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Exploring the educative role of judges' sentencing remarks: an analysis of remarks on child exploitation material

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The online viewing of child exploitation material (CEM) is a seemingly intractable problem. Evidence suggests that CEM is viewed not only by the paedophilic 'other', but by people without prior offending histories or pre-existing sexual interests in children. Studies emphasise the role of offence-supportive attitudes in enabling first-time offending. Relatedly, nascent research indicates that some sections of the Australian community express ambivalence about the harms involved in viewing such material. Taking a crime prevention perspective, this article considers the need and value of tackling such attitudes and the educative role that judges' sentencing comments may play. In doing so, this article presents a content analysis of judicial comments from Victoria and Tasmania. Encouragingly, results show that judges provide some explanation of the harms involved in most instances. Yet, some of the explanations that judges give may be perpetuating, rather than reducing, ambiguity about the wrongfulness of 'just' viewing CEM online.

Key words: child exploitation material; crime prevention; educative role; judges; sentencing remarks.

1. Introduction

Child exploitation material (CEM), also called child pornography, presents a complex problem to which Australian legislatures have been attempting to respond since the late 1970s (Sullivan, 1997). Successive waves of legislative reform have widened the scope of criminalisation and increased maximum sentences (Warner, 2010; Pierrette, Gotsis, & Poletti, 2010). Jurisdictional differences exist in terms of how CEM is defined in Australia, but CEM is broadly defined as material that depicts or describes real or fictitious children in a range of sexual and non-sexual activities and contexts. Only material involving real children is considered in this article. Criminal laws proscribe a range of behaviours, including procuring a child for CEM production, the production and distribution of material, and the possession and accessing, or as referred to in this article, the 'viewing', of such material online.

However, while laws have changed, and sentences have increased, this article contends that CEM policy formation is underdeveloped, particularly in relation to the online viewing of CEM. This is despite the substantial growth of the market for CEM in recent decades facilitated by widespread access to the internet and digital cameras (Internet Watch Foundation, 2016; Maalla M'jid, 2013; Quayle & Taylor, 2002; Wortley &

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Smallbone, 2012). Indeed, some modelling suggests that the number of people who 'just' view CEM represent a substantial, and perhaps the largest, proportion of individuals involved with CEM (Aiken, Moran, & Berry, 2011; Conde, 2011).

Increasingly, individuals with otherwise 'ordinary profile' (Wortley & Smallbone, 2012, p. 49), discussed in more detail below, are viewing CEM on their personal computers, smartphones and tablets (Steel, 2015). This material is found in a range of online spaces, including websites, image hosting services and peer-to-peer (P2P) networks (Brennan & Hammond, 2017; Internet Watch Foundation, 2016). The sheer amount of CEM accessible and available online has led Wortley and Smallbone (2012, p. 3) to describe demand for CEM as 'supply-led'.

In light of these factors, a question that arises is whether the State is doing enough to prevent individuals from beginning to view CEM – that is, offending 'onset' (Prichard, Watters, & Spiranovic, 2011, p. 587). To explore this question, this article asks whether the State needs to do more to explain the criminality of viewing CEM online to the community and to increase public awareness of the reasons why this behaviour is treated as a crime. To some readers this question may seem strange, even preposterous, given recent reports highlighting that such material invariably depicts acts of horrific child sexual abuse including penetrative sex activity between adults and very young children (Internet Watch Foundation, 2016).

From a crime prevention perspective, the first part of this article argues that educative strategies are worthwhile because of (a) nascent evidence that a substantial minority of Australians may believe that viewing CEM is a relatively harmless activity because of perceptions such as 'it's just pictures' and (b) increasingly strong evidence that previously law-abiding people are more likely to begin viewing CEM if they are aware of arguments downplaying the wrongfulness of such behaviour. With this background, the second part of the article focuses on the potential role that comments made by judges when sentencing offenders for CEM viewing offences could play in this context. It suggests that these comments, called 'sentencing remarks', may serve a valuable educative function as a major, if not the only, ongoing source of normative messaging about the wrongfulness of viewing CEM that emanates from the State. To situate this analysis, the third part of this article briefly outlines the four main types of theoretical explanations for the harms, or 'wrongfulness', of viewing CEM. The article then reports the results of original empirical research examining 57 sentencing remarks from Victoria and Tasmania over a four-year period. In the final section of the article, these results are critically analysed and discussed, with particular attention given to the implications of these findings from a crime prevention perspective. This article concludes with suggestions about future research directions.

2. Crime prevention

The term crime prevention encompasses 'any action that results in the reduced likelihood of a criminal act occurring' (Laycock, 2013, p. 59). As originally conceptualised by Brantingham and Faust (1976), actions are typically divided into three categories: primary, secondary and tertiary prevention. Secondary and tertiary interventions, respectively, address those at high risk of offending, and those already offending including through detection, prosecution and incarceration (Brantingham, Brantingham, & Taylor, 2005). In contrast, primary prevention strategies target those who merely have the potential to offend and have a much wider remit. It could include, for instance, the normative messages contained in judicial sentencing remarks as an action that may 'address . . . underlying factors that have a basic influence on everyone, shaping people, sites and situations that are amenable to criminal events' (Brantingham et al., 2005, p. 274). It is generally considered more useful

to conceptualise crime prevention strategies as existing along a 'continuum' as opposed to a 'categorical schema' (Wortley & Smallbone, 2012, p. 90–91). In taking this approach, this article further adopts Wortley and Smallbone's (2012) conceptualisation of primary prevention for CEM offending – namely, that primary prevention has two aims: 'to prevent children from being the subject of [CEM] images in the first place', and the focus of this article, 'to prevent potential offenders from . . . using [CEM] for the first time' (Wortley & Smallbone, 2012, p. 89).

