight-on-child-exploitation-offences.pdf> accessed 26.01.22. The equivalent figure for female offenders was 13% but is from a very small sample ($n = 24$) and so difficult to interpret.

For offenders receiving non-custodial sentences, Figure 8 reveals that by far the dominant outcome was a Community Payback Order (76.5%), followed by probation (15.2%).⁵⁸ Another sentencing option was received in just over 8% of cases.

Figure 8. Percentage of IIOC offenders receiving a non-custodial penalty assigned to each sentence type, 2010-20.

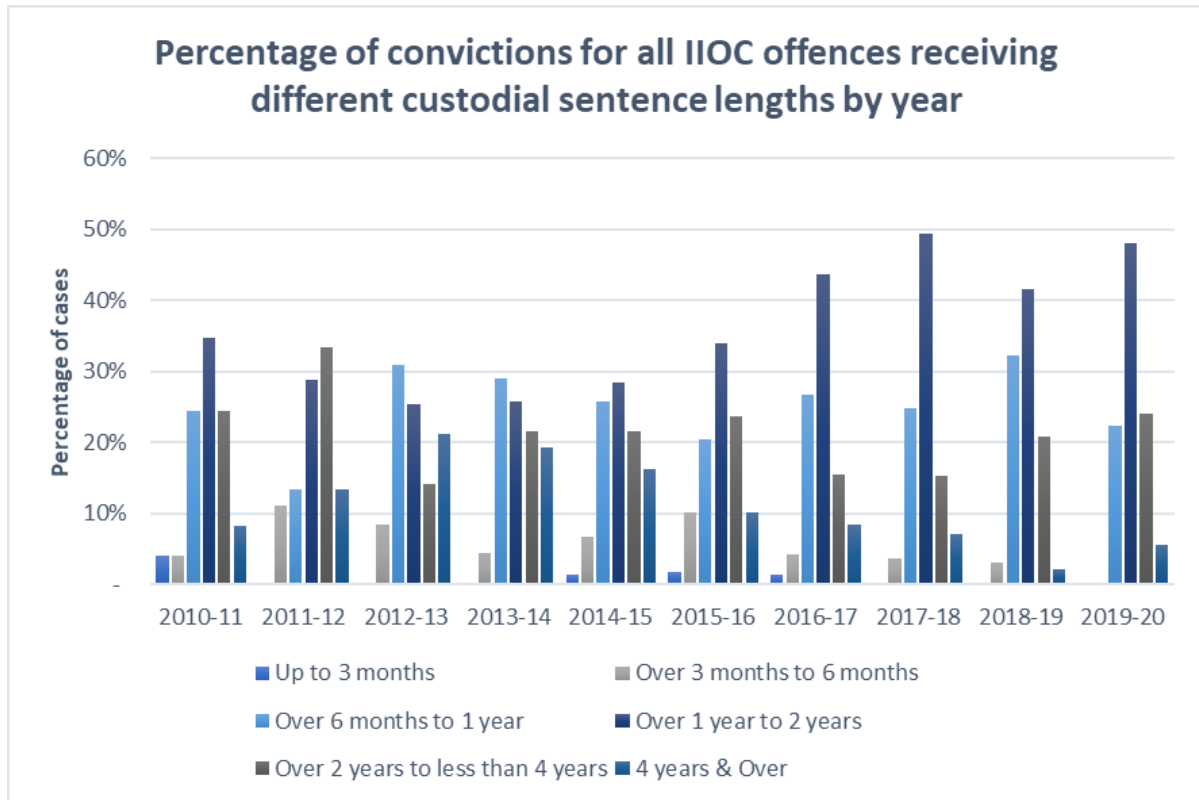


2.1.5. Custodial sentence lengths

Figure 9 provides information on the length of custodial sentences issued between 2010 and 2020. The sentence length data has been collapsed into six ordinal categories: up to three months, over three months to six months, over six months to a year, over one year to two years, over two years to less than four years, and four years and over. Figure 9 reflects the proportion of defendants in each fiscal year receiving a sentence in each such category for all IIOC offences combined.

⁵⁸ Community Payback Orders are only available for offences committed on or after 1 February 2011. Probation (sometimes accompanied by unpaid work requirements) and Community Service Orders are only an option for offences committed prior to 1 February 2011. Scottish Government, *Criminal Proceedings in Scotland, 2019-20* (n 53) 105.

Figure 9. Percentage of convictions for all IIOC offences receiving different custodial sentence lengths, 2010-20.



An important time trend is observable, whereby there is a significant increase in the proportion of custodial penalties at the range of one to two years after the fiscal year 2015-16. This may be related to the introduction in England and Wales of the IIOC Guideline and its subsequent adoption by the Scottish Courts as guidance for determining appropriate sentence lengths.⁵⁹ The IIOC Guideline ranges for high and medium severity cases intersect between one year and 18 months' custody. Sentences were also more likely in the latter years to be within a smaller range of custodial terms over six months to less than four years. In other words, there was a proportional reduction in the shortest sentences (six months or less) and longest sentences (four years and more) after 2015-16.

Figure 9 combined custodial lengths into ordinal bins, while Figure 10 below uses a continuous measure for the length of a prison sentence issued.

⁵⁹ However, this explanation does not account for what would be a two-year lag between the introduction of the new guideline and the change in sentencing patterns.

Figure 10. Average custodial sentence length (in days) received for all IIOC offences, 2010-20.

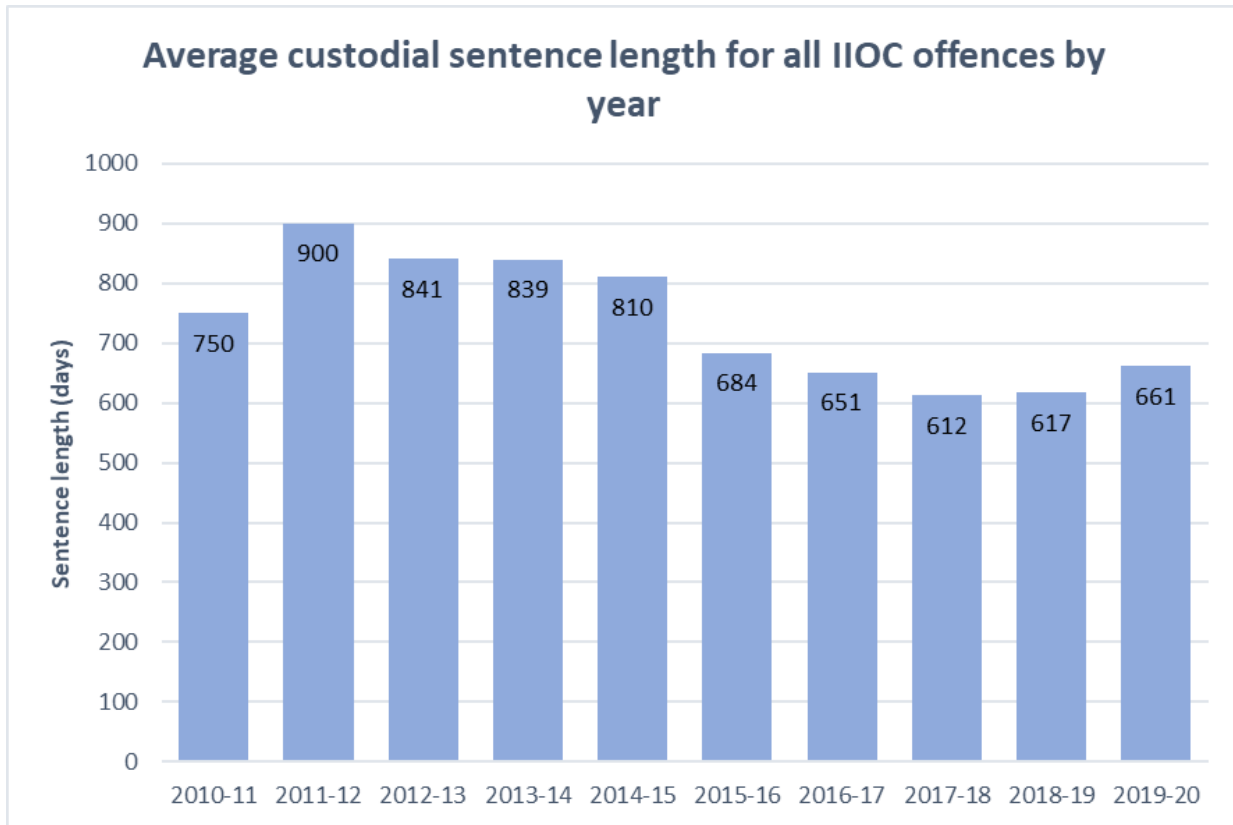
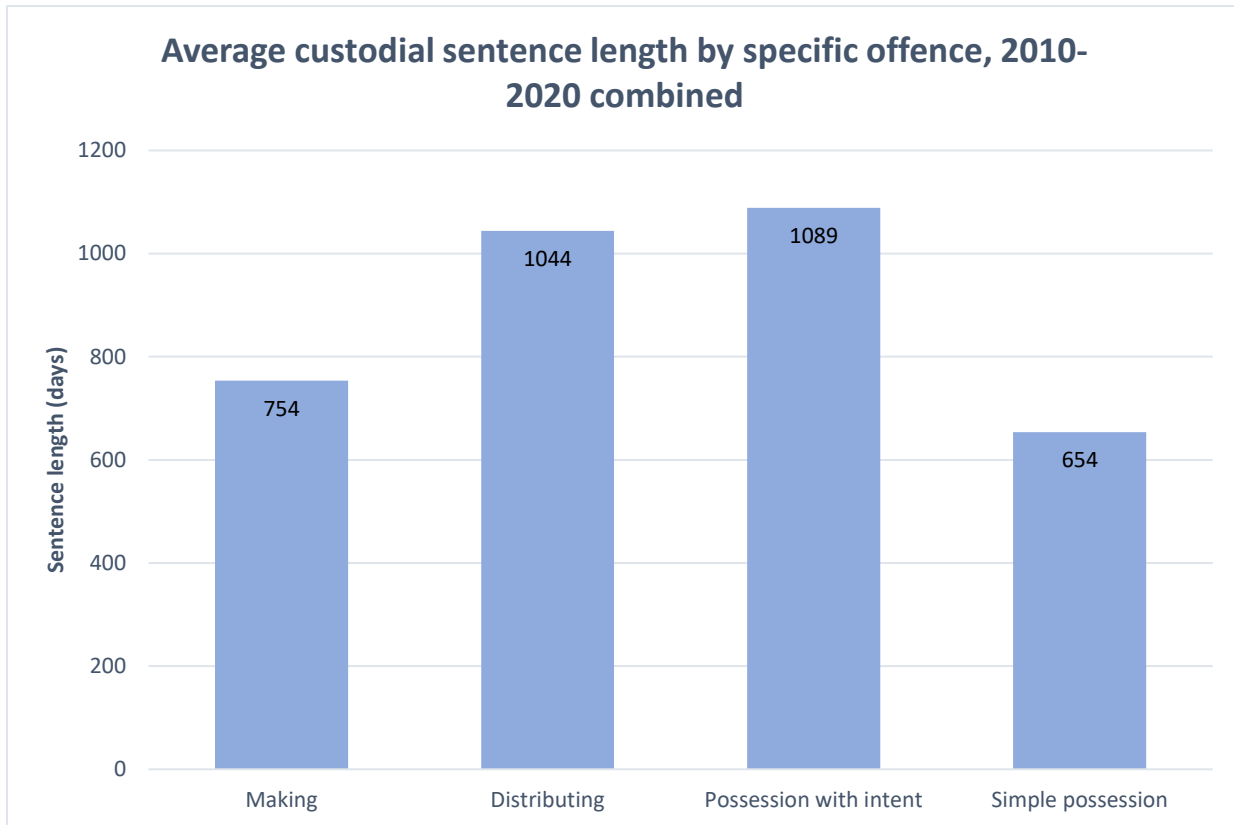


Figure 10 shows an apparent trend over time in a reduction in the average length of custodial sentences for IIOC offences combined in the period covered. From its highest average of 900 days (about two-and-a-half years) in 2011-12, there is a downward trend to 612 days (about one year and eight months) in 2017-18. In the latest two fiscal years of data, there is a slight uptick to an average of 661 days (about one year and ten months) in 2019-20. Figure 11 next breaks down the average custodial length information by IIOC offence type.

Figure 11. Average custodial sentence length (in days) received by specific IIOC offence, 2010-20 combined.



Broken down by specific offence, convictions for possession with intent to distribute received the longest average sentence (1089 days), followed by convictions for distribution (1044 days) making (792 days), and simple possession (659 days). Possession with intent to distribute appears to be an anomaly with a higher mean sentence than distribution (1089 days versus 1044 days, respectively) given distribution is a more serious offence than possession with intent to distribute. However, there were only five cases during the time period of possession with intent to distribute who were given custodial sentences, rendering the mean result potentially misleading with such a small sample.

Another comparison to notice here is the difference between the mean terms for making and simple possession cases. Whereas the prior Figure 6 indicated almost identical percentages of cases of making and simple possession receiving custodial sentences, here the data reflect that when given custodial sentences, the group convicted of making IIOC is associated with a longer mean custodial length of sentence than simple possession (754 days and 654 days, respectively, meaning just over three months' difference). It is possible that the somewhat higher figure for making offences may reflect the inclusion of some true production cases amongst those convicted under that

sub-section whose offences may be considered more serious than (non-production) downloading/ possession cases and thus attract a more severe sentence.

Figure 12. Average custodial sentence length (in days) received by specific IIOC offence by year, 2010-20.

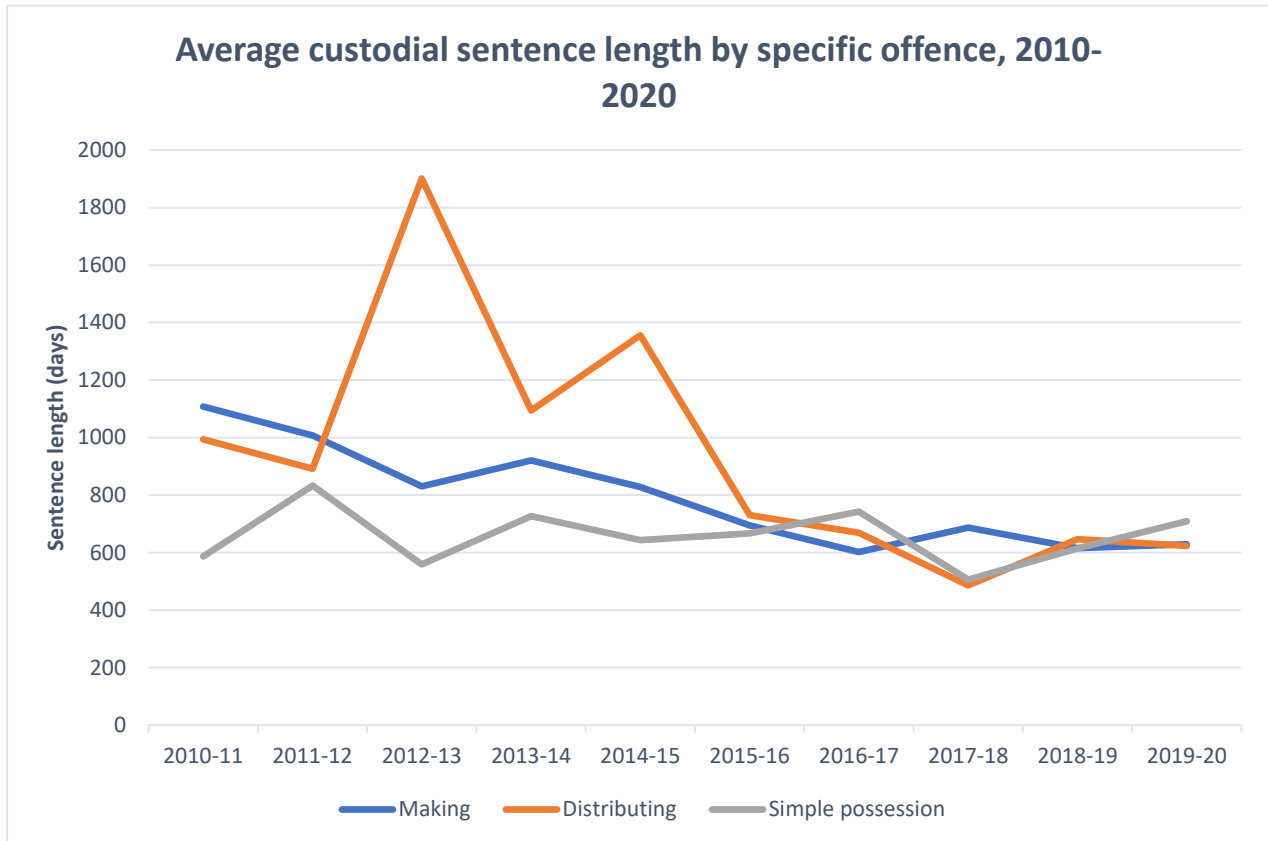
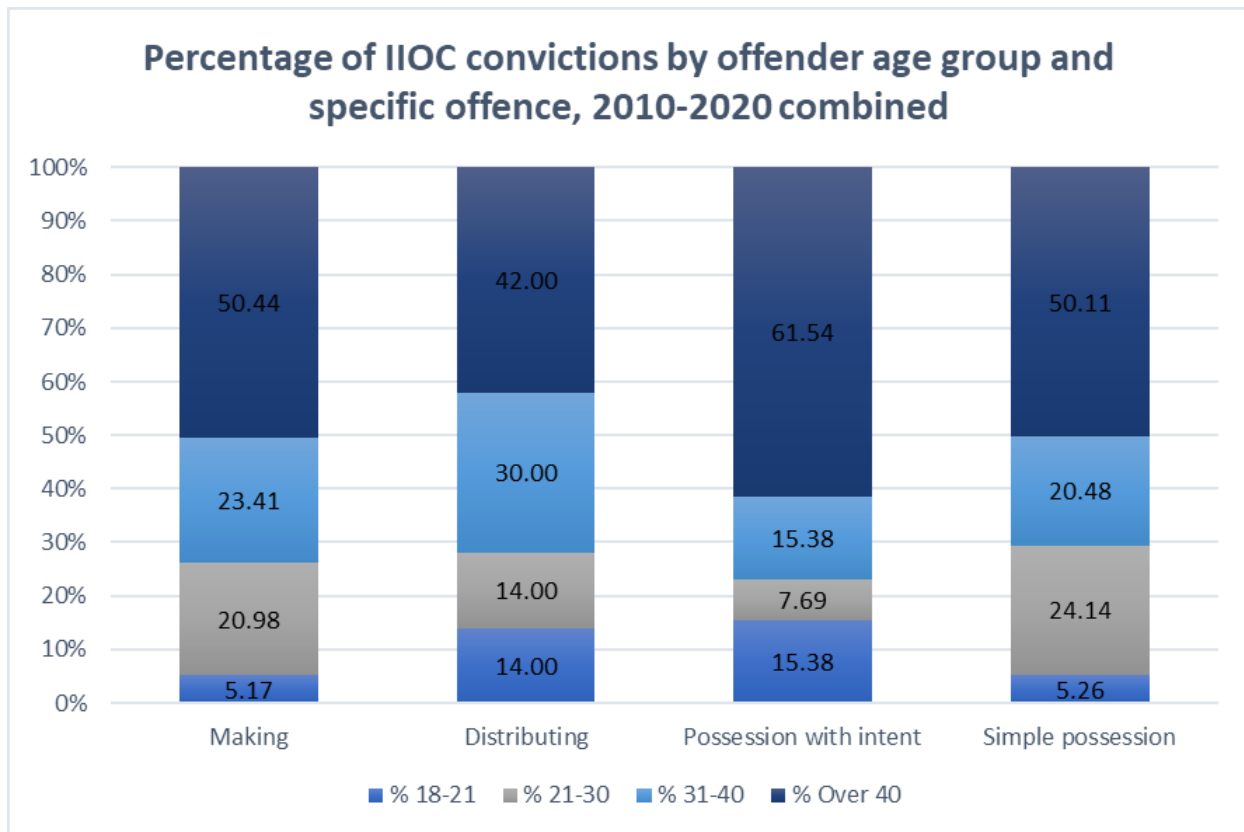


Figure 12 shows the trend of average custodial sentence lengths between 2010 and 2020 for making, distributing, and simple possession offences. Possession with intent has been removed from this figure since there were only five cases during the time period and none since 2016-17. It is striking that custodial sentence lengths for distribution offences were substantially lower over the most recent five years covered by the data than in the previous five-year period. Meanwhile, sentence lengths for making offences have declined and sentence lengths for simple possession have been fairly stable, although with an upward trajectory for the most recent three years of data. As a result, as of 2020, offenders convicted of all three specific offences shown who received a custodial sentence were receiving very similar average periods in custody (just over 600 days).

2.1.6. Offender age

Offender age is the only offender characteristic currently available, except that it is known that defendants convicted of IIOC offenders are overwhelmingly male (99.6% over the time period of 2010-20). Statistics on IIOC offences contain no information on offenders' previous offending. Figure 13 shows the percentage of convictions for each of the IIOC offences by the age group of the offender.

Figure 13. Percentage of all IIOC convictions received by offender age group and specific offence, 2010-20 combined.



For making, possession with intent to distribute, and simple possession cases, the majority of offenders were over 40 years old. Those convicted of an offence of distributing indecent images were somewhat younger, with only 42.00% being over 40. Another notable aspect is that a greater percentage of offenders convicted of distributing and possession with intent to distribute were within the youngest age group of age 18-21 than making or simple possession (14.00-15.38% for distribution/possession with intent and just over 5% for each of making and simple possession).

It is worth noting as regards the statistics provided in the foregoing tables and figures that the Scottish Government data do not take account of IIOC offences that are sentenced alongside other, more serious sexual offences.

2.2. Case law in Scotland

The following section provides an overview of issues arising in relation to the sentencing of IIOC offences in the Scottish Court of Criminal Appeal.

2.2.1. Relevance of sentencing purposes to IIOC offences

The Scottish Sentencing Council's Principles and Purposes of Sentencing guideline outlines the foundational aims of sentencing generally.⁶⁰ The overriding principle is that "sentences must be fair and proportionate". The purposes of sentencing are listed "in no particular order", as follows: protection of the public; punishment; rehabilitation of offenders; giving the offender the opportunity to make amends; and expressing disapproval of offending behaviour. Deterrence is mentioned only indirectly as a means of protecting the public. Rehabilitation is described in terms of reducing the risk of reoffending. As regards expressing disapproval of offending behaviour, an earlier Council public consultation report noted that "this purpose was intended to describe the concept of denunciation, which is not about being guided solely by public sentiment. It is a means of expressing, in a measured way, society's concern about and disapproval of the offending behaviour". In summary, the guideline notes that each individual sentence "should best achieve the purposes of sentencing that are appropriate to the particular case but should always reflect the core principle of fairness and proportionality" and that "in achieving the appropriate purpose(s) of a particular sentence, the efficient use of public resources may be considered".

The judges in *Graham* noted that in a case (such as the one heard in *Graham*) involving many thousands of "vile" images at a high level of severity, "the requirements of punishment, denunciation and general deterrence are paramount".⁶¹ This statement in *Graham* was cited with approval in *Wood et al.*,⁶² where the court observed, in refusing to overturn a custodial sentence for downloading IIOC, that while rehabilitation may be an important sentencing factor, deterrence was also significant.

⁶⁰ Scottish Sentencing Council, *Principles and purposes of sentencing: Sentencing guideline* (2018) <<https://www.scottishsentencingcouncil.org.uk/media/1964/guideline-principles-and-purposes-of-sentencing.pdf>> accessed 17 December 2021.

⁶¹ *Graham* (n 9) [53].

⁶² *Wood et al.* (n 23) [30].

2.2.2. Whether to give an extended sentence

As discussed above a court can award an extended sentence composed of a custodial period plus an additional period of up to 10 years on licence.⁶³ The Scottish courts have issued extended sentences in over 40% of cases in which they have sentenced IIOC offenders to custodial penalties.⁶⁴ However, there has been some judicial debate about the circumstances in which it is appropriate to add an extension period. In *Kay v HM Advocate*,⁶⁵ a first-instance extension period of 30 months was reduced to 12 months on the basis that the offender was considered at low risk of re-offending. In *Wood et al.*,⁶⁶ the court held that an extension period should only be used to protect the public from serious harm, such that ordering an extension as a means of ordering treatment considering the defendant's risk profile was unjustified. The *Wood* opinion further reflected on the allegation that a defendant who downloaded IIOC qualified as a serious risk to the public, arguing:

“[I]t is simply not possible to classify these appellants as posing a risk of “serious harm” to the public were they to be released during the course of, or at the end of, the period of custody imposed. In order to reach a contrary conclusion, a somewhat convoluted course of reasoning would require to be adopted, whereby a connection would be established between accessing the pornographic images and the risk to those who might appear in similar images in the future. Such a connection does exist in general terms, but to classify it as involving a risk of “serious harm” to the public in the sense intended in the legislation is an error.”⁶⁷

A recent decision followed *Wood et al.*, in ruling that a high risk of non-contact IIOC offending was not sufficient to constitute serious harm justifying an extended sentence, referring to expert evidence that a small percentage of IIOC offenders commit contact sexual crimes.⁶⁸

However, *Doherty v HM Advocate*⁶⁹ – a case involving offences of distributing and simple possession – distinguished *Wood et al.* and upheld an extended sentence, because the offender's behaviour “suggested an intensifying pattern of behaviour... moving from possession to distribution; progressing to discussing these images... watching live-streamed images as well as pre-recorded ones and developing a

⁶³ Criminal Procedure (Scotland) Act 1995.

⁶⁴ See Table 3.

⁶⁵ [2005] HCJAC 48.

⁶⁶ *Wood et al.* (n 23) [27].

⁶⁷ *ibid* [27]. The judges suggested, though, that the Scottish Government and/or Scottish Sentencing Council review this and consider allowing a “deterrent custodial sentence” to be combined with “extended supervision”.

⁶⁸ *Webster v HM Advocate* [2022] HCJAC 8.

⁶⁹ [2018] HCJAC 72.

motivation to seek out ever more extreme images”.⁷⁰ In the circumstances, there was a “sufficiently established connection between the appellant’s offending and the risk to the public.”⁷¹

In *McArthur v HM Advocate*⁷² the appellant made an argument similar to that seemingly upheld in *Wood et al.*, that incapacitating him (who did not produce or inspire others to view) through an extended sentence would not protect the public from others who would create new IIOC.⁷³ The court held that there was nevertheless adequate evidence to support an extended sentence, given that the defendant was at high risk of committing new IIOC crimes, he minimised his offending behaviour, and had been actively engaged in illicit Internet communities discussing child sexual abuse.

2.2.3. Custodial sentences for simple possession offences

In *Ryder v HM Advocate* (a case based on the 2007 England and Wales guideline), the offender had been convicted of possessing indecent images and sentenced to 4 years and 10 months’ custody.⁷⁴ The 2007 Guideline proposed a starting point of three months’ imprisonment for a comparable offence. However, the court referred to s204(2) of the Criminal Procedure (Scotland) Act 1995: “a court shall not pass a sentence of imprisonment unless it considers that no other method of dealing with the case is appropriate” and took the view that the most important consideration in the case was the offender receiving professional treatment for his entrenched habit of viewing internet pornography.⁷⁵ The offender’s sentence was therefore reduced to a three-year community payback order which included attendance at a treatment programme. Another relevant factor was that the offender was not believed to constitute an immediate danger to the public, even though he was considered to be at major risk of re-offending with IIOC. Similarly, in *Taylor v HM Advocate* the court concluded that legitimate concerns about the offender’s attitude and the protection of the public were best met by a two-year probation order and attendance at a treatment programme.⁷⁶

⁷⁰ *ibid* [14].

⁷¹ *ibid* [14].

⁷² [2013] HCJAC 121.

⁷³ Compare *R v Terrell* [2007] EWCA Crim 3079, in relation to the similar sentence of imprisonment for public protection under the Criminal Justice Act 2003, where the English Court of Appeal held such a sentence was inappropriate in a case of possession because the link between the offending act of downloading images and the possible harm to children was too remote to satisfy the requirement that the offender’s reoffending would cause serious harm. *Terrell* has been approved in *R v Guest* [2011] EWCA Crim 1762 (an offender involved in the sophisticated distribution of images could not be categorised as dangerous). See also *R v Hayes* [2016] EWCA Crim 663.

⁷⁴ *Ryder* (n 43). The offender’s criminal behaviour only involved possession of indecent images but, in line with common practice, he was charged with both simple possession and making offences.

⁷⁵ *ibid* [12].

⁷⁶ [2002] Scot (D) 16/6.

