

Possess child exploitation material/ child pornography

s220 Criminal Code

s 60(1) Classification (Publications, Films and Computer Games) Enforcement Act

Prior to 1 January 2014

Transitional Sentencing Provisions: Each of the two tables is divided into thirds based on the three relevant periods of Sentencing Provisions:

- Post-transitional provisions period
- Transitional provisions period
- Pre-transitional provisions period

These periods are separated by a row which shows when the transitional provisions were enacted, and another showing when they were repealed.

Glossary:

imp	imprisonment
susp	suspended
conc	concurrent
cum	cumulative
PG	plead guilty
PNG	plead not guilty
poss	possess
ct	count
CSI	conditional suspended imprisonment
TES	total effective sentence
TOI	trial of issues
DC	District Court

No.	Case	Antecedents	Summary/Facts	Sentence	Appeal
24.	<p><i>Wilhelm v The State of Western Australia</i></p> <p>[2013] WASCA 273</p> <p>Delivered 29/11/2013</p>	<p>42 yrs at time sentencing.</p> <p>Convicted after PG.</p> <p>Prior criminal record in NSW & WA; apart from one stealing as a servant in NSW, both records limited to non-recent minor traffic offences.</p> <p>Parents separated when 9 yrs; Estranged from father.</p> <p>Left school after Year 11; Employed in Navy for 6 yrs; Discharged because he stole navy property.</p> <p>Failed marriage.</p> <p>The offences had been committed 6-8 years before sentencing; proceedings delayed as a result of appellant fleeing the jurisdiction for 5 ½ years.</p>	<p><u>Indictment 727 of 2012</u> Fraud x 3</p> <p><u>Indictment 810 of 2012</u> Possess child pornography x 7</p> <p><u>Section 32 Notice (facts not recited)</u> Steal MV x 2 Fraud x 21 No MDL x 2 Stealing x 1 Breach of Bail x 1 Exceed speed limit x 1 Fail to stop x 1 Reckless driving x 1 False number plates x 1</p> <p><u>Indictment 727 of 2012</u> The victim agreed to sell to the appellant his motor vehicle. The appellant paid a \$200 deposit and took possession of the vehicle. The appellant on sold the vehicle to two other persons without each other's knowledge. The victims never received delivery of the vehicle.</p> <p>The appellant then assisted another with the purchase of a motor vehicle. The victim gave money to the appellant in anticipation of the purchase. The appellant used the money for his own purposes.</p>	<p><u>Indictment 727 of 2012</u> TES 2 yrs 8 mths imp.</p> <p><u>Indictment 810 of 2012</u> TES 6 mths imp.</p> <p><u>Section 32 Notice</u> TES 2 yrs imp. MDL disq 6 yrs 6 mths. Fine \$2,900.</p> <p>TES 5 yrs 2 mths imp.</p> <p>EFP.</p> <p>No remorse and no real insight into his offending; Externalised blame for the fraud offences onto his former partner.</p> <p>Low risk of violent sexual offending.</p> <p>Sentencing judge noted child pornography offences as being 'not of a high level of objective seriousness'.</p>	<p>Allowed.</p> <p>Indictment 727 of 2012 orders for cumulacy on Ct 3 set aside and served conc with Ct 2; Re-sentenced to 22 mths imp.</p> <p>Indictment 810 of 2012 order for cumulacy Ct 5 set aside & each term of imp be wholly conc with Indictment 727 of 2012.</p> <p>Section 32 notice not interfered with.</p> <p>Re-sentenced to TES 3 yrs 10 mths imp.</p> <p>EFP.</p> <p>Driver's licence disqualification was conceded by respondent. MDL disq substituted with 4 yrs 6 mths.</p> <p>At [46] The appellant's overall offending was multifaceted and serious. There is no question that it warranted a significant term of imprisonment.</p>

			<p>Each victim sustained significant financial loss and expense.</p> <p><u>Indictment 810 of 2012</u> Police executed a search warrant at the appellant's home address. Police located 24 printed images of child pornography. Police also seized 111 CDs. Altogether, police discovered 762 images and 17 videos that constituted child pornography.</p>		<p>At [49] Child pornography offences ... not as bad as others. His Honour may not have imposed terms of immediate imprisonment had he been dealing with these offences alone.</p> <p>At [52] ... The total sentence of imprisonment was unjust and unreasonable. It was more than was required to satisfy sentencing objectives.</p>
23.	<p><i>Godfrey v The Queen</i></p> <p>[2013] WASCA 247</p> <p>Delivered 23/10/2013</p>	<p>43 yrs at time sentencing.</p> <p>Convicted after PG.</p> <p>No WA criminal record; suggested he was 'a person of interest' in the Netherlands and USA regarding offences of a sexual nature.</p> <p>Citizenships in Aus, Netherlands & USA.</p> <p>Regular competitor of gymnastics in USA from 5 to 28 yrs; worked as a gymnastics coach between 18 & 39 yrs.</p> <p>Left USA in 2006 to return to live and work in the Netherlands.</p> <p>Previously married; no serious or long term relationships since.</p>	<p>Ct 1: Possess & control of child porn outside Australia (Cth).</p> <p>Ct 2: Possess child exploitation material (WA).</p> <p>Ct 3: Used carriage service to access child pornography (Cth).</p> <p>Between October 2006 and October 2010 the appellant resided in the Netherlands. In October 2010 he approached a Dutch welfare agency to seek treatment for his sexual attraction to female children. He admitted to a counsellor that he had downloaded child pornography. The counsellor reported the appellant to police.</p> <p>An analysis of the appellant's notebook computer, 3 hard drives and a USB memory stick was conducted. Video files and images of child pornography were located on 2 of the 3 hard drives.</p>	<p>Ct 1: 4 yrs 6 mths imp – non parole period 3 yrs.</p> <p>Ct 2: 2 yrs imp EFP.</p> <p>Ct 3: 4 yrs imp – non parole period 3 yrs.</p> <p>Cts 1 & 3 to commence on backdated date.</p> <p>Ct 3 wholly conc on Ct 1.</p> <p>Ct 2 to commence at the conclusion of non-parole periods for Cts 1 and 3.</p> <p>TES 5 yrs imp.</p> <p>To serve 4 yrs imp before EFP.</p> <p>As a result of consulting</p>	<p>Allowed.</p> <p>Re-sentenced:</p> <ul style="list-style-type: none"> • Ct 2 - 2 yrs imp. • Cts 1 & 3 2 yrs imp & 16 mths imp – both to commence on the day becomes EFP on Ct 2. <p>To be released after serving 12 mths of the sentences of Cts 1 & 3 & on entering into a \$10,000 GBH for 12 mths.</p> <p>At [32] The offences in this case included both federal and state offences. Different statutory provisions apply. There is, however, a great deal of commonality.</p> <p>At [56] ... The continuation of this activity in light of his past history tended to show this sexual interest in children was</p>