The current approach to prevent CEM offending in Australia is heavily invested in interventions that fall towards the tertiary end of the prevention continuum. Little, if any, investment has been made at the opposite end of the scale. Within the key policy platforms, the Australian government has listed actions designed to prevent the victimisation of a child in the first place but have given little thought to interventions aimed at preventing the onset of CEM offending (Department of Family and Community Services, 2000; Department of Social Services, 2009; Australian Attorney-General's Department, 2013). The failure by the State to invest in the development, or even endorse the need for interventions to prevent individuals from experiencing onset, within key policy platforms is not limited to Australia. Jurisdictions including the United States (United States Department of Justice, 2016), the United Kingdom (Child Exploiation and Online Protection Centre, 2013), and, to some extent, Canada (Department of Public Safety Canada, 2015) take a similar approach. The rationale for, in effect, ignoring individuals who are at risk of onset by not investing in such interventions is unclear, although it may simply be that policy-makers do not consider such interventions useful for this type of offending.

This article argues that this perception can, and should, be challenged. The most important reason for doing so is that the current approach is based, in large part, on a misconception about who views CEM, and who is at risk of viewing CEM. If policy-makers accept that individuals will only begin viewing CEM if they have pre-existing paedophilic tendencies, any offender-orientated interventions that fall towards the primary prevention end of the continuum would seem redundant. Each potential new viewer would be highly motivated to offend and thus relatively impervious to such methods. Yet this view is not consistent with the growing body of evidence showing that some individuals begin viewing CEM *without* a pre-existing sexual attraction to children. While, as Henshaw, Ogloff, and Clough (2015) recently reiterated, reliable data are difficult to obtain, research indicates that the profiles of individuals who 'just' view CEM may differ more from those of other child sex offenders than they do from those of members of the general population based on both the demographic and psychological characteristics (Aslan & Edelmann, 2014; Elliott, Beech, Mandeville-Norden, & Hayes, 2009; Elliott, Beech, & Mandeville-Norden, 2013; Kettleborough, & Merdian, 2017; Jung, Ennis, Stein, Choy, & Hook, 2013; Ray, Kimonis, & Seto, 2014; Seigfried-Speller, 2013; Seigfried, Lovely, & Rogers, 2008). Indeed, researchers observe that it is the 'ordinary rather than the unusual characteristics of these offenders that is striking' (Wortley & Smallbone, 2012, p. 45). That said, research does suggest that CEM viewers endorse offence-supportive attitudes specific to CEM offending (Bartels & Merdian, 2016; Howitt & Sheldon, 2007; Merdian, Curtis, Thakker, Wilson, & Boer, 2014; Winder, Gough, & Seymour-Smith, 2015). The relevance of this is returned to below, but at this point it is sufficient to note that while debate is ongoing about the role that such attitudes play in the aetiology of online CEM offending (Maruna & Mann, 2006), recently Bartels and Merdian (2016, p. 17) concluded that for CEM offending they may play a role in '*initiating* the behaviour [and] in reducing internal inhibitions towards first time offending'.

Explanations of why an individual with an otherwise 'ordinary profile' (Wortley & Smallbone, 2012, p. 49) would choose to begin viewing CEM often focus on the nature of the internet. It is argued that more than merely instrumentally facilitating the offending of individuals who would have offended anyway, the internet is an 'active cause' of offending for a 'new group of offenders who succumb to temptations they would otherwise have controlled' (Babchishin, Hanson, & VanZuylen, 2015 , p. 46; Jung et al., 2013, p. 296). Making this point, Wortley and Smallbone (2012, p. 49) observe that 'the increased availability and ease of access afforded by the internet has pushed the problem of child pornography further into the normal population'. Although limited by sample size, this claim finds support in theoretical and empirical research suggesting that 'opportunity' and 'curiosity' are triggers for onset for some individuals (Beech, Elliott, Birgden, & Findlater, 2008; Denis & Whitehead, 2012; Merdian, Wilson, Thakker, Curtis, & Boer, 2013; Winder et al., 2015).

Research also shows that CEM viewers hold, and may rely on, offence-supportive attitudes to initiate such behaviour (Bartels & Merdian, 2016). This suggestion takes on greater significance when coupled with nascent research into public attitudes toward the viewing of CEM in Australia. The evidence base around public attitudes is still growing, but recent studies indicate that such attitudes are not limited to CEM offenders.

In a study of 431 Australian tertiary students, Prichard, Spiranovic, Gelb, Watters, and Krone (2016) found that 7% of participants did not think that viewing CEM involving real children should be illegal – a proportion that increased to 21.3% of participants for material depicting a virtual child. The researchers further found that 10.3% of participants did not think further harm was perpetrated by 'just' viewing CEM involving real children (Prichard et al., 2016, p. 230). In a recent qualitative study, Liddell and Taylor (2015) identified similar beliefs. This research examined the experiences of Australian women whose partners had been charged with possession of CEM. The researchers reported that the women they interviewed recounted that their family and friends denied the seriousness of their partner's behaviour with comments such as 'They are only pictures so what is the harm?' (Liddell & Taylor, 2015, p. 8).

More research is needed, yet these studies tend to suggest that a minority of the population may hold such attitudes. This reflects the view, posited by Warner (2010, p. 395), that the viewing of CEM 'may not appear to be serious criminality in a modern and permissive society'. Nor is it only academics expressing disquiet about public attitudes in this context. In the 2015 Victorian case of *DPP v Pearce* (2015), in paragraph 4 Judge Hampel expressed the hope that by explaining why the viewing of CEM is criminal in her sentencing remarks,

> the broader community will stop calling it a victimless crime, and those who are tempted to access child pornography will not be able to rationalize it or to delude themselves that they are not participating in the victimisation of these children.