The High Court's position in *Ryder* and *Taylor* is echoed in wording added to the England and Wales IIOC Guideline – “where there is a sufficient prospect of rehabilitation, a community order with a sex treatment programme... can be a proper alternative to a short or moderate length custodial sentence”.⁷⁷ However, the court in *Wood et al.*, while acknowledging the IIOC Guideline wording, noted that where the offence involved a significant number of Category A images (penetrative sexual activity etc.), a custodial sentence should generally be imposed unless there is some exceptional circumstance, such as “relatively fleeting possession, or particularly compelling personal circumstances, such as extreme old age”.⁷⁸ This position was affirmed in *Morrison v HM Advocate*.⁷⁹

2.2.4. Use of SOPOs

A court may only award a SOPO if necessary, which is defined by the relevant act when the judge is “satisfied that the defendant’s behaviour since the appropriate date makes it necessary to make such an order, for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant.”⁸⁰ For typical terms that may be included in a SOPO, see *Connal v Dunn*.⁸¹ Still, the use of a SOPO is only appropriate if similar requirements are not already in place, such as through a sentence of incarceration or will likely be conditions placed while one is on license.⁸²

2.2.5. Role of risk assessment in sentencing generally

Questions of whether to give a custodial sentence, add an extension period, or use a SOPO all turn on the question of whether an offender is a sufficient danger to the public.⁸³ This, in turn, may depend heavily on the evaluation contained in the Criminal Justice Social Work Report (CJSWR), sometimes (but not necessarily) accompanied by a separate psychological assessment. The CJSWR will likely address issues such as the extent to which an offender recognises his or her behaviour is wrong, shows empathy for the victims involved, and is ready and willing to participate in a treatment programme. The aim of the CJSWR is to assist the court in making an overall assessment of the offender’s risk of reoffending, potential for harming the community,

⁷⁷ IIOC Guideline (n 22).

⁷⁸ *Wood* (n 23) [30].

⁷⁹ *Morrison* (n 30).

⁸⁰ Sexual Offences Act 2003, s.104(1)(a).

⁸¹ *Connal* (n 44).

⁸² *Moore* (n 25).

⁸³ See s.210A of the Criminal Procedure (Scotland) Act 1995; *Ryder* (n 43); *Taylor* (n 76).

and prospects for rehabilitation.⁸⁴ In reported case law, the offender's attitude has most often been noted as an aggravating factor, as in, for example, *Brown*,⁸⁵ where the fact the offender was in denial about his offences was cited as a factor in favour of a lengthy period of supervision on release or *McArthur*,⁸⁶ where the court upheld an extended sentence for distribution after a CJSWR stated that the offender had minimised his offending, appeared to feign regret, and showed little concern for the impact of his offending on victims.

2.2.6. Requirement for sentencers to view images involved

Sentencers have a discretion whether to look at the images involved; viewing a sample may be useful but sentencers should be careful of passing sentence when their emotions have been raised by what has been seen.⁸⁷

2.3. Summary of reported IIOC cases

Table 3 summarises a sample of reported cases involving IIOC offences heard in the Scottish Court of Criminal Appeal between 2001 and 2022. It is perhaps notable that the cases heard have been almost exclusively appeals against excessive sentences, rather than against sentences considered to be unduly lenient.

⁸⁴ In England and Wales, the IIOC Guideline includes a mitigating factor entitled "demonstration/taking steps to address offending behaviour". See further Section 6.2.8.

⁸⁵ *Brown v HM Advocate* [2010] SCL 889.

⁸⁶ *McArthur* (n 72) [5].

⁸⁷ *Graham* (n 9) [49]-[50]. See also the Australian case of *R v Porte* [2015] NSWCCA 174, where it was observed that providing a random sample of images from a collection may communicate the true nature of the material better than a formulaic classification process.

Table 3. Summary of reported IIOC case outcomes in the Scottish Court of Criminal Appeal by year

Case	IIOC offences	No./type of images	Duration of offence	Original sentence	Sentence after appeal
<i>Ogilvie v HM Advocate</i> [2002] JC 74	2 charges under s 52(1)(a) and 1 under s 52A(1).	22,000 images of pre-pubescent boys. Wide variety of sexual acts depicted.	Not stated.	3 concurrent sentences of 2 years.	3 and 6 months for s52(1)(a) breaches and 6 months for s52A(1) – all concurrent.
<i>Gair v HM Advocate</i> [2002] SCCR 54	Charge under s 52(1)(a).	1 video of a 14-year old girl.	N/A – 1 video.	6 month's custody.	Fine of £1,500.
<i>Taylor v HM Advocate</i> [2002] Scot (D) 16/6	Charge under s 52(1)(a).	> 7,000 images of girls under 16, in sexual poses or performing sexual acts, some with adults.	2 years.	12 months' custody + 2-year extension period.	Probation Order for 2 years with requirement to attend offender treatment and alcohol rehab programmes.
<i>McGaffney v HM Advocate</i> [2004] SCCR 384	Charges under ss 52(1)(a),(b) and (c).	> 6,000 images downloaded and distributed. Included abuse of children 2-3 yrs old and above.	4 years.	9 months' custody for s52(1)(a) offence, then 18 months for each of s52(1)(b) and (c), concurrent but consecutive to the s52(1)(a) sentence + 2-year extension period.	Total sentence of 18 months' custody for all three offences + 2-year extension period.

Case	IIOC offences	No./type of images	Duration of offence	Original sentence	Sentence after appeal
<i>Kay v HM Advocate</i> [2005] Scot (D) 7/4	Charges under ss 52(1)(a) and (b).	36 files, including moving images: 1 at L1, 1 at L2, 6 at L3 and 15 at L4, all in a shared folder.	2 months.	27 months' custody + 30-month extension period.	27 months' custody + 12-month extension period.
<i>Peebles v HM Advocate</i> [2007] HCJAC 6	Charges under ss 52(1)(a), (b) and (c) and s 52A(1).	7 moving image files, 154 still images of children, in a shared folder.	1+ year.	Not stated in report (appeal did not relate to sentence).	Not stated in report.
<i>Jordan v HM Advocate</i> [2008] SCCR 618	Charge under s 52(1)(a).	8,073 still images, 3 video files. Rep sample included males from babies to early teens and involved penetrative sex and other sexual activities.	5 months.	4 years' custody + 4-year extension period.	4 years, 8 months' custody + 5-year extension period (no guilty plea reduction applied to extension).

Case	IIOC offences	No./type of images	Duration of offence	Original sentence	Sentence after appeal
<i>Brown v HM Advocate</i> [2010] SCCR 393	Charges under ss 52(1)(a) and (b).	4,452 images (759 video, 3,747 still) – various age groups, including under 5s. 2,463 at L1, 193 at L2, 502 at L3, 1,354 at L4, 30 at L5. 4,800-9,000 images distributed.	Not stated.	6 years' custody + 4-year extension period.	6 years' custody (calculated differently) + 4-year extension period.
<i>HM Advocate v Graham</i> [2010] HCJAC 50 – Guideline judgment	Charges included 2 under ss 52(1)(a) and (b).	80,205 images (79,011 still, 1,194 moving). 56,897 at L1, 4,293 at L2, 8,162 at L3, 9,218 at L4, 1,635 at L5.	4 ½ years.	6 months' custody, running concurrent with sentence for other charges of 9 months' custody + 5-year extension period.	6 years, 4 months' custody, concurrent with other sentences.
<i>Harris v HM Advocate</i> [2012] HCJAC 5	Charges under ss 52(1)(a) and 52A(1).	614 images. Severity not stated.	Not stated.	3 years' probation.	Appeal did not relate to sentence length.
<i>Ryder v HM Advocate</i> [2013] HCJAC 63	Charge under s 52(1)(a) and also s 51A (extreme pornography).	Images of children aged 3-16. Stills: 4,176 at L1, 26 at L2, 28 at L3, 63 at L4, 16 at L5. Videos: 3 at L1, 6 at L2, 2 at L5.	11 years.	4 years, 10 months' custody + 3-year extension period, for both offences.	Sentenced for s52(1)(a) only – 3-year CPO with conditions including treatment programme.

Case	IIOC offences	No./type of images	Duration of offence	Original sentence	Sentence after appeal
<i>McArthur v HM Advocate</i> [2013] HCJAC 121	Charges under ss 52(1)(a) and (b).	26,728 stills, 594 videos, infants to 15 yrs. 70 stills, 14 videos at L5, "considerable number" at L4.	11 years (possession); 3 years (distribution).	3 years, 2 months' custody for s52(1)(a) and 4 years, 6 months for s52(1)(b). Extension period not stated.	Original sentence upheld.
<i>Archer v HM Advocate</i> [2013] HCJAC 162	Charge under s 52(1)a.	11,498 images, children 1-15 yrs. Stills: 7,384 at L1, 614 at L2, 1,897 at L3, 937 at L4, 50 at L5. Videos: 33 at L1, 22 at L2, 37 at L3, 70 at L4, 4 at L5.	2 years.	36 months' custody.	Original sentence upheld.
<i>Connal v Dunn</i> [2014] HCJAC 77	Charges under ss 52(1)(a) and (c). THEN continued offending.	Not stated.	Not stated.	3 years' probation + treatment programme. THEN SOPO with internet restrictions.	Terms of the SOPO amended to allow, inter alia, supervised internet access.
<i>Milligan v HM Advocate</i> [2016] HCJAC 63	Various charges incl. s 52(1)(b).	Not stated.	Not stated.	7 years' custody + 1-year extension period for s52(1)(b) offence.	Appeal did not relate to sentence length.

Case	IIOC offences	No./type of images	Duration of offence	Original sentence	Sentence after appeal
<i>Wood et al. v HM Advocate</i> [2017] HCJAC 2	Offender 1. Charges under ss 52(1)(a) and 52A(1).	1,843 stills: 459 A, 399 B, 985 C (E&W categories). 236 videos: 145 A, 51 B, 40 C. Children 3-14 yrs.	2 ½ years.	16 months' custody + 24 months' extension period.	Extension period quashed; rest of sentence upheld.
	Offender 2. Charge under s 52(1)(a).	101 images. 46 A (26 videos), 13 B, 42 C. Girls 8-16.	6 years.	8 months' custody + 3 years' extension period.	Extension period quashed; rest of sentence upheld.
	Offender 3. Charge under s52(1)(a).	188 stills: 6 A, 10 B, 172 C. 540 videos: 332 A, 137 B, 71 C. Boys 3-11 yrs, girls infants-7 yrs.	2 years.	9 months' custody + 3 years' extension period.	Extension period quashed; rest of sentence upheld.
<i>Moore v HM Advocate</i> [2018] HCJAC 40	Charges under ss 52(1)(a) and (b) and 52A(1).	863 images (799 still, 64 video): "a large percentage" in A (incl. 46 videos).	7 years.	27 months' custody + 10-year SOPO.	Custodial sentence upheld, SOPO quashed b/c custody + licence would have similar conditions.
<i>Doherty v HM Advocate</i> [2018] HCJAC 72	Charges under ss 52(1)(b) and 52A(1).	152 videos: 74 A (including one 19 min "very extreme" video), 65 B. 61 stills: 61 A, 22 B. 86 files distributed.	Not stated.	22 months' custody + 15-month extension period.	Sentence upheld.

Case	IIOC offences	No./type of images	Duration of offence	Original sentence	Sentence after appeal
<i>Morrison v HM Advocate</i> [2019] HCJAC 14	Charge under s 52(1)(a).	22,179 images. 18 A, 49 B, 22, 112 C. "Many" related to "very young children".	13 months.	20 months' custody + 24-month extension period.	10 months' custody, extension period quashed.
<i>Leadbetter v HM Advocate</i> [2020] HCJAC 51	Charges under ss 52(1)(a) and 52A(1) + under 51A (extreme pornography).	36 images of children 3-13 yrs. (+ extreme pornographic images).	Not stated.	Concurrent sentences of 6 months' custody + 6 months' custody for the ss52 and 52A charges. 18 months' custody for s51A, also concurrent. 16-month extension period.	Appeal not related to the original sentence.
<i>Webster v HM Advocate</i> [2022] HCJAC 8	Charges under ss 52(1)(a) and 52A(1).	Not stated.	3 years.	30 months' custody + 36 month extension period + 5-year SOPO.	30 months' custody; extension period quashed.

3. Sentencing of IIOC offences in other jurisdictions

The frameworks for sentencing IIOC crimes in other common law jurisdictions may be informative. The discussion here will review choices made in England and Wales, United States, Australia, and Ireland.

3.1. England and Wales sentencing legislation and guideline

Sentencing of IIOC offences in England and Wales is of particular relevance to Scotland, given that the guideline judgment of *Graham* specifically mandates the use of England and Wales sentencing guidelines in such cases.⁸⁸ The relevant guidelines were introduced earlier (see Section 1.2), with some additional information provided here.

3.1.1. Legislation

The legislation in England is contained in two Acts, both of which use substantially the same wording as the Scottish legislation. Section 1 of the Protection of Children Act 1978 (the “1978 Act”) covers (a) taking or making indecent photographs or pseudo-photographs of a child; (b) distributing or showing such photographs or pseudo-photographs; (c) possessing such photographs with a view to distributing them; and (d) advertising the distribution of such photographs.⁸⁹ Section 160 of the Criminal Justice Act 1988 (the “1988 Act”) covers possession of indecent photographs or pseudo-photographs of a child.⁹⁰

3.1.2. Other specific guidance in the IIOC Guideline

Determining the severity of an image collection. In most cases the intrinsic character of the most serious of the offending images will initially determine the appropriate severity category in terms of the three Categories in the IIOC Guideline. If, however, the most serious images are unrepresentative of the offender’s conduct, a lower category may be appropriate. The England and Wales Court of Appeal in *R v P(R)* questioned

⁸⁸ *Graham* (n 9).

⁸⁹ The Crown Prosecution Service website provides further guidance on the interpretation of “pseudo-photograph”: “If the image was printed would it look like a photograph (or a pseudo-photograph)? If it would then it should be prosecuted as such. For example, some high quality computer generated indecent images may be able to pass as photographs and should be prosecuted as such. The CPS has had successful prosecutions of computer-generated images as pseudo-photographs”. See <https://www.cps.gov.uk/legal-guidance/indecent-and-prohibited-images-children>

⁹⁰ The same wording used in the Criminal Justice Act 1988 was inserted into the Civic Government (Scotland) Act 1982 by s 161 of the Criminal Justice Act 1988 and subsequently amended in parallel with the Criminal Justice Act 1988.

the guidance in the IIOC Guideline that the highest category of image should not determine sentencing if it is “unrepresentative” of the images as a whole.⁹¹ The court’s logic was as follows:

“[A]ssume for example there had been the same number of category A and category B images (eight in total) but only, say, 10 category C images rather than 1,200. In such circumstances the most serious images in category A and B would no longer be ‘unrepresentative of the offender’s conduct’, and on the fact of it a starting point consistent with the guidelines would have been appropriate for category A and B – six to 12 months. It surely cannot be the case that because there are vastly more rather than fewer images at category C, this somehow reduces the seriousness of the category A and B offending.”⁹²

However, other recent Court of Appeal cases have nevertheless evaluated image collections based on the proportion of higher-level images, such as *R v Nestoros*,⁹³ where the court evaluated a set of images based on the fact that “64 per cent were Category A, which was an extremely high proportion”⁹⁴ or *R v Marshall*,⁹⁵ where the Court of Appeal questioned the length of a first-instance sentence based on category A images because “the preponderance of these images were category C images”.⁹⁶ It could be argued that having a few only or mostly category A images rather than a few in amongst thousands of other images perhaps illustrates a focus on particularly disturbing imagery which may indicate a more extreme level of sexual deviance and translate into higher risk of recidivism and further harm to the public.

Harris makes a contrary point about classifying a collection of mixed-level images:

“[c]onsider the situation where an individual accesses images on a website, or downloads images from a file-sharing service, and proceeds to “flick” quickly through those images to find the type of material that best satisfies his or her particular desire. If there are 40 level 5 images (now category A), 40 level 3 images (now category B) and 40 level 1 images (now category C), it might be appropriate to begin with the sentence for the level 3 images and make an uplift for the level 5 images. But, if in fact, he has “flicked” past the level 1 and 3 images and settled on the level 5 images, is in truth, a level 5 case.”⁹⁷

⁹¹ [2015] EWCA Crim 941.

⁹² *ibid* [8].

⁹³ [2015] EWCA Crim 1424.

⁹⁴ *ibid* [9].

⁹⁵ [2015] EWCA Crim 784.

⁹⁶ *ibid* [18].

⁹⁷ Harris (n 12).

Use of community sentences. Where there is a sufficient prospect of rehabilitation, a community order with a sex offender treatment programme requirement under part 3 of schedule 9 of the Sentencing Code⁹⁸ can be a proper alternative to a short or medium length custodial sentence. The 2012 guideline consultation noted that intensive community-based sentences involving a targeted treatment programme may be more appropriate than a short custodial sentence as they “may be more likely to achieve the purposes of sentencing and of protecting the public because the offender’s thinking and behaviour will be better addressed via treatment and the degree of risk posed to the community by the offender can be closely monitored.”⁹⁹ In Scotland, the court in *Wood et al.*,¹⁰⁰ citing *Graham*,¹⁰¹ noted that notwithstanding the guidance in the IIOC Guideline, where a possession case involved category A images, a particular circumstance such as compelling personal circumstances would be needed to justify a community sentence.¹⁰²

Lack of guidance on aggravators and mitigators. One final notable feature of the IIOC Guideline is that while it provides a list of aggravating and mitigating factors, there is very little supporting information on what they mean in practice and how they should be evaluated in court.¹⁰³ Researchers have argued for more guidance, including as regards the weight to be given to factors for particular offences (as seen in the case law relating to guilty pleas and previous good character for IIOC offences) and the rationale behind each factor – with particular consideration given to controversial factors.¹⁰⁴

⁹⁸ Sentencing Act 2020, pt 3, sch 9.

⁹⁹ Sentencing Council for England and Wales, *Sexual Offences Guideline Consultation* (n 37) 84-85. This position was also approved by the Council of HM Circuit Judges in their response to the consultation.

¹⁰⁰ *Wood et al.* (n 23) [30].

¹⁰¹ *Graham* (n 9).

¹⁰² Arguably there is no conflict here, since the IIOC Guideline wording is focused on sentences where a non-custodial option is available, i.e., possession of category B or C images or distribution of category C images.

¹⁰³ The enhanced explanations provided in the Sentencing Council’s general guideline are welcome but limited in scope. See Sentencing Council for England and Wales, *General guideline: overarching principles* (2022) <<https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/#Step%20%20Aggravating%20and%20mitigating%20factors>> accessed 12 January 2022.

¹⁰³ Sentencing Council for England and Wales, *Sexual Offences Guideline Consultation* (n 37) 83.

¹⁰⁴ E.g., Julian V. Roberts, Mike Hough, and Andrew Ashworth (2011), ‘Personal mitigation, public opinion, and sentencing guidelines in England and Wales’ (2011) 7 Crim. L.R. 524; Warren Young and Andrea King, ‘Addressing problematic sentencing factors in the development of guidelines’ in Julian V. Roberts (ed), *Mitigation and Aggravation at Sentencing* (CUP 2011); Julian V. Roberts, ‘Aggravating and mitigating factors at sentencing: Towards greater consistency of application’ (2008) 4 Crim. L.R. 264; Mandeep K. Dhami, ‘Sentencing guidelines in England and Wales: Missed opportunities?’ (2013) 76 Law & Contemp. Probs. 1; Andrew Ashworth, *Sentencing and Criminal Justice* (6th edn, CUP 2015), 289; Keir Irwin-Rogers and Thomas W. Perry, ‘Exploring the impact of sentencing factors on sentencing domestic burglary’ in Julian V. Roberts (ed), *Exploring Sentencing Practice in England and Wales* (Palgrave MacMillan 2015);

3.1.3. Impact of the England and Wales guidelines

A 2013 resource assessment concluded that the 2013 sexual offences guideline would not have significant impact on resources, except for some cases of rape. Two main risks were identified: (1) the resourcing effect of increased consistency may not be neutral, as more sentences may be adjusted upwards than downwards (or vice versa). (2) Judges may not interpret the new guideline as intended.¹⁰⁵

The Sentencing Council for England and Wales reviewed the implementation of the 2013 sexual offences guideline in 2018, using a mix of statistical analysis of court and survey data and interviews with judges.¹⁰⁶ Some specific feedback was obtained in relation to IIOC offences.

Possession of indecent photographs. In 2015, 45% of offenders were given community orders, 27% were given suspended sentences and 25% were given immediate custody. Sentencing severity remained relatively stable before and after the guideline, with the adjusted average custodial length sentence equal to 1 year 8 months in 2013 and 1 year 7 months in the 12 months thereafter.¹⁰⁷

Key findings from the interviews (based on 8-9 interviews) were:

- Sentencers highlighted the importance of the ability to pass a community order or suspended sentence order that includes a rehabilitative requirement (e.g., requiring attendance on an offenders' treatment programme), particularly for first time offenders.
- There was concern that the public misunderstood sentencing in this area: "it is often (wrongly) assumed that offenders who receive such sentences 'get off lightly or scot free'".¹⁰⁸ Therefore, public education on sentencing practices and interventions may be useful to address these misperceptions.
- Judges expressed support for the approach focused on nature rather than volume of the images involved but acknowledged that volume still matters and should continue to be an aggravating factor. However, more assistance could be provided with the assessment of what constitutes a "high volume" of images.

Production and distribution of indecent photographs. Approximately 39% of offenders in 2015 were given community orders, 31% were given suspended sentences

¹⁰⁵ Sentencing Council for England and Wales, *Final resource assessment: Sexual offences* (2013) < https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Resource_Assessment_Sexual_offences.pdf > accessed 10 March 2022.

¹⁰⁶ Anna Carline, Emma Palmer, Mandy Burton, Sally Kyd, Pamela Jooman, 'Assessing the implementation of the Sentencing Council's Sexual Offences Definitive Guideline' (Sentencing Council for England and Wales 2018) < <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sex-offences-guideline-assessment.pdf> > accessed 25 February 2022.

¹⁰⁷ *ibid.* The report notes that comparison before and after the guideline is difficult as different data was collected before and after.

¹⁰⁸ Carline and others 2018 (n 106) 25.

and 27% were given immediate custody. The average custodial length sentence increased from 2 years 1 month in 2013 to 2 years 4 months in the following 12 months.

Key findings from the interviews (based on interviews with 8-9 judges):

- Judges were given a sentencing scenario involving distribution of indecent images, which was sentenced consistently by the small group who looked at it. All but one imposed a prison sentence (range = 8 months to 2 years). Some judges stated that they would not rule out a non-custodial sentence but the decision would depend on the information in the pre-sentence report.

3.2. US federal sentencing guideline on child pornography

The United States criminal justice system is federal in nature, whereby the federal government and each state maintains its own penal code. For jurisdictional purposes, most crimes are adjudicated at the state level. However, the federal government may prosecute offences through various jurisdictional links, including, as important here, when the crime involves interstate commerce.¹⁰⁹

In America, the U.S. federal government plays a predominant role in prosecuting IIOC as these offences typically require activities that cross state boundaries (thus giving the federal system jurisdictional authority) and state-level prosecutors and investigators often cede cases they could have pursued because of the more substantial resources in the federal system to manage technologically complex crimes. Consequently, we shall refer here to the sentencing practices of the U.S. federal government for IIOC.

The U.S. federal system has operated a guidelines-based system since the 1980s. The United States Sentencing Guidelines (“USSG”) are discretionary in nature. While the United States Supreme Court has ruled that the USSG are authoritative and federal judges (as the sentencers) must review relevant guidelines before passing judgment, individual judges retain the ability to disagree with specific USSG recommendations or policies or to otherwise depart from USSG formulae.¹¹⁰

The USSG maintains two separate frameworks regarding IIOC, one for production and the other for non-production cases. For purposes of the U.S. federal criminal code, production means the creation of the original image,¹¹¹ thus it is distinguishable from the term “making” in the relevant Scottish law, which has been interpreted (see Section 1.1) as including downloading an image. For the U.S. law and the USSG, downloading would be treated as receipt and thereby fall under the non-production guidance.

¹⁰⁹ Sara Sun Beale, ‘Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction’ (1995) 46 *Hastings Law Journal* 979.

¹¹⁰ *United States v. Booker*, 543 U.S. 220 (2005).

¹¹¹ 18 U.S.C. § 2251.

3.2.1. Production

The number of defendants sentenced in the federal system for IIOC has risen across fiscal years 2005-2019, largely “attributed to technological advancements that provide offenders easier access to victims as well as the prevalence of smartphones with built-in cameras and expansive storage.”¹¹² In the U.S. federal system, production of IIOC carries a mandatory minimum term of 15 years and a maximum of 30 years of imprisonment.¹¹³ For a defendant having a criminal history with one or more qualifying sexual offence convictions (depending on the various statutory details), the mandatory minimum rises to either 25 or 35 years and the maximum can rise to 50 years or life without parole. As consequences of mandatory minimums and high statutory maximums, in fiscal year 2019, all production defendants ($n = 512$) received a term of imprisonment, with a mean of 23 years.¹¹⁴ The mean of actual sentence terms issued was below the mean of the guideline minimum recommendation of 28 years.

The USSG for IIOC production contains multiple aggravating circumstances that increase the recommended guideline range of a prison sentence:

- (1) victim under age 16 (with a greater severity if under age 12);
- (2) the offence involved sexual contact or other sexual act;
- (3) the defendant knowingly distributed IIOC;
- (4) the consent was sadistic or masochistic in nature or featured an infant or toddler;
- (5) the defendant was a parent, relative, or legal guardian of the child involved, or the child was otherwise in the custody, care, or supervisory control of the defendant;
- (6) the offence involved the knowing misrepresentation of a participant’s identity (e.g., masquerading as a minor);
- (7) the offence involved the use of a computer to persuade or entice a minor to participate in sexually explicit conduct;
- (8) the exploitation of more than one minor;
- (9) engagement in a pattern of activity involving prohibited sexual conduct with a minor; or

¹¹² United States Sentencing Commission, *Federal Sentencing of Child Pornography Production Offenses* (2021), < https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20211013_Production-CP.pdf > accessed 10 March 2022.

¹¹³ 18 U.S.C. §§ 2251, 2252, 2252A, 2260.

¹¹⁴ United States Sentencing Commission, *Federal Sentencing of Child Pornography Production Offenses* (n 112).

(10) prior convictions for specified sex offences involving children.

3.2.2. Non-production

In contrast to production cases, the number of non-production cases sentenced in the federal system rose from fiscal year 2005, peaked in fiscal year 2012, and has declined since then (through the end of the reporting in fiscal year 2019).¹¹⁵ The penalty for IIOC possession ranges from probation to 20 years of imprisonment, unless the defendant has a qualifying prior sexual offence conviction, in which case a mandatory minimum of 10 years applies and the maximum increases to 20 years.¹¹⁶ The penalty is higher for receipt or distribution with a mandatory minimum of 5 years and a maximum of 20 years, unless the defendant has a qualifying prior sexual offence conviction, in which case a mandatory minimum of 15 years applies with a maximum of 40 years. Briefly noted here is that a longstanding debate exists as to whether possession and receipt of IIOC are truly distinguishable (i.e., receipt being a logical precursor to possession),¹¹⁷ but the statutory peculiarity remains.

In fiscal year 2019, 99% of non-production cases ($n = 1,340$) received a term of imprisonment with a mean of nine years.¹¹⁸ This is below the mean of the USSG suggested minimum of 11 years.

Another guideline (i.e., distinct from the production guideline) provides recommendations on trafficking IIOC offending, most typically involving distribution, receipt, or possession.¹¹⁹ The U.S. Sentencing Commission staff has for years been clear that this guideline, most of it crafted prior to 2005, is outdated.¹²⁰ Senior staff has recommended substantive changes to the aggravating factors, but for various reasons no action has been taken either by the Commissioners (the Commission has for several years lacked a quorum as terms ended without departing Commissioners being

¹¹⁵ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (2021) < https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210629_Non-Production-CP.pdf > accessed 10 March 2022.

¹¹⁶ 18 U.S.C. §§ 2252, 2252A, 2260.

¹¹⁷ United States Sentencing Commission, *The History of the Child Pornography Guidelines* (2009) < https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf > accessed 10 March 2022.

¹¹⁸ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115).

¹¹⁹ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115).

¹²⁰ United States Sentencing Commission, *Federal Child Pornography Offenses* (2012) < https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf > accessed 20 February 2022.

replaced) or by Congress as certain of the recommendations would require statutory amendments.¹²¹

The non-production USSG currently in force contains these aggravators:

- (1) victim under the age of 12 or appearing to be pre-pubescent;
- (2) defendant distributed IIOC;
- (3) content is sadistic or violent;
- (4) exploitation of an infant or toddler;
- (5) engagement in a pattern of activity involving sexual exploitation of a minor;
- (6) use of a computer to commit the offence; and
- (7) a collection of 600 or more images (with a specific calculation for moving images).

One reason the commission staff believe this USSG to be outdated is that most of the aggravators are present in almost every case, with the exception of the two regarding distributing IIOC and pattern of activity involving sexual exploitation.¹²² Consequently, the current USSG largely fails to distinguish between more or less severe cases. The staff has suggested that, instead, better ways to differentiate would be around three factors regarding the defendant's collecting behaviour, involvement in child sexual exploitation communities, and history of sexually exploitative conduct,¹²³ generally described in an earlier report as follows:

- (i) the content of an offender's child pornography collection and the nature of an offender's collecting behaviour (in terms of volume, the types of sexual conduct depicted in the images, the age of the victims depicted, and the extent to which an offender has organized, maintained, and protected his collection over time, including through the use of sophisticated technologies);
- (ii) the degree of an offender's involvement with other offenders – in particular, in an Internet "community" devoted to child pornography and child sexual exploitation; and

¹²¹ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115).