		<p>Suffered depression following the end of his marriage; long history of excessive alcohol use beginning in his early 20s.</p>	<p>Prior to the completion of the analysis the appellant left the Netherlands and permanently relocated to Australia. The AFP subsequently took over the investigation. A further examination of the drives located 181 images and 13 video files of child pornography.</p> <p>The AFP commenced an investigation into the appellant's current internet activity and established that during February – April 2012 he accessed 40 written text stories which constituted child pornography.</p> <p>Police subsequently executed a search warrant and seized a number of computers, portable hard drives and other storage devices. An analysis established that these devices contained a total of 6,596 images and 12 video files classified as child pornography. All but about 500 items had been deleted and had to be retrieved by police using forensic software.</p>	<p>a counsellor he voluntarily presented himself to the Netherlands Police and handed over computer hard drives.</p> <p>Acknowledged his behaviour but minimised his behaviour and feigned ignorance regarding whether written material could constitute child pornography.</p> <p>Denied any sexual interest in forced or coerced sexual behaviour but admitted that he had an interest in pornography for many years; stated had a preference for images & erotic literature featuring female children between 12-15yrs.</p> <p>Sentencing judge noted that the material included child pornography in the worst category.</p>	<p>entrenched.</p> <p>At [60] ... The fact that no actual children had been exploited in respect of these stories placed the offending in respect of count 3 into a lower category of seriousness than counts 1 or 2.</p>
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				Denied any actual sexual contact with children and there was no evidence to the contrary.	
22.	<p><i>Downie v The State of Western Australia</i></p> <p>[2013] WASCA 244</p> <p>Delivered 22/10/2013</p>	<p>36 yrs at time sentencing.</p> <p>Convicted after late PG – sentenced by separate judges on separate days.</p> <p>No criminal history.</p> <p>Parents separated when 5 yrs; between 6 yrs and 13 yrs was physically and sexually abused by his stepfather.</p> <p>Completed year 12; excellent employment history.</p> <p>Separated from wife; 2 teenage children.</p> <p>Socially withdrawn and experiences social anxiety and discomfort.</p> <p>Undertaken Sycamore Tree programme and wished to participate in sex offender treatment program.</p>	<p><u>Indictment 131/2012</u> Indecent deal child 13-16 yrs x 2. Sex pen child 13-16 yrs x 1. Distribute child exploitation material x 1. Possess child exploitation material x 1.</p> <p><u>Indictment 757/12</u> Indecent deal child 13-16 yrs x 11 Sex pen child 13-16 yrs x 8</p> <p><u>Indictment 131/2012</u> <u>Cts 1-3:</u> The appellant ‘met’ the 14 yr old male victim online. The appellant was 34 yrs; however he told the victim that he was 28 yrs. An arrangement was made for the appellant and victim to meet in a public toilet. They met as agreed. The appellant undid the victim’s jeans and rubbed his penis. He then took the victim’s hand and placed it on the appellant’s penis and indicated to the victim to rub it, which he did. The appellant then placed his mouth over the victim’s penis and performed fellatio until the victim ejaculated.</p> <p><u>Cts 4-5:</u> Police later executed a search warrant at the victim’s home and seized a computer. An analysis discovered 1,241 still images</p>	<p><u>Indictment 131/12</u> TES 3 yrs 6 mths imp (cum).</p> <p><u>Indictment 757/12</u> TES 3 yrs 6 mths imp (cum).</p> <p>TES 7 yrs imp.</p> <p>Medium to high risk of re-offending.</p> <p>Sentencing judge noted the appellant did not fully comprehend the seriousness of the situation.</p> <p>Sentencing judge described offences as ‘highly premeditated’ and involving a degree of ‘depravity, paedophilic lust, grooming, planning and enthusiasm.</p>	<p>Dismissed.</p> <p>At [74] ..., the inappropriate use of language by his Honour does not equate to an erroneous sentence.</p> <p>At [81] There can be no doubt that the appellant’s overall offending was very serious...</p> <p>At [83] The offences dealt with by McCann DCJ were separate and distinct from the offences dealt with by Curthoys DCJ. They were also more numerous and considerably more serious...</p>