3. Sentencing remarks: an overlooked opportunity for primary prevention?

Traditionally judges provide comments or 'remarks' at the point of sentencing. The purpose of the remarks is to explain the sentence that is imposed on the offender. They are directed at the offender but they also provide an opportunity to inform the victim and the wider public about the sentencing process. Part of the process is to explain why the particular behaviour deserves to be punished with criminal sanctions. By explaining why the behaviour is treated as a crime, or why it is wrongful, a judge can be said to be acting as the 'authorized spokesperson for the state' and in this role delineates between 'right and wrong social conduct' (Daly & Bouhours, 2008, p. 519). In so doing, particularly where

offences have been recently introduced or where existing laws have expanded into new areas, judges can be said to play the role of a 'norm entrepreneur' – a person 'interested in changing social norms' – by using law's 'expressive function' to 'mov[e] norms in better directions' (Sunstein, 1996, p. 953). Indeed, sentencing is recognised as a 'communication tool' not just between judge and offender, but also between the criminal justice system and society (Mackenzie, 2005, p. 27).

Reference is made in sentencing remarks to the purpose, or purposes, that the sentence itself is intended to achieve. When the judge directs their comments to the wrongfulness of the behaviour this aligns most closely with the sentencing purpose of denunciation, which finds expression in Australian sentencing statutes including, for example, s. 3(e) of the *Sentencing Act* 1997 (Tas). While denunciation is regarded as 'largely symbolic' in terms of its function, it is nonetheless recognised as 'one of the most important sentencing purposes, and although not necessarily stated, underlies almost every sentence' (Mackenzie, 2005, pp. 114–115). In part, the role and significance of denunciation, according to Freiberg (2014, p. 260) 'relates to the impact the judicial pronouncement itself has in reaffirming shared values'. As a form of communication, Daly and Bouhours (2008, p. 500) describe sentencing as 'moral communication'. It performs a normative function as it may educate 'both the offender and the public about correct moral values' (Australian Law Reform Commission, 2006, p. 4.18; Mackenzie, Stobbs, & O'Leary, 2010, p. 49). Underlining this point, Peršak (2016, p. 96) states '[j]udicial communication is important not only as a vehicle for passing on bits of data but also as a method of contextualising the information and shaping public opinion on various matters'.

If we widen focus beyond the context of the purposes of sentencing, as Warner (2005, p. 248) argues, sentencing remarks also provide judges with an opportunity to play an 'educative role' in the criminal justice system. Daly and Bohours (2008, p. 519) observe that judges' remarks are often reported by the press and may be published online. Arguably, this amounts to a form of free public outreach inasmuch as the media coverage itself involves a negligible cost to the taxpayer. Others have commented on the value of such messaging. For example, Wolak, Finkelhor, Mitchell, and Ybarra (2008, p. 122) acknowledge, with respect to sexual offending against young people more generally, '[i]t is valuable for the public to hear messages that reinforce norms' including statements delivered with the authority of judicial office about the rationales for criminalisation.

Admittedly, the claim that what judges say in their sentencing remarks can shape social attitudes should not be overstated. The potential scope of any educative role played by a judge is likely to be greatly influenced by the degree to which media outlets are interested in the case at hand, the amount of coverage given to the particular case and the accuracy and quality of the reporting (Mackenzie, 2005). Though, theoretically, a determined member of the public could access some sentencing remarks themselves, public availability is patchy (see Table 1). Moreover, as Mackenzie (2005) points out with respect to the actual sentence imposed, but arguably also with relevance to the normative messages in sentencing remarks more broadly, the effect of sentencing on public perceptions of the seriousness of the offence is largely speculative. Yet, if sentencing remarks are to be harnessed as a vehicle for informing and educating the public about the wrongfulness of viewing CEM, issues around availability and access must be addressed first. At present, it is only in the right circumstances that large audiences may read or hear direct quotes from judges.

4. The meaning of wrongfulness

When judges refer to the 'wrongfulness' of viewing CEM they refer not to ossified

Table 1. Public availability and accessibility of sentencing remarks in Australia.

Jurisdiction	Made publicly available on court website or by related department?	Time period available	All remarks?	Made available online in open access databases?	Time period available	All remarks for that period?
Tasmania [1]	✓	2008–present	✓	✘	N/A	N/A
Victoria [2]	✓	2012–present	✘[b]	✓	1993– present	✘
South Australia [3]	✓	4 weeks	✘[b]	✘	N/A	N/A
Western Australia [4]	✓[a]	'Approximately a limited time'	✘[b]	✘	N/A	N/A
New South Wales [5]	✓	2005–present	✘[b]	✓	2005– present	✘
Queensland [6]	✓	3 months	✘[b]	✘	N/A	N/A
Northern Territory [7]	✓	3 months	✓	✘	N/A	N/A
Australian Capital Territory [8]	✓	Unclear	✘	✓	1988–present	✘[a]