¹²² United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115).

¹²³ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115).

- (iii) whether an offender has a history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offence.¹²⁴

The severity of statutory sentences and the outdated aggravating factors have made the non-production USSG a basis of controversy for many years.¹²⁵ These foundations could explain why many prosecutors and judges engage in a variety of methods to avoid the non-production IIOC USSG in terms of departing from its recommendations and generally sentencing below the recommended ranges.¹²⁶ However, this attitude is not consistent, such that the commission staff bemoans the significant rate of departures, yet amidst an environment in which other judges strictly comply with the non-production USSG, thereby causing sentencing disparities for otherwise similarly-situated individuals.¹²⁷

3.3. Sentencing of IIOC offences in Australia

3.3.1. Legislation

Australia has eight State and Territory jurisdictions and a federal jurisdiction. All jurisdictions have enacted legislation criminalising the production, dissemination and/or possession of IIOC material. The definition of IIOC offending (referred to variously as child pornography, child abuse material, or child exploitation material) differs across jurisdiction but is substantially the same: material that depicts a child in a sexual context and (depending on the jurisdiction) either is for the sexual gratification of others or reasonable people would regard as being offensive. “Material” is not limited to photographic images but includes pictures/paintings/drawings, sculptures and written or printed material. For example, New South Wales and Victoria add “or any other thing of any kind”.¹²⁸

All Australian jurisdictions distinguish production, distribution and possession of images, although the offences are grouped differently in the relevant legislation across jurisdictions. Every jurisdiction has statutory maximum custodial sentences for offences

¹²⁴ United States Sentencing Commission, *Report to the Congress: Federal Child Pornography Offenses* (2012), pgs. xvii-xviii < https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf > accessed 10 March 2022.

¹²⁵ Melissa Hamilton, ‘The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?’ (2011) 22 *Stanford L. Policy Rev.* 545.

¹²⁶ Melissa Hamilton, ‘Political and Empirical Controversies in Federal Sentencing: Debating the Child Pornography Sentencing Guidelines’, in Carissa Byrne Hessick (ed) *Refining Child Pornography Law: Crime, Language and Social Consequences* (Michigan Press 2016).

¹²⁷ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115).

¹²⁸ Crimes Act 1900 No. 40, s. 91FA; Crimes Act 1958, s. 51A.

relating to IIOC. New South Wales also has standard non-parole periods for these offences. Production offences invariably carry higher maximum sentence lengths than possession or distribution offences. Table 4 provides a summary of the maximum custodial sentences available for possession, distribution and production offences across Australia.

Table 4. Statutory maximum sentences available for IIOC offences across Australian jurisdictions.

State/Territory	Maximum custodial sentence by type of IIOC offence		
	Possession	Distribution	Production
Australian Capital Territory	7 years	12 years	15 years
Commonwealth of Australia (federal)	15 years (25 + 7 mandatory minimum if aggravated: 3+ occasions, 2+ people)		
New South Wales	14 years	10 years	
Northern Territory	10 years		
Queensland	14 years		20 years
South Australia	5 years	10 years	
Tasmania	21 years		
Victoria	10 years		
Western Australia	7 years	10 years	

3.3.2. Issues related to sentencing practice

There are no sentencing guidelines in any Australian jurisdiction. Some States have made provision for guideline judgments¹²⁹ but none have issued a guideline judgment on IIOC offences as yet. Prosecutions involving a combination of Commonwealth and

¹²⁹ In New South Wales, guideline judgments have statutory force and must be taken into account: *Moodie v R* [2020] NSWCCA 160 [24]. Div 4 of Pt 3 of the Crimes (Sentencing Procedure) Act 1999 contains the statutory scheme for issuing guideline judgments.

state offences are not uncommon. Although the offences overlap, they are not identical: Commonwealth offences are focused on internet behaviours whereas state offences are not concerned with the means by which an offender obtains IIOC material.¹³⁰

The paramount importance of general deterrence when sentencing IIOC offences is a key theme that recurs across Appellate decisions.¹³¹ A good example is the New South Wales decision in *Assheton v The Queen*: “general deterrence must be the paramount consideration given the prevalence and availability of child pornography, particularly on the internet”.¹³² This position has been criticised on the grounds that “it fosters the idea that harsher sentences are an effective response to any crime problem, that size of the penalty matters and increasing it (‘marginal deterrence’) will deter crime.”¹³³

The leading Australian case setting out potential aggravating and mitigating factors relevant to assessing the seriousness of an IIOC offence is the New South Wales case of *Minehan v The Queen*.¹³⁴ The factors identified in *Minehan* were approved and added to by the court in *R v Porte*.¹³⁵ Australian case law related to specific potential aggravating and mitigating factors is included where relevant in Section 6 below.

3.4. Sentencing of IIOC Offences in the Republic of Ireland

3.4.1. Legislation

The Criminal Law (Sexual Offences) Act 2017 criminalises knowingly producing, distributing, selling, advertising, possessing for the purpose of distributing, and possessing IIOC.¹³⁶ The maximum sentences available for the offences are 14 years’ imprisonment for producing, distributing, selling, advertising, or possessing for the purpose of distributing, and 5 years’ imprisonment for possession.

¹³⁰ Judicial Commission of New South Wales, *Sentencing Bench Book* (2022), s 17-541 <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sexual_offences_against_children.html> accessed 24 February 2022.

¹³¹ E.g., *R v Carson* (2008) 187 A Crim R 435 [32] (New South Wales); *DPP (Cth) v D’Alessandro* [2010] VSCA 60 [36] (Victoria); *R v Cook; Ex p DPP (Cth)* [2004] QCA 469 [21] (Queensland).

¹³² (2002) 132 A Crim R 237 [246]. In *DPP v Watson* [2016] VSCA [33], the court observed that the internet was “a rapidly developing and easy means by which vulnerable children are exploited” and IIOC offences should be considered more serious as a result.

¹³³ Kate Warner, ‘Sentencing for child pornography in Australia’ (2010) 84 ALJ 384, 395.

¹³⁴ (2010) 201 A Crim R 243 [94].

¹³⁵ *R v Porte* (n 88) [63]-[64]. The revised list was applied in *R v De Leeuw* [2015] NSWCCA 183 [70].

¹³⁶ Criminal Law (Sexual Offences) Act 2017, s 12(5) (all offences except possession) and s 14(6) (possession).

3.4.2. Case law

DPP v Loving was only the second IIOC case to come before the Court of Criminal Appeal and the first not accompanied by more serious offences.¹³⁷ The Court considered 14 reported cases from the Circuit and District Courts, as well as the England and Wales case of *R v Oliver*,¹³⁸ noting the five levels of image severity given in the latter case. The statutory maximum sentence at the time (unchanged to date) was one year on summary conviction or five years on indictment. Sentencing factors mentioned were seriousness and number of the images, circumstances and duration of the activity leading to possession of the images (including any interaction with e.g., alcohol abuse), whether the images had been paid for or shared with others including children, and whether there were any linked offences against children. Mitigating factors included whether the offender accepted responsibility for the events including a plea of guilty, albeit that in many such cases there is little scope for plausible denial. The Court noted that in the case of a first offence, the court should consider the possibility of a wholly suspended sentence.

In *People (DPP) v O'Byrne* the Court of Criminal Appeal noted that sentencing for child pornography in Ireland was “not a well worn or well lit path where experience has built up a significant consensus on the appropriate sentences”.¹³⁹ The Court observed that there was no single template for cases; “some offenders may themselves be damaged. Others may reveal a chilling lack of awareness that their activities are wrong”. The Court stated that where, in the opinion of a professional, an offender recognises that their conduct is wrong and is willing to engage in appropriate therapy, it may be appropriate to consider suspending a portion of the sentence or imposing a community sentence.¹⁴⁰ The Court also endorsed the use of the levels of image severity set out in *DPP v Loving* (following *R v Oliver*). A notable feature of the case was that images were purposely located using a search term deliberately constructed to seek out indecent images of children and via software that ran continuously in the background on the offender’s computer. There were a number of mitigating factors in the case, including that the offender had had a very difficult childhood and a number of health issues. In the Court’s view, of most relevance was the “significant evidence that the appellant had sought to address his addiction to alcohol and drugs, and with apparent success, between 2009 and the date of his sentence”¹⁴¹ and he was assessed as being at low risk of re-offending so long as he maintains his sobriety. The original sentence of three years’ custody was reduced to two years and a three-year post-release supervision order.

¹³⁷ [2006] IR 355.

¹³⁸ *Oliver and others* (n 26).

¹³⁹ [2013] IECCA 93 [9].

¹⁴⁰ *ibid* [10].

¹⁴¹ *ibid* [28].

The question of mandatory treatment programmes for IIOC offenders in Ireland was considered in the Second Report of the Special Rapporteur on Child Protection,¹⁴² which amongst other things discusses the human rights issues raised by mandatory treatment. The report stated that rehabilitation is a key aspect of seeking to prevent future child abuse but the law in Ireland “is clear that medical treatment cannot generally be carried out on a patient without his/her consent”.¹⁴³ This principle has also been upheld by the European Court of Human Rights.¹⁴⁴ In contrast, the courts in Canada (not being restricted by the European rules), have upheld mandatory treatment, where appropriate, noting that “mandatory treatment and medication conditions in an order are a proportionate response to protecting the public from a person who, by definition, is a substantial risk to reoffend”.¹⁴⁵

¹⁴² Geoffrey Shannon, ‘Second Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas’ (October 2008) <
<https://assets.gov.ie/27435/117202bdaaeb40ba89ae16e91ae319a3.pdf>> accessed 21 February 2022.

¹⁴³ *ibid* 62.

¹⁴⁴ *Pretty v U.K.* (2002) 35 E.H.R.R 1.

¹⁴⁵ *R v Goodwin* (2002) BCCA 513 [83].

4. Public perceptions and attitudes on indecent images sentencing

Studies eliciting public sentiments on the appropriate punishments for IIOC offending may be informative. A nationally representative sample of adult residents in Scotland investigated various aspects of public perceptions on sentencing generally and then focused on sexual offences, including a question about IIOC.¹⁴⁶ When queried about the most important factors Scottish courts (across offence types) should try to achieve when sentencing, 56% of respondents indicated protecting the public, 33% rehabilitating offenders, and 23% punishing the crime committed.¹⁴⁷ Survey participants believed that while pleading guilty should have no consequence to the penalty given, lack of remorse and repeat offending should be aggravating circumstances. The authors noted that many respondents overestimated the actual use of prison sentences across cases: the estimate of the percentage of convictions would be sentenced to prison was twice the actual rate of prison sentences given.¹⁴⁸ This result is not unique to this survey as experts suggest caution on surveys of the public on sentencing practices.¹⁴⁹ Lay citizens' knowledge of actual statistics about crime rates and sentencing outcomes tend to be poor and they often underestimate the severity of sentences actually issued, such as the rate in which penalties include incarceration.¹⁵⁰ Also relevant is that the public may be overly reliant upon custodial sentences if they are not more broadly aware of the availability of noncustodial options.¹⁵¹

The same Scottish survey just mentioned queried about attitudes on sentencing for sexual offences.¹⁵² A specific inquiry concerned a hypothetical 32 year old male with no prior convictions found guilty of possessing a small number of indecent photographs of children.¹⁵³ About three-quarters (77%) of respondents believed the individual should

¹⁴⁶ Carolyn Black, Rachel Warren, Rachel Ormston, and Cyrus Tata, 'Public Perceptions of Sentencing: National Survey Report' (Scottish Sentencing Council 2019) <

<https://www.scottishsentencingcouncil.org.uk/media/1996/20190902-public-perceptions-of-sentencing-report.pdf> > accessed 10 March 2022.

¹⁴⁷ The percentages do not add up to 100% as respondents could choose more than one option.

¹⁴⁸ Black and others 2019 (n 146).

¹⁴⁹ Kate Warner, Julia Davis, Caroline Spiranovic, and Helen Cockburn, 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19 Punishm. Soc 180.

¹⁵⁰ Mike Hough, Ben Bradford, Jonathan Jackson, and Julian V. Roberts, 'Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for England and Wales' (Ministry of Justice Analytical Service 2013), <

https://www.academia.edu/13133262/Attitudes_to_Sentencing_and_Trust_in_Justice_Exploring_Trends_from_the_Crime_Survey_for_England_and_Wales > accessed 10 March 2022.

¹⁵¹ Black and others 2019 (n 146).

¹⁵² *ibid.*

¹⁵³ *ibid* 36. The participants were given this scenario:

The offender, a 32 year-old man with no previous convictions, took his laptop to a local computer repair shop to have a virus removed. The staff member repairing the laptop found a small number of images of children aged 8-10 without clothing on his

receive a custodial sentence, albeit with significant variations on their suggested lengths of imprisonment (e.g., 16% at 1-3 years, 19% at 3-5 years, and 18% from 5-10 years). Of the full sample, 11% thought a community order with rehabilitative programming was sufficient, while an additional 2% chose a community payback order. The survey authors noted that the response to the indecent images' hypothetical contrasted with the reality in Scottish sentencing practices in which the individual would most likely receive a community payback order. This disagreement was not limited to the indecent images offence, as respondents when given examples of other types of crimes were also more severe in their sentencing judgments than judges are in practice in Scotland. Notably, the respondents were more punitive with the indecent images scenario than they were with a hypothetical concerning a middle-aged man who, when he was age 18 had sexually touched two 17 year old girls; in that case 46% believed a prison sentence was deserved (compared to 77% in the indecent images scenario). This result suggests that there is some willingness in public attitudes to envision that an IIOC possession case may be more serious than a hands-on sexual crime against a minor. Still, it is likely relevant to the relative leniency that the hands-on offence was a historical crime, did not include sexual penetration, and involved victims aged 17 with a youthful offender aged 18.

A qualitative study using focus groups in Scotland discovered that participants often thought that punishments for sexual crimes, as a general rule, were too lenient and were punished less harshly than property crimes.¹⁵⁴ The focus groups were not asked specifically about IIOC, but results are informative to the extent that across other types of sexual offences, there often was a lack of consensus in the specifics of what an appropriate penalty should entail.

Another recent survey specifically addressed public perceptions of indecent image offenders. An online design used a sample of 253 participants (many of whom were university students in England) and featured a vignette of a hypothetical possessor of IIOC.¹⁵⁵ When asked about an appropriate penalty, 41% thought imprisonment was reasonable, while 37% felt that probation was appropriate.¹⁵⁶ Regardless of penalty, 68% believed that therapy should be ordered, which the author found to be surprising

hard drive and alerted the police. The offender was convicted of possession of indecent photographs of children.

¹⁵⁴ Hannah Biggs, Susan Reid, Kaushi Attygalle, Konstantina Vosnaki, Rachel McPherson, and Cyrus Tata, 'Public Perceptions of Sentencing in Scotland: Qualitative Research Exploring Sexual Offences' (Scottish Sentencing Council 2021) < <https://www.scottishsentencingcouncil.org.uk/media/2122/public-perceptions-of-sentencing-qualitative-research-of-sexual-offences-final-july-2021.pdf> > accessed 10 March 2022.

¹⁵⁵ Joshua Samuel Taylor-Smith, 'Public Perceptions of Indecent Image Offenders' (2021) 14 The Plymouth Student Scientist 636 < https://pearl.plymouth.ac.uk/bitstream/handle/10026.1/18519/TPSS-Vol14n2_636-650Taylor-Smith.pdf?sequence=1 > accessed 10 March 2022.

¹⁵⁶ Respondents could give more than one answer. It was unclear if participants believed that imprisonment and probation would be mutually exclusive or could be given together.

and surmised that perhaps “stigmatisation may be on the decrease with public support growing for more contemporary methods of reducing offences against children.”¹⁵⁷ Still, as almost half of the sample were university students, the likely ages of the sample being younger than the broader population may have some relevance to having more lenient attitudes. In terms of judgments on the severity of the offence, the age of the child in the image was salient in that participants perceived the offence as more serious if the picture involved a child aged 5 to 11 compared to a 17 year old minor. Another query to survey respondents elicited estimates that the hypothetical IIOC offender had a 69% likelihood of committing a new IIOC crime and a 54% likelihood of committing a future contact sex offence against a child. The author concluded that these last results indicated that the public might overestimate the probability of recidivism for IIOC offenders. The survey respondents’ 69% risk of a new IIOC crime contrasted with a 6-13% chance given by empirical research the report cited, while the respondents’ 54% risk of committing a future hands-on sexual offence with a child contrasted with the 3-4% statistics pursuant to cited empirical studies.

A research firm contracted by the Sentencing Council for England and Wales undertook an online survey of public perceptions of sentencing practices and included IIOC crimes within its queries.¹⁵⁸ The nationally representative sample included 2,000 adults living in England and Wales in 2018. When asked generally about penalties given for downloading and viewing IIOC, 67% thought they were “a little too” or “much too” lenient, 30% thought just about right, and 3% surmised a “little too” or “much too” tough. The proportion judging sentences for IIOC as too lenient (67%) was on the higher end relative to other types of offences, ranging from 42% as too lenient for drug production to 72% and 76% for death by dangerous driving and rape, respectively. The authors suspected, based on past research, that the public tended to judge sentences as too lenient in the abstract, but this was tempered when given a specific fact scenario. The authors explained that the bias in abstract thinking was likely due to recollecting media reports highlighting when perceptively light sentences were meted out to certain heinous offenders.¹⁵⁹ Concerning IIOC, an identical proportion (67%) thought a given penalty associated with a hypothetical IIOC case was still a “little too” or “much too” lenient, which the authors found indicated the public had some appetite for laws allowing for severe sentences at least for some crimes, such as IIOC. Nonetheless, a shift was evident whereby, in the abstract, 3% thought IIOC sentences were too tough,

¹⁵⁷ Taylor-Smith (n 155) 645.

¹⁵⁸ Nicola Marsh, Emma McKay, Clara Pelly, and Simon Cereda, ‘Public Knowledge of and Confidence in the Criminal Justice System and Sentencing’ (Sentencing Council for England and Wales Aug. 2019) < <https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Knowledge-of-and-Confidence-in-the-Criminal-Justice-System-and-Sentencing.pdf> > accessed 10 March 2022.

¹⁵⁹ *ibid.* See also Warner and others 2011 (n 149) (finding that when members of the public are given examples of actual case facts, they tended to consider sentences issued by judges more appropriate than what they tend to believe based on media accounts of sentencing outcomes).

the proportion more than doubled to 7% adjudging the specific sentence as too tough when provided a hypothetical case study.

A prior study on behalf of the Sentencing Council for England and Wales involved focus groups with 82 members of the public in England and Wales and likewise explored perceptions of sentencing in sexual abuse cases, including some queries about possession of IIOC.¹⁶⁰ Focus group members varied widely in the length of a custodial sentence for a IIOC crime, recommending up to 40 years, though with 10 years being a common number. Those arguing for longer sentences cited the need to deter others considering the availability of the materials online and the potential for fuelling demand for more abusive images, while the few members in favour of shorter sentences indicated that viewing was distinguishable from actual physical abuse of a child. Still, focus group respondents generally also promoted treatment and rehabilitation to be a component of any sentence to reduce their potential of progressing to contact offending. Another result of interest highlighted that how sexually explicit the image was mattered to their assessment of severity of the crime.

Next, an online study of US residents using hypothetical vignettes of IIOC possessors found there was no difference in judgments on the severity of the crime based on the defendant's particular motivation (given as either sexual arousal, compulsive pornography use, or risk-taking behaviour).¹⁶¹ Respondents overwhelmingly recommended an incarcerative sentence for IIOC possession, with 85% endorsing a prison term (a mean of two years and a median of one year).¹⁶²

One of the first known surveys on public perceptions concerning the severity of IIOC cases involved a sample of undergraduate students in Canada.¹⁶³ Participants adjudged the case as more severe when the depicted child was younger, but the depicted child's gender was uncorrelated with judgments on severity. The crime was considered more serious the greater the likelihood of any of three factors: a history of sexual contact offending, future contact offending, or paedophilic interests. Almost half of subjects (45%) recommended a sentence involving incarceration, meaning that a majority would not advocate for a prison term.

¹⁶⁰ Carol McNaughton Nicholls, Martin Mitchell, Ian Simpson, Stephen Webster, and Marianne Hester, 'Attitudes to Sentencing Sexual Offences' (Sentencing Council for England and Wales 2012), <https://www.sentencingcouncil.org.uk/wp-content/uploads/Attitudes_to_Sentencing_Sexual_Offences_web1.pdf > accessed 10 March 2022.

¹⁶¹ Beth C. Kliethermes, 'The Effect of Child Sexual Exploitation Material Offender Age, Motivation for Use, and Treatment Interest on Public Perceptions of Offense and Treatment' (doctoral dissertation, University of North Dakota 2021) <<https://commons.und.edu/cgi/viewcontent.cgi?article=5080&context=theses> > accessed 10 March 2022.

¹⁶² *ibid.*

¹⁶³ Anita Lam, Jennifer Mitchell, and Michael C. Seto, 'Lay Perceptions of Child Pornography Offenders' (2010) 52(2) *Can. J. Criminol. Crim. Justice* 173.

5. Sentencing implications from empirical literature on indecent images offending

Evidence from the medical, behavioural, and social sciences literatures is summarised herein to contextualise important issues about IIOC offending and potential harms to victims, children generally, and societal interests. The discussion provides a way of better understanding relevant topics to sentencing IIOC cases, such as motivations, facilitating factors, likelihood of crossover to hands-on sexual assault of children, deterrence, and future risk of IIOC reoffending.

5.1. The role of paedophilia

A common myth depicts IIOC users as paedophilic in nature, meaning that they are expected to have a sexually preferential interest in children. However, many IIOC users would not qualify for a diagnosis of paedophilia, while many of those individuals who could be diagnosed as paedophilic do not commit sex crimes against children.

The Diagnostic and Statistical Manual, the so-called “bible” of mental disorders, in its latest version (DSM-5) altered the diagnostic terminology from paedophilia to paedophilic disorder. The diagnosis of paedophilic disorder requires that (a) for at least six months (b) the individual experience “recurrent, intense sexually arousing fantasies, sexual urges, or behaviours involving sexual activity with prepubescent child or children” and that (c) either (i) the individual has acted on those sexual urges or (ii) these sexual “fantasies cause marked distress or interpersonal difficulty.”¹⁶⁴ Paedophilic disorder requires all of the foregoing to be present, meaning that a IIOC user may not qualify for a variety of reasons, such as these: the viewing interest may have been temporary, lasting less than six months; the interest did not reach the persistence required (i.e., recurrent); the interest lacked sufficient intensity; or the individual is not sufficiently distressed by such sexual interests.

Several additional reasons exist to avoid conflating IIOC use and paedophilic interest. The first regards age and the stage of sexual development. Paedophilic disorder is limited to sexual urges toward pre-pubescent children (generally age 13 or younger), whereas IIOC includes images of youth outside that range, such as being older than 13 or who are otherwise are pubescent or post-pubescent in their stage of sexual development. Some professionals had argued in favour of including in DSM-5 a disorder involving a sexual attraction to pubescent children between ages 11-14,

¹⁶⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (5th edn, 2013). The DSM-5 distinguishes a paraphilia from a paraphilic disorder. A paraphilia is a non-normative sexual interest, whereas to qualify as a disorder, the non-normative sexual interest must be acted upon or cause marked distress. Ethel Quayle, ‘Online Sexual Deviance, Pornography and Child Sexual Exploitation Material’ (2020) 14 *Forens. Psychiatr. Psychol. Kriminol.* 251.

referred to as hebephilia.¹⁶⁵ However, this suggestion was faced with significant objections and was ultimately rejected.¹⁶⁶ Hence, sexual attraction to pubescent or post-pubescent minors does not exist as a formally recognised psychiatric disorder.

Second, sexual fantasies do not necessarily indicate one's enduring sexual interest.¹⁶⁷ A sexual interest refers to the "predisposition to respond sexually to a preferred category" such as an object or type of person.¹⁶⁸ In contrast, a sexual fantasy might be fleeting, spontaneous, purely imagined, and/or bizarre.¹⁶⁹ A sexual fantasy is not necessarily associated with a concomitant desire to literally act upon it; in other words there may be a discordance between one's fantasy and one's behaviour.¹⁷⁰ An individual might, for instance, fantasize about sexually assaulting a submissive victim, without wishing to have this experience in reality.¹⁷¹ A relevant study involving interviews with adult males in a sexual behaviours clinic who admitted to viewing IIOC found that half of them reported sexual fantasies with children, though a significant portion of them also indicated no interest in touching children or that they otherwise felt averse to the reality of sexually abusing a child.¹⁷² Consistent therewith, most individuals with a preferential sexual interest in children will not commit a contact or noncontact sexual crime against a child.¹⁷³

Third, viewing IIOC may not necessarily motivated primarily by a desire to have sexual contact with children, but instead could in some cases be indicative of general curiosity, sensation-seeking, an obsessive compulsion to collect deviant items, among other motivations discussed further below. A study with a community sample of individuals who self-reported IIOC observed that two-thirds of them indicated they would not engage in sexual activity with a minor even if they knew they would not be caught.¹⁷⁴

¹⁶⁵ Charles Moser, 'DSM-5, Paraphilias, and the Paraphilic Disorders: Confusion Reigns' (2019) 48 Arch. Sex. Behav. 681.

¹⁶⁶ Julia Wilpert and Ellen Janssen, 'Characteristics of Offending and Non-Offending CSA Helpline Users Explored' (2020) 22(3) JFP 173.

¹⁶⁷ Ross M. Bartels, 'Sexual Fantasy Use as a Proxy for Assessing Deviant Sexual Interest, in Geraldine Akerman, Derek Perkins, and Ross M. Bartels (eds) *Assessing and Managing Problematic Sexual Interests* (1st edn, Routledge 2020) 115.

¹⁶⁸ Sandy K. Wurtele, Dominique A. Simon, and Leah J. Parker, 'Understanding Men's Self-Reported Sexual Interest in Children' (2018) 47 Arch. Sex. Behav. 2264.

¹⁶⁹ Bartels 2020 (n 167).

¹⁷⁰ Christian C. Joyal and Julie Carpentier, 'Concordance and Discordance Between Paraphilic Interests and Behaviors: A Follow-Up Study' (2021) 59(3) J. Sex Res. 385.

¹⁷¹ Christian C. Joyal and Julie Carpentier, 'The Prevalence of Paraphilic Interests and Behaviors in the General Population, A Provincial Survey' (2017) 54(2) J. Sex Res. 161.

¹⁷² Natasha Knack, Dave Holmes, and J. Paul Federoff, 'Motivational Pathways Underlying the Onset and Maintenance of Viewing Child Pornography on the Internet' (2020) 38 Behav. Sci. Law 100.

¹⁷³ Marie Henshaw, Rajan Darjee and Jonathan A. Clough, 'Online Child Sexual Offending', in India Bryce and Wayne Petherick (eds) *Child Sexual Abuse: Forensic Issues in Evidence, Impact, and Management* (Elsevier 2020) 85.

¹⁷⁴ James V. Ray, Eva R. Kimonis and Michael C. Seto, 'Correlates and Moderators of Child Pornography Consumption in a Community Sample' (2014) 26(6) Sex. Abuse 523.

Fourth, to change the focus a bit, a large segment of individuals who commit contact sex offences with children are not paedophilic. A well-regarded expert on child sex crimes estimates that about half of contact sex crimes against children are by perpetrators who have a sexual interest in pre-pubescent children.¹⁷⁵

5.2. IIOC offending

Experts consistently agree that IIOC offenders are heterogeneous in nature in such areas as their backgrounds, motivations, and future prospects.¹⁷⁶ Still, two common demographic characteristics that distinguish IIOC offenders are that this group is overwhelmingly comprised of white males.¹⁷⁷

This section will address the scientific literature on IIOC offending identifying and discussing the relevance of common motivations, facilitators, situational factors, and offending trajectories. The public may make certain assumptions about IIOC crimes that are not supported by the empirical evidence available. Overall, this sub-section reveals that IIOC offenders are diverse regarding the factors discussed herein, with the notable exception of the role of the Internet and related technologies in providing a modern platform for these crimes.

5.2.1. Motivations

IIOC users are motivated by a variety of reasons, sexual and non-sexual in nature. Some offenders may harbour more than one motivating influence.

A prominent typology for sexual motivations comprises those who are primarily *contact-driven* versus those who are more *fantasy-driven*. One distinguishing factor is that contact-driven offenders aim for sexual climax offline with a child, while fantasy-driven individuals are more interested in attaining sexual release online through IIOC.¹⁷⁸

Contact-driven individuals are thus seeking offline (direct) sexual interaction with victims.¹⁷⁹ Some contact-driven offenders will also use the IIOC to groom children for

¹⁷⁵ Michael C. Seto, 'The Motivation-Facilitation Model of Sexual Offending' (2019) 31(1) *Sex. Abuse* 3.