			<p>and 22 movie files of child pornography. Investigators found that the appellant used an internet file sharing program to distribute 64 images of child pornography to the USA.</p> <p><u>Indictment 757/12</u> <u>Ct 1-5:</u> The victim was, at the time, either at or close to 14 yrs. The appellant and victim 'met' online and started communicating on the internet. During those communications the appellant was grooming the victim. Eventually the appellant and victim met in person and the appellant drove the victim to a car park in Fremantle. There they tongue-kissed and masturbated each other's penis and performed fellatio on each other. The appellant then drove the victim to another location and gave him \$300.</p> <p><u>Ct 7-10:</u> The appellant and victim met, having agreed to spend the night together in a hotel. The appellant paid for the room. While there, the appellant and victim tongue-kissed, masturbated each other and performed fellatio on each other to ejaculation.</p> <p><u>Cts 11-14:</u> The appellant and victim then went to IKEA, where the appellant bought the victim some items. Later, they drove to a</p>	<p>Lacked real insight into his offending.</p>	
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			<p>restaurant for dinner. They then returned to the hotel and engaged in more sexual activity. After tongue-kissing, the appellant masturbated himself in the victim's presence and they then engaged in fellatio on each other.</p> <p><u>Cts 15-19:</u> The following morning they tongue-kissed, masturbated each other and performed fellatio one each other to ejaculation. After checking out of the hotel, they went to an ATM, where the appellant provided the victim with money.</p>		
21.	<p><i>DO v The State of Western Australia</i></p> <p>[2013] WASCA 218</p> <p>Delivered 20/09/2013</p>	<p>36 yrs at time sentencing.</p> <p>Convicted after trial (sex offences). Convicted after PG (indecent recordings).</p> <p>Criminal record in Qld for poss child pornography.</p> <p>Separated from his wife; 3 young sons.</p> <p>Charges in IND 742/12 committed whilst on bail for the offences on IND 1467/11.</p>	<p><u>IND 1467/11</u> Sex pen child U13 yrs x 4. Indecent deal child U13 yrs x 16. Indecent recording x4. Poss child exploitation material x1.</p> <p><u>IND 742/12</u> Indecent deal child U13 yrs x 2.</p> <p><u>IND 1467/11 – Cts: 1-13, 15-21</u> The offending occurred when the appellant was a parent helper at his son's school and occurred over several years.</p> <p>On 4 occasions the appellant put his hand down a boy's shorts and penetrated the anus of the boy with his finger and on 16 other occasions he put his hand down a boy's shorts and indecently touched the boy on the penis or the bottom. The offending involved a total of 7 boys,</p>	<p>Sentence range 6 mths – 2 yr 6 mths imp (cum & conc).</p> <p>IND 747/12 cum on IND 1467/11.</p> <p>TES 10 yrs imp.</p> <p>EFP.</p> <p>Position of trust and some authority within the school environment; also father of school friends of the victims.</p> <p>Sentencing judge found that involved grooming boys by trying to normalise the behaviour</p>	<p>Allowed.</p> <p>IND 1467/11 orders for cumulation on Cts 6 & 9 set aside.</p> <p>Re-sentenced to TES 8 yrs imp.</p> <p>At [35] ... the nature of the offending, while serious, was not of the most serious kind of sexual offending against children. Most of the offending involved 'touching' not sexual penetration offences (none of which involved penile penetration) involved one complainant rather than multiple complainants.</p>

			<p>between 6 - 9 yrs and occurred over 3 yrs. 11 of the offences occurred in the classroom, 7 occurred outside the class room (1 on the school oval), and 2 occurred at an aquatic centre where the school was conducting swimming lessons.</p> <p><u>IND 1467/11 - Cts: 22-25</u> The appellant took 53 photographs of boys, aged between 6 -12 yrs using a mobile phone. The photographs were taken in the male changing room at an aquatic centre while the appellant was assisting teachers with swimming lessons organised by the school. The images were taken when the boys were wholly or partly naked while getting changed and focused on their genitals and buttocks.</p> <p>The appellant took a further 19 photographs in the same circumstances, using a different mobile phone. The images were of boys 8-12 yrs. The appellant's offending came to light when a student saw the appellant surreptitiously taking such photographs and reported it to a teacher.</p> <p>When the appellant was arrested, a search of a thumb drive in his possession revealed 1,938 images of child exploitation material of boys aged between 6 – 14 yrs. A search of the appellant's computer revealed 2 video images of child exploitation material and</p>	<p>to make them think it was acceptable.</p> <p>Lack of insight into offending; moderate to high risk of re-offending.</p>	
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			<p>3 still images of boys.</p> <p><u>IND 747/12</u></p> <p>The victim was a 6 yr old boy. The appellant was a family friend and was staying at the victim's house. During the early hours of the morning he went to the victim's bedroom, picked him up from his bed and carried him to the appellant's own bed. The appellant lay the victim down on the bed, removed his pyjama pants and lay next to him. He then patted the victim's naked buttocks and flicked the victim's penis with his fingers. The victim told police it had occurred on 3 previous occasions, and the appellant had told him not to tell anyone.</p>		
20.	<p><i>KWLD v The State of Western Australia</i></p> <p>[No 4] [2013] WASCA 185</p> <p>Delivered 14/08/2013</p> <p>On appeal from Children's Court</p>	<p>15-17 yrs at time offences. 18 yrs at time sentencing.</p> <p>Convicted after PG.</p> <p>Prior criminal record; breach VRO, make threatening statement, fraud, poss child exploitation material and stalking.</p> <p>Troubled childhood; born of a very brief liaison between his parents who were not in a relationship; little positive contact with biological father; Short term emergency accommodation by DCP from 13 yrs.</p>	<p>Ct 1: Att sex pen child 13-16 yrs. Ct 2: Sex pen child 13-16 yrs. Ct 3: Sex pen child 13-16 yrs. Ct 4: Sex pen child 13-16 yrs. Ct 5: Sex pen child 13-16 yrs. Ct 6: Sex pen child 13-16 yrs. Ct 7: Sex pen child 13-16 yrs. Ct 8: Involving a child in child exploitation. Ct 9: Poss child exploitation material. Ct 10: Agg burg. Ct 11: Agg burg. Ct 12: Dep liberty. Ct 13: Impersonating public officer.</p> <p>The sexual offences involved 4 different female victims. TB was 14 yrs, SM was 13 yrs and both MC and SW were 15 yrs.</p>	<p>Ct 1: 18 mths imp. Ct 2: 12 mths imp (conc). Ct 3: 12 mths imp (cum). Ct 4: 9 mths imp (conc). Ct 5: 9 mths imp (conc). Ct 6: 9 mths imp (conc). Ct 7: 9 mths imp (conc). Ct 8: 6 mths imp (conc). Ct 9: 4 mths imp (conc). Ct 10: 15 mths imp (conc). Ct 11: 9 mths imp (conc). Ct 12: 12 mths imp (conc). Ct 13: 3 mths imp</p>	<p>Dismissed on papers.</p> <p>At [94] Based on the findings of the sentencing judge the appellant had engaged in a pattern of behaviour. This involved targeting girls who were younger and previously unknown to him. He then engaged in emotional coercion and persistence to obtain their compliance. Other than in the case of MC this did not occur in the context of a genuine relationship.</p> <p>At [104] – [105] An appeal is not an opportunity to seek new material with a view to retrying</p>