[1] Tasmanian Supreme Court, Sentences 2008 – Tasmanian Government (http://catalogues.lawlibrary.tas.gov.au/textbase/SentSearch.htm).
[2] Victorian County Court, Decisions of Note Government of Victoria (https://www.countycourt.vic.gov.au/decisions-of-note).
[3] Courts Administration Authority of South Australia, District Court – Sentencing Remarks (http://www.courts.sa.gov.au/SentencingRemarks/Pages/District-Court.aspx).
[4] Western Australian District Court, Sentencing Reasons (http://www.districtcourt.wa.gov.au/C/criminal_sentencing_remarks.aspx?uid=6393-2680-8568-7315).
[5] New South Wales Department of Justice, NSW CaseLaw Government of New South Wales (https://www.caselaw.nsw.gov.au/about).
[6] Supreme Court Library Queensland, Sentencing Remarks Queensland Government (http://www.sclqld.org.au/caselaw/sentencing-remarks/).
[7] Supreme Court of the Northern Territory, Latest Sentencing Remarks Supreme Court of the Northern Territory (http://www.supremecourt.nt.gov.au/remarks/).
[8] Supreme Court of the Australian Capital Territory, New Judgements and Sentences Supreme Court of the Australian Capital Territory (http://www.courts.act.gov.au/supreme/news/new-judgments-and-sentences).
[a]'Not routinely'. [b]Selected only.

understandings of what that entails but to a multifaceted and evolving concept. The purpose of briefly surveying commentary on the meaning of 'wrongfulness' here is that it provides context to the analyses of sentencing remarks in the Results section of the paper that follows.

Discussions of the wrongfulness of viewing CEM can be found in jurisprudential literature and, to a lesser extent, in empirical studies of CEM offenders. Typically, the literature conceives wrongfulness in term of the effects of viewing on the victim(s) depicted in the material, the effects on the viewer themselves, the effects on other offenders and the effects on society at large.

4.1. Effects on victims

There are two main explanations of wrongfulness within this theme. The most well-developed explanation is, as argued by Ost (2009), that when someone views CEM, in circumstances where the child *knows* that the material has been created and distributed, this awareness may cause further suffering to the child. In a similar vein, Gillespie (2011, 2016) characterises this effect as 'secondary victimisation' with acts of viewing said to re-victimise the child. Much of the evidence for this argument comes from victim impact statements (Cassell, Marsh, & Christiansen, 2016, pp. 191, 192–193). Yet, questions are raised about whether a child must in fact know that the material exists for the secondary effect to occur. And, while this issue receives much attention, not all explanations require knowledge. Ost (2009, p. 118) argues that even if the child does not know, the viewer of CEM is still taking 'unfair advantage' of the child. Gillespie (2011) argues that the *potential* for secondary re-victimisation remains, even if the child does not have knowledge. Another explanation for wrongfulness appearing within this theme, although more commonly cited with respect to the wrongfulness of the production of CEM, emphasises the importance of acknowledging child victims (O'Donnell & Milner, 2007). In a similar vein, others argue that viewing CEM contravenes the rights of the child, particularly their right to privacy and dignity, irrespective of knowledge (Rogers, 2016).

4.2. Effects on viewers

Explanations of the wrongfulness of viewing CEM that contend that such interactions negatively affect the viewer take a variety of forms, with particular attention given to the concern that viewing increases the risk of contact sexual offending against children, through processes such as normalisation. As Gillespie (2016, p. 230) points out, this risk is 'perhaps the most common policy justification advanced for the criminalisation of possession'. While it is beyond the scope of this article to examine in detail the empirical research on the nature of this risk, the notion that there is a causative relationship between viewing and contact offending has been criticised as a 'gross generalization' (Harduf, 2016, p. 300). That said, the viewing of CEM probably constitutes a risk factor for contact offending for individuals who are already predisposed to sexual aggression, although the point remains that many viewers of CEM appear not to commit contact offences against children (Prichard & Spiranovic, 2014, p. 21).

4.3. Effects on other offenders

Where the wrongfulness of viewing CEM is conceived in terms of the effect on other offenders, market principles provide the main explanatory mechanism. These explanations seem to have an intuitive appeal, and have been described as the 'most reasonable' (Danay, 2005, p. 191). While the language used to make these arguments varies, the underlying logic is, as recently summarised by Harduf (2016, p. 296), essentially the same; consumption of CEM signals demand, demand creates an incentive to supply new material and the creation of new material requires the sexual abuse of children. While

there is broad agreement that paying to view CEM stimulates supply – that is, the production of new material and thereby the further abuse of children – disagreement exists about whether viewing without monetary payment (such as on free websites and peer-to-peer networks) sends a sufficient signal to stimulate supply. Some theorists contend that the 'knowledge' that other people 'want to and are able to view the material' is a sufficient motive to stimulate production (Ost, 2002, p. 453). Other scholars criticise such a hypothesis as little more than a 'convenience argument' (Mirkin, 2009, p. 259) premised on a weak connection between viewers' behaviour and production (Harduf, 2016, p. 297; Dillof, 2016, p. 23). It is contended that even if a producer is aware of a viewer, this provides 'little incentive' to produce new material on the basis of this 'demand' because, as Dillof (2016, p. 23) states, the supply of CEM is already sufficient to satisfy the 'demands of most offenders'; an observation echoing that of Wortley and Smallbone (2012, p. 3).

A variation of this argument substitutes for money the encouragement provided by the viewer's behaviour as the demand signal. Ost (2009, p. 115) posits that although the behaviour of an individual in seeking to view CEM is an 'act which is harmless in itself' it 'encourages creators of such material to produce more of it'. Ost (2009, p. 118) bases this argument on there being a valid 'imputational link' between the producer of the material and the possessor of the material, and/or a valid 'normative link' between the possessor of the material and the producer of the material based on the notion that the viewer's behaviour encourages the actions of people who abuse children and/or produce CEM.

4.4. Effects on society

The dominant explanation of wrongfulness within this theme references the 'compelling' protectionist discourse around children (Ost, 2010, p. 232). It is asserted that the possession of CEM (and arguably the accessing of such material) 'threatens public moral values which affirm the sacred, protected status of children' (Ost, 2009, p. 120). The concept of tolerance is also referenced on the basis that criminalisation reinforces the idea that society does not tolerate the sexual abuse of children (Ost, 2002, p. 459).