¹⁷⁶ Kelly M. Babchishin, Hannah L. Merdian, Ross M. Bartels, and Derek Perkins, 'Child Sexual Exploitation Materials Offenders: A Review' (2018) 23(2) *Eur. Psycho.* 130; Danielle G. Kettleborough and Hannah L. Merdian, 'Gateway to Offending Behaviour: Permission-Giving Thoughts of Online Users of Child Sexual Exploitation Material' (2017), 23(1) *J. Sex. Aggress.* 19.

¹⁷⁷ Jonah R. Rimer, "'In the Street They're Real, in a Picture They're Not": Constructions of Children and Childhood Among Users of Online Child Sexual Exploitation Material' (2019) 90 *Child Abuse Negl.* 160; Rick Brown and Samantha Bricknell, 'What is the Profile of Child Exploitation Material Offenders?' [2018] *Trends Issues Crime Crim. Justice* 564.

¹⁷⁸ Laura Jayne Broome, Cristina Izura, and Nuria Lorenzo-Dus, 'A Systematic Review of Fantasy Driven vs. Contact Driven Internet-Initiated Sexual Offences: Discrete or Overlapping Typologies' (2018) 79 *Child Abuse Negl.* 434.

¹⁷⁹ Babchishin and others 2018 (n 176).

actual sexual contact.¹⁸⁰ IIOC in grooming cases presents as a tool to normalize child sexual activity and/or to illustrate to a young recipient how to perform specific sexual acts.¹⁸¹ The offender could intentionally deploy illustrations of minors appearing to “voluntarily” engage in and “enjoy” such activities to interest and desensitize children.¹⁸² While the future goal is for offline sexual arousal with children, contact-driven individuals may masturbate when viewing the IIOC online as well.¹⁸³

For many fantasy-based offenders, their sexual curiosity orients towards children.¹⁸⁴ Community-based surveys show that more males admit to having sexual fantasies or other sexual interest in young children than might be expected, ranging from 1-10%, depending on the methodology used and the age of the children specified in the queries.¹⁸⁵ These numbers, though, do not necessarily indicate these individuals hold a *preferential* sexual interest in young children.¹⁸⁶ The American Psychiatric Association estimates that 3-5% of the male population could be diagnosed with paedophilic disorder.¹⁸⁷

Unlike contact-based offenders, fantasy-driven individuals appear to prefer indirect means for sexual satisfaction.¹⁸⁸ Still, for certain fantasy-based offenders, the motivation is more about sexually deviant materials generally.¹⁸⁹ Research indicates that perhaps half of IIOC consumers are not primarily driven by sexual fantasies regarding pre-pubescent children *per se*, but are aroused by indiscriminate sexual curiosities

¹⁸⁰ Larissa S. Christensen, Dominique Moritz, and Ashley Pearson, ‘Psychological Perspectives of Virtual Child Sexual Abuse Material’ (2012) 25 *Sex. Cult.* 1353.

¹⁸¹ *ibid.*

¹⁸² *ibid.*

¹⁸³ Broome and others 2018 (n 178).

¹⁸⁴ Knack and others 2020 (n 172).

¹⁸⁵ Joyal and Carpentier 2021 (n 170), (reporting in a sample of males that 1.1% had a sexual interest in pre-pubescent children and for females of .2%); Joyal and Carpentier 2021 (n 171), (reporting a study of adults in Quebec in which 1.1% of males reported a wish to experience sex with a child, and .2% of women); Beate Dombert and others, ‘How Common is Men’s Self-Reported Sexual Interest in Prepubescent Children?’ (2016) 53(2) *J. Sex Res.* 214 (finding in an online sample of German men that 4.1% reporting having sexual fantasies involving pre-pubescent children); Sandy K. Wurtele, Dominique A. Simons, and Tasha Moreno, ‘Sexual Interest in Children Among an Online Sample of Men and Women: Prevalence and Correlates’ (2014) 26(6) *Sex. Abuse* 546 (reporting in surveys of college students and in online forum that 4% of males endorsed being sexually attracted to children); Christian C. Joyal, Amélie Cossette, and Vanessa Lapierre, ‘What Exactly Is an Unusual Sexual Fantasy?’ (2015) 12 *J. Sex. Med.* 328 (reporting in a survey of males in Quebec that 2% had fantasies of having sex with a child under the age of 12); Christoph Joseph Ahlers and others, ‘How Unusual are the Contents of Paraphilias? Paraphilia-Associated Sexual Arousal Patterns in a Community-Based Sample of Men’ (2011) 8 *J. Sex. Med.* 1362 (reporting paedophilic general sexual fantasies by 9.5% and paedophilic masturbation fantasies by 6.0% of males (some could be in both categories) in a community sample in Germany).

¹⁸⁶ Henshaw and others 2020 (n 173).

¹⁸⁷ American Psychiatric Association, *DSM-5* (n 164).

¹⁸⁸ Hannah L. Merdian and others, ‘Fantasy-Driven Versus Contact-Driven Users of Child Sexual Exploitation Material: Offender Classification and Implications for Their Risk Assessment’ (2018) 30(3) *Sex. Abuse* 230.

¹⁸⁹ Babchishin and others (n 176).

regarding a broad category of deviant pornographies (e.g., bestiality, fetishism, sadomasochism, or other extreme material).¹⁹⁰ For these offenders, the inclusion of IIOC within their viewing experiences may be a by-product rather than the original or direct intention.¹⁹¹ The voyeuristic nature of the themes and the inherent secrecy of viewing intimate acts may be appealing for some.¹⁹² Overall, online sexual activity is commonplace, judging by the number of daily visits to such sites as Pornhub.¹⁹³ The Internet offers an anonymous method for pursuing various sexual fantasies or curiosity, though this voyeuristic behaviour is also linked to more generally relieving negative moods and psychological distress.¹⁹⁴

Fantasy-driven offenders may masturbate when viewing IIOC.¹⁹⁵ Yet sexual release is not the only goal, for some individuals the search for, and anticipation of finding, sexually deviant materials itself triggers reward systems within the brain (e.g., a dopamine rush).¹⁹⁶

Consequently, compared to contact-driven individuals, the fantasy-driven offenders have higher levels of sexual arousal to deviant sexual materials generally and spend more hours online viewing legal and illegal pornography.¹⁹⁷ The role of online technologies in current motivations of fantasy-based offenders is also a differentiator. Many of the fantasy-driven also exhibit addictive tendencies with Internet usage,¹⁹⁸ such as obsessively compiling extensive IIOC collections.¹⁹⁹ For example, collectors might find pleasure when their laborious attempts are successful in locating rare IIOC images or completing a series of images that has been recognised as such in the child pornography community.²⁰⁰ A survey of known IIOC offenders found that 42% had attempted to collect all the pictures to complete a series or all available images of a particular child.²⁰¹

¹⁹⁰ Chad M.S. Steel, Emily Newman, Suzanne O'Rourke, and Ethel Quayle, 'Collecting and Viewing Behaviors of Child Sexual Exploitation Material Offenders' (2021) 118 *Child Abuse Negl.* 105.

¹⁹¹ *ibid.*

¹⁹² Kettleborough and Merdian 2017 (n 176).

¹⁹³ Virginia Soldino, Jaume Miró-Ramos, and Enrique J. Carbonell-Vayá, 'Online Sexual Addiction Among Adult Males Convicted of a Sexual Offense' (2021) < <https://psyarxiv.com/2gej8/download> > accessed 10 March 2022.

¹⁹⁴ *ibid.*

¹⁹⁵ Christensen and others 2021 (n 180).

¹⁹⁶ Chad M.S. Steel, Emily Newman, Suzanne O'Rourke, and Ethel Quayle, 'Lawless Space Theory for Online Child Sexual Exploitation Material Offending' (2021) < <https://psyarxiv.com/hnvv4/download?format=pdf> > accessed 10 March 2022.

¹⁹⁷ Babchishin and others 2018 (n 176); Merdian and others 2018 (n 188).

¹⁹⁸ Steel and others 2021 (n 190); Emily D. Gottfried, Emily Knight Shier, and Abby L. Mulay, 'Child Pornography and Online Sexual Solicitation' (2020) 22 *Curr. Psychiatry Rep.* No. 10 (citing studies).

¹⁹⁹ Rogers and others 2021 (n 1); Steel and others 2021 (n 190).

²⁰⁰ Francis Fortin, Sarah Paquette, and Benoit Dupont, 'From Online to Offline Sexual Offending: Episodes and Obstacles' (2018) 39 *Aggress. Violent Behav.* 33.

²⁰¹ Steel and others 2021 (n 190).

A study identifying distinctions found that compared to contact-driven offenders, fantasy-driven users are more likely to report arousal to deviant sexually explicit material, have more extreme IIOC collections, and have intimacy deficits (e.g., struggles with finding and maintaining a romantic partner), yet are less likely to view children as sexual agents (e.g., when a child enquires about sex it signifies they want to engage in sexual activity).²⁰² Overall, fantasy-driven individuals are at low risk of committing a contact sexual offence against a child.²⁰³

Still, either type of offender may not be primarily lured to children *per se*, but harbour other motivations. High sex drive or hypersexuality are illustrative. An IIOC viewer with a high libido may hold a diversity of deviant sexual thoughts, yet without having a preferred or sustained interest in children.²⁰⁴ In fantasy-driven IIOC offenders, high sex drive may manifest in pursuing a general pattern of seeking illegal or taboo pornography, including IIOC.²⁰⁵ In contact-driven offenders, a related driver is intense mating effort, which relates to a desire for many and novel sexual partners (including child victims).²⁰⁶ Another recognized motivator presents as a manifestation of obsessive-compulsive disorder in which the individual feels obsessively compelled by fears and excessive worries of being sexually attracted to children, yet are not in actuality sexually aroused by children.²⁰⁷

Some motivations do not appear to neatly fall into either contact- or fantasy-driven categories. The situationally-motivated²⁰⁸ include offenders who indicate generally being driven by curiosity or sensation-seeking,²⁰⁹ or those who enjoy the collecting and managing aspect of the project.²¹⁰

5.2.2. Facilitators

Entertaining a desire to view IIOC is not a sufficient condition for actually engaging with these images. Self-control would generally allow law-abiding adults to resist such an impulse.²¹¹ Motivation to access IIOC typically must be facilitated through one or more means. Facilitators as used here regard factors tending to lessen one's self-control or

²⁰² Hannah L. Merdian and others 2018) n 188).

²⁰³ Rogers and others 2021 (n 1).

²⁰⁴ Renée Sorrentino and Janette Abramowitz, 'Minor-Attracted Persons: A Neglected Population' (2021) 20(7) *Curr. Psychiatr.* 21; Wurtele and others 2018 (n 168).

²⁰⁵ Seto 2019 (n 175).

²⁰⁶ *ibid.*

²⁰⁷ Sorrentino and Abramowitz 2021 (n 204).

²⁰⁸ Madeleine van der Bruggen and Arjan Blokland, 'Profiling Darkweb Child Sexual Exploitation Material Forum Members Using Longitudinal Posting History Data' (2021) *Soc. Sci. Comput. Rev.* (online first) < <https://doi.org/10.1177/0894439321994894> > accessed 10 March 2022.

²⁰⁹ Michael C. Seto and others, 'Viewing Child Pornography: Prevalence and Correlates in a Representative Community Sample of Young Swedish Men' (2015) 44 *Arch. Sex Behav.* 67.

²¹⁰ Kettleborough and Merdian 2017 (n 176).

²¹¹ Seto 2019 (n 175).

negate other inhibitions that should thwart one's acting upon present motivations.²¹² The literature has identified common emotional and behavioural facilitators to using IIOC.

A recognized facilitation factor regards self-regulation, which means the ability to effectively temper one's emotions, thoughts, and behaviours.²¹³ A problem with self-regulation signifies a deficit in self-control, often when one is experiencing negative, stressful, or unpleasant situations.²¹⁴ IIOC users report viewing as a means to cope with sexual self-regulation problems, such as deficits in moderating their sexual thoughts, fantasies, or urges.²¹⁵ Hyperfocused sexual arousal can mean that a sexual preoccupation with IIOC distracts the individual from fully experiencing other feelings, such as negative emotions, guilt over using IIOC, and/or worries about the consequences of their actions.²¹⁶

Issues with self-regulation exist outside the sexual realm as well. IIOC viewing for some provides an outlet to deal with negative emotions, such as those connected to difficulties in negotiating personal relationships with other people (including problems in maintaining romantic relationships) and experiencing depression and stress.²¹⁷ Relatedly, IIOC users commonly cite feeling lonely, isolated, and/or having low self-esteem,²¹⁸ or blame alcohol or addiction.²¹⁹ The Internet facilitates by offering content that has the ability to alter these negative emotional states.²²⁰ The Internet may also provide a forum to experience emotional escapism whereby the individual feels able to temporarily exist in a world away from their daily struggles with stress and the responsibilities of their realities.²²¹

Several types of behavioural facilitation are connected to IIOC use. Regardless of motivation, the "Triple-A Engine" of the Internet facilitates by offering the alluring benefits of accessibility, affordability, and anonymity.²²² Anonymity reduces self-control by deindividualizing the person, which in turn reduces disinhibitions to bad behaviour.²²³ Further, where accessing or viewing IIOC provides some kind of (sexual or nonsexual) stimulation for the individual, the on-demand nature of the Internet allows for immediate

²¹² *ibid.*

²¹³ *ibid.*

²¹⁴ Knack and others 2020 (n 172).

²¹⁵ Seto 2019 (n 175).

²¹⁶ Knack and others 2020 (n 172).

²¹⁷ Knack and others 2020 (n 172); Seto 2019 (175); Sian Morgan and Ian Lambie, 'Understanding Men who Access Sexualised Images of Children: Exploratory Interviews with Offenders' (2019) 25(1) *J. Sex. Aggress.* 60.

²¹⁸ Knack and others 2020 (n 172).

²¹⁹ Kettleborough and Merdian 2017 (n 176).

²²⁰ Ray and others 2014 (n 174).

²²¹ Knack and others 2020 (n 172).

²²² Al Cooper, 'Sexuality and the Internet: Surfing into the New Millennium' (1998) 1(2) *CyberPsychol. Behav.* 187.

²²³ Sarah Paquette and Franca Cortoni, 'Offense-Supportive Cognitions Expressed by Men Who Use Internet to Sexually Exploit Children: A Thematic Analysis' (2021) *Int. J. Offender Ther. Comp. Criminol.*

gratification.²²⁴ In turn, the instantaneous gratification so offered may fuel repetitive interactions with online IIOC.

A trajectory for many begins with online viewing of adult pornography which progresses to include IIOC. The theory is that consuming sexually explicit images, such as adult pornography, causes sexual arousal. Arousal itself reduces inhibitions and diminishes the disgust response such that more deviant materials, such as IIOC, do not generate the same level of repulsion when the individual is already in an aroused state.²²⁵

A related, and common, behavioural facilitator to continued engagement with IIOC is habituation. Taboo materials repeatedly viewed can eventually become normalized, even boring, thereby failing to provide the same level of excitation and arousal.²²⁶ The individual then may engage in proactive attempts to increase the novelty value of images viewed. Habituation can lead to pursuing more deviant images by individuals who initially viewed adult pornography and those whose original motivation was IIOC. For those individuals who started with adult pornography, habituation may facilitate searching for more deviant forms of pornography (such as indecent images of children).²²⁷ For those who initially were IIOC-motivated collectors, habituation may lead to seeking images with more violent and brutal content and/or younger children.²²⁸

Importantly, habituation does not equally affect all individuals who view adult pornography. For example, a study comparing the materials accessed by individuals who self-reported online pornography use found that those known to be IIOC offenders were more likely than members of the general public (without IIOC histories) to have visited a wider variety of more deviant pornographic materials (e.g., bestiality, rape, hentai).²²⁹ In the same study, all of the IIOC offender group reported consuming adult pornography, though it is not evident which came first for any of them – the adult materials or the IIOC.²³⁰

Habituation is also relevant in that the longer the individual interacts with IIOC without detection, the weaker the perceived risk of continuing (or escalating in severity) that behaviour becomes.²³¹ In other words, habituation acts as a behavioural facilitator as well in terms of reducing one's inhibitions linked to weighing potential negative consequences that may arise.

²²⁴ van der Bruggen and Blokland 2021 (n 208).

²²⁵ Marie Henshaw and others 2020 (n 173).

²²⁶ Francis Fortin and Jean Proulx, 'Sexual Interests of Child Sexual Exploitation Material (CSEM) Consumers: Four Patterns of Severity Over Time' (2019) 63(1) *International J. Offender Ther. Comp. Criminol.* 55.

²²⁷ *ibid.*

²²⁸ *ibid.*

²²⁹ Steel and others 2021 (n 190).

²³⁰ *ibid.*

²³¹ Steel and others 2021 (n 196).

Interacting with others in discussing, trading, or otherwise collaborating about IIOC (e.g., use of online forums, peer to peer exchanges, text messaging) further normalizes this behaviour, potentially encouraging criminal escalation considering these mutual activities reinforce the perceived benefits while undermining the consideration of potential negative risks.²³² A report on IIOC offenders sentenced in fiscal year 2019 in the United States' federal system indicated that 44% had been involved in an online IIOC community, and that the likelihood was higher for those who had engaged in more severe forms of criminal behaviour.²³³ Relatedly, the facilitation of social relationships is relevant to those who find virtual communities with which to positively engage, itself a potential beneficial attribute for individuals otherwise feeling socially isolated or marginalized.²³⁴ Perhaps an understandable analogy is to online gaming where strangers liaise with others having similar recreational interests and eventually these social interactions become more salient than the game itself.²³⁵

Other behavioural facilitation factors underlying sex offending and relevant to IIOC are the presence in the individual of antisocial tendencies, aggression, hostility, and having a criminal history.²³⁶ An additional temporal behavioural facilitator is substance abuse which reduces one's inhibitions to consuming IIOC.²³⁷

Cognitive distortions in many cases play a contributing (facilitating) role in translating motivation into action.²³⁸ As relevant here, cognitive distortions are specific or general beliefs or attitudes that a person possesses which violate commonly accepted practices regarding sexually appropriate urges and behaviours.²³⁹ Cognitive distortions are maladaptive in that they condone criminal behaviour despite the significant negative consequences the individual may face.²⁴⁰ A pre-existing literature has identified common cognitive distortions that are present in contact sex offenders generally and in contact offenders against children, yet recently researchers have begun to realise that IIOC users may differ in their cognitive distortions in salient ways. Theoretically, applicable cognitive distortions in IIOC offenders may allow them to minimise their actions by distinguishing themselves from contact offenders in arguing that IIOC viewing

²³² Steel and others 2021 (n 196); Fortin and others 2018 (n 200).

²³³ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115).

²³⁴ Christensen and others 2021 (n 180).

²³⁵ *ibid.*

²³⁶ Seto 2019 (n 175). Antisocial tendencies involve personality attitudes that disregard societal norms, impulsivity, lack of remorse and persistent rule violation. American Psychiatric Association, DSM-5 (n 164).

²³⁷ Seto 2019 (n 175).

²³⁸ Kettleborough and Merdian 2017 (n 176).

²³⁹ Caoilte Ó Ciardha and Tony Ward, 'Theories of Cognitive Distortions in Sexual Offending: What the Current Research Tells us' (2013) 14(1) *Trauma Violence Abuse* 5.

²⁴⁰ Christensen and others 2021 (n 180).

does not involve using force or intimidation or rationalising that just viewing is not harming real children.²⁴¹

One conceptualisation has identified specific cognitive distortions common to IIOC offenders, as relayed in Table 5.²⁴²

Table 5. Offence-supportive cognitive distortions common to IIOC offenders.

<i>Offence-supportive cognition</i>	<i>Description</i>
Child as sex object	A belief that allows one to perceive children as sexual stimuli rather than as humans
Unhappy world	A belief in a dejected world filled with judgmental people, which elicits a negative affect and a desire to seek escape through the Internet
Nature of harm	A belief that IIOC viewing is not harmful and that the behaviours depicted in the material are not harmful
Self as uncontrollable	A belief that one has no control over their actions, such as feeling “addicted” to IIOC
Self as collector	A belief that one’s self-concept is linked to collecting behaviour itself as satisfying rather than the sexual content of the IIOC
Reinforcing nature of the Internet	A belief that the Internet can be an unlimited, immediate, and anonymous source for desired social benefits

Notably, the specific cognitive distortions in Table 5 are linked more strongly to IIOC offenders who are fantasy-driven rather than those who are contact-driven.²⁴³ Early evidence finds support for the existence of these cognitive distortions in IIOC offenders.²⁴⁴ For instance, providing evidence of the ‘children as sex objects’ and ‘reinforcing nature of the internet’ distortions, offenders in a treatment program typically regarded children in the real world as asexual, innocent, and in need of protection; yet their perspectives altered whereas they viewed children depicted in online IIOC as less

²⁴¹ Chad M.S. Steel, Emily Newman, Suzanne O’Rourke, and Ethel Quayle, ‘A Systematic Review of Cognitive Distortions in Online Child Sexual Exploitation Material Offenders’ (2020) 51 *Aggress. Violent Behav.* 101375.

²⁴² Ross M. Bartels and Hannah L. Merdian, ‘The Implicit Theories of Child Sexual Exploitation Material Uses: An Initial Conceptualization’ (2016) 26 *Aggress. Violent Behav.* 16.

²⁴³ Virginia Soldino, Hannah L. Merdian, Ross M. Bartels, and Hannah K. Bradshaw, ‘Implicit Theories of Child Sexual Exploitation Material Offenders: Cross-Cultural Validation of Interview Findings’ (2020) 64(4) *Int. J. Offender Ther. Comp. Criminol.* 315.

²⁴⁴ *ibid.*

real and also more sexualized.²⁴⁵ The ‘child as sex object’ and ‘unhappy world’ themes appear to apply to offenders who justify their IIOC engagement by viewing the children as not real and that they turn to IIOC to cope after divorce or job loss.²⁴⁶ Potentially reflecting the ‘nature of harm,’ ‘self as uncontrollable,’ and ‘reinforcing nature of the Internet’ options, problematic Internet use is a common justification by offenders, often combined with an explanation that the individual was simply one of many who were engaging in the same behaviour seemingly without consequence or judgment.²⁴⁷ Another study found support for the ‘nature of harm’ distortion in which IIOC offenders thought little harm was caused as the materials already existed.²⁴⁸

For these cognitive distortions, it may not necessarily be clear, however, whether the underlying thoughts were present long before (such as from childhood), at the time of the IIOC viewing, or whether they exist as post hoc justifications to minimize one’s actions.²⁴⁹ Still, the wide-open spaces of the Internet foster these cognitive distortions (and facilitate motivated IIOC offending) when offenders observe others engaging in more heinous discourses or possessing content more deviant than their own, with these observations serving to reinforce self-minimizing reasoning.²⁵⁰

5.2.3. Situational factors

In understanding IIOC crimes it is important to recognise that even those who are motivated and facilitated to sexually offend against children may not actually do so if situational factors do not also align. For those who produce IIOC with a real child, access to a vulnerable victim is relevant, which is often more difficult with children, who may be protected by appropriate guardians and separated by potential predators in time and place.²⁵¹ For non-production cases, the Internet now provides an efficient infrastructure that is permitting, even fostering, access to distribute, download, and store IIOC materials.²⁵²

The Internet conveys the appearance of a lack of capable guardianship, thereby presenting as a lawless space in which criminal activity flourishes unregulated and undetected.²⁵³ The Internet offers a feeling of less social risk and otherwise reduces inhibitions.²⁵⁴

²⁴⁵ Rimer 2019 (n 177).

²⁴⁶ Paquette and Cortoni 2021 (n 223).

²⁴⁷ Paquette and Cortoni 2021 (n 223); van der Bruggen and Blokland 2021 (n 208).

²⁴⁸ Knack and others 2020 (n 172).

²⁴⁹ Paquette and Cortoni 2021 (n 223); Kettleborough and Merdian 2017 (n 176).

²⁵⁰ Steel and others 2019 (n 196).

²⁵¹ Seto 2019 (n 175).

²⁵² Brown and Bricknell, 2018 (n 177).

²⁵³ Steel and others 2021 (n 196).

²⁵⁴ Ray and others 2014 (n 174).

In the past, the effort to obtain IIOC in hard copy was more difficult and thus likely only those strongly attracted to children made the requisite efforts. Today, with the broader availability of the materials on the Internet, including the Dark Web, there are fewer obstacles such that those with little or no particular interest in children are finding IIOC.²⁵⁵ The Internet creates an environment for which individuals whose sexual inclinations, general curiosity, and/or tendencies toward deviant engagement might otherwise be suppressed in the real world are instead given seemingly free reign.²⁵⁶

A corresponding situational factor (also a facilitator as previously mentioned) is the existence of online communities in which people post, barter, and otherwise facilitate the collection and sharing of IIOC and validate each other's actions and fantasies.²⁵⁷

The glimpses into the communities that researchers have attained indicate these communities tend to be hierarchical in nature. Members might be allocated different roles (e.g., registered member, VIP member, moderator, administrator) depending upon what they have to offer in terms of posting images and comments, as well as their willingness to engage in certain operational functions to keep the particular forum in working order.²⁵⁸ As an illustration, sites have awarded points or stars depending on the level of individual participation, which corresponds to the level of access to IIOC that was consequently given.²⁵⁹ A recent turn has witnessed the use of online gaming communities as a method to distribute IIOC and to entice minors.²⁶⁰

5.2.4. Trajectories

IIOC offenders are heterogeneous in their offending trajectories, though some commonalities among career paths have been evidenced.²⁶¹ A well-known trajectory, mentioned previously, is the adult pornography route. This may begin with an interest in pornography (regardless of life circumstances) or the viewing may be the main means

²⁵⁵ Christensen and others 2021 (n 180).

²⁵⁶ Risk Management Authority (of Scotland), 'Literature Review: A Review of the Risk Posed by Internet Offenders' (2018).

²⁵⁷ Jessica Woodhams, Juliane A. Kloess, Brendan Jose, and Catherine E. Hamilton-Giachritsis, 'Characteristics and Behaviors of Anonymous Users of Dark Web Platforms Suspected of Child Sexual Offenses' (2021) 12 *Front. Psychol.* 623668.

²⁵⁸ van der Bruggen and Blokland 2021 (n 208).

²⁵⁹ Alice Raven, Babak Akhgar, and Yara Abdel Samad, 'Case Studies: Child Sexual Exploitation' in Babak Akhgar, Marco Gercke, Stefanos Vrochidis, and Helen Gibson (eds), *Dark Web Investigation* (Springer 2021) (noting a cite awarding achieving individuals the status of "VIP Rapist"); Julak Lee, 'Child Pornography Websites on the Darknet' (2019) 8(256) *IJRTE* 48.

²⁶⁰ Elie Bursztein and others, 'Rethinking the Detection of Child Sexual Abuse Imagery on the Internet' (2019) < <https://elie.net/static/files/rethinking-the-detection-of-child-sexual-abuse-imagery-on-the-internet/rethinking-the-detection-of-child-sexual-abuse-imagery-on-the-internet-paper.pdf> > accessed 10 March 2022.

²⁶¹ Kelly M. Babchishin, Angela W. Eke, Seung C. Lee, Nicole Lewis, and Michael C. Seto, 'Applying Offending Trajectory Analyses to Men Adjudicated for Child Sexual Exploitation Material Offenses' (2021) *Crim. Justice Behav.* (online first) < <https://doi.org/10.1177/00938548211040849> > accessed 10 March 2022.

of sexual gratification for individuals who lack available adult sexual partners either because of geographical limitations or social inadequacies.²⁶² A related perspective on a pathway for those who did not have a pre-existing sexual interest in children is that “sexual frustration, certain sexual interests, and poor coping strategies in response to negative affect resulting from loneliness, boredom, depression, and stress are all factors that may directly or indirectly motivate the use” of IIOC.²⁶³

The Internet is relevant to the adult pornography as a gateway trajectory in many cases. A small study of adult males with a history of accessing IIOC who were enrolled in a sexual offender treatment programme in New Zealand found that most of them reported that they first accessed adult pornography when feeling stressed, lonely, and isolated, progressed to including IIOC in their collections, and continued to view IIOC to cope with experiencing negative emotions and out of some addictive quality of their interactions on the Internet.²⁶⁴ While not directly indicative of original viewing material, investigations of IIOC offenders’ collections typically discover that almost all of them also contain adult pornography.²⁶⁵

An alternative explanation for the adult pornography trajectory regards sexual arousal. Those who use adult pornography for sexual release may find that sexual arousal states reduce inhibitions toward clicking on risky websites or searching for more deviant material (such as IIOC) while discounting the potential consequences.²⁶⁶ Then, offenders may increase their activities with IIOC due to habituation in that offenders then seek more exciting material, such as images of younger children or more violent activities.²⁶⁷ A study of self-admitted online pornography viewers found that those scoring high on sensation-seeking and who spent longer periods of time viewing adult pornography online were more likely to also view IIOC.²⁶⁸

In contrast with the role of habituation toward increasing one’s involvement with IIOC, some offenders follow the opposite trajectory. A study of a Dark Web IIOC forum discovered that one-third had no additional engagement after their initial login.²⁶⁹ For a subset who initially viewed IIOC out of curiosity, they discovered little or no interest and

²⁶² Knack and others 2020 (n 172).