		<p>Unresolved personal issues; from young age been exposed to domestic violence, substance abuse and criminality.</p> <p>Intelligent and did well at school.</p> <p>At time of offending was likely to have been suffering a depressive illness; borderline personality disorder with significant anti-social personality traits.</p> <p>On bail at time of agg burg offences.</p>	<p><u>Victim MC:</u> At the time of the offences MC and the appellant were in a relationship. In June 2010 the appellant initiated contact with MC by electronic communication. He arranged to meet with her to see a movie. After meeting they walked together to a secluded location where they had sexual intercourse until he ejaculated. MC asked the appellant to use a condom but he refused.</p> <p>After the incident the appellant and MC developed a relationship which lasted for about 3 months. The appellant sought information of a private nature from MC with the intention of ensuring her trust and dependency upon him.</p> <p><u>Victim SW:</u> SW was 1 of 40-50 girls in Perth randomly targeted by the appellant to engage in chat via social media with a view to becoming friends.</p> <p>In 2011 the victim initiated contact with SW through Facebook. She was previously known to him. The appellant manipulated the victim including threatening to terminate their friendship unless she sent sexually explicit photographs of herself to him. She did as requested and took photographs of herself, which she sent to him.</p>	<p>(conc).</p> <p>TES 30 mths imp.</p> <p>EFP.</p> <p>Trial of Issues – there was a dispute as to whether each of the victims had freely and voluntarily consented to the relevant sexual acts.</p> <p>Sentencing judge viewed the offences against TB and SM as being the most serious and that the appellant had used the difference in age between he and the complainants and his own level of maturity to achieve his objective with them.</p> <p>Noted by judge that the appellant is an intelligent young man who was fully aware of the nature of the offences he was committing; high risk of re-offending.</p>	<p>the issues on a different basis. The general rule is that an appeal court must decide an appeal on the evidence and material before the court below... the test in an appeal against sentence is whether if the evidence had been before the sentencing judge a different sentence should have been imposed.</p> <p>At [113] ... It is far from clear that the habits or behaviour of young people in regards to social media are recognised fields of special expert knowledge.</p> <p>At [116] I have taken the opportunity to examine the extensive Facebook exchanges... When read in their entirety they amply support the conclusion that the appellant was engaged in manipulative behaviour. He maintained control by becoming angry, threatening to withdraw or threatening to tell others what had occurred.</p> <p>At [144]-[145] It is an error for a sentencing judge to either reduce or extend a term of imprisonment based upon an assumption that the offender will be paroled... There is no reason to suppose that the</p>
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			<p>In respect of the charge of poss child exploitation material this related to the photograph sent to the appellant by SW. In the course of his evidence the appellant conceded that he had wanted this photograph because he found it sexually arousing.</p> <p><u>Victim TB:</u> The appellant initiated contact with TB in 2011 using mobile phone texts and internet. He asked TB to meet with him at a beach and she agreed. Prior to meeting the victim the appellant said that if she did not meet with him he would kill himself. After they met the appellant tried to coerce TB to engage in sexual behaviour. He attempted to sexually penetrate her with his penis. He then digitally penetrated her without her consent. After she walked home the appellant made contact with her by phone and made threats towards her, her family and himself.</p> <p><u>Victim SM:</u> The appellant initiated contact with SM in early 2011 by electronic media. He persuaded her to meet with him at a service station. They then walked back to her house. The appellant forced himself on her with threats of self-harm and manipulation. She complied and he penetrated her vagina until he ejaculated.</p>		<p>sentencing judge imposed a sentence that was longer than was otherwise appropriate to take into account an assumption that the appellant would be released on parole.</p>
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			<p>The appellant was wearing a condom but it broke. He laughed at this.</p> <p>State's case was that in respect of each of the complaints the appellant had used emotional manipulation and persistence to achieve his objective.</p> <p><u>Agg burg:</u> The appellant and his co-offender formed a common intention to go to the victim's house and threaten and intimidate the occupants. The intention was that this would be done whilst he pretended to be a police officer conducting a search for drugs. The appellant dressed as a police officer armed with a knife sharpening implement, entered the house of 49B Dongara Street, Innaloo and declared he was a police officer and demanded to know where the drugs were.</p> <p>The appellant left and met the co-offender who was leaving 49A Dongara Street. He grabbed her and pretended to place her under arrest. He then entered 49A declaring himself to be a police officer and yelled to the occupants, including a 10 yr old child to get on the floor and place their arms behind their backs whilst he demanded to know the location of their drugs.</p>		
19.	<i>Naysmith v The Queen</i>	28 yrs at time sentencing. Convicted after early PG.	Ct 1: 1 x Poss child exploitation material (WA Code charge). Ct 2: 1 x Use carriage service to access	Ct 1:12 mths imp. Ct 2:12 mths imp. conc.	Allowed. Re-sentenced to 9 mth ISO.