5. The current study

This empirical study comprised a content analysis of 57 sentencing remarks for cases involving the viewing of CEM from Victoria and Tasmania between 2011 and 2015. These jurisdictions were chosen for pragmatic reasons, including the ready availability of sentencing remarks, and because, in terms of the origin of remarks, these jurisdictions provide examples of a small and a large jurisdiction within which different court hierarchies operate. The purpose of the analysis was to explore whether and how judges explain the wrongfulness of viewing CEM to offenders. These two jurisdictions are not homogeneous in their sentencing regimes and practices, but the study was not undertaken for the purpose of jurisdictional comparison, nor was it designed to investigate possible structural explanations for any observed differences between the jurisdictions. In any case, given that only two jurisdictions are examined, and the sample sizes involved are relatively small, any comparison was unlikely to be particularly meaningful. It should also be acknowledged at this point that questions exist about the value and appropriateness of judges taking on an 'educative role' and that some judges may resist doing so (Daly & Bouhours, 2008, p. 520). A number of further limitations relating to the data collection process and the scope of this study are identified below.

5.1. Research design

Two selection protocols were applied to the collected data. First, only first-instance

decisions were included as appeal cases are unlikely to generate judicial commentary on the wrongfulness of CEM. Second, to avoid compromising the purpose of this study, only remarks that concentrated exclusively on CEM viewing were collated. This meant that cases that melded judges' discussion of CEM viewing with other sexual crimes were excluded.

The Tasmanian sentencing remarks were obtained from the publicly accessible *Supreme Court of Tasmania Sentences 2008* database. This process returned 66 documents, of which 28 satisfied the selection protocols. The Victorian sentencing remarks were obtained from the *Australasian Legal Information Institute (AustLII)* database. This may not be a complete database because not all Victorian County Court decisions, for instance, are made public. Nonetheless, this is the principle depository for such decisions. Searches of this database returned 108 documents, of which 29 satisfied the selection protocols.

5.2. Methodology

To analyse what judges say in their sentencing remarks, a content analysis methodology was adopted. Simply put, content analysis is 'a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use' (Krippendorff, 2012, p. 24). In other words, texts that have a meaning for others were examined, and specific inferences were drawn about their meaning in the context of explanations for the wrongfulness of viewing CEM. This approach was appropriate as sentencing remarks are, depending on the jurisdiction, either a full or a 'partial and selected' textual record of sentencing in the form of a document (Daly & Bouhours, 2008, p. 505). This facilitated the systematic study of the sentencing remarks (Maxfield & Babbie, 2015, p. 348) and the identification and categorisation of the explanations, in turn enabling analysis and interpretation (Harwood & Garry, 2003, p. 479). Aligning with the stipulation that courtroom speech must be situated, not abstracted, each sentencing remarks document was examined as a complete text (MacMartin & Wood, 2005, p. 141–142). This was practical as sentencing remarks are relatively short (between 1,000 and 4,000 words), and, because their structure is a matter of discretion for the individual judge, there was no logical way to segment the text that would aid analysis.

A situated approach was also critical for this research to ensure that only explanations about the wrongfulness of CEM viewing were coded, rather than explanations that judges might provide as to the rationale for the sentence, including deterrence. Although there is overlap between these types of explanations, the key difference for the purpose of this analysis is that in the main sentencing considerations are *post factum* explanations for punishment, which look to the future – that is, how to protect children from exploitation or abuse by others *in the future* by emphasising the threat of punishment. In this analysis, we focused on explanations for why an offender's behaviour is wrongful drawing on *ex ante* explanations of wrongfulness or, in other words, rationales for criminalisation.

5.3. Procedure and coding

To perform the content analysis, *QSR International's* qualitative research software NVivo 11 for Macintosh (NVivo) was used. Because analysing sentencing remarks for judicial explanations of the wrongfulness of viewing CEM is novel, an inductive approach was taken in the first instance, with explanations coded as they emerged from the data (Thomas, 2006, p. 241). To identify the relevant explanations – or data segments – to code, the sentencing remarks were examined in terms of their manifest content, which is the 'visible surface content' rather than any additional 'underlying meaning' of the text (Maxfield & Babbie, 2015, p. 348). In other

words, a 'semantic approach' was taken based on the 'explicit or surface meanings of the data' – which in practice meant that the researcher's focus did not go beyond what judges actual said (Braun & Clarke, 2006, p. 84). This was desirable in this research to ensure that the content identified reflected, as closely as possible, the explanations given by the judges as they appeared in the sentencing remarks.

In line with the inductive approach, upon identification data segments were coded by creating a node name from the selected text. Next, nodes were sorted into broader categories with reference to theme, namely, the 'central idea that emerge[s] from the data' (Walter, 2013, p. 324). These themes were then sorted into hierarchical categories. At this stage, a distinction was made between explanations involving a real child and those involving a fictitious child. Only explanations relating to the former are considered in this article. In line with best practice, a coding rule was created for each theme (Walter, 2013, p. 263–264). This helped to ensure consistency of approach and minimised subjectivity as much as possible. In addition, previously coded data segments remained visible and provided a constant point of reference for the researcher.

Initial reading of the sentencing remarks indicated that in a small minority of cases, judges reproduced secondary sources, including second reading speeches, explanatory memoranda and case law from their own and other jurisdictions. These explanations fell outside the scope of this analysis, as, even where the judge expressly adopted the statement, the subject matter of the quote was not limited to viewing offences.

After completing the first round of coding, the data were re-coded three days later to check the reliability of the coding – the 'test–retest method' (Maxfield & Babbie, 2015, p. 125). The face-validity of the coding in both rounds was checked. This involved checking that the data segment comprising the nodes had been accurately interpreted and categorised with reference to the coding rules. Next, a text search for key words was conducted followed by individual examination of each result generated, to ensure that all relevant references were included.