²⁶³ *ibid* 113.

²⁶⁴ Morgan and Lambie 2019 (n 217).

²⁶⁵ Michael C. Seto and Angela W. Eke, ‘Predicting Recidivism Among Adult Male Child Pornography Offenders: Development of the Child Pornography Offender Risk Tool (CPORT)’ (2015) 39(4) *Law Hum. Behav.* 416 (90% of collections included adult pornography); Tony Krone, Russell G. Smith, Jenny Cartwright, Alice Hutchings, Adam Tomison, and Sarah Napier, ‘Online Child Sexual Exploitation Offenders: A Study of Australian Law Enforcement Data’ (Australian Institute of Criminology 2017) < <https://www.aic.gov.au/sites/default/files/2020-05/58-1213-FinalReport.pdf> > accessed 10 March 2022 (88% with adult images).

²⁶⁶ Babchishin and others 2018 (n 176).

²⁶⁷ *ibid* (listing studies).

²⁶⁸ Ray and others 2014 (n 174).

²⁶⁹ van der Bruggen and Blokland 2021 (n 208).

thus moved to exclusively adult content.²⁷⁰ This trajectory represents a “de-escalation pattern” identified by researchers in another study. This latter study tracked a sample of cases in terms of whether their viewing patterns increased or decreased in terms of the severity of IIOC collected and the age of the children in the images.²⁷¹ The de-escalation pattern (found in 23% of cases) was exhibited by a decrease in the severity of images and an increase in the age of the children. Three other trajectories were found.²⁷² In direct contrast to the de-escalation pattern, the ‘degenerating spiral pattern’ (38% of cases) existed when over time, the material was associated with an increase in the severity of images and a decrease in the age of children depicted (i.e., more serious images with younger children). The ‘sexualised adolescent pattern’ (20%) showed an increase in severity and in the age of the children, suggesting habituating to higher levels of contact sexual activity but only with older children. Finally, the ‘boy/girl-love pattern’ (20%) found a decreasing severity and age of children, showing a shift to softcore porn when the child gets younger, perhaps indicating a belief in “loving” adult-child sexual relationships.

5.3. The potential for crossover

It was noted in a prior section that conflating paedophilia (as recognised in the psychiatric community) with IIOC viewing—and vice versa—is not supported in the literature. Here, the point is that it is not appropriate to assume that IIOC consumers have committed, or in the future will commit, a contact sex offence against a child. Offenders who commit sex crimes involving children do not constitute a homogeneous group. When considering IIOC crimes, researchers have identified three groups of child sex offenders:

Group	Description
IIOC-only	individuals known only for IIOC offences
Contact-only	individuals who have engaged in a contact sex crime with a minor but are not involved with IIOC
Mixed (or dual offender)	individuals who have used IIOC and committed a contact sex crime with a minor

These three groups vary in terms of their motivating factors, facilitators to offending, and in some of their situational characteristics.

Experts typically conclude that the likelihood of having a sexual interest in young children varies significantly between the three groups. Mixed offenders are most likely to

²⁷⁰ Babchishin and others 2018 (n 176).

²⁷¹ Fortin and Proulx 2019 (n 226).

²⁷² *ibid.*

have sexual urges toward children, followed by IIOC-only offenders, with contact-only offenders being the least motivated by sexual interest in minors.²⁷³ The order is the same for having any paraphilic disorders (being the DSM diagnoses of sexual deviances, such as sadism, fetishism, voyeurism) which are most likely in mixed offenders, then IIOC-only, then contact-only offenders.²⁷⁴ IIOC-only offenders are more likely than the other two groups to be fantasy-driven.²⁷⁵ For dual offenders, the Internet may permit both fantasy and contact motivations in terms of accessing IIOC and in identifying, grooming, and communicating with potential victims.²⁷⁶ In this Literature Review, we are concerned primarily with the IIOC-only and dual offender groups. Below we summarize the characteristics and behaviours that research studies find are more or less prevalent between these two groups.

The following behaviours or characteristics are more prevalent in IIOC-only offenders (compared to dual offenders):

- Victim empathy²⁷⁷
- Easy access to the Internet²⁷⁸
- Problematic Internet use²⁷⁹
- Maintain larger IIOC collections²⁸⁰
- View deviant sexual materials other than IIOC²⁸¹
- IIOC materials across multiple age ranges²⁸²
- Produce IIOC through non-contact means (e.g., webcam)²⁸³

²⁷³ Babchishin and others 2018 (n 176) (listing studies); Kelly M. Babchishin, R. Karl Hanson, and Heather VanZuyle, 'Online Child Pornography Offenders are Different: A Meta-Analysis of the Characteristics of Online and Offline Sex Offenders Against Children' (2014) 44(1) Arch. Sex. Behav. 45. See also Dombert and others 2016 (n) (reporting on a survey of men in the community in Germany, those who were dual offenders were more likely to report sexual fantasies involving children than IIOC-only and contact-only individuals).

²⁷⁴ Marie Henshaw, James R. P. Ogloff, and Jonathan A. Clough, 'Demographic, Mental Health, and Offending Characteristics of Online Child Exploitation Material Offenders: A Comparison with Contact-Only and Dual Sexual Offenders' (2018) 36 Behav. Sci. Law 198.

²⁷⁵ Rogers and others 2021 (n 1).

²⁷⁶ Rogers and others 2021 (n 1).

²⁷⁷ Babchishin and others 2018 (n 176).

²⁷⁸ Babchishin and others 2014 (n 273).

²⁷⁹ Henshaw and others 2020 (n 173) (citing studies).

²⁸⁰ Michelle Ann McManus, Matthew L. Long, Laurence Alison, and Louise Almond, 'Factors Associated with Contact Child Sexual Abuse in a Sample of Indecent Image Offenders' (2015) 21(3) J. Sex. Aggress. 368; Matthew L. Long, Laurence A. Alison, and Michelle A. McManus, 'Child Pornography and Likelihood of Contact Abuse: A Comparison Between Contact Child Sexual Offenders and Noncontact Offenders' (2012) 25(4) Sex. Abuse 370.

²⁸¹ Babchishin and others 2018 (n 176) (listing studies).

²⁸² McManus and others 2015 (n 280).

²⁸³ *ibid.*

- Married, educated, employed²⁸⁴
- Be in skilled or professional occupations²⁸⁵
- Advanced computer skills²⁸⁶
- Likelihood to destroy their IIOC collection at least once²⁸⁷
- Confess guilt when confronted by law enforcement²⁸⁸

The following behaviours or characteristics are more prevalent in mixed offenders:

- Paedophilic²⁸⁹
- Paraphilia²⁹⁰
- Prefer IIOC with boys²⁹¹
- Antisociality²⁹²
- Hostility²⁹³
- Assertiveness²⁹⁴
- Unemployed²⁹⁵
- Frequent sexual partners²⁹⁶
- Produce IIOC through contact offending²⁹⁷
- Engage in online and offline grooming of children²⁹⁸
- Engage in online sexual solicitation of a child²⁹⁹

²⁸⁴ Seto and Eke 2015 (n 265); Long and others 2012 (n 280).

²⁸⁵ Virginia Soldino, Enrique J. Carbonell-Vayá, and Kathryn C. Seigfried-Spellar, 'Criminological Differences Between Child Pornography Offenders Arrested in Spain' (2019) 98 Child Abuse Negl. 104178; Seto and Eke 2015 (n 265).

²⁸⁶ Soldino and others 2019 (n 285).

²⁸⁷ McManus and others 2015 (n 280).

²⁸⁸ McManus and others 2015 (n 280); Long and others 2012 (n 280).

²⁸⁹ Babchishin and others 2018 (n 176).

²⁹⁰ Matthew E. Hirschtritt, Douglas Tucker, and Renée L. Binder, 'Risk Assessment of Online Child Sexual Exploitation Offenders' (2019) 47(2) J. Am. Acad. Psychiatry Law 1; Henshaw and others 2018 (n 274); Babchishin and others 2014 (273).

²⁹¹ Soldino and others 2019 (n 285); Seto and Eke 2015 (n 265). But see Long and others 2012 (n 280) (finding no difference between IIOC-only and mixed offenders on preferring gender of child image).

²⁹² Henshaw and others 2018 (n 274); Babchishin and others 2018 (176).

²⁹³ Babchishin and others 2018 (n 176).

²⁹⁴ Brown and Bricknell 2018 (n 177).

²⁹⁵ Babchishin and others 2018 (n 176) (listing studies).

²⁹⁶ Babchishin and others 2014 (n 273).

²⁹⁷ Soldino and others 2019 (n 285); McManus and others 2015 (n 280).

²⁹⁸ Soldino and others 2019 (n 285); McManus and others 2015 (n 280).

²⁹⁹ Soldino and others 2019 (n 285); Henshaw and others 2018 (n 274); Seto and Eke 2015 (n 265).

- Engage in online chats with a child³⁰⁰
- Send adult or child pornography to a child³⁰¹
- Commit any new offence³⁰²
- Commit any new contact sexual offence³⁰³

The foregoing lists of differentiating factors provide evidence that IIOC-only offenders have greater levels of self-control. Compared to contact offenders, IIOC-only offenders are more likely to be married, educated, intelligent, and employed; more likely to have psychological barriers to committing contact crimes; and less likely to have mental health problems or substance abuse problems. These attributes suggest greater ability to regulate one's emotions, such that even if these individuals hold strongly paedophilic interests, they are better able to stop themselves from acting on such desires and fantasies. Brain imaging studies indicate that for individuals with diagnosed paedophilic interests, the ability to control inhibitions helps distinguish those who commit contact sex offences against children (lesser inhibitory control) from those who do not (greater exercise of inhibition).³⁰⁴ It is also relevant that, overall, the IIOC-only group tends to present as higher-functioning individuals.³⁰⁵

With one important aspect, the evidence is mixed. Studies differentially indicate which group (IIOC-only or mixed offenders) are more likely to participate in a IIOC social network or otherwise engage with others online about IIOC.³⁰⁶

Some commentators have argued that IIOC is a gateway to contact offending against children when the viewers become desensitized to the images and thereafter seek sexual gratification from live children.³⁰⁷ However, most experts and research reports concur that there is a very low risk of cross-over from IIOC to contact sexual offending.³⁰⁸ Studies in various jurisdictions typically conclude that IIOC-only offending,

³⁰⁰ Jennifer A. McCarthy, 'Internet Sexual Activity: A Comparison between Contact and Non-Contact Child Pornography Offenders' (2010) 16(2) J. Sex. Aggress. 181.

³⁰¹ *ibid.*

³⁰² Anne Goller and others, 'Criminal Recidivism of Illegal Pornography Offenders in the Overall Population—A National Cohort Study of 4612 Offenders in Switzerland' (2016) 6 Adv. Appl. Sociol. 48.

³⁰³ Soldino and others 2019 (n 285); Babchishin and others 2018 (n 176) (listing studies).

³⁰⁴ Christian Kärgel and others 'Evidence for Superior Neurobiological and Behavioral Inhibitory Control Abilities in Non-Offending as Compared to Offending Pedophiles', 38 Hum. Brain Mapp. 1092.

³⁰⁵ Gottfried and others 2020 (n 198) (citing studies).

³⁰⁶ Compare Babchishin and others 2014 (n 273) (concluding IIOC-only more likely to engage in an online IIOC network) with Rogers and others 2021 (n 1) (citing studies that IIOC-only are less likely to socialize with others online about IIOC) and Krone and others (n 265) (mixed offenders more likely to take a networking role).

³⁰⁷ Christensen and others 2021 (n 180).

³⁰⁸ Rogers and others 2021 (n 1) (citing studies); Christopher Dowling, Hayley Boxall, Kamarah Pooley, Cameron Long, and Christie Franks, 'Patterns and Predictors of Reoffending Among Child Sexual Offenders' [2021] Trends Issues Crime Crim. Justice 632; Hirschrift and others 2019 (n 290); Ian A. Elliott, Rebecca Mandeville-Norden, Janine Rakestrow-Dickens, and Anthony R. Beech, 'Reoffending

without additional risk factors, is not a significant risk predictor for contact offending against children.³⁰⁹ A report produced by the United States Sentencing Commission on non-production child pornography cases concluded that “most social science research suggested that viewing child pornography alone did not cause offenders to commit additional sex offences absent other risk factors.”³¹⁰ Risk factors for crossover offending identified in the research include antisociality, social withdrawal, and impulsivity.³¹¹ Protective factors that reduce the likelihood of IIOC-only offenders to crossover are limited access to children and having psychological barriers to committing contact sex offences.³¹² Notably, the relevant empirical studies indicate that the number, nature, type, or severity of images are not associated with escalating to contact offending.³¹³

A common criminal trajectory for mixed offenders may be of interest. Contact sexual offending in most cases occurs before viewing IIOC, in a few cases they occur together, and only in rare cases do first contact offences occur after IIOC use.³¹⁴ Hence, any crossover potential is more likely in the opposite direction, from contact offending against children to IIOC. “[I]t is more likely that a contact offender will transition to a child pornography offence as a means of a sexual outlet, and less likely that a [IIOC offender] will transition to committing a hands-on offence against a child.”³¹⁵

One final note regarding a difference is that mixed offenders are at higher risk of being facilitated by a greater number of cognitive distortions than IIOC-only and contact-only offenders, presumably because they hold cognitive distortions in both groups.³¹⁶

Rates in a U.K. Community Sample of Individuals with Convictions for Indecent Images of Children’ (2019) 43(4) Law Hum. Behav. 369; Krone and others 2017 (n 265) 59 (concluding with a review of Australian cases of IIOC that “[n]o clear transition from online to offline offending was observed in this study”).

³⁰⁹ Goller and others 2016 (n 302) (of IIOC-only offenders, in a 3-year follow-up period, 0.2% convicted of a contact offence against a child and 1.6% of an illegal pornography charge) (studying all illegal pornography index offence but indicating most likely child pornography); Valérie Savoie, Ethel Quayle, Elizabeth Flynn, and Suzanne O’Rourke, ‘Predicting Risk of Reoffending in Persons with Child Sexual Exploitation Material Offense Histories: The Use of Child Pornography Offender Risk Tool in a Scottish Population’ (2021) Sex. Abuse (2021) (online first) < <https://doi.org/10.1177/10790632211047190> > accessed 10 March 2022 (re Scotland).

³¹⁰ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115).

³¹¹ Gottfried and others 2020 (n 198) (citing studies).

³¹² Babchishin and others 2018 (n 176) (listing studies); Babchishin and others 2014 (n 273).

³¹³ Henshaw and others 2020 (n 173).

³¹⁴ *ibid.*

³¹⁵ Thanh Ly, R. Gregg Dwyer, and J. Paul Federoff, ‘Characteristics and Treatment of Internet Child Pornography Offenders’ (2018) 36 Behav. Sci. Law 216, 218.

³¹⁶ Steel and others 2020 (n 241).

5.4. Female IIOC offenders

IIOC offenders are overwhelming male.³¹⁷ Not much is known about female offenders, such that the behavioural patterns, psychological traits, and risk predictors that are relevant to men may not be applicable to women who commit IIOC crimes.³¹⁸ Enquiries of adults in the community about their sexual interest in children typically yield smaller proportions (typically half the size) for women. For instance, a study in Quebec found that 1% of females (compared to 2% of males) reported having fantasized about having sex with a child under 12.³¹⁹ Surveys of college students and an online public sample found 2% of females (compared to 4% of males) endorsed being sexually attracted to little children.³²⁰

A recent study delving into the case files of women convicted of such crimes in the U.S. federal system provides some hints. Two-thirds of these women were first-time offenders and committed the IIOC offence with a male co-offender.³²¹ A male participant was more likely in cases when the female was involved with producing IIOC, which also in many cases involved her own child.³²² A significant percentage had a history of mental health issues and had been previously victimized by physical or sexual violence, both aspects indicating a background involving trauma.³²³ These results are consistent with other research focusing on women convicted of sexual crimes against children in which many have prior mental health, substance abuse, and trauma histories and often are coerced into the crimes by male romantic partners involving girls already known to them (e.g., daughters or other relatives).³²⁴ Still, there is evidence that a small subset of females is motivated by a sexual desire for children, typically boys, and this tends more often to occur in solo offending occurrences.³²⁵

³¹⁷ Brown and Bricknell 2018 (n 177).

³¹⁸ William Bickart, Alix M. McLearn, Melissa D. Grady, and Katie Stoler, 'A Descriptive Study of Psychosocial Characteristics and Offense Patterns in Females with Online Child Pornography Offenses' (2019) 26(2) *Psychiatr. Psychol. Law* 295.

³¹⁹ Joyal and others 2015 (n 185).

³²⁰ Wurtele and others 2014 (n 185).

³²¹ Bickart and others 2019 (n 318).

³²² Michael Salter, WK Tim Wong, Jan Breckenridge, Sue Scott, Sharon Cooper, and Noam Peleg, 'Production and Distribution of Child Sexual Abuse Material by Parental Figures' [2021] *Trends Issues Crime Crim. Justice* 616.

³²³ Bickart and others 2019 (n 318).

³²⁴ Sophie Augarde and Michelle Rydon-Gange, 'Female Perpetrators of Child Sexual Abuse: A Review of the Clinical and Empirical Literature – A 20-year Update' (2022) 62 *Aggress. Violent Behav.* 101687 (citing studies).

³²⁵ *ibid.*

5.5. Harm to the child

The sexual abuse of a child can cause physical, psychological, and emotional harms to a child at the time of the incident and long thereafter. Another long-term psychological effect is the knowledge that the images are out in the world where other people can indirectly exploit the child by getting sexual pleasure by seeing his/her naked body and witnessing their victimization.³²⁶ Related harms, whether or not contact sexual abuse occurred at the time the images were taken, concern undermining the privacy, dignity, bodily integrity, humanity, and autonomy of the child for their lifetime.³²⁷ In the case of morphed images in which a photo of a real child is sexualized through alterations, the harms concern the sexualized exploitation of the child and the loss of personal autonomy in having their image(s) sexualized.³²⁸ Sexual images of a child, even if freely and voluntarily self-taken by a teenager, can cause damage to them later in life, such as interfering with job prospects or engaging in political debate.³²⁹

Relatively little research has been accomplished directly with the child victims of indecent images crimes, though a few reports are now available.³³⁰ It is noted, though, that the findings in these reports cannot be held to be conclusive as none of them constitute representative samples, such that results may be biased as a result.

Perhaps the earliest attempt to conduct an empirical study of victims of IIOC was done in Germany in the early 2000s.³³¹ These researchers focused on professionals who worked with sexually abused children rather than questioning the victims themselves. In any event, the respondents indicated that the most common reasons that child victims did not report their own IIOC abuse were due to feelings of guilt or receiving threats from their abusers. These professionals reported gender differences in coping skills, but the article does not specify further in terms of whether boys or girls are better at coping or how/why. Most of the IIOC producers were fathers or male friends of the family who engaged in grooming behaviour and/or threats. Half of respondents believed children who were the subject of IIOC suffered greater stress than those who were sexually abused without pornographic exploitation. The reasons given were that the IIOC caused additional harm where the permanence and potential availability of the materials caused the victims to feel a sense of helplessness in being unable to control who might see their images or in what situations.

The Canadian Centre for Child Protection undertook an international survey of self-identified victims of IIOC beginning in 2016, with 150 mostly female and then-adult

³²⁶ Alisdair A. Gillespie, 'Child Pornography' (2018) 27(1) *Inf. Commun. Technol. Law* 30.

³²⁷ *ibid.*

³²⁸ *ibid.*

³²⁹ *ibid.*

³³⁰ We do not cover here studies that focus on what would be regarded as teenage sexting culture.

³³¹ Julia von Weiler, Annette Haardt-Becker and Simone Schulte, 'Care and Treatment of Child Victims of Child Pornographic Exploitation (CPE) in Germany' (2010) 16(2) *J. Sex. Aggress.* 211.

survivors who participated.³³² While the study provides one of the few avenues to getting the perspectives of the victims, there are several limitations that render the results unrepresentative. A (reasonable) choice was made not to require answers to all questions considering the significant length of the survey itself. But this means that responses might be unrepresentative to the extent an individual may be more likely to answer a question that is felt as more relevant to their case. There was a skew geographically in that almost half of respondents lived in the Netherlands at the time of the abuse. Then responses may have been impacted as almost two-thirds of respondents were at the time of the survey engaged in ongoing therapy with a professional. With these provisos, a summary of the report indicates that the proportions of those answering any particular question who reported the following attributes or impacts of their IIOC abuse were:

- Age less than age 12 when the sexual abuse began (87%)
- The IIOC producer was a family member (50% of single offenders; 82% of primary offenders where multiple offenders were involved), and most likely a father or stepfather
- Lived full-time with the IIOC producer (54%)
- Sexual abuse occurred within the victim's home (58%)
- Aware of the creation of the IIOC at the time (71%)
- Instructed to pose/perform (44%), smile/show enjoyment (38%), and/or wear costumes (38%)
- Threatened with harm to self (67%) and/or a family member (24%)
- Shown adult pornography (55%)
- Shown the IIOC of other children (42%)
- Shown their own (indecent) images (60%)
- Felt concerned about the permanence of their IIOC (67%)
- Worried about being recognised by someone who had seen their images (69%)
- Had been targeted by someone who saw their IIOC (82%)
- Experienced difficulties with family (55%), parenting (18%) and/or partner relationships (16%)

³³² Canadian Centre for Child Protection, 'Survivors' Survey: Full Report 2017' (2017) < https://www.protectchildren.ca/pdfs/C3P_SurvivorsSurveyFullReport2017.pdf > accessed 10 March 2022.

- Reported intimacy and trust issues (64%)
- Diagnosed with a trauma or stress-related disorder (70%)
- Their sexual abuse had not been reported to the police (58%)

Respondents could choose multiple responses to a query about their struggles as a result of their victimisation, with a substantial majority reporting anxiety, sleeping difficulty, hypervigilance, body image problems, suicidal ideation, relationship difficulties, self-harm, problematic eating, and avoiding sex. In terms of the impact of the IIOC crimes on their daily lives, 39% reported their lives were generally affected thereby, 32% did not feel safe and were hypervigilant, and 22% generally faced difficulty in performing tasks or communicating with others. Overall, 30% of those who answered the relevant question indicated they had actually been Identified either online or in person by someone who had viewed their IIOC.

Another online convenience sample, consisting of 133 then male and female adult survivors (age range 18-75) who were sexually molested as a child during the production of IIOC, reported that in three out of four cases their molestation lasted for more than a year, and more than half of the IIOC victimisations had never been reported to authorities.³³³ A majority of the sample reported that “all the time” they felt ashamed, worried people would think they were a willing participant, and felt it was their fault. A majority indicated that either all the time or sometimes they worried about being recognised in public, feared that people they knew would see the images, and refused to talk about their abuse experiences. One respondent commented that the “molesting or rape eventually stops. But images keep forever and maybe they’ll never stop being circulated.”³³⁴ This sample thereby appeared to feel that the IIOC constituted a continuing legacy of abuse. Then, almost half admitted to either all the time or sometimes denying that there existed any IIOC involving themselves.³³⁵

These researchers used a subset of the same online sample just discussed to answer other research questions. The mean age of the subsample (n = 107, age range 18-63) when the images were first created was 6 years (standard deviation of 4), with the perpetrator being a family member in 62% of cases and an acquaintance in 38%. Just over half were aware the images of them were shared (51%), with the rest either believing the materials were not shared or they did not know either way.³³⁶ Using a four-point scale ranging from never to “all the time,” the respondents were asked several

³³³ Ateret Gewirtz-Meydan, Wendy Walsh, Janis Wolak, and David Fiinkelhor, ‘The Complex Experience of Child Pornography Survivors’ (2018) 80 Child Abuse Negl. 238.

³³⁴ *ibid* 244.

³³⁵ The international survey of adult survivors of IIOC also indicated that some tried to deny the existence of their own IIOC. Canadian Centre for Child Protection, Survivors’ Survey (n 332).

³³⁶ Ateret Gewirtz-Meydan, Yael Lahav, Wendy Walsh, and David Finkelhor, ‘Psychopathology among Adult Survivors of Child Pornography’ (2019) 98 Child Abuse Negl. 104189.

questions. On a query of whether survivors felt guilt regarding the images of them (as in feeling it was their fault), the mean response was 3.31, signifying that it was common for them to feel guilty much of the time.³³⁷ When asked if they were embarrassed when authorities viewed their images, the mean response was 3.21, indicating that ongoing and strong feelings of shame were experienced when officials observed their images in the course of their duties.³³⁸ In addition, most of the survivors indicated they tended to avoid being photographed as adults.³³⁹ Higher levels of guilt and embarrassment were associated with a greater level of trauma symptoms in these adult survivors. The study found evidence, too, that trauma symptoms tended to decline over time in that older survivors, controlling for other sociodemographic and crime factors, reported fewer trauma symptoms.

Two high court decisions have discussed the harms of IIOC, though without citing empirical studies. An opinion from the United States Supreme Court in 2009 described the harms attributable to any viewer of IIOC regarding the child depicted therein include contributing to the child's continued sexual victimisation as a permanent record thereof, causing the victim humiliation, perpetuating the invasion of the child's privacy, and constituting direct abuse of the child by supporting the production of IIOC.³⁴⁰ The Canadian Supreme Court has characterised the harms of IIOC as promoting cognitive distortions, fuelling fantasies that might incite predators, being useful for grooming and seducing child victims, and invading the child's privacy rights.³⁴¹

5.6. Sentencing philosophies

The scientific literature provides some informative material about the role of deterrence and potential need for incapacitation specifically addressing IIOC offenders.

5.6.1. General deterrence

The sentencing philosophy of general deterrence does not operate well with IIOC offenders.³⁴² Deterrence theory is based on three attributes: the certainty that the individual will be punished for committing the crime, the swiftness of punishment, and a

³³⁷ *ibid.* Over half of respondents in another survey likewise admitted at the time of their abuse they felt shame and guilt. Canadian Centre for Child Protection, Survivors' Survey (n 332).

³³⁸ Gewirtz-Meydan and others 2019 (n 336).

³³⁹ *ibid.* In the Canadian Centre for Child Protection's international survey, 28% reported sensitivity in the presence of cameras. Canadian Centre for Child Protection, Survivors' Survey (n 332).

³⁴⁰ *United States v. Paroline*, 134 S.Ct. 1710 (2014).

³⁴¹ *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 SCR 45.

³⁴² Roderic Broadhurst and Matthew Ball, 'Tor's Underworld, "Onion Services" and Child Sexual Abuse Material: Submission to the Australian Parliamentary Joint Committee on Law Enforcement Inquiry into 'Law Enforcement Capabilities in Relation to Child Exploitation' (2021) <

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3927628 > accessed 10 March 2022.

severe penalty. General deterrence is challenging on each attribute. Despite multiple jurisdictions attempting to engage general deterrence by criminalising each layer of IIOC offending (from producing, to distributing, to viewing) and creating harsh penalties for such offences, the evidence suggests that this classic model of general deterrence is largely unsuccessful. The increases in the number of reports of IIOC circulating and of prosecutions for IIOC offences in recent years appear not to support general deterrence.³⁴³ The sharp uptake in IIOC offending during the COVID-19 pandemic provides implicit support for the relevance of stress, long periods of Internet engagement, and social disengagement.³⁴⁴ The Risk Management Authority in Scotland has acknowledged that it is not possible to tackle the global problem of IIOC through formal law enforcement channels.³⁴⁵ To date, criminal justice interventions are “the tip of the iceberg”.³⁴⁶

The certainty that one will be caught, as a required tenet of general deterrence theory, is almost non-existent. Experts believe only a small proportion of individuals accessing IIOC are ever identified, much less apprehended and punished.³⁴⁷ Surveys of community samples of males show that approximately 2-9% self-report having viewed IIOC.³⁴⁸ A survey focused on individuals admitting to online pornography use found that 21% of them had also accessed IIOC.³⁴⁹

The nature of IIOC offending in the age of the Internet undermines the threat of being caught in the minds of potential offenders.³⁵⁰ The “Triple-A Engine” of the Internet offers the alluring benefits of accessibility, affordability, and anonymity.³⁵¹ Anonymity leads to deindividualisation and thus seen less disinhibiting of bad behaviour.³⁵² The general lack of fear of apprehension is evidenced in various ways. A study of IIOC offenders in

³⁴³ Henshaw and others 2020 (n 173); Knack and others 2020 (172).

³⁴⁴ Broadhurst and Ball 2021 (n 342); Jensen Deutrom, Vasilis Katos, and Raian Ali, ‘Loneliness, Life Satisfaction, Problematic Internet Use and Security Behaviours: Re-Examining the Relationships When Working from Home During Covid-19’ (2021) *Behaviour & Information Technology* <<https://doi.org/10.1080/0144929X.2021.1973107>> accessed 10 March 2022.

³⁴⁵ Risk Management Authority (of Scotland) 2018 (n 256).