	<p>[2013] WASCA 32</p> <p>Delivered 8/02/2013</p>	<p>One prior conviction for intentionally exposing a person under 16 to indecent material.</p> <p>Intellectual disability. Registered with DSC since aged 7. Also diagnosed with ADHD.</p> <p>Raised in an environment of significant emotional and social deprivation.</p> <p>In government care from under 2 yrs and next 4 yrs in foster homes then returned to live with his mother and stepfather.</p> <p>Led a relatively solitary, lonely existence. At time of offending, the appellant's general living conditions were described as squalid, with him receiving minimal support or guidance concerning personal hygiene and the development of social and general daily living skills.</p>	<p>child pornography (Commonwealth charge).</p> <p><u>Ct1:</u> The appellant had in his possession child exploitation material on external hard drives, a laptop computer and 26 optical disks). The material was classified by the respondent into five categories.</p> <p>The material depicted children ranging from 12 mths to 16 yrs. The appellant possessed some 5832 images and video files, the vast majority of which were in the lowest category of seriousness, depicting erotic posing with no sexual activity. There were 64 images depicting sexual activity between children or solo masturbation, 93 images depicting non-penetrative sexual activity between adults and children, 368 images depicting penetrative sexual activity between children and adults; and three images depicting sadism or bestiality.</p> <p><u>Ct 2:</u> The appellant accessed on the internet 33 images classified as child pornography material under the <i>Commonwealth Code</i>.</p>	<p>EFP.</p> <p>Ordered to be released after service of 6 mths of the sentence for Cth offence upon entering into a recognisance of \$5000 to be of good behaviour for 6 mths.</p>	<p>At [26] The unusual circumstances of this case bring the appellant within the exceptional category in which a term of imprisonment was not an appropriate sentencing option.</p>
18.	<p><i>Dartnall v The State of Western Australia</i></p> <p>[2012] WASCA</p>	<p>39 yrs at time sentencing.</p> <p>Convicted after early PG.</p> <p>Minor prior criminal record – traffic offences; cannabis; poss</p>	<p>1 x Poss child pornography. 1 x Poss indecent article.</p> <p>Police executed a search warrant at appellant's home. Appellant arrived home during the search carrying a backpack.</p>	<p>18 mths imp. \$1500 fine.</p> <p>TES 18 mths imp and \$1500 fine.</p>	<p>Dismissed.</p> <p>Fine not challenged on appeal.</p> <p>At [24] Sentence is high but not outside the appropriate sentencing</p>

	<p>251</p> <p>Delivered 4/12/2012</p>	<p>indecent publication.</p> <p>In de facto relationship; son aged 4 yrs and daughter aged 11 yrs from previous relationship.</p>	<p>The backpack contained a number of discs which were seized along with discs from his home and his computer.</p> <p>6 images were found on his computer. 24 videos were found on the discs from his backpack as well as back-up files. 13 videos were found on discs seized from his home. Material had been downloaded from the internet and burned onto the discs.</p> <p>Material depicted acts of sex pen of children by adults, adults by children and children by children as well as masturbating involving children. Sex pen was vaginal and anal as well as involving the insertion of objects. Material depicted acts of a high level of depravity.</p> <p>Accepted in sentencing that appellant came by material inadvertently while downloading adult pornography and was not actively seeking it out.</p>	<p>EFP.</p> <p>Remorseful; some insight; low risk re-offending.</p>	<p>range.</p> <p>At [17] Offences of this kind ordinarily attract a term of immediate imprisonment.</p> <p>At [18] Level of perversion and debauchery in material is relevant sentencing consideration regardless of the extent to which the material is viewed. The fact that an offender only views part of the material is not in itself mitigating.</p> <p>At [20]-[21] Discussion of comparable cases.</p> <p>At [23] Even if inadvertently downloaded, it was still kept in a readily accessible form by the appellant and no weight should be given to the fact the appellant had not gone back to view at the time the offending was uncovered – no suggestion it was not viewed as appellant found it offensive.</p>
<p>17.</p>	<p><i>Phinthong v The Queen</i></p> <p>[2011] WASCA 192</p> <p>Delivered</p>	<p>Convicted after PG.</p> <p>Thai national in Australia on an apprenticeship visa.</p> <p>Good antecedents.</p>	<p>1 x Poss child pornography. 1 x Import child pornography.</p> <p>Appellant's home was searched while he was overseas and seized his home computer. On re-entering Australia, appellant's laptop was seized by customs officers.</p>	<p>14 mths imp. 18 mths imp.</p> <p>TES 25 mths imp.</p> <p>EFP after 14 mths imp.</p> <p>Low risk re-offending.</p>	<p>Allowed.</p> <p>TES18 mths imp substituted – individual sentences not disturbed rather sentences ordered to run wholly concurrent.</p> <p>At [17]-[21]Material on laptop</p>

	16/09/2011		<p>36 video files found on home computer – videos ran in length from 0.2 minutes to 116 minutes and depicted children of various ages engaged in anal, digital and penile penetration, masturbation and oral sex, children engaged in sexual acts with adults, children using sex toys and in various stages of undress. There were also rape and group rape scenes where children had their hands and feet bound and were urinated on by adults performing sexual acts.</p> <p>4 video files found on laptop – depicted children aged 10-12 yrs engaged in sexual activity with adults.</p>		<p>had been placed there from home computer for storage purposes prior to appellant going overseas – it was not obtained overseas and brought into the country. Overlap in the material found on home computer and on laptop meant appropriate for sentences to run wholly concurrent.</p> <p>At [24] Ordinary disposition is term of immediate imprisonment – child pornography is not a victimless crime, those who possess or import it fuel the demand for it and, for the protection of children, deterrence is paramount sentencing consideration.</p> <p>At [25] Length of each term is appropriate.</p>
16.	<p><i>Smit v The State of Western Australia</i></p> <p>[2011] WASCA 124</p> <p>Delivered 1/06/2011</p>	<p>61 yrs at time sentencing.</p> <p>Convicted after PG at earliest opportunity.</p> <p>No prior relevant criminal record.</p> <p>Lost job as result conviction; wife supportive; cared for elderly mother.</p>	<p>1 x Poss child pornography.</p> <p>43 images on work computer – 29 female child u13 clothed in provocative pose; 8 pre-pubescent female being sexually penetrated in vagina by middle aged man; 4 pre-pubescent female exposing her genitals with what appears to be semen on her; 2 penis against child’s genitals.</p> <p>Additional 1,411 images and 98 videos found on laptop – appellant</p>	<p>2 yrs imp.</p> <p>TES 2 yrs imp.</p> <p>PSR reports show need personal deterrence – minimised level responsibility; no appreciation harm child exploitation causes; some risk further offending.</p>	<p>Dismissed – high but not so high that error manifested.</p> <p>At [17] classification child pornography in levels or on scales only marginal assists court in imposing or reviewing sentence.</p>