To aid discussion, these themes were subsequently categorised by reference to the four areas of effect identified within the literature and outlined above.

As a final point, given the scope of this analysis, with respect to both the time period and the jurisdictions examined, the possibility remains that the range of themes and explanations identified in this study may not be representative of these jurisdictions, or the themes and explanations given around Australia. Notwithstanding these limitations, the results of this analysis reveal some interesting findings as reported and discussed below.

6. Results

This study is explorative. The reported results are not intended as a criticism of any individual judge. The aim is to examine the explanations that have been given, and identify the potential strengths and weaknesses of the comments from a prevention perspective. To reinforce this point, neither the identities of the judges nor the names of the cases are referenced in this article.

6.1. *Descriptive statistics*

A total of 57 sentencing remarks documents (Tasmanian $n = 28$ and Victorian $n = 29$) were collated following the selection protocols. The cases were spread evenly across the years included in the study, with between 9 and 14 cases collated for each calendar year (2011–2015). With respect to type of material, the majority of cases were for CEM involving an actual child (Tasmania $n = 24$, Victoria $n = 25$) with only a small proportion also including material involving a fictitious child (Tasmania $n = 4$, Victoria $n = 4$). As explained at the outset of this article, only

findings relating to the material involving real children are reported.

In 11 of the 57 remarks (19%; Victoria $n = 9$, Tasmania $n = 2$) the judge gave no explanation for the wrongfulness of CEM viewing. Accounting for remarks in which one or more explanation was given (81%), a total of 90 references were identified within this dataset. Among these 90 references, nine types of explanations emerged: *Acknowledge Victims* ($n = 35$), *Further Effect on Victims* ($n = 11$), *Market* ($n = 13$), *Encouragement* ($n = 13$), *Demand* ($n = 6$), *Normalisation* ($n = 2$), *Desensitisation* ($n = 1$), *Protect Children* ($n = 6$) and *Community Standards* ($n = 3$).

Subsequent analysis revealed that each of these explanations corresponded to one of the four themes identified in the theoretical literature discussed previously: (a) *Effects on the Victim(s)*; (b) *Effects on Other Offenders*; (c) *Effects on the Viewer*; and (d) *Effects on Society*. Respectively, Figures 1 and 2 show the breakdown of the dataset by theme and explanation, and aggregated percentage by theme.

As Figure 2 demonstrates, the most frequently cited explanations of wrongfulness fell within the theme *Effects on Victim(s)* ($n = 46$, 51%). Two separate explanations within this theme were identified: *Acknowledge Victim* and *Further Effect on Victim(s)*. The former explanation was referenced 35 times and was the only explanation given in 13 (23%) of the sentencing remarks (Tasmania $n = 8$, Victoria $n = 5$). This explanation emphasised the importance of acknowledging the past suffering of the individuals depicted in the material. For example, 'It is obvious that children who are the subject of such material must suffer great harm' (C8). The latter explanation was referenced 11 times and, in contrast to the first explanation, emphasised the further, or additional, effect that the act of viewing CEM has on the child or children depicted in the material. For example, 'The victims are re-victimised every time their images are accessed by people like you' (C51).

The next most frequent theme was *Effect on Other Offender* ($n = 32$, 35%). This theme encompassed three explanations: viewing

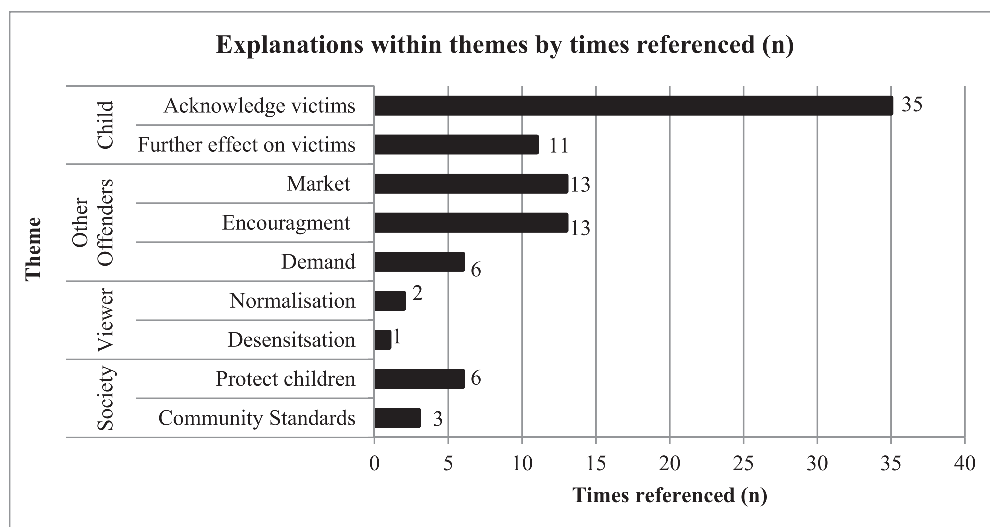

Figure 1. Explanations identified by judges within the four themes by number of times referenced within the dataset.