³⁴⁶ Tim J. Wilson, ‘Collaborative Justice and Harm Reduction in Cyberspace: Policing Indecent Child Images’ (2020) 84(5) *J. Crim. Law* 474, 476.

³⁴⁷ Seto and others 2015 (n 209).

³⁴⁸ Caoilte Ó Ciardha, Gaye Ildeniz, and Nilda Karoğlu, ‘The Prevalence of Sexual Interest in Children and Sexually Harmful Behavior Self-Reported by Men Recruited Through an Online Crowdsourcing Platform’ (2021) 34 *Sex. Abuse* 207 (reporting a 3.3% prevalence rate of viewing IIOC in an online sample of males with a proclivity toward having a sexual interest or sexual behaviours regarding children); Seto and others 2015 (n 209) (reporting 4.2% IIOC viewership among a Swedish sample of 2,000 young males (age 17-20)); Dombert and others 2016 (n 185) (reporting a 2.4% IIOC viewership among an online survey of German men); Wurtele and others 2014 (n 185) (reporting 9% of male subjects sampled admitted to likely viewing IIOC).

³⁴⁹ Ray and others 2014 (n 174).

³⁵⁰ Bryce G. Westlake, Martin Bouchard, and Ashleigh Girodat, ‘How Obvious is it? The Content of Child Sexual Exploitation Websites’ (2017) 38(3) *Deviant Behav.* 282; Ray and others 2014 (n 174).

³⁵¹ Cooper 1998 (n 222).

³⁵² Paquette and Cortoni 2021 (n 223).

the United States found that an attempt at concealing their activities was found in just 16% cases (10% using the Dark Web, 5% with software that wipes files, 3% using encryption, and 1% using hidden files).³⁵³ Researchers with a sample in Spain found only 9% of IIOC offenders adopted some form of security measure.³⁵⁴ Another study found that less than 30% of IIOC offenders used password protections to thwart others from finding their collections.³⁵⁵

Another study is relevant in finding that, of those IIOC offenders who had deleted their entire collection at least once, only 20% of them did so out of fear of detection and the resulting consequences (most often the destruction was because of wanting to stop and/or instigated by feelings of guilt, shame, or remorse).³⁵⁶ The minimal sense of fear is also on the part of the creators and managers of sites offering IIOC. A report indicates that many websites containing IIOC did not try to hide their purpose and that those that were more explicit in their focus were not more likely to be shut down than those which were more covert in their operations.³⁵⁷

The certainty and swiftness of apprehension are also undermined from legal and practice perspectives. IIOC by its nature transcends physical, geographic, and cultural boundaries. It is simply difficult to prevent or deter a borderless crime when there is no harmonization of laws, regulatory regimes, or investigative resources.³⁵⁸ For IIOC, laws around the world vary significantly. Some countries have no laws that criminalize IIOC, which means that creating, posting, distributing, or advertising sexualized images of children may have initially constituted entirely legal actions. Further, content that is deemed illegal matter in one country may be legal in other jurisdictions.³⁵⁹ To illustrate, a recent investigation by Google and the National Center for Missing and Exploited Children into the top 10 countries which generated reports of victims and abusive entities found significant volumes tagging Indonesia and Thailand, both of which do not have a legal definition regarding child pornography, and Iraq and Somalia, both countries that do not criminalize IIOC.³⁶⁰ As other examples, jurisdictions vary in whether possession is a crime,³⁶¹ whether pseudo- or non-photographic images are illegal, or what age of the child constitutes the demarcation of unlawful pornography.

³⁵³ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115).

³⁵⁴ Soldino and others 2019 (n 285). See also Krone and others 2017 (n 265) (finding only 8% had encrypted the IIOC).

³⁵⁵ McManus and others 2015 (n 280).

³⁵⁶ Steel and others 2021 (n 190).

³⁵⁷ Westlake and others 2017 (n 350).

³⁵⁸ Sabine K. Witting, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders' (2021) 29 *Int. J. Child. Rights* 731.

³⁵⁹ Broadhurst and Ball 2021 (n 342).

³⁶⁰ Elie Bursztein and others 2019 (n 260).

³⁶¹ Witting 2021 (n 358).

Then the general deterrence tenet of severity of penalty yields inconsistent results. Penalties for violating IIOC-related crimes vary significantly across jurisdictions, from a community order to extremely long sentences.³⁶² Yet there is no evidence that potential IIOC offenders are aware of what penalty might await them in their jurisdiction. For example, one author suggests that while possessing IIOC in Korea is a crime punishable by up to a year in prison, this crime is not widely known as such by that country's residents.³⁶³

As with other types of cybercrime, tackling online IIOC is difficult even when investigators might easily find where it resides. The success of any investigation is challenged (thus impacting the certainty and swiftness of any particular offender being caught) by a combination of the sheer numbers of individuals involved and transactions that are occurring, jurisdictional issues, privacy protections that may impede investigatory efforts, barriers to sufficiently identifying images as IIOC (e.g., pinpointing the age of the child), and technological impediments to personally identifying offenders.³⁶⁴

5.6.2. Specific deterrence

The available evidence strongly indicates that IIOC offenders can be specifically deterred in that a significant majority of those apprehended and convicted of IIOC-based crimes will not reoffend with a sexually based crime. In a meta-analysis of studies reporting recidivism rates for online offenders (most of whom were IIOC offenders) found that the sexual recidivism rate (including contact and non-contact crimes involving adults or children) was 5%,³⁶⁵ which two of the authors later described as “belying the notion that all child pornography offenders are at high risk to reoffend.”³⁶⁶

Researchers studying a sample of cases from the east coast of Scotland convicted of IIOC offences found that 9.9% were charged with a new sexual offence (which was inclusive of contact and non-contact crimes, involving adults or children, and breaching a Sexual Offence Prevention Order); the recidivism rate for a new IIOC crime specifically was 7.8%.³⁶⁷ Researchers with a U.K. sample of IIOC offenders who attended sex offender programs from 2002 to 2008 using a fixed five-year follow-up

³⁶² See Section 3.

³⁶³ Lee 2019 (n 259).

³⁶⁴ Westlake and others 2017 (n 350).

³⁶⁵ Michael C. Seto, R. Karl Hanson, and Kelly M. Babchishin, 'Contact Sexual Offending by Men With Online Sexual Offenses' (2011) 23(1) Sex. Abuse 124.

³⁶⁶ Seto and Eke 2015 (n 265).

³⁶⁷ Savoie and others 2021 (n 309).

period reported a 2.7% IIOC recidivism rate.³⁶⁸ An Australian sample found a 4.6% IIOC recidivism rate.³⁶⁹

The recidivism rates just provided group together IIOC-only with mixed offenders, though further statistics indicate the likelihood of reoffending with a sex crime differs significantly between the groups. In the Scottish sample mentioned above, the IIOC reoffending rate for IIOC-only individuals was 6.6%, compared to 14.3% for the mixed offender group.³⁷⁰ In the UK sample mentioned, the report does not distinguish IIOC recidivism rates in the fixed follow-up, but for any sexual recidivism the rates varied from 2.7% for IIOC-only offenders to 14.2% for the mixed offenders.³⁷¹ Studies in other countries tend to find that mixed offenders are more likely to commit new sexual offences generally and to commit a new IIOC crime specifically.³⁷² Across studies, IIOC-only offenders tend to have a IIOC recidivism rate (differentially measured as arrest or conviction depending on the study) ranging from 0 to 9%.³⁷³ In sum, specific deterrence is weaker, though still strong, with mixed offenders for the reasons discussed earlier. Mixed offenders are more likely to have a IIOC rearrest than IIOC-only offenders.³⁷⁴

Among the reasons for the positive specific deterrence effect is the situational factor where the Internet is perceived as a lawless space offering anonymity. Once the individual is detected by law enforcement, that veneer of lawlessness and of invisibility dissolves.³⁷⁵

5.6.3. Future risk/incapacitation

Some research indicates that mixed offenders are at highest risk of future contact offending against children, greater than IIOC-only and contact-only, because they rate higher on both sexual deviance and antisociality (IIOC-only rate high on sexual deviance and low on antisociality, contact-only low on sexual deviance and high on

³⁶⁸ Elliott and others 2019 (n 308).

³⁶⁹ Krone and others 2017 (n 265).

³⁷⁰ Savoie and others 2021 (n 309).

³⁷¹ Elliott and others 2019 (n 308).

³⁷² Soldino and others 2019 (n 285); Goller and others 2016 (n 302).

³⁷³ Soldino and others 2019 (285); Brown and Bricknell 2018 (n 177) (listing studies); Goller and others 2016 (n 302) (finding in a Swiss sample that illegal pornography-only offenders had a 1.6% recidivism rate of IIOC offending); Seto and Eke 2015 (n 265) (7% IIOC recidivism rate in a Canadian sample). See also United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115) (regarding IIOC offenders generally, finding a 3.3% rate of arrest for noncontact sexual offences generally (inclusive of IIOC arrests)).

³⁷⁴ Angela W. Eke, L. Maaikje Helmus, and Michael C. Seto, 'A Validation Study of the Child Pornography Offender Risk Tool (CPORT)' (2019) 31(4) *Sex. Abuse* 456 (reporting a 6.1% IIOC rearrest for IIOC-only compared to 17.9% for mixed offenders); Goller and others 2016 (n 302) (reporting a 1.6% IIOC recidivism rate for illegal pornography-only offenders compared to 3.5% for mixed offenders).

³⁷⁵ Steel and others 2021 (n 196).

antisociality).³⁷⁶ Experts have concluded that theories, knowledge, and risk assessment tools designed for contact sex offenders are insensitive to the different attributes of the IIOC-only population.³⁷⁷ Similarly, risk assessment tools designed to predict contact sexual offences tend to overestimate the risk of IIOC-only offenders.³⁷⁸

For example, the IIOC-offence-specific Child Pornography Offender Risk Tool (CPORT) predicts any sexual recidivism (i.e., not limited to offences involving children), and includes contact and noncontact offending (such as indecent exposure).³⁷⁹ Thus, CPORT does not exclusively predict contact offending or contact offending against children.³⁸⁰ CPORT was not intended to be used exclusively on CSEM-only individuals as it was normed on a developmental sample that included dual offenders and those with production charges. Nonetheless, the factors included within CPORT as statistically associated with any future sexual offence are: age, any prior criminal history, any contact sexual offence history, any failure on conditional release, admission of or diagnosed paedophilic or hebephilic interest, having a more than 51% ratio of boy to girl child pornography content, having more boy than girl other child-related content (e.g., nudity). CPORT developers noted that a person collecting content suggesting multiple paraphilic interests was not a significant predictor, with authors surmising this was because having such a varied material base could mean curiosity, accident, or that the collection was for trading purposes. Other items tested that were not found to be significantly predictive of sexual recidivism were organizing a collection, and access to children.³⁸¹

A sentencing jurisdiction might consider adopting CPORT to assist with assessments of whether a penalty including some form of incapacitation might be justified. However, the CPORT requires substantive details about the content of the offender's IIOC collection and information on whether the individual has a paedophilic or hebephilic interest, which are not part of the general practice in Scotland; hence the routine use of CPORT would require material changes in practices and greater resources.³⁸² It is also of note that CPORT did not perform well when researchers studied its accuracy in a Scottish sample of individuals convicted of IIOC offences, in that higher CPORT scores were not consistently related to a higher rate of either any sexual reoffending or specifically IIOC reoffending.³⁸³ Another validation study showed that while CPORT performs adequately

³⁷⁶ Henshaw and others 2018 (n 274).

³⁷⁷ Hannah L. Merdian, Derek Perkins, Darragh McCashin, and Jelena Stevanovic, 'Integrating Structured Individual Offending Pathway Analysis into Group Treatment for Individuals who have Accessed, Shared, and/or Distributed Child Sexual Exploitation Material: A Feasibility Study and Preliminary Outcome Evaluation' (2021) 27(6) *Psychol. Crime Law* 579.

³⁷⁸ Savoie and others 2021 (n 309).

³⁷⁹ Seto and Eke 2015 (n 265).

³⁸⁰ Henshaw and others 2020 (n 173).

³⁸¹ Seto and Eke 2015 (n 265).

³⁸² Savoie and others 2021 (n 309).

³⁸³ *ibid.*

for mixed offenders, it exhibited a weak ability for IIOC-only offenders.³⁸⁴ Another limitation is that CPORT has not been validated for female offenders.³⁸⁵

A recent addition to the OASys Sexual Reoffending Predictor risk tool used by Her Majesty's Prison and Probation Service is meant to be specific to indecent images cases (OSP/I).³⁸⁶ The OSP/I is extremely streamlined in that it solely considers the existence of prior convictions for IIOC offences.³⁸⁷ It is not evident in any event that this tool would be of much use in selecting those individuals who are very likely to commit a new IIOC crime. For OSP/I, a high risk designation (based on the existence of more than one prior IIOC conviction) is associated with a 6% IIOC recidivism rate.³⁸⁸

The Kent Internet Risk Assessment Tool – Version 2 (KIRAT-2) was designed to prioritise police resources toward those most likely to have previously committed a contact sexual crime against a child.³⁸⁹ Consequently, this tool is not a traditional risk assessment device as it does not predict the future risk of offending.³⁹⁰

5.6.4. Reflections on harms

Section 5.5 addressed the harms to the children in the IIOC materials that are evidenced by the scientific literature. This sub-section extends that analysis with a variety of conceptualisations of the harms caused by IIOC that have been articulated regarding minors and harms to society more generally but not necessarily based on scientific evidence.

The then leader of the National Center for Missing and Exploited Children, an organisation that has been instrumental in investigations of IIOC crimes, describes IIOC in general terms as imposing “extreme harm” on the children.³⁹¹ Another observer argues that the possessor of IIOC is culpable in perpetuating the original child’s

³⁸⁴ Eke and others 2019 (n 374).

³⁸⁵ *ibid.*

³⁸⁶ Philip Howard and Helen Wakeling, ‘Comparing Two Predictors of Sexual Recidivism: The Risk Matrix 2000 and the OASys Sexual Reoffending Predictor’ (HM Prison and Probation Service 2021) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/95534/5/comparing-2-predictors-sexual-recidivism.pdf > accessed 10 March 2022.

³⁸⁷ HM Prison and Probation Service, ‘OASys Sexual reoffending Predictor (OSP): Guidance for Practitioner’ (2020), < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/95652/2/osp-guidance-practitioners.pdf > accessed 10 March 2022.

³⁸⁸ *ibid.*

³⁸⁹ Eke and others 2019 (n 374).

³⁹⁰ Henshaw and others 2020 (n 173).

³⁹¹ Prepared Statement of Ernie Allen, President and CEO, National Center for Missing and Exploited Children, to the U.S. Sentencing Commission (Oct. 20, 2009) < https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20091020-21/Allen_testimony.pdf > accessed 10 March 2022.

victimization.³⁹² A similar contention is that: “Possessing photos on personal devices and fantasizing about sexual acts with children is equal to exploiting minors in a real-life situation.”³⁹³

Other offerings do not focus on the direct harm caused to real children, but are broader, such as conveying that the materials harm the community’s moral character or may pollute the minds of children.³⁹⁴ By severely punishing IIOC crimes, the State sends a message that child sexual exploitation is not tolerated.³⁹⁵ An American senator has depicted IIOC as “the most heinous [crime] imaginable.”³⁹⁶

In describing these types of harm caused, perhaps more nuance may be appropriate. IIOC often derives from actual instances of contact sexual abuse involving a real child, but this is not always the case.³⁹⁷ IIOC can include self-produced images where the child is remotely solicited or coerced by another, self-taken sexual images when no other person was directly or remotely involved, or images of children in semi- or full nudity taken surreptitiously, such as by a remotely operated webcam.³⁹⁸ With technologies, individuals can now produce IIOC without having any physical contact with the target.³⁹⁹ A study of the UK’s International Child Sexual Exploitation Image Database found that, for cases with identified victims, 44.3% of the images were self-produced and while most were procured through some coercion from another person, there was a subset where there was no apparent coercion or influence from others.⁴⁰⁰ Notably, this 44.3% figure is not generalizable across IIOC collections because of limitations of the study (a UK sample known to law enforcement with identified victims), but is related here to provide an illustration of the existence of cases that constitute IIOC without necessarily involving violence, threat, or coercion.

Conceptualising fantasies about children to be equivalent to exploitation may also require nuance. Considered broadly, humans think and fantasize about many things, including deviant acts, without necessarily having any intent, or as a practical matter

³⁹² Anthony M. Dillof, ‘Possession, Child Pornography, and Proportionality: Criminal Liability for Aggregate Harm Offenses’ (2017) 44(4) FSU L. Rev. 1331.

³⁹³ Sana Ali, Hiba Abou Haykal, and Enaam Youssef Mohammed Youssef, ‘Child Sexual Abuse and the Internet—A Systematic Review’ (2021) Hu. Arenas (online first) < <https://doi.org/10.1007/s42087-021-00228-9> > accessed 11 March 2022.

³⁹⁴ Christensen and others 2021 (n 180).

³⁹⁵ Witting 2021 (n 358).

³⁹⁶ 154 Congressional Record S4588-02, at S4588 (daily ed. May 21, 2008) (statement of Senator Hatch).

³⁹⁷ Risk Management Authority (of Scotland) 2018 (n 256).

³⁹⁸ McManus and others 2015 (n 280).

³⁹⁹ Jesse Cale, Thomas Holt, Benoit Leclerc, Sara Singh, and Jacqueline Drew, ‘Crime Commission Processes in Child Sexual Abuse Material Production and Distribution: A Systematic Review’ [2021] Trends Issues Crime Crim. Justice 617.

⁴⁰⁰ Ethel Quayle, Linda S. Jonsson, Karen Cooper, James Traynor, and Carl Göran Svedin, ‘Children in Identified Sexual Images – Who are They? Self-and Non-Self-Taken Images in the International Child Exploitation Image Database 2006-2015’ (2018) 27 Child Abuse Rev. 223 (of the images with identified victims, 34.4% were self-produced involving some level of coercion from another party and 9.9% self-produced without coercion).

being likely, to act on those thoughts and fantasies. Human brains are designed to harbour some levels of attraction to deviant subjects. In terms of sexualizing children, it may also be a relevant consideration that other industries, most notably advertising, sexualize children in outwardly public-facing ways, yet are not considered illegal or necessarily immoral.⁴⁰¹

A contrary perspective should be mentioned. Some contact-driven IIOC offenders argue that the material was cathartic in satisfying their sexual desires and thus deterred them from engaging in hands-on sexual acts with children.⁴⁰² In other words, this perspective suggests a lesser harm in that IIOC may reduce the number of contact offences involving children. However, it might not be possible for research to validate this argument or quantify an estimate of how many children may have been saved from direct harm.

Another harm that has been articulated is that IIOC creates a demand for producing more materials.⁴⁰³ Such an argument has been repeated frequently across Scottish case law of the last 20 years.⁴⁰⁴ In *Longmuir v HM Advocate*, the court stated that downloading an indecent photograph “enables child pornography to proliferate”.⁴⁰⁵ The Court went further in *Ogilvie v HM Advocate*: “unless there were people willing to take into their possession images of this kind, they would not be created in the first place” and as a result, the offender was complicit in child abuse.⁴⁰⁶ The judgment in *Jordan v HM Advocate* affirmed *Ogilvie* and noted that “the making of such photographs... is not a ‘victimless crime’... The appellant and people like him bear an indirect responsibility for the sexual abuse by creating a demand for photographs of it and thus for the commission of the abuse itself”.⁴⁰⁷ This is also the approach taken in *Graham*: “viewing, downloading and distributing indecent images of children is part of the process of child sexual abuse... Those who access this material through the internet bear responsibility for the abuse by creating a demand for the material” and such offences “contribute to the pain, discomfort and fear suffered by children who are physically abused”.⁴⁰⁸ The courts in Australia have also repeatedly advanced market-making arguments,⁴⁰⁹ for example likening the relationship between pornography makers and users to thieves and receivers: without a market for stolen goods there would be no incentive to steal.⁴¹⁰

⁴⁰¹ Christensen and others 2021 (n 180).

⁴⁰² Christensen and others 2021 (n 180); Knack and others 2020 (n 172).

⁴⁰³ Elliot and others 2019 (n 308).

⁴⁰⁴ *Ryder* (n 43); *Wood et al.* (n 23) [30]; *Archer* (n 25) [14]: “it is the downloaders of indecent images who provide the economic foundation for child pornography”.

⁴⁰⁵ *Longmuir* (n 10) [14].

⁴⁰⁶ [2001] SLT 1391 [6].

⁴⁰⁷ [2008] SCCR 618 [20].

⁴⁰⁸ *Graham* (n 9) [28] (approving *Ogilvie* (n 406) and *Jordan* (n 407)).

⁴⁰⁹ E.g., *R v Jones* (1999) 108 A Crim R 50; *Assheton* (n 132).

⁴¹⁰ *R v Cook* (n 131) [21]. See also *R v Porte* (n 88) [68]-[70]. The court in *R v Booth* [2009] NSWCCA 89 [40]-[44] emphasised the impact in particular on children in underprivileged countries which lack the resources to provide adequate child protection mechanisms.

This perspective is largely responsible for Australia's preoccupation with deterrence when sentencing IIOC cases.

The evidence against such a market theory is that in today's climate, digital images are infinitely reproducible at little or no cost and the supply of IIOC images already far exceeds demand (the number is far more than any individual can possibly access and thus previously produced materials will always be material "new" to them).⁴¹¹

⁴¹¹ Dillof 2017 (n 392).

6. Aggravating and mitigating factors

The potential for various aggravating and mitigating factors for IIOC crimes is reflected in discussions across materials, such as in the wording of guidelines from different jurisdictions, the way that criminal statutes choose to differentiate and gradate different types of IIOC offending, addressed in case law opinions, and the subject of empirical studies of risk factors for reoffending with IIOC crimes or committing hands-on sexual crimes with children. This Section thus compiles these sources in order to delineate the common factors thought relevant for consideration to increase or decrease a penalty and explore their potential efficacy in application considering sentencing philosophies and goals.

6.1. Potential aggravating factors

An aggravating factor is typically viewed as one not present in the typical case and which increases the perceived severity of the behaviour, culpability of the offender, and/or harm caused.

6.1.1. Size of the collection

There are some data on the size of the IIOC collections of individuals investigated, though the numbers are not directly comparable as the methodologies differed as to whether all possible storage devices were included and if/how to count (e.g., images, videos, files). On the low end, samples yielded median numbers of images of 424 (from 2 to 202,500 images, mean of 7,135)⁴¹² and a median of 552 (mean of 1,038 images).⁴¹³ Higher numbers have been observed using samples in Australia and the United States. The Australian sample included a maximum 580,731 files in a single case, and a median collection size of 1,000 files; across cases, 20% maintained collections of more than 10,000 files, and the upper 5% with over 100,000 files.⁴¹⁴ The United States sample represented the U.S. Sentencing Commission's special investigative report for defendants sentenced in fiscal year 2019, which revealed individual collections ranging from one to 2,999,033 images (counting each video as equivalent to 75 images), with a median of 4,265 images.⁴¹⁵ This U.S. report commented that their Guideline's aggravator for additional severity levels set at 600

⁴¹² McManus and others 2015 (n 280).

⁴¹³ Fortin and Proulx (n 226). See also Long and others 2012 (n 280) (in a UK sample, a median of 787, mean of 15,099, and a range from 4 to 199,832).

⁴¹⁴ Krone and others 2017 (n 265).

⁴¹⁵ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115).

images clearly was no longer adequate to distinguish seriousness or culpability between individuals.⁴¹⁶

Some issues on using the size of the IIOC collection should be noted. The mere size of one's collection may no longer be a viable distinguishing feature in terms of culpability.⁴¹⁷ Volume increases observed in recent years are likely due to digital devices being cheaper and having greater storage capacity, as well as the availability of inexpensive cloud storage sites.⁴¹⁸ The further evolution of technologies may mean that any attempt to gradate harm by quantitative measures will quickly be outdated.

A related major shift is with the movement away from collectors maintaining local copies of their IIOC (e.g., on hard drives, flash drives, CDs). With the recent proliferation of streaming services, cloud storage, and Darknet-based websites with on-demand viewing, individuals may be able to readily access materials without the need to download to be able to view immediately or to access again at a later time.⁴¹⁹ For instance, live-streaming sexual abuse may mean no permanent image is actually created, much less downloaded or technically possessed. The likely decreasing reliance upon storing IIOC locally is also due to the increased use of mobile technologies in IIOC consumption, such as by smartphone or tablet.⁴²⁰

It is also the case that the size of an individual's collection found at any particular time may simply be a matter of chance. One study showed that 74% of IIOC viewers had deleted their collections at least once.⁴²¹ This means that unless the investigating agency is able to uncover deleted files, if the individual is apprehended around the time of deletion, then a forensic analysis may uncover little or only a small portion of the stash that was at one point actually possessed. As an example, Australian police had information that an individual had over time accessed 11,000 images and 21 videos, but most of them had been deleted by the time a search warrant was executed, such that police were only able to recover 96 images and 8 videos.⁴²² Relatedly, some offenders are using public devices to view, such as library computers, and thus there may be further difficulty in tracking what images were viewed by any particular individual using a shared computer.

⁴¹⁶ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115).

⁴¹⁷ Chad M.S. Steel, Emily Newman, Suzanne O'Rourke, and Ethel Quayle, 'An Integrative Review of Historical Technology and Countermeasure Usage Trends in Online Child Sexual Exploitation Material Offenders' (2020) 33 *Forensic Sci. Int.: Digit. Investig.* 300971.

⁴¹⁸ Virginia N.L. Franqueira, Joanne Bryce, Noora Al Mutawa, and Andrew Marrington, 'Investigation of Indecent Images of Children Cases: Challenges and Suggestions Collected from the Trenches' (2018) 24 *Digit. Investig.* 95.

⁴¹⁹ Steel and others (2020) (n 417).

⁴²⁰ *ibid.*

⁴²¹ *ibid.*

⁴²² Krone and others 2017 (n 265).

In any event, there is likely a diminishing return in terms of the meaning of extremely large collections. Maintaining a vast assortment of IIOC, greater than one can practically view in its entirety, even over the course of a lifetime, appears to undermine an assumption that the intent was about interacting with the images themselves rather than for some other purpose. As a case example, one defendant in Australia had 36,000 images, 1,158 videos, and 80 text files in his IIOC collection.⁴²³

In terms of future risk, one study concluded there was no relationship between the size of the IIOC collection and the likelihood of sexual reoffending or IIOC reoffending.⁴²⁴ On the other hand, the mere fact that the individual intentionally retains the collection, regardless of its size, may indicate a higher tolerance for taking risk, which might signify a more culpable and dangerous individual.⁴²⁵

In *Graham*, the Scottish Court of Criminal Appeal considered the number of images to be a relevant factor.⁴²⁶ In a commentary on *Graham*, however, Gillespie argued that the difficulty of basing sentences on quantity is that it can simply be an indication as to how technically proficient a person is at using the Internet.⁴²⁷ Similarly, the court in *Archer* acknowledged the issues raised by changing technology, noting that “in comparing numbers of images downloaded from the internet it is important to bear in mind the extraordinary ease of downloading large amounts of material of any kind from that source”, meaning that “the effort required to copy a thousand images is not significantly greater than the effort required to copy a single image”.⁴²⁸

The Sentencing Council for England and Wales had in the 2007 Guideline differentiated between collections that were “few”, “small”, and “large” in size⁴²⁹ but has since then taken the view that “the large number of images is not necessarily an indicator of the offender’s culpability; what the offender has done with the images is a better indicator of this”.⁴³⁰ The number of victims is also included as an aggravator in the IIOC Guideline and the Australian courts have tended to emphasize this factor over the number of images involved.⁴³¹ The US federal sentencing guideline for non-production offences

⁴²³ *ibid.* For comparison, the defendant in *Graham* (n 9) had a collection of 79,011 still images and 1,194 videos.

⁴²⁴ Krone and others 2017 (n 265).

⁴²⁵ Steel and others 2020 (n 417).

⁴²⁶ *Graham* (n 9) [30]-[32]: images in the low hundreds can be described as a “small” number, while those in the high hundreds or thousands can be said to be a “large” number.

⁴²⁷ Alisdair A. Gillespie, ‘Sentences for Offences relating to Indecent Photographs’ (2010) 74 J. Crim. Law 513, citing Max Taylor and Ethel Quayle, *Child Pornography: An Internet Crime*, (Routledge 2003) 205.

⁴²⁸ *Archer* (n 25) [16]. Also relevant here is the approach adopted in England and Wales, where the number of images can only adjust a sentence within a chosen sentence range, rather than influencing the choice of range (see Section 1.3).

⁴²⁹ Sentencing Guidelines Council, *Sexual Offences Act 2003: Definitive Guideline* (n 21).

⁴³⁰ Sentencing Council, *Sexual Offences Guideline Consultation* (n 37) 81.