			unsuccessfully tried to delete these and they were not charged. Shows behaviour not aberration – as do appellant’s admissions.		
15.	<i>Young v The State of Western Australia</i> [2011] WASCA 13 Delivered 14/01/2010	41 yrs at time sentencing. Convicted after fast track PG. University degree; good employment record. Severely burned at 18 mths (skin grafts required); left eye damaged by dog bite when in yr 7 (degree disfigurement); bullied at school; grandparents, had significant role in upbringing, died when appellant was a teenager. Claimed PTSD lead to offending – download masses material from internet to avoid sleeping due to nightmares. Held no causal link as does not explain why downloaded child pornography or retained and viewed it. Taken voluntary steps to rehabilitation.	6 x Poss child pornography. 2 x Poss indecent/obscene article. Material described in sentencing as ‘worst category of child abuse imaginable’ at [8] – not challenged. Images found on appellant’s laptop after de facto partner found them. <u>Count 1:</u> 4,263 images on laptop. <u>Count 2:</u> 83 videos on laptop. <u>Count 3:</u> 80,385 images on external hard drive. <u>Count 4:</u> 24,725 videos on external hard drive. <u>Count 5:</u> 15 images on USB flash drive. <u>Count 6:</u> 19 videos on USB flash drive. (total: 84,633 images & 24,477 videos). Appellant admitted accumulating material over period 4-5 yrs – used as masturbatory aid and appellant aware illegal to possess child pornography.	2 yrs imp each count. TES 2 yrs imp. PSR reports - minimised offending; little insight; paedophilic tendencies; remorseful; motivated to stop offending.	Dismissed – only sentence in relation to child porn appealed.
14.	<i>DAR v The State of</i>	64-65yrs at time offending. 65yrs at	1 x Poss child pornography.	18 mths imp.	Dismissed.

	<p>Western Australia</p> <p>[2010] WASCA 72</p> <p>Delivered 28/04/2010</p>	<p>sentencing.</p> <p>Convicted after PG at earliest opportunity. Co-operated with police.</p> <p>No prior criminal record.</p> <p>Gainfully employed since 15yrs old; served defence force over 20yrs; depression and anxiety.</p> <p>Family support despite offending.</p>	<p>3 x Indec record lineal relative u16 1 x Supply child porn.</p> <p>Victim biological grand-daughter of appellant. Offending period 14mths. Victim aged 5yrs.</p> <p>In 12mths prior to offending, appellant experienced marital difficulties and believed attracted to young children - advertised mobile number on toilet wall in Hillarys to pursue interest. Engaged in series text messages, during the course of which 3 images of 11yr old girl engaged in oral sex, penetrative sex and posing with adult male sent by appellant Images surrendered to police by third party, not appellant. As a result, appellant's home searched. Appellant found have further child pornography stored on mobile phone.</p> <p>Unable to ascertain on appeal how many pictures involved – characterised as 'small'.</p>	<p>2 yrs imp each count. 2 yrs imp.</p> <p>TES 4 yrs imp.</p>	<p>At [38] range possess child porn 8mths – 2yrs.</p>
<p><i>Transitional Provisions Repealed (14/01/2009)</i></p>					
13.	<p>Hill v The State of Western Australia</p> <p>[2009] WASCA 4</p> <p>Delivered</p>	<p>47 yrs at time sentencing.</p> <p>Convicted after fast track PG.</p> <p>No prior criminal record.</p>	<p>2 x Poss child pornography.</p> <p><u>Count 1:</u> 38 images of naked girls posing; naked girl with 2 naked men; image of naked girl performing sex act. Children aged 6-</p>	<p>Ct 1 :12 mths imp. Ct 2: 24 mths imp.</p> <p>No real risk re-offending.</p>	<p>Allowed.</p> <p>Sentence set aside and remitted to DC for TOI. If appellant decides no TOI then appeal dismissed.</p>

	12/01/2009	<p>Previous good character; serving police officer and minister in local church at time offending.</p> <p>Undergone counselling by psychologist.</p>	<p>16 yrs. <u>Count 2:</u> Video of 2 naked female children estimated 9-11 yrs performing oral sex on hooded adult male; using sex toy on each other, masturbating adult male and having sexual intercourse with him; other children present & taking photos. Appellant only viewed part of video for 30 seconds as disturbed by content</p>		
12.	<p><i>Dragon v The State of Western Australia</i></p> <p>[2008] WASCA 252</p> <p>13/11/2008</p>	<p>Convicted after fast track PG.</p> <p>Had been in custody 7 months when sentenced by Kennedy CJDC, and further 3.5 months when sentenced by Bowden DCJ.</p> <p>Prior criminal record - imprisoned in Thailand (1993-2006) for sex offences against children; imprisoned in NSW & Qld for offences of dishonesty. Above average intelligence; reasonable work history (when not imprisoned); estranged from siblings; socially isolated.</p>	<p><u>Sentence - Kennedy CJDC:</u> Cts 1 & 2: Poss child pornography. Ct 3: Poss indecent article (s32 notice - 2 images of adult females engaged in bestiality).</p> <p><u>Count 1:</u> 818 images - sexual penetration (anal and vaginal)/sexual activity of children aged 2-15. Children's distress seen from images. <u>Count 2:</u> 11 images - female children 12-16 in lewd positions. <u>Sentence – Bowden DCJ:</u> 1 x Poss child pornography (3 weeks after imposition CSI by Kennedy CJDC). 6 images of female children (low end of scale seriousness – not involved in sexual activity; clothed).</p>	<p>Cts 1 & 2: 12 mths imp each count. Ct 3: 3 mths imp.</p> <p>TES 12 mths imp susp 12 mths.</p> <p>3 mths imp. Terms imp conditionally suspended by Kennedy CJDC ordered to be served concurrently.</p> <p>TES 15 mths imp (spent 7 mths spent in custody awaiting sentence for charges before Kennedy CJDC – not considered</p>	<p>Allowed.</p> <p>Not open to Kennedy CJDC to impose CSI for poss indecent article (fine only sentencing option in legislation s 59(5) <i>Classification Enforcement Act</i>. \$2400 fine substituted.</p> <p>16 mths imp substituted on count 1 and 4 mths imp substituted on count 2. \$1200 fine imposed for child pornography charge before Bowden DCJ.</p> <p>TES 6 mths 1 day (given 7 mths and 3.5 mths credit as time spent in custody on charges before Kennedy CJDC and Bowden DCJ respectively) and \$3600 fine.</p>