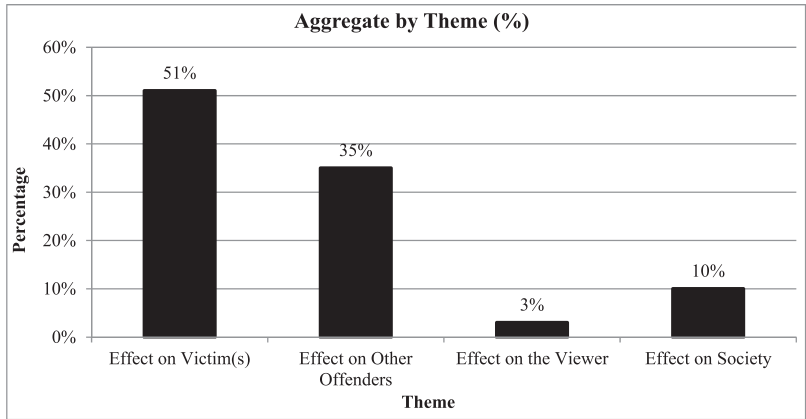

Figure 2. The four themes represented as a percentage of the dataset.

creates a *Market* for CEM ($n = 13$), the behaviour of the viewer provides *Encouragement* to other offenders ($n = 13$) and the behaviour of the viewer creates *Demand* ($n = 6$). These explanations tend to be conflated in the theoretical literature, but are characterised differently in the sentencing remarks and so are reported separately here. Respectively, key examples include,

- *Market*: 'Those who access these images create a market for this exploitation to continue' (C46);
- *Encouragement*: 'Your crime of possessing child pornography fuels and encourages this criminal activity' (C31); and,
- *Demand*: 'To be in possession of them, without more, contributes to a demand for them and the demand perpetuates the abuse of children' (C18).

References to the other two themes were much less frequent, although *Effect on Society* ($n = 9$, 10%) received more references than *Effect on the Viewer* ($n = 3$, 3%).

The two types of explanations within *Effect on Society* were *Protect Children* ($n = 6$) and *Community Standards* ($n = 3$). The former characterised the wrongfulness of viewing with reference to a broader social value, the need to protect children generally. For example, '[t]he legislation under which you have been charged is designed to provide some protection for these children who clearly cannot protect themselves' (C9). Conversely, the second explanation, *Community Standards*, referred to notions of public morality including tolerance. For example, '[t]he community cannot, and will not, tolerate the sexual abuse of children' (C33).

Similarly, two types of explanations were identified within *Effect on the Viewer*. While there were similarities in the tenor of the judges' comments, the explanations took different forms. One explanation centred on the issue of 'normalisation' ($n = 2$) – for example, '[t]he material when produced may give the impression that the behaviour depicted is in some way normal' (C10) – while the other explanation focused on 'desensitisation' ($n = 1$) with the judge remarking '[t]here may be a level of becoming somewhat desensitised which means that there is a progression from adult to child pornography and from older children to younger . . . ' (C48).

7. Discussion

This study suggests that in sentencing offenders for CEM-viewing offences judges tend to provide an explanation for the

wrongfulness of such behaviour. This was the outcome in all but 11 of the 57 cases analysed. Of the 11 cases where no explanation was provided, nine were Victorian. It is unclear whether this might be explained by differences between the jurisdictions but the aim of this research was not to explore differences between jurisdictions. It could also evidence the kind of resistance suggested by Daly and Bouhours (2008, p. 520), although there was no pattern among these remarks to suggest this.

Nonetheless, at the very least, it signals that a potential opportunity for education has been missed. Further research should be done to determine whether this is likely to be an ongoing trend. Among the remaining 46 cases, both Tasmanian and Victorian judges appear to have gone to some lengths over this four-year period to explain to the offender (and arguably the community more widely) the wrongfulness of viewing CEM. Encouragingly, this suggests that for this type of offending judges do take the opportunity to play an 'educative role' in the criminal justice system (Warner, 2005, p. 248).

However, it is also the case that the value of what judges say in their sentencing remarks to educate the public and perhaps potential offenders about the wrongfulness of viewing CEM varies. For example, if we examine those explanations identified in the theme, *Effect on Victim(s)*, we find that *Acknowledging Victims* was the most frequently referenced explanation. This explanation emphasises the harm perpetrated on the victims by the abusers, creators and distributors. The example provided above demonstrates this point as the judge emphasised how 'obvious' it was that the children depicted 'suffer great harm' (C8). Notably, however, this kind of statement does not specify why, with respect to viewing, it is important to acknowledge victims. This approach can be compared with the point made by O'Donnell and Milner (2007, p. 71–72) who assert that recognising victims is important to give them a voice. This is problematic as, while the acknowledgment of victims directs attention to the circumstances in which the material was produced and the appalling abuse suffered by the victims, it does not explain the wrongfulness of viewing such material per se. Instead attention is directed *away* from the viewer to the actions of the person who abused, exploited and/or produced the material without identifying how the behaviour of the viewer connects to or is associated with the origin of the material. This is particularly the case where victim acknowledgment is the only explanation given.

This can be contrasted with the other explanation in this theme, *Further Effect on Victims,* which seeks to draw an explicit link between the behaviour of a viewer and the effect of such behaviour on the child. This is shown by the example above that the viewer's behaviour re-victimises the child (C51). However, interestingly, while the literature suggests that the question of whether a child has knowledge that the material was created and people may be viewing it is considered very relevant to whether a further effect manifests – whether the child is re-victimised – the question of knowledge was only referenced once in this dataset. A single judge identified that 'if' the child has knowledge this increases the abuse perpetuated upon them. Although not all theoretical explanations require the child to have knowledge, ignoring the issue of knowledge leaves such explanations open to challenge (Ost, 2009, p. 119). In practice, this may be a weaker explanation than one where (a) the circumstances that make it likely that the child or children have knowledge are identified or (b) an alternative explanation, not predicated on knowledge, is identified.