⁴³¹ *R v Gent* (2005) 162 A Crim R 29 [33]; *Minehan* (n 134) [94]-[95]; *R v Hutchison* [2018] NSWCCA 152. But see *Hitchen v The Queen* [2010] NSWCCA 77, although this was an extreme case involving more than 729,000 still images and 2,700 video files.

includes aggravators based on collection size, with the highest level being 600 or more images (with a video counting as 75 images).⁴³² The U.S. Sentencing Commission has observed that this now includes almost every case and instead proposes assessing the nature of an offender's collecting behaviour.⁴³³

6.1.2. Type and severity of content

Several efforts exist to rank the type and level of severity of the content that could be useful in gradating the IIOC materials in a particular case. An exhaustive review of these scales is beyond the scope of this report, but the ones included are indicative of options from which stakeholders might select if intent on creating typologies for purposes of grading severity.

6.1.2.1. Gradations of sexual activity captured

Perhaps one of the first attempts was the COPINE (Combating Paedophile Information Networks in Europe) scale, shown in Table 6 below, which represents an ordinal ranking of the severity of the content of child sexual exploitation materials.⁴³⁴ The degree of sexual assault (if any) becomes more serious the higher the COPINE scale number. To be useful in sentencing, the COPINE scale would need to be modified as it was not developed to encapsulate only criminalized images, but instead allows for "classification of a broad range of material that may be of interest to a person with a sexual attraction to children".⁴³⁵

⁴³² See Section 3.2.

⁴³³ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 116).

⁴³⁴ M. Taylor, G. Holland, and E. Quale, 'Typology of Paedophile Picture Collections' (2001) 2 *Police J.* 97.

⁴³⁵ Krone and others 2017 (n 265).

Table 6. The COPINE scale⁴³⁶

Level	Type	Description
1	Indicative	Non-erotic and non-sexualised pictures showing children in their underwear, bathing suits, etc. from commercial sources or family albums; pictures of children in otherwise normal settings but the collector indicates inappropriateness.
2	Nudity	Pictures of naked or semi-naked children in appropriate nudist settings.
3	Eroticism	Surreptitiously taken photos of children showing their underwear or varying degrees of nakedness.
4	Posing	Deliberately posed pictures of children fully clothed, partially clothed, or naked where suggests sexual interest by collector.
5	Erotic posing	Deliberately posed pictures of full clothed, partially clothed, or naked children in sexualized or provocative poses.
6	Explicit erotic posing	Pictures emphasizing genital areas, where the child is naked, partially clothed, or fully clothed.
7	Sexual acts involving children	Pictures depicting touching, mutual and self-masturbation, oral sex, or intercourse by a child, not involving an adult.
8	Assault	Pictures of children subject to a sexual assault, involving digital touching, with an adult.
9	Gross assault	Grossly obscene pictures of sexual assault, involving penetrative sex, masturbation or oral sex, with an adult.
10	Sadistic/bestiality	Pictures showing a child being tied, bound, beaten, or otherwise implying pain or pictures where an animal is involved in some form of sexual behaviour with a child.

Several Australian jurisdictions either have moved or are considering moving from classifying images using COPINE-based schemes to four-level classification schemes incorporating the INTERPOL Baseline category.⁴³⁷ This move was evidently aimed at increasing collaboration with international efforts to tackle IIOC offending and reducing

⁴³⁶ Ethel Quayle, 'The COPINE Project' (2008) 5 Ir. Probat. J. 65.

⁴³⁷ Only two of the four INTERPOL categories cover IIOC content: category 1 (the "Baseline" category) for images involving a real child appearing to be younger than 13 years old, who is involved in or witnesses sexual activities, or where there is a clear focus on the child's genital or anal area; and category 2, which covers other indecent images of children 13 and over and/or not involving sexual activity, i.e., comparable to England and Wales' Category C. For the category list, see *R v Large* [2021] NSWDC 429 [11]. The New South Wales courts appear to have adopted the INTERPOL classification during 2021 (see e.g., *R v Large* [11]; *R v Yates* (a pseudonym) [2021] NSWDC 701 [4]), and the Victorian County Court has used it very recently (see *DPP v Amarasinghe* [2022] VCC 200); Queensland and Western Australian courts were still using 5-level systems in the last reported IIOC judgments located by this review.

the time, cost and exposure of personnel to disturbing images that are currently involved in evaluating large collections of IIOC material.⁴³⁸ The change to such a simple system has attracted some criticism.⁴³⁹ Canada has moved from a six-level classification tool to a more streamlined, three-level tool based on the INTERPOL classification system.⁴⁴⁰

Two options with collapsed tiers have been offered by the Sentencing Council for England and Wales and presented earlier: the older Levels 1-5 version and the newer Categories A – C revamp.⁴⁴¹ The Scottish courts have adopted the approach to classification set out in England and Wales' IIOC Guideline, which amounts to a simplification of the COPINE scale. The federal system in the United States maintains perhaps the simplest system here where the production and non-production include an aggravator for content that is sadistic or violent.

A separate guideline aggravator indicative of the type of content could be the presence of one or more images in which the child appears to be in extreme pain or distress. This might distinguish from cases in which the offender only dealt with more benignly appearing images (e.g., seemingly voluntarily self-produced, sexualized poses, images made without the child's awareness). In England and Wales, the IIOC Guideline includes "discernible pain or distress suffered by child depicted" as an aggravator and the Scottish Court of Criminal Appeal has taken the same approach.⁴⁴² The New South Wales Court of Appeal in Australia has also recognised the importance of apparent cruelty or physical harm done to the children depicted.⁴⁴³

⁴³⁸ The change in categorization has been driven by the Australian Federal Police's adoption of the INTERPOL categories. See e.g., Australian Government, *Annual Progress Report 2021: Implementation of recommendations from the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse* (2021) 70 <

<https://www.childabuseroyalcommissionresponse.gov.au/sites/default/files/2021-12/annual-progress-report-2021.DOCX> > accessed 12 March 2022; Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes: Final report* (2017) <

<https://www.sentencingcouncil.qld.gov.au/terms-of-reference/child-exploitation-material#keyfindings> > accessed 23.02.22; Australian Federal Police, 'Millions of files being reviewed to identify victims of child sexual abuse' (29 January 2022) < <https://www.afp.gov.au/news-media/media-releases/millions-files-being-reviewed-identify-victims-child-sexual-abuse> > accessed 12 March 2022.

⁴³⁹ *R v Yates* (a pseudonym) (n 437) [4]: "comparisons, which might allow an assessment of relative seriousness, is [sic] impossible". See also *R v Houweling* [2021] NSWDC 293 [8]; Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes* (n 438) 181 (reporting objections from several State Directors of Public Prosecution to the council's proposed adoption of a scheme combining the INTERPOL scale with an accompanying qualitative report); *R v Porte* (n 87) (stating that classification systems are useful but the court also needs to review the actual content of the images to get a proper sense of their nature).

⁴⁴⁰ Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes* (n 438).

⁴⁴¹ See Section 1.3.

⁴⁴² *Brown* (n 85) [5].

⁴⁴³ *Minehan* (n 134) [94-95].

Nonetheless, the research does not confirm that possessing images with greater levels of sexual contact is indicative of a higher risk of contact offending against children. One report indicates that having images involving sexual activity between adults and children not involving penetration and having non-erotic and non-sexualized images of children (hence, not IIOC) increased the risk of child contact offending; however, accessing images of sexual activity with penetration or sadistic sexual content was not related to sexual reoffending.⁴⁴⁴

Another issue in using the type of content to differentiate culpability between offenders is that skills and sociability in being able to locate serious material and to convince others to share may not separate those with and without a sexually preferential interest. Individuals without skills and sociability may simply not be able to access those materials and thus their collection may appear less serious than they would otherwise desire.

6.1.2.2. Ages of children in the images

A related factor might be if the individual's collection contains a clear indication of a preference for pubescent or pre-pubescent children as this might indicate a greater hebephilic or pedophilic sexual attraction. Studies of the age groupings in IIOC offenders' actual collections show mixed results. Across several studies, the overall mean age indicated was 10-11 years, thus signifying a significant amount of content with pre-pubescent children.⁴⁴⁵ But, while there are subsets of offenders whose collections appear to indicate their affinity for possessing material within a single age grouping, most collections contain images spanning more than one age range.⁴⁴⁶ The availability of so many materials on technological platforms likely influence the commonality of collections with many age ranges, which thereby undermines this type of aggravator if the purpose of this type of aggravator is related to evidence of a preferential sexual interest.⁴⁴⁷

As a general matter, the age of victims and their sexual development stages (e.g., infants, pre-pubescent, post-pubescent) in IIOC collections vary significantly across studies, likely because researchers operationalize age ranges and relevant terms differently, data on full collections may not always be available, and the resources

⁴⁴⁴ Soldino and others 2019 (n 285).

⁴⁴⁵ Fortin and Proulx 2019 (n 226) (mean 9.9, median 10, mode 7); Quayle and others 2018 (n 400) (mean age 11.1).

⁴⁴⁶ Steel and others 2021 (n 190) (finding that 12% of known IIOC offenders self-reported exclusively viewing a single age category, but otherwise the median number of age ranges viewed was 4, with a mode of 6); Ricardo Tejeiro, Laurence Alison, Emma Hendricks, Susan Giles, Matthew Long, and David Shipley, 'Sexual Behaviours in Indecent Images of Children: A Content Analysis' (2020) 14(1) Int. J. Cyber Criminol. 121 (reporting on a non-representative sample that 89% had images of both pre- and postpubescent children).

⁴⁴⁷ Steel and others 2021 (n 190).

needed to collate large numbers of images may inhibit full accounting. Consequently, some researchers have relied upon sampling subsets of collections. Still, to provide some context, a few reports find the presence of infants and toddlers in 1-4% of images,⁴⁴⁸ whereas others find significantly larger proportions, such as a U.S. finding of collections with 23% of infants and 29% containing images of toddlers.⁴⁴⁹ Studies more often agree that collections tend to have significant proportions of pre-pubescent images (here excluding babies and toddlers) ranging from 30-70%.⁴⁵⁰

As regards the age of the victim, the IIOC Guideline notes that this factor should be given significant weight and in cases where the actual age of the victim is difficult to determine, sentencers should consider the stage of sexual development of the child (infant, pre-pubescent, post-pubescent). While not specifically referred to as an aggravator, the Scottish courts have also commented that images involving infants or young children should be considered more serious.⁴⁵¹ In the United States Sentencing Commission guidelines, aggravators include where the victim is under 12 (also under 16 for production offences) or appears pre-pubescent, and a more heavily weighted aggravator where infants or toddlers are depicted.

A potential impediment is the ability to discretely decipher exact ages of the children presented. One option that investigators use is a resource that allows for the possibility of identifying images and then linking to information on potential ages. INTERPOL maintains an International Child Sexual Exploitation (ICSE) database of over one million images (as of August 2017), which enables national specialist units to check whether IIOC seized in the course of an investigation are already known to international law enforcement and, crucially, whether the children in the images have already been identified.⁴⁵² The ICSE classification system uses a simple combination of victim age and activity depicted. Illegal material in the ICSE database is classified into (1) a Baseline list, containing images of real children who are or appear to be under 13 and are involved in or witness sexual activities, or where there is a clear focus on the child's genital or anal area,⁴⁵³ and (2) other material that is illegal according to local legislation,

⁴⁴⁸ Steel and others 2021 (n 190); Tejeiro and others 2020 (n 446).

⁴⁴⁹ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115). See also Krone and others 2017 (n 265) (33% of images under age 2).

⁴⁵⁰ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115) (finding 47% of collections with ages 4-12 years); Steel and others 2021 (n 190) (ages (proportions): 9-11 (17%), 6-8 (9%), 3-5 (3%)); Soldino and others 2019 (n 285) (72% pre-pubescent); Krone and others 2017 (n 265) (68% of images age 2-7); Seto and Eke 2015 (n 265) (34% pre-pubescent); Tejeiro and others 2020 (n 446) (4-9 years 45%, 10-12 years 36%).

⁴⁵¹ See, for example, *McGaffney v HM Advocate* [2004] SCCR 384, *Morrison* (n 30), *Brown* (n 85).

⁴⁵² INTERPOL and ECPAT International, 'Towards a global indicator on unidentified victims in child sexual exploitation material' (Technical Report, 2018) < <https://www.ecpat.org.uk/towards-a-global-indicator-on-child-sexual-exploitation-material> > accessed 6 March 2022.

⁴⁵³ INTERPOL, 'Blocking and categorizing content' < <https://www.interpol.int/en/Crimes/Crimes-against-children/Blocking-and-categorizing-content> > accessed 2 March 2022.

either by way of age or content.⁴⁵⁴

6.1.2.3. Ratio of boys to girls

Research does support that the greater ratio of boys to girls in the collection is related to a higher risk of sexual recidivism.⁴⁵⁵ Relatedly, mixed offenders are more likely than IIOC-only offenders to have predominantly or exclusively boy image collections.⁴⁵⁶ This would be a differentiator in that across cases and studies, the vast majority of images are of girls,⁴⁵⁷ while a small proportion of individual collections are mostly or exclusively of boys.⁴⁵⁸

An impediment to any of these types of aggravators related to the type and severity of the collections is whether investigators can consistently score them across cases. Auditing requires an extensive forensic analysis of each individual's collection. Current estimates are that processing a case to derive its contents may take two days to two months.⁴⁵⁹

6.1.3. Duration of the offending behaviour

Typically for sentencing purposes, an individual's continued engagement in criminality is indicative of a more culpable and heinous offender. The Scottish courts have frequently relied on duration of the offending conduct as an aggravating factor, at least where periods of several years are involved.⁴⁶⁰ One commentator has argued that where an offender has been accessing images for many years, this may be more relevant than the number of images downloaded, since it indicates a consistent predisposition towards IIOC material.⁴⁶¹ The factor is also included in the England and Wales IIOC Guideline's list of aggravators (generically stated as a period over which the IIOC

⁴⁵⁴ Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes* (n 438).

⁴⁵⁵ Soldino and others 2019 (n 285); Seto and Eke 2015 (n 265).

⁴⁵⁶ *ibid.*

⁴⁵⁷ Steel and others 2021 (n 190) (74% girls); Fortin and Proulx 2019 (n 226) (90% girls); Tejeiro and others 2020 (n 446) (73% girls); Seto and Eke 2015 (265) (91% girls).

⁴⁵⁸ Steel and others 2021 (n 190) (4% exclusively boys); Fortin and Proulx 2019 (n 226) (10.2% majority boys); Tejeiro and others 2020 (n 446) (22% all males); Krone and others 2017 (n 265) (24% exclusive boys); Seto and Eke 2015 (n 265) (9% exclusively boys).

⁴⁵⁹ Franqueira and others 2018 (n 418). The onerous process involved in auditing the contents of a collection and the psychological impacts on auditors are grounds cited in Australia for moving towards a system compatible with INTERPOL's ICSE database; Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes* (n 438).

⁴⁶⁰ E.g., *Graham* (n 9), *McArthur* (n 73), *Moore* (n 25). The periods of offending involved were four-and-a-half years, 11 years and seven years, respectively.

⁴⁶¹ Gillespie 2010 (n 426) 514.

behaviours occurred)⁴⁶² and has been applied by State and federal courts in Australia.⁴⁶³

The challenge here is that the evidence suggests, at least for individuals convicted of IIOC crimes, virtually all of them engaged with IIOC on more than one discrete occasion. The average time of collecting in one report (which required evidence of at least 6 months of collecting to be included) showed a mean of 23 months, with a maximum in the dataset of 70 months.⁴⁶⁴ In that same report, of the collections that were less than 6 months, most had been collecting for at least 3 months.⁴⁶⁵ Separate studies indicated an average of 3.5 years⁴⁶⁶ and 5.6 years⁴⁶⁷ for the relevant periods of collecting.

The duration of offending evidently is not, though, related to dangerousness *per se*. One study on topic found that the length of time spent collecting IIOC was not predictive of future risk of committing a sexual offence (including IIOC as a new crime).⁴⁶⁸ Another found that IIOC-only offenders had a mean length of time engaged with IIOC more than two years longer than dual offenders who had a known contact offence (5.6 and 3.3, respectively).⁴⁶⁹ A further issue is that because research has found a vast majority of IIOC collectors had deleted their entire collections at some point, the forensic evidence of current materials may not accurately detect the true lifespan of the activity.⁴⁷⁰

A new type of aggravating factor has been suggested based on the research on trajectories of IIOC engagement over time, which can indicate an increasing trend and the individual's intentionality.⁴⁷¹ For instance, evidence that the collection was gradually including content with greater deviance and/or the age of children becoming younger may signify a more culpable defendant. A similar issue arose in the Scottish case of *Doherty*,⁴⁷² where the offender's behaviour had intensified from viewing images to discussing them and expressing an interest in abusing children.

⁴⁶² IIOC Guideline (n 22).

⁴⁶³ Warner 2010 (n 133); National Judicial College of Australia, 'Sentencing child exploitation offences' <<https://csd.njca.com.au/principles-practice/categories-of-federal-offenders/sentencing-child-exploitation-offences/>> accessed 23 February 2022.

⁴⁶⁴ Fortin and Proulx 2019 (226).

⁴⁶⁵ *ibid*.

⁴⁶⁶ Seto and Eke 2015 (n 265).

⁴⁶⁷ Long and others 2012 (n 280).

⁴⁶⁸ Seto and Eke 2015 (n 265).

⁴⁶⁹ Long and others 2012 (n 280).

⁴⁷⁰ Steel and others 2021 (n 190). This evidence also undermines the validity of accepting deletion of files as a mitigating factor as was the case in *Moore* (n 25) but see *Morrison* (n 30), where the value of file deletion as a mitigator was questioned.

⁴⁷¹ Steel and others 2020 (n 417).

⁴⁷² *Doherty* (n 69).

6.1.4. Organisational efforts

Efforts to organize the collection may indicate greater culpability in terms of intentionality and be a sign of a commitment to continue. In one study, about 30-40% of offenders were found to have catalogued their IIOC images.⁴⁷³ Another investigation found that dual offenders were more likely to have engaged in organisational efforts.⁴⁷⁴

The guideline judgment in *Graham* included systematic storage or organization of a collection as an aggravator, following the 2007 Guideline in England and Wales. The subsequent decision in *Archer* held that arranging images into hundreds of folders and sub-folders, named to indicate content, represented “much more than the mere downloading of images.”⁴⁷⁵ However, there is no mention of sophisticated organization of images as an aggravator in the IIOC Guideline. The factor was included in the 2012 consultation as “systematic storage of collection” but not approved for the final guideline.⁴⁷⁶ Instead, the IIOC Guideline includes deliberate or systematic *searching* for images.⁴⁷⁷ The United States Sentencing Guidelines for IIOC have not included an aggravator related to organizational efforts.

6.1.5. Child(ren) depicted personally known

Arguably, the harm to the child is greater if the perpetrator is known to them as it might remind them of their abuse and degradation more often. This aggravator is included in the England and Wales’ IIOC Guideline (child depicted known to the offender) but does not appear to have been addressed directly in reported Scottish case law to date. This might also present as a risk factor as mixed offenders are more likely to commit contact sexual abuse on a child known or otherwise accessible to them. This potential aggravator is relevant to the next suggestion regarding an abuse of trust.

6.1.6. Abuse of a position of trust

The offender’s abuse of a position of trust might aggravate the harm. An adult offender and a minor child are generally indicative of a relative power imbalance. This could manifest in a variety of ways, such as producing IIOC by abusing the child’s trust, coercing a child known to them to self-produce and send images, or by sending IIOC to

⁴⁷³ Steel and others 2021 (n 190) (22% of known IIOC offenders self-reported organizing their content); Seto and Eke 2015 (265) (38% organized collections).

⁴⁷⁴ Soldino and others 2019 (n 285).

⁴⁷⁵ *Archer* (n 25) [17]. See also the Tasmanian case of *Colbourn v R* [2009] TASSC 108, where the offender’s creation of a detailed 353-page catalogue of his IIOC files was viewed as a serious aggravating factor.

⁴⁷⁶ See Sentencing Council for England and Wales *Sexual Offences Guideline Consultation* (n 37) 83.

⁴⁷⁷ In *Kay* (n 65), the Scottish Court of Criminal Appeal took account of the fact that search terms on the offender’s computer indicated he had specifically sought out images of children.

a child to whom they have been entrusted in some caretaking capacity. Abuse of trust is represented as an aggravator in the IIOC Guideline, and has been noted as such in Scottish cases relating to contact offences.⁴⁷⁸

6.1.7. Type of action

The type of act is commonly seen as differentiating the severity of offending. Production presents as the most severe form of IIOC offending and simple possession as the least.

In the sentencing precedents in both Scotland and England and Wales, downloading is treated under the rules for possession rather than production of an original image.⁴⁷⁹ All Australian jurisdictions make comparable distinctions between possession, distribution, and production to those present in the UK jurisdictions.

The relevant Scottish statute distinguishes distribution as a separate offence, but not types of distributing behaviour. The same is true for England and Wales. As regards what constitutes distribution, the court in *Graham* held that if an offender puts images into a shared folder, that amounts to distribution as soon as another person accesses the folder.⁴⁸⁰ However, limited distribution on a peer-to-peer basis, rather than peer-to-group (e.g., via a file-sharing site), can be a mitigating factor in some circumstances.⁴⁸¹

The federal system in the United States increases punishment recommendations if the crime involved any type of distribution, but further increases the penalty for certain, more aggravated types of distribution.⁴⁸² Distributing images for pecuniary gain, for other valuable consideration, and to a minor, all increase penalty levels. Distributing to a minor with intent to persuade or coerce that minor into any illegal activity carries a higher increase. Then, distributing to a minor with intent to persuade, coerce, or facilitate the travel, of that minor to engage in sexual conduct is associated with the greatest increase in recommended penalty among the types of distribution behaviours.

6.1.8. Collection including moving images

This factor is listed in the IIOC Guideline as an aggravator; and the Sentencing Council's 2012 consultation noted, in recommending moving images as an aggravator, that a video could contain more than one abusive incident and "[p]otentially, hundreds of

⁴⁷⁸ See e.g., *HM Advocate v AB* [2016] SCCR 47; *HM Advocate v CH* [2017] HCJAC 82 (both involving the rape of a child).

⁴⁷⁹ Sentencing Council for England and Wales, *Possession of Indecent Photograph of Child/Indecent Photographs of Children* (2014).

⁴⁸⁰ *Graham* (n 9) [35].

⁴⁸¹ *Moore* (n 25) [7].

⁴⁸² Guideline 2G2.2.

still images may be taken from the one 20-minute film”.⁴⁸³ This is at odds with the Scottish position in *Graham*, where the court took the view that the nature of the indecent activity depicted is more important than the medium used.⁴⁸⁴ The United States federal guidelines approach this somewhat differently whereby any film or movie counts as 75 still images for purposes of its aggravator for the overall number of images.⁴⁸⁵

6.1.9. Network engagement

The individual’s participation in a network related to IIOC or contact sexual offending increases culpability and supports the continued proliferation of the indecent images and of abuse. An aggravator could be dichotomous as in whether the person did so participate, could rank the level of participation (e.g., member, manager, moderator, owner), and/or be based on some hierarchical culpability structure regarding other attributes of the extent of participation (e.g., duration, commenting, encouraging). England and Wales recognise active involvement in a network that produces indecent images as an aggravating factor, and in the Scottish case of *Brown*,⁴⁸⁶ the court noted in aggravation that although the offender only distributed images, rather than producing them, he had been in direct contact with a person who produced material to order. The court in *Doherty*⁴⁸⁷ recognised that the offender’s participation in online forums was an aggravating feature and in *McArthur v HM Advocate*, the offender’s online chat logs were said to be an aggravating factor as they gave “a graphic insight not only into the appellant’s attitude towards the images he held and distributed, but to his thinking on viewing them”.⁴⁸⁸

The United States Sentencing Commission has recommended that an aggravator be included that would relate to the individual’s participation in an Internet community devoted to IIOC or child sexual exploitation more generally.⁴⁸⁹ This suggestion remains outstanding simply because the Commission has not in recent years enjoyed a quorum of commissioners to allow it to vote on such a matter.

⁴⁸³ Sentencing Council for England and Wales, *Sexual Offences Guideline Consultation* (n 37).

⁴⁸⁴ *Graham* (n 9) [33].

⁴⁸⁵ Guideline 2G2.2.

⁴⁸⁶ *Brown* (n 85) [9].

⁴⁸⁷ *Doherty* (n 69).

⁴⁸⁸ *McArthur* (n 72) [8].

⁴⁸⁹ United States Sentencing Commission, *Federal Sentencing of Child Pornography Non-Production Offenses* (n 115).

6.1.10. Commercial or profit motivation

Pursuit of criminal offending for commercial or other profitable gain is a common aggravator (see Section 3). For instance, the IIOC Guideline in England and Wales defines the equivalent aggravator as “commercial exploitation and/or motivation”. It is noted here that an aggravating factor requiring the exchange of money would distinguish only a small subset of defendants. A few reasons explain why IIOC rarely is a monetary-based business model these days. With the current state of the Internet and the Dark Web, there is now little evidence there is money to be made.⁴⁹⁰ For instance, a review found that administrators of a dominant Dark Web IIOC forum operating from 2010-14 did not appear to earn monetary profits in part because the material was either shared freely or bartered rather than sold.⁴⁹¹ One exception is evidence of an attempt to commercialise using the Dark Web and cryptocurrency on a site called PedoFunding by creating a model of crowdfunding in which IIOC producers would release a stash of content once a sufficient amount of money was raised in cryptocurrency, thus potentially creating a financial model for future abuse.⁴⁹² The life of PedoFunding was short, allegedly as its creator became frustrated with IIOC users not being willing to pay for content.⁴⁹³

Piracy of images is the rule rather than the exception in this area. Intellectual property protections that would otherwise allow the owner of images to prevent illegal copying and distribution and to protect the monetary value of their “investment” are not of assistance in this arena. Considering the illegality and immorality of IIOC, copyright owners are unlikely to resort to civil courts to sue for infringement to regain lost profits, or to report to criminal justice authorities.⁴⁹⁴ There is also a unique cultural practice within online IIOC communities in which distributing images is viewed as an encouraged method of showing solidarity among the group, which is particularly salient as members often feel socially condemned for their thoughts and actions.⁴⁹⁵

In contrast, live streaming of sexual abuse involving children is typically a for-profit business model.⁴⁹⁶ Law enforcement awareness is growing of live streaming of child

⁴⁹⁰ van der Bruggen and Blokland 2021 (n 208).

⁴⁹¹ van der Bruggen and Blokland 2021 (n 208); Madeleine van der Bruggen and Arjan Blokland, ‘Child Sexual Exploitation Communities on the Darkweb: How Organized Are They?’ in Marleen Weulen Kranenbarg and Rutger Leukfeldt (eds), *Cybercrime in Context* (Springer 2021) 259. Researchers found that 7.5% of the IIOC on the Tor site were connected to some form of cash flow. Broadhurst and Ball 2021 (n 342).

⁴⁹² Steel and others 2020 (n 417).

⁴⁹³ Kemal Veli Acar, ‘Child Abuse Materials as Digital Goods: Why We Should Fear New Commercial Forms’ (Economics Discussion Papers, No. 2017-15, Kiel Institute for the World Economy 2017) (quoting the owner as complaining that potential clients were “self-entitled brats who wanted your [child pornography] for free instead of having to pay producers a fair price”).

⁴⁹⁴ *ibid.*

⁴⁹⁵ *ibid.*

⁴⁹⁶ Rick Brown, Sarah Napier, and Russell G. Smith, ‘Australians Who View Live Streaming of Child Sexual Abuse: An Analysis of Financial Transactions’ [2020] *Trends Issues Crime Crim. Justice* 589.

abuse in real time with payments through anonymous financial institutions or use of cryptocurrencies.⁴⁹⁷ However, live streaming (also referred to as webcam sex tourism⁴⁹⁸) would constitute contact child sexual abuse and thus would be outside the scope of IIOC offences that are the subject of this Literature Review.

An alternative to relying upon monetary incentives is engaging in IIOC distribution in return for anything of value. This could be broader than monies, such as trading/bartering/uploading in expectation of such things as forum membership, receipt of IIOC, or greater access to network advantages. The New South Wales Court of Appeal has referred to a higher level of severity for IIOC crimes “whether any payment or other material benefit was received”.⁴⁹⁹

The Scottish courts have recognised that although offenders do not necessarily benefit financially from sharing images, they gain the opportunity to access others’ material.⁵⁰⁰ Large-scale distribution of images, whether by exchange or placing in shared folders, should be regarded as commercial distribution.⁵⁰¹

6.1.11. Attempts to conceal behaviour

Affirmative efforts to avoid being caught may present as an aggravator if perceived to signal knowledge of the illegality of one’s actions and/or intent to interfere with investigative efforts. Various tools and methods of concealment have been recognised by investigators, such as these: the use of encryption, internet protocol anonymisers, hard drive eraser software,⁵⁰² disguised websites,⁵⁰³ virtual private networks or proxy servers,⁵⁰⁴ steganography (concealment by embedding a message into another message or object), data sanitation, wiping tools, Darknet,⁵⁰⁵ burner phones,⁵⁰⁶ password protection, disguising file names, anonymizing accounts, deleting images from cache storage, partitioning storage devices,⁵⁰⁷ and technologies that hide the

⁴⁹⁷ Graeme Edwards, Larissa S. Christensen, Susan Rament-McHugh, and Christian Jones, ‘Cyber strategies used to combat child sexual abuse material’ [2021] Trends Issues Crime Crim. Justice 636.