				by Bowden DCJ). PSR reports - appellant failed to appreciate the seriousness of offending; aroused by children; personal deterrence major factor; high risk re-offending.	
11.	<p><i>The State of Western Australia v Cunningham</i></p> <p>[2008] WASCA 240</p> <p>Delivered 28/11/2008</p>	<p>51 yrs at time sentencing.</p> <p>Prior criminal record – relevantly assault and burglary (entered bedroom young female child and tapped her on the head – confronted by child’s father and police called). Received ISO (successfully completed).</p> <p>Unhappy childhood; employed same position 20 yrs; history chronic alcohol abuse.</p>	<p>2 x Poss child pornography.</p> <p><u>Ct 1:</u> Computer generated print outs - numerous images children 10-16 yrs engaging in sexual activity; image naked female child approx 10 yrs old; image of very small child’s vagina.</p> <p><u>Ct 2:</u> Images found on discs - 122 images on 5 discs of male and female children aged 12 mths – 12 yrs engaging in sexual activity with male and female adults (separate 252 duplicate images on 8 discs); 157 images on 5 discs of male and female children aged 2- 12 yrs naked and/or in provocative poses (separate 354 duplicate images on 4 discs).</p> <p>Links to child pornography sites found on computer.</p> <p>Classified as worst category child pornography see [11]-[12].</p>	<p>14 mths imp each count.</p> <p>TES 14 mths imp susp 2 yrs.</p>	<p>Allowed – appeal against imposition suspended imp.</p> <p>Re-sentenced 14 mths imp each count.</p> <p>TES 14 mths immediate imp.</p> <p>At [27] review cases shows general range 8 mths – 2 yrs imp for poss child pornography.</p> <p>At [38] essential reason term immediate imprisonment generally appropriate owing to fact that production of child pornography involves ‘<i>exploitation and corruption of children who are incapable of protecting themselves.</i>’</p> <p>At [43] ‘<i>The corruption of children ... is a factor of utmost importance.</i>’</p>

<p>10.</p>	<p><i>The State of Western Australia v Rock</i></p> <p>[2007] WASCA 121</p> <p>Delivered 29/05/2007</p>	<p>Youth not mitigating factor.</p> <p>Convicted after trial.</p> <p>Depressive illness; ongoing back pain after workplace accident; varied employment history.</p>	<p>7 x Poss child pornography.</p> <p><u>Ct 1:</u> 1260 images on computer hard drive.</p> <p><u>Cts 2-6:</u> 1255 images stored on 5 discs.</p> <p><u>Ct 7:</u> 147 printed images in lever arch file.</p> <p>Images all young females – acts of sexual penetration, fellatio, group sex and other sexual acts. Downloaded large number images over considerable period time.</p>	<p>Ct 1: 12 mths imp.</p> <p>Cts 2-6: 8 mths imp each count.</p> <p>Ct 7: 8 mths imp.</p> <p>TES 12 mths imp.</p> <p>No remorse.</p>	<p>State appeal in relation to sentence on child sex charges – sentences for child pornography (separately charged and sentenced) also considered in relation to issue of totality.</p> <p>At [33] ‘...the downloading of images of this kind creates a market which encourages the exploitation and corruption of children.’</p>
<p>9.</p>	<p><i>Hutchins v The State of Western Australia</i></p> <p>[2006] WASCA 258</p> <p>Delivered 28/11/2006</p>	<p>51 yrs at time offending.</p> <p>Convicted after late PG.</p> <p>No relevant prior criminal record.</p> <p>Excellent employment history; previous good character.</p>	<p>2 x Poss child pornography.</p> <p><u>Ct 1:</u> 14 images on computer hard drive - sexual acts between children aged under 16 yrs, between children and adults and images of girl’s and boy’s genitalia.</p> <p><u>Ct 2:</u> 45 images on disc – children masturbating and performing oral sex on adults; sexual penetration children no older than 6 or 7 yrs being sexually penetrated by adult males.</p> <p>Charges result of information given to police by appellant’s son.</p>	<p>Ct 1: 4 mths imp.</p> <p>Ct 2: 8 mths imp.</p> <p>TES 8 mths imp.</p>	<p>Dismissed.</p> <p>At [2]-[9] discussion as to factors relevant to assessing the seriousness child pornography.</p> <p>At [26] whether or not payment made, demand for child pornography stimulates its supply and causes irreparable harm to children involved.</p> <p>NB: State conceded at sentencing immediate imprisonment not only option.</p>
<p>8.</p>	<p><i>G v The State of Western Australia</i></p> <p>[2005] WASCA</p>	<p>56 yrs shortly after sentencing.</p> <p>Convicted after PG at earliest opportunity.</p>	<p>2 x Poss child pornography (counts 13 & 14).</p> <p>12 x child sex offences.</p>		<p>Dismissed – only sentences for child pornography challenged.</p>