The logic underlying all three explanations relevant to the second theme, *Effect on Other Offenders*, is essentially the same. For this type of explanation, one area of significant contention in the literature relates to the relative importance of whether a viewer pays to view the material. This issue was almost

completely ignored in these sentencing remarks, although it is a concern within legal discourse more widely (see, for example, *Young v Western Australia,* 2011). Here, the issue of payment was only referred to once in a market context, although the judge used the term 'industry' (C17). Indeed, reference to the fact that no payment was made was significantly more common, although only as a factor that did not mitigate the seriousness of the offender's behaviour (Warner, 2010, p. 389).

Reference to the *Market* or *Demand* in sentencing remarks where no payment is made would not have been unexpected. Previous judicial commentary has categorised viewing as a commercial activity irrespective of payment; see, for example, *Minehan v R* (2010) and *R v Ryan* (2012). Yet, given argument that supply is already sufficient to meet the demand of most viewers in any case, the value of a market-based explanation to account for the wrongfulness of viewing CEM is questionable (Dillof, 2016, p. 23), and reference to the concept such as encouragement may well provide a more credible explanation. That said, scepticism about explanations based on the market was not evident in this study, with judges characterising the effect of the viewer's behaviour in terms of the market as often as they referenced encouragement. Moreover, judges do not appear to engage with theoretical questions about why the actions of individuals who abuse, exploit, produce and/or distribute CEM are attributable to the behaviour of a single viewer (Ost, 2009); nor do they grapple with the question raised by Dillof (2016, p. 23) about how 'significant' the effect of such behaviour is likely to be.

The last two themes, *Effects on the Viewer* and *Effects on Society*, both encompass two subsidiary explanations. As noted above, the former explains wrongfulness in terms of the effect of viewing on the viewer, with concerns around the normalisation of CEM and the desensitisation of the viewer. A key concern in both the literature and sentencing remarks is that the viewing of CEM may lead to contact offending against children. That said, while it would not be entirely misleading to suggest that a relationship exists between the viewing of CEM and contact offending, the nature of this relationship is far from straightforward. This reality may undermine, especially if it becomes well known, the value of this type of explanation of wrongfulness.

With respect to *Effects on Society*, the two explanations were *Protect Children* and *Community Standards.* These explanations attribute the wrongfulness of viewing to the fact that this behaviour is contrary to the social interest in protecting children and reinforces social intolerance of child sexual abuse. Given Ost's (2010, p. 232) observation about the 'compelling' nature of the protectionist discourse around children, it is perhaps hardly surprising that judges did little more than assert the validity of such explanation. In other words, the force of this discourse may have rendered the need for further explanation, in the mind of a judge at least, unnecessary.

8. Conclusion

This article has identified that sentencing remarks are a possible tool for educating the public about explanations or rationales for criminalising the viewing of CEM. By examining the comments made by judges in sentencing offenders for viewing offences this article emphasises the educative role played by judges. It also suggests that judges' remarks offer an authoritative source of *ongoing* communication relevant to the second aim of primary prevention. Even if a judge only gives one or two explanations for wrongfulness within a single sentencing remark, the cumulative effect of continual comments by judges over a period of time may well have substantial value as an educative tool, especially given that under certain conditions, the explanations that judges give may reach a substantial public audience.

However, even leaving aside practical questions about the dissemination of the messages in sentencing remarks, it is a concern that a proportion of sentencing remarks do not contain explanations of why the relevant behaviour is wrongful in the first instance – either at all, or only in terms of determining the appropriate sentence. Further, and perhaps more importantly, the explanations in some sentencing remarks direct attention to the behaviour of other offenders without identifying any link with, or to, the behaviour of the viewer. The lack of research in this area means we cannot know with any certainty how an offender might perceive this, nor can we know what the implications of this might be in a broader societal context. Nonetheless, the prospect that it may perpetuate rather than reduce ambiguity about the wrongfulness of this behaviour remains a concern given the research examined above.

This article does not suggest a direct causative relationship between a judge explaining the wrongfulness of viewing CEM and the internalisation of such an explanation by any member of the community – let alone someone at risk of experiencing onset, not least because of the patchy public availability of sentencing remarks and their sporadic reporting in the media. There are also no guarantees, even if picked up by the media, that such messages reach an individual at risk of onset.

However, the importance of judges clearly explaining why the viewing of CEM is wrongful in their sentencing remarks should not be overlooked in a broader prevention context. The lack of attention given to strategies to prevent the viewing of CEM by the State, a level of community ambivalence about the wrongfulness of such behaviour, and the increasingly recognised role that certain beliefs may play in initiating onset at the very least underline the value in alerting and encouraging judges to continue, or begin to play, a greater educative role in this context.

The identified limitations of sentencing remarks emphasise that they are not a panacea and underline the need for the State to take a more active role in this area. For example, this could include the investigation of more targeted approaches to challenge attitudes as part of a wider strategy to tackle this problem in Australia.

Future research could usefully examine and compare the explanations that judges give across the various jurisdictions to determine if and why differences exist. Such exploration could also assess the extent of judicial awareness of the issue of public attitudes towards the viewing of CEM and, as a consequence, the desirability of fostering the educative role they can play. Further, there is a need to examine media reporting of the sentencing of cases of viewing to determine whether, and how well or otherwise, the explanations that judges give for the wrongfulness of viewing are communicated. Lastly, it is critical to understand the nature of public attitudes towards the law in this area better in order, at the very least, to inform judges about how to strengthen the messages they deliver in their sentencing remarks.

Ethical standards

Declaration of conflicts of interest

Charlotte Hunn has declared no conflicts of interest
Helen Cockburn has declared no conflicts of interest
Caroline Spiranovic has declared no conflicts of interest
Jeremy Prichard has declared no conflicts of interest

Ethical approval

This article does not contain any studies with human participants or animals performed by any of the authors.

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