⁴⁹⁸ Raven and others 2021 (n 259).

⁴⁹⁹ *Minehan* (n 134), at [94-95].

⁵⁰⁰ *Brown* (n 85); *Graham* (n 9) [37].

⁵⁰¹ *Brown* (n 85) [9]: “although the offender received no monetary rewards, that does not mean in our view that he did not profit thereby”.

⁵⁰² *Brown and Bricknell* 2018 (n 177).

⁵⁰³ Risk Management Authority (of Scotland) 2018 (n 256).

⁵⁰⁴ Edwards and others 2021 (n 497).

⁵⁰⁵ Franqueira and others 2018 (n 418).

⁵⁰⁶ Steel and others 2020 (n 417).

⁵⁰⁷ United States Sentencing Commission, Federal Child Pornography Offenses (2012) < https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf > accessed 11 March 2022.

identity or location of the individual (e.g., The Onion Router (TOR) or anonymous remailers).⁵⁰⁸

A few notes of caution appear appropriate. A sentencing factor related to concealment likely should not be dichotomous in terms of whether there is evidence of concealment or not.⁵⁰⁹ The application of such an aggravator may also require evidence of the offender's intent to conceal rather than just the presence of tools that thwart detection. Many advanced technology platforms today have built-in countermeasures that hide a user's activities, whether legal or illegal.⁵¹⁰ As examples, encryption may be automatically embedded in the technology or device deployed without the user's knowledge or wiping is pre-set to automatically occur when files are deleted without the user's awareness or action.⁵¹¹

Another issue is that there are legitimate reasons for an Internet user to habitually use software and systems that allow for online anonymity and to protect oneself and one's data from tracking and theft. Law-abiding citizens are even encouraged by governments to use security devices such as password protection and encryption to thwart hacking. Regularly deleting data from one's computer cache may innocently be a way to manage storage limits. Even the use of the Dark Web is not necessarily nefarious, such as using Tor to protect one's privacy generally, to prevent revealing one's current geolocation, to access sensitive research materials which some countries restrict (e.g., religious or political speech), or to shield oneself from online surveillance such as website tracking.⁵¹² Indeed, civil rights advocates applaud these anonymous and private Darknet-style online networks which can facilitate free speech.⁵¹³

The present Literature Review did not locate any reported Scottish case significantly engaging with the issue of efforts to conceal as evidence of greater culpability in an IIOC offence. The Sentencing Council for England and Wales has included in the IIOC Guideline an aggravating factor for attempts to dispose of or to conceal images, expressly in response to the increasingly sophisticated methods being employed by offenders to evade detection by law enforcement.⁵¹⁴ In Australia, the Queensland Court of Appeal issued a substantial sentence (six years' imprisonment) for an offender found guilty of possession and distribution offences, on the grounds that he was a member of

⁵⁰⁸ Broadhurst and Ball 2021 (n 342).

⁵⁰⁹ Steel and others 2020 (n 417).

⁵¹⁰ van der Bruggen and Blokland 2021 (n 208).

⁵¹¹ Steel and others 2020 (n 417).

⁵¹² Dimitrios Kavallieros, Dimitrios Myttas, Emmanouil Kermitsis, Euthimios Lissaris, Georgios Giataganas, and Eleni Darra, 'Using the Dark Web 27-48' in Babak Akhgar, Marco Gercke, Stefanos Vrochidis, and Helen Gibson (eds) *Dark Web Investigation* (Springer 2021).

⁵¹³ Broadhurst and Ball 2021 (n 342).

⁵¹⁴ Sentencing Council of England and Wales, *Sexual Offences Guideline Consultation* (n 37).

a newsgroup that used highly sophisticated methods to avoid detection.⁵¹⁵

6.1.12. Multiple victims

A common aggravating factor generally in sentencing applies to offending that involves multiple victims. The courts in England and Wales and in Australia have acknowledged the aggravating effect where a large number of different victims are involved.⁵¹⁶

Nonetheless, it appears that this factor would distinguish few IIOC offenders as the studies and judicial opinions discussed herein are replete with case facts involving collections of numerous images, compared to little evidence of a subset whose single image or cache presented was exclusively of one child.

6.1.13. Vulnerable victim

A related common aggravating factor generally is a crime involving a particularly vulnerable victim. This factor would similarly fail to distinguish IIOC offenders. Because these victims are by definition minors, the vulnerable victim would be present in virtually all cases. An exception might be the lack of a vulnerable victim in some instances of pseudo-images.

6.2. Potential mitigators

This section addresses potential mitigating factors. It is noted here, though, that if any one or more of the aggravating factors discussed in the prior sub-section were not found to be sufficiently worthy of additional punishment because it or they applied in most cases (e.g., sizable collection, duration of offending, multiple victims), it might be worth considering whether instead the situation suggests a mitigating factor as the contrast. For example, policymakers may determine that relevant mitigators are the existence of a very small collection, a short period of offending behaviour, or a single victim. This section does not otherwise discuss such factors individually considering the explanations already given on them.

6.2.1. Accidental collection

A subset of IIOC offenders claim that IIOC were an unintended by-product obtained when searching for adult pornography online or other deviant materials.⁵¹⁷ Hence, this

⁵¹⁵ *R v Mara* [2009] QCA 208 [10], [37]. See also *R v Talbot* [2009] TASSC 107 [9], where use of encryption was held to be an aggravator.

⁵¹⁶ Sentencing Council, *Sexual Offences Guideline Consultation* (n 37) 81; *R v Gent* (n 429).

⁵¹⁷ Paquette and Cortoni 2021 (n 223).

lack of specific intent could be a mitigating factor for defendants who took immediate steps to delete or otherwise avoid the images once discovered.

However, this explanation is somewhat questionable. There is to date no empirical evidence on the regularity in which individuals might inadvertently come across IIOC while searching for legal materials.⁵¹⁸ Viewing IIOC is a foreseeable crime and thus navigating to access child images is not simple, in part as the ISPs (Internet Service Providers), major search engines companies, and social media platforms (Google, Microsoft, Facebook, Twitter) purposely deploy blocking technologies and actively shut down known IIOC sites.⁵¹⁹ Collecting thereby tends to require some proactive engagement and constant learning to stay ahead of corporate and law enforcement attempts to obstruct access, such as deciphering which new search terms are required and to adapt to new technologies as materials are moved onto different platforms with more secure formats to obstruct law enforcement efforts.⁵²⁰ One possible objective way to evaluate the likelihood that an offender acquired IIOC accidentally could be to look at the proportion of IIOC present in his or her collection compared to adult pornographic material. For example, finding that a collection contained 5 IIOC files and 5,000 adult files might support an argument of accidental possession.

6.2.2. Deleting collection

An offender may show remorse by bulk deleting the entire IIOC collection. This may indicate accidental receipt if accomplished immediately upon realizing the existence of the materials. On the other hand, the deletion might be due to fear of detection or a deliberate attempt to avoid a suspected police investigation into the individual's devices. Consequently, to serve as a mitigating factor, the court may require additional information to understand the purpose of the deletion. Remorseful deletion of images has been recognised as a mitigator in Scotland,⁵²¹ but any such mitigation is unlikely to be substantial.⁵²²

6.2.3. Pseudo-images

Collecting only pseudo-images or quantifying a collection with mostly pseudo-images could be a mitigator if no live children were involved. Still, it may be possible for

⁵¹⁸ Thomas J. Holt, Jesse Cale, Benoit Leclerc, and Jacqueline Drew, 'Assessing the Challenges Affecting the Investigative Methods to Combat Online Child Exploitation Material Offenses' (2020) 55 *Aggress. Violent Behav.* 101464.

⁵¹⁹ Wilson 2020 (n 3); Fortin and others 2018 (n 200).

⁵²⁰ Fortin and others 2018 (n 200). While not simple, other experts contend that locating IIOC is not overly complex as a person with a "modicum of skill" in deploying appropriate technologies can locate IIOC. Westlake and others 2017 (n 350).

⁵²¹ *Moore* (n 25) [7].

⁵²² *Morrison* (n 30) [10].

software to make images of real children look fictional, such that the argument about lesser harm is weakened.⁵²³ From a practical perspective, a difficulty may arise if authorities are not able to adequately distinguish computer-generated images from actual photographs or videos involving real children.⁵²⁴ In Scotland, the courts have treated pseudo-images as less serious than real images but they can be equally serious “where the imagery is particularly grotesque and beyond the scope of normal photography”.⁵²⁵

6.2.4. Individuals with developmental disorders

A vast literature exists about the role of mental disorders with criminal offending. Here, the issue is more limited to address emerging knowledge about how developmental disorders may in affected individuals help contextualise IIOC offending in a way that some judges might consider to be mitigating. The suggestion is not necessarily that a guideline ought to expressly incorporate developmental disorders as a definitive mitigating factor as the field is still advancing and courts have disagreed as to their relevance to culpability (as reported further below).

Still, it appears justifiable to summarise the current state of knowledge that is growing after certain experts have raised awareness of a subset of indecent images viewers who have some form of development disorder that might be related to this behaviour. Pervasive developmental disorders are a group of neurodevelopmental diagnoses characterized by delays in the individual’s development of socialization and communication skills which tend to be associated with difficulty relating to people, discomfort with unfamiliar surroundings, and repetitive or ritualistic actions or routines.⁵²⁶

An early study about the psychological characteristics of IIOC users provided some initial evidence. The study of 30 males who had been convicted of downloading IIOC in England found evidence that they were likely to exhibit interpersonal deficits and experience difficulties in age-appropriate relationships.⁵²⁷ The researchers also found elevated levels of certain psychiatric symptoms, which they concluded suggested that “individuals experiencing marked social isolation, detachment from interpersonal

⁵²³ Christensen and others 2021 (n 180).

⁵²⁴ *ibid.*

⁵²⁵ *Jordan* (n 407) [39].

⁵²⁶ National Institute of Health, National Institute of Neurological Disorders and Stroke, ‘Pervasive Developmental Disorders Information Page’ < <https://www.ninds.nih.gov/disorders/all-disorders/pervasive-developmental-disorders-information-page> > accessed 11 March 2022.

⁵²⁷ Sarah Laulik, Jane Allam, and Lorraine Sheridan, ‘An Investigation into Maladaptive Personality Functioning in Internet Sex Offenders’ (2007) 13(5) *Psychol. Crime Law* 523.

relationships, difficulties within personal relationships, affective instability, identity problems and empathy deficits extensively engage with indecent images of children.”⁵²⁸

Individuals with developmental disorders or intellectual disabilities can perceive other people who are (in fact) significantly younger in chronological age to still feel relatable to them as peers on intellectual, social, and emotional levels.⁵²⁹ A relevant example in the literature is autism spectrum disorder (ASD).⁵³⁰ The connection between IIOC is surmised to be multifaceted whereby those with ASD may exhibit these attributes: (a) finding the ritualistic nature of IIOC to be compelling; (b) tendency to hold a literal view of the world whereby the free availability of IIOC on the Internet suggests legal accessibility; (c) impaired ability to correctly estimate the chronological age of the individuals presented in the images; (d) feeling intellectually, socially, and emotionally on a par with young children; (e) impaired ability to read the emotions of the child presented, such as fear or pain.⁵³¹ As an example of some of the foregoing aspects, a small study of individuals with ASD who committed contact and noncontact sexual offences mostly involving children found that most of them were cognizant of their deficits in social skills and sexual experiences, while appearing to be unaware of the seriousness or legal consequences of their actions.⁵³²

Asperger’s syndrome is another developmental disorder with characteristics such as impairment of social function, narrow interests, dependence on routines, and limited or inappropriate non-verbal engagement.⁵³³ ASD and Asperger’s tend to be associated with delayed social maturity, including slower sexual development which may leave individuals “stuck” in adolescence,⁵³⁴ obliviousness to emotional context, tendency to become obsessed with a single subject, and extreme naivety.⁵³⁵ These conditions do not necessarily equate with the level of one’s intelligence; these individuals may in other ways present as quite smart.⁵³⁶

⁵²⁸ *ibid* 532.

⁵²⁹ Clare S. Allely, Sally Kennedy, and Ian Warren, ‘A Legal Analysis of Australian Criminal Cases Involving Defendants with Autism Spectrum Disorder Charged with Online Sexual Offending’ (2019) 66 *Int. J. Law Psychiatry* 101456.

⁵³⁰ *ibid*.

⁵³¹ *ibid*.

⁵³² Katy-Louise Payne, Katie Maras, Ailsa J. Russell, and Mark J. Brosnan, ‘Self-Reported Motivations for Offending by Autistic Sexual Offenders’ (2020) 24(2) *Autism* 307-320.

⁵³³ Melanie Clark Mogavero, ‘Autism, Sexual Offending, and the Criminal Justice System’ (2016) 7(3) *J. Intellect. Disabil. Offending Behav.* 116.

⁵³⁴ *ibid*.

⁵³⁵ Dennis P. Sugrue, ‘Forensic Assessments of Individuals on the Autism Spectrum Charged with Child Pornography Offenses in Lawrence A. Dubin and Emily Horowitz (eds) *Caught in the Web of the Criminal Justice System: Autism, Developmental Disabilities, and Sex Offenses* (Jessica Kingsley 2017) 112.

⁵³⁶ Allely and others 2019 (n 529).

These developmental disorders impact social and emotional maturity.⁵³⁷ Further, because the relevant symptoms from developmental delays may impede social and sexual interactions with others, those who suffer may use the Internet for sexual education and/or to satisfy sexual needs.⁵³⁸ In some cases, the appearance of asociality may be perceived by parents as asexuality, with the parents then assuming that discussions of sexual topics are unnecessary, and in this vacuum, then, the Internet may become the developmentally disordered individual's main source of information of a sexual nature.⁵³⁹ Such online activity in turn can lead to viewing IIOC, which may appear desirable for those "stuck" at an adolescent level of emotionality and maturity.⁵⁴⁰ Moreover, developmentally-delayed individuals may use IIOC as a means of learning about sexual interactions from the children pictured in them.⁵⁴¹ The role of obsessiveness can exacerbate the problem whereby once the individual begins to engage IIOC, the combination of being obsessed by the Internet and with IIOC can further fuel these behaviours.⁵⁴²

A case study of an individual known as P.J. in Scotland is informative. P.J. was found guilty of downloading IIOC and given a 13-month prison sentence.⁵⁴³ After conviction, P.J.'s family arranged for P.J. to be assessed and he was then for the first time diagnosed with ASD. P.J.'s lawyer was reported to be sceptical about the relevance of ASD, but submitted the diagnostic assessment on the day of the appeal of the sentence. The High Court Judges determined that the ASD diagnosis was relevant and that the initial penalty was excessive. Thus, the appellate tribunal quashed the sentence, substituting a community payback order involving 200 hours of unpaid labour.

A search of published case law in Scottish courts did not reveal any other substantive discussions of a defendant convicted of an IIOC-related offence where a developmental disorder was relevant to sentencing. A few published opinions in England and Wales may be informative. In one case, the defendant was given a community order for making and possessing prohibited images, with the opinion mentioning that "it was unlikely that [the offender] was able to truly appreciate the seriousness of the offences either from a legal or a moral standpoint" and "he sometimes struggled to understand why the images were prohibited and...he may not have fully appreciated the severity of

⁵³⁷ Clare S. Allely, 'Contributory Role of Autism Spectrum Disorder Symptomology to the Viewing of Indecent Images of Children (IIOC) and the Experience of the Criminal Justice System' (2020) 11(3) J. Intellect. Disabil. Offending Behav. 171.

⁵³⁸ Mogavero and others 2016 (n 533).

⁵³⁹ Sugrue 2017 (n 535).

⁵⁴⁰ Mogavero and others 2016 (n 533).

⁵⁴¹ *ibid.*

⁵⁴² Clare Sarah Allely and Larry Dubin, 'The Contributory Role of Autism Symptomology in Child Pornography Offending: Why there is an Urgent Need for Empirical Research in this Area' (2018) 9(4) J. Intellect. Disabil. Offending Behav. 129.

⁵⁴³ Clare Allely, 'Case Study: ASD and Viewing Indecent Images of Children (2020) <https://pureportal.strath.ac.uk/files/120954333/Allely_2020_CYCJ_AS_D_and_viewing_indecent_images_of_children.pdf> accessed 11 March 2022.

his actions”.⁵⁴⁴ In another case involving a sentence for possession of prohibited images, the English appellate court substituted the initial two-year prison sentence for a two-year community order, with the following comments:

“we would not wish to lay down any approach of general applicability to those cases in which an appellant is suffering from Asperger’s Syndrome or, as it may be, from autism. Each case must necessarily turn on its own facts. But one cannot ignore the link in appropriate circumstances between such a condition and the offence which has occurred... There is here such substantial mitigation arising out of the Asperger’s Syndrome which the appellant displayed that there should have been recognition that he was entitled to pray that in aid substantially in mitigation.”⁵⁴⁵

In several other England and Wales cases, the IIOC offender’s developmental disorder was mentioned, but either the court declined to treat it as a mitigating factor or it appeared to have no specific relevance to the punishment imposed.⁵⁴⁶

There is evidence in literature reviews of a few additional cases of defendants convicted of IIOC offences outside of the United Kingdom being given reduced sentences because the judges perceived that their diagnoses of Asperger’s contributed to their offending behaviour.⁵⁴⁷ However, other studies of court cases have identified instances where the defendant’s developmental disorder was not seen as mitigating punishment because it did not sufficiently interfere with their ability to control their actions⁵⁴⁸ or otherwise impair their cognitive functioning.⁵⁴⁹

6.2.5. Remorse

Some concerns have been expressed in England and Wales about the role of remorse as a mitigating factor for sexual offences when “it could be easily faked and ‘switched on’ by manipulative offenders”.⁵⁵⁰ The Sentencing Council’s view is that the evaluation

⁵⁴⁴ *R v Hemus* [2021] EWCA Crim 656 [11].

⁵⁴⁵ *R v Palmer* [2011] EWCA Crim 1286 [23].

⁵⁴⁶ *R v Hart* [2014] EWCA Crim 2234 (the defendant’s ASD was discounted as a mitigating factor in a case of making and distributing indecent images because of the defendant’s pattern of behaviour); *R v Honey* [2015] EWCA Crim 371 (noting the presence of ASD as a personality disorder rather than mental illness did not detract from the individual’s responsibility for the IIOC crimes committed); *R v AA* [2016] EWCA Crim 1663 (in a case of making indecent photographs and contact sexual offences, the individual’s autism was related to lacking victim empathy but it was unclear that this impacted the sentence given); *R v KC* [2019] EWCA Crim 2311 (opinion mentioning a diagnosis of ASD without appearing to have a significant bearing on the penalty in a case involving IIOC and contact sexual offences).

⁵⁴⁷ Chad Steel, ‘The Asperger’s Defence in Digital Child Pornography Investigations’ (2016) 23(3) *Psychiatry Psychol. Law* 473.

⁵⁴⁸ *ibid.*

⁵⁴⁹ Allely and others 2019 (n 529).

⁵⁵⁰ Sentencing Council for England and Wales, *Sexual Offences Guideline Consultation* (n 37) 17.

of remorse is nuanced and should be left at the sentencer's discretion, and the issues around both remorse and previous good character are better dealt with in judicial training.⁵⁵¹ Genuine remorse might be expected to carry some weight in IIOC cases, where offenders often show little remorse for their actions or empathy for their victims.⁵⁵² However, in the New South Wales case of *Saddler v R*,⁵⁵³ the court made no reduction for the offender's remorse because while he accepted responsibility for his actions, he also sought to minimize the impact of his behaviour.

6.2.6. Previous good character and/or exemplary conduct

Several commentators have identified previous good character as a problematic mitigator, characterizing it as "social accounting"⁵⁵⁴ or "intrusive moral policing"⁵⁵⁵ which undermines the principle of proportionality. The expanded explanation for this factor in the England and Wales general guideline confirms that it is different from having no previous convictions and proposes that the more serious the offence, the less weight which should normally be attributed to this factor.⁵⁵⁶ It also states that where previous good character and/or exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed, and such conduct may constitute an aggravating factor. The 2012 sexual offences guideline consultation notes that "where an offender is claiming previous good character as mitigation but has been involved with such images over a long period, sentencers may wish to take this into consideration in determining whether any weight is given to previous good character."⁵⁵⁷ The English Court of Appeal in *R v M* discounted positive good character as a mitigating factor since "that is a characteristic to which many offenders in the circumstances of the appellant for this type of offending can lay claim",⁵⁵⁸ a view also endorsed by the courts in Australia.⁵⁵⁹ The Scottish guideline judgment of *Graham* goes further, raising the possibility that coming from a stable family or community could even be an aggravating

⁵⁵¹ *ibid* 19.

⁵⁵² Scottish cases where the offender(s) showed little to no remorse or victim empathy include *Jordan* (n 407), *McArthur* (n 72), and *Wood et al.* (n 23 – all three offenders).

⁵⁵³ [2009] NSWCCA 84 at [4].

⁵⁵⁴ Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, CUP 2015); Andreas von Hirsch, 'Foreword', in Julian V. Roberts (ed), *Mitigation and Aggravation at Sentencing* (CUP 2011).

⁵⁵⁵ Hannah Maslen and Julian V. Roberts, 'Remorse and sentencing: An analysis of sentencing guidelines and sentencing practice, in Andrew Ashworth and Julian V. Roberts (eds), *Sentencing guidelines: Exploring the English model* (Oxford University Press 2013).

⁵⁵⁶ Sentencing Council for England and Wales, *General guideline: overarching principles* (n 103).

⁵⁵⁷ Sentencing Council for England and Wales, *Sexual Offences Guideline Consultation* (n 37) 83.

⁵⁵⁸ *R v M* (n 40).

⁵⁵⁹ *R v Gent* (n 429); *Mouscas v R* [2008] NSWCCA 181 at [37]; *DPP v D'Alessandro* (n 131). In *Ryan v The Queen* [2008] 206 CLR 267 [34], the court ruled that since the offender's behaviour had continued for a long period, his prior good character was consequently of little value.

factor in some circumstances.⁵⁶⁰ While previous good character has been acknowledged in Scotland as a mitigator in IIOC cases,⁵⁶¹ this may be in the sense of no previous convictions, which is different from the concept of positive good character mentioned in the IIOC Guideline.⁵⁶²

6.2.7. Age and/or lack of maturity

In England and Wales, this mitigating factor is included in the IIOC Guideline and accompanied by an expanded explanation which notes that offenders' lack of maturity can affect both their responsibility for the offence and the impact a sentence will have on them (especially custody).⁵⁶³ It has not been a major factor in any Scottish case dealing with IIOC offences identified in this review, although it was cited as being a relevant consideration in *Peebles v HM Advocate*.⁵⁶⁴ In addition, age and maturity are included in the Scottish Sentencing Council's guideline on sentencing young people as factors which courts should take into account, both when assessing culpability and when considering the impact a sentence may have on the offender.⁵⁶⁵

6.2.8. Steps taken to address offending behaviour

The Scottish courts have acknowledged this as a mitigating factor, although it was only cited in one reviewed case⁵⁶⁶ and appeared to have little if any impact on the final sentence. In England and Wales, voluntarily embarking on a treatment programme has been judged a "significant and exceptional mitigation".⁵⁶⁷ Courts in Australia have taken a different view, determining that evidence of rehabilitation may be less relevant for sentencing IIOC crimes given the primary importance of deterrence and denunciation in

⁵⁶⁰ *Graham* (n 9) [42], [43]: "The fact that an offender has come from a stable family is a relevant consideration; but it may be double-edged. An offender who has had such good fortune may be regarded as being more reprehensible than one who, for example, has suffered an abused or deprived childhood." The court also noted, however, that having a disturbed background could not be an important consideration, since the predominant considerations must be the nature and effects of the offences and the need to impose a sentence that will mark the court's view of the gravity of the case.

⁵⁶¹ E.g., *Moore* (n 25).

⁵⁶² The IIOC Guideline (n 22) states that evidence of "positive good character" through, for example, charitable works may reduce the sentence. There is a separate mitigating factor of "no previous convictions or no relevant/recent convictions".

⁵⁶³ *ibid.*

⁵⁶⁴ [2007] HCJAC 6.

⁵⁶⁵ Scottish Sentencing Council, *Sentencing Young People: Sentencing Guideline* (2021) <<https://www.scottishsentencingcouncil.org.uk/media/2171/sentencing-young-people-guideline-for-publication.pdf>> accessed 30 March 2022. The guideline applies to anyone who is under the age of 25 at the date of their plea of guilty or when a finding of guilt is made against them.

⁵⁶⁶ *Wood et al.* (n 23).

⁵⁶⁷ *R v M* (n 40) [19]. See also *R v Norval* [2015] EWCA Crim 1694.

such cases.⁵⁶⁸

6.2.9. Guilty plea discount

In *McGaffney v HM Advocate*,⁵⁶⁹ the Scottish Court of Criminal Appeal determined that an appropriate discount for an early guilty plea was 25% rather than the usual 33% because no vulnerable witnesses were spared the ordeal of giving evidence. This was also the approach followed in *Graham*.⁵⁷⁰ In *Brown*,⁵⁷¹ the offender was awarded only a 20% guilty plea discount and the court observed that “the application of a discount for a guilty plea could not be a mechanical exercise which had to happen in every case”.⁵⁷² Equally, “the court should always be slow to conclude that a plea of guilty had been practically inevitable”⁵⁷³ and avoid applying a discount for that reason but in the present case there was conclusive evidence against the offender and no substantive defence. Where an offender is given an extended sentence under the 1995 Act, no guilty plea discount should be applied to the extension period; the discount should instead be applied to the custodial sentence before adding any extension.⁵⁷⁴

6.2.10. Negative effect of the sentence on the offender’s life

An offender’s loss of home life and standing in the community as a result of offending was acknowledged to be a potential mitigating factor in the Scottish cases of *McGaffney* and *Moore*.⁵⁷⁵

⁵⁶⁸ *R v Porte* (n 87) [71]-[72]; *R v Booth* (n 409) [70].

⁵⁶⁹ *McGaffney* (n 451).

⁵⁷⁰ *Graham* (n 9).

⁵⁷¹ *Brown* (n 85).

⁵⁷² *ibid* [10].

⁵⁷³ *ibid* [10].

⁵⁷⁴ *Jordan* (n 407).

⁵⁷⁵ *McGaffney* (n 451) [9]; *Moore* (n 25) [7].

7. Conclusion

IIOC offences are an increasingly complex and rapidly developing area of criminal behaviour, driven by the global proliferation of the internet and advancement of technologies for image production and dissemination, and detection avoidance. Legislation and sentencing practice in Scotland has responded pragmatically to those changes resulting in a somewhat confusing relationship between the IIOC offences prosecuted and those actually committed. One major challenge for IIOC sentencing is how to address the seriousness with which the public appear to view IIOC behaviour, while weighting sentences appropriately in comparison to other sexual offences. It is striking in this regard that the courts in Scotland, England, and Australia have emphasised the importance of deterrence rather than rehabilitation (or other aims) as the key goal of IIOC sentencing.

This Literature Review presents detailed data from the Scottish Government on IIOC cases passing through the criminal justice system, which is not currently available elsewhere. Amongst other things, the data show that there has been no significant increase in recorded IIOC cases in Scotland over the past decade. This is an interesting finding against the backdrop of rising concern internationally regarding the increase in child exploitation activities online. It is also notable that in the two years to 2020, recorded case numbers went up while proceedings and convictions went down. In addition, custodial sentence lengths were lower over the five years to 2020 compared to the five years before that, which could reflect a change in sentencing practice (perhaps influenced by the change in England and Wales guideline) and/or changes in the profile of IIOC offenders over the past decade. Surprising findings relating to sentencing outcomes for offenders convicted of different IIOC activities (making, distributing, possessing) include that all categories of offender appear to have received similar custodial sentence lengths in recent years.

The courts in Scotland have identified many different aggravating and mitigating factors relevant to the sentencing of IIOC offenders, both directly through judicial opinion and indirectly through the adoption of England and Wales' IIOC sentencing guideline. The IIOC Guideline appears to have been positively received in England and has undoubtedly proved a useful benchmark for sentencing in Scotland. However, the Scottish courts have always recognised the need to prevent it shackling their discretion unduly and the time may be ripe to revisit the review of guideline factors carried out by the Court of Criminal Appeal in *Graham* and *Wood et al.* some 12 and nine years ago, respectively. Further insights can be gained from the similarities and differences of approach seen in other common law jurisdictions such as the USA and Australia. However, insufficient work has been done to date to ground the sentencing of IIOC crime within the growing body of empirical evidence concerning the nature of IIOC offending and offenders, and/or the overarching purposes of sentencing. In particular,

current practice perhaps does not distinguish sufficiently – at least in a systematic way – between the characteristics and trajectories of IIOC-only offenders and those who also commit contact offences against children.

Scottish Sentencing Council
Parliament House
Parliament Square
Edinburgh
EH1 1RQ

sentencingcouncil@scotcourts.gov.uk
www.scottishsentencingcouncil.org.uk
[@ScotSentencing](https://twitter.com/ScotSentencing)

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