	150 Delivered 11/08/2005	No prior criminal record. Successful career in radio 20 yrs, assistant to Federal MP & Electorate Officer for Federal Senator; family business ran with daughter; married. History anxiety and depression – no connection to offending.	<u>Ct 13:</u> 26 images on 2 discs – naked male children under 16 yrs showing their penises. <u>Ct 14:</u> 4066 images on 2 discs – male children under 16 yrs in sexually explicit poses (some sexual activity depicted). Images described as ‘humiliating’ and ‘degrading’.	Ct 13: 24 mths imp. Ct 14: 20 mths imp. TES 9 yrs 6 mths imp. EFP. Limited insight into offending; some remorse.	
<i>Transitional Provisions Enacted (31/08/2003)</i>					
7.	<i>Dodge v The Queen</i> [2002] WASCA 286 Delivered 18/10/2002	Convicted after fast track PG – even after own legal counsel advised PNG as fictitious persons described in writing not persons as defined by relevant section. Serving term imprisonment for child sex offences at time offending (term began in 1993). Due to be released the week after the pornography found. Extensive prior criminal record child sex offences.	1 x Poss child pornography. 1 x Supply child pornography. 17 written pieces – described adult males performing sex acts on young children or vice versa. Very explicit in written detail – described as ‘disgusting’ & ‘depraved’. Prison officers conducted random cell search of another prisoner and found child pornographic writing. Prisoner stated appellant supplied it to him. Appellant’s cell then searched and further written child pornography found. Appellant stated used writing as masturbatory material and that he had had it since 1995.	18 mths imp. 18 mths imp. TES 3 yrs. Equivalent to 6 yrs 4 mths imp after implementation of transitional provisions. Not EFP. Remorse.	Allowed. Sentence each count reduced 12 mths imp. TES reduced to 12 mths imp. Not EFP. At [23]-[26] Significant factor in appeal was that no exploitation real children involved – criminality of supply lay in potential to stimulate people with depraved tendencies toward children.
6.	<i>Assheton v The</i>	Convicted after fast track PG.	3 x Poss child pornography.		Dismissed.

	<p>Queen</p> <p>[2002] WASCA 209</p> <p>Delivered 7/08/2002</p>	<p>No prior criminal record.</p> <p>Good employment history; numerous positive references.</p>	<p>12 x Importation child pornography. 2 x Indecent acts children under 16 yrs (Cth charge – committed in Indonesia).</p> <p><u>Ct 1:</u> Footage on video tape.</p> <p><u>Ct 2:</u> 3019 images on discs – 173 discs in total (73 hidden in air conditioning vent).</p> <p><u>Ct 3:</u> 2563 (2039 deleted) images and 502 (1 deleted) movies on computer hard drive.</p>	<p>Ct 1: 1 yr imp.</p> <p>Ct 2: 1 yr imp.</p> <p>Ct 3: 1 yr imp.</p> <p>TES 7 yrs imp. Equivalent to 4 yrs 8 mths imp after implementation of transitional provisions.</p> <p>Remorse; shame and humiliation; low-medium risk re-offending.</p>	
5.	<p>R v Coultas</p> <p>[2002] WASCA 131</p> <p>Delivered 11/04/2002</p>	<p>Convicted after PG.</p> <p>No prior criminal record.</p>	<p>1 x Poss child pornography. 94 x Supply child pornography.</p> <p>Images young females, naked and semi-naked, engaged in sexual acts with adults. Some images females younger than 6 or 7 yrs engaged in degrading sexual acts.</p>	<p>18 mths imp. 18 mths imp each count.</p> <p>TES 18 mths imp. Equivalent to 12 mths imp after implementation of transitional provisions. EFP.</p>	<p>Dismissed – TES low but not so low as to manifest error especially given double jeopardy. NB: double jeopardy applied to State Appeals.</p>
4.	<p>Pendleton v The Queen</p> <p>[2002] WASCA 4</p>	<p>41 yrs at time sentencing (after commencement of preliminary hearing on whether penetration on e child took place).</p>	<p>6 x Poss child pornography (counts 1-6). 1 x Show offensive material to a child under 13 yrs. 18 x Procure child under 13 yrs to do</p>	<p>1 yr imp each count.</p> <p>TES 12 yrs imp. Equivalent to 8 yrs imp</p>	<p>Dismissed.</p> <p>Individual sentences and TES all appropriate.</p>

	<p>Delivered 24/01/2002</p>	<p>Convicted after late PG.</p> <p>Prior criminal record – stealing as servant. Married twice (divorced and separated); 2 sons.</p> <p>Sexually abused as child by adult female; left school at 16 yrs; 18 yrs Army service; retail employment until convicted stealing as servant; later qualified as teacher.</p>	<p>indecent act. 9 x Sex pen child under 13 yrs. 76 x Indecently record child under 13 yrs. s 32 conviction having 73 pairs young girl's underwear in possession thought to be stolen.</p> <p>Appellant pre-primary schoolteacher at time offending – 11 victims aged 5-6 yrs.</p> <p><u>Ct 1:</u> Handwritten pornographic story with children aged 7-9 yrs.</p> <p><u>Ct 2:</u> 11 images on computer.</p> <p><u>Ct 3:</u> 3 images young girls in scrapbook containing mainly adults.</p> <p><u>Ct 4:</u> Dutch magazine with photographs young women and containing child pornographic story.</p> <p><u>Ct 5:</u> Pornographic sketches and woodcuts of children.</p> <p><u>Ct 6:</u> Handwritten pornographic story involving a child.</p> <p>Some highly explicit images, varying degrees of indecency. Material collected over number of years.</p>	<p>after implementation of transitional provisions.</p> <p>Not EFP.</p> <p>High risk re-offending.</p> <p>PSR reports – fixated paedophile; deviant sexual orientation and arousal.</p>	
3.	<i>Lee v The Queen</i>	Convicted after trial.	14 x Poss child pornography.	2 yrs imp each count.	Allowed.

	[2000] WASCA 73 Delivered 22/03/2000		1 x Display child pornography. 1 x Sex Pen child under 16 yrs (Cth charge – committed in Cambodia). 8 x Indecent acts child under 16 yrs (Cth charges – committed in Cambodia). Photos of victims in Cth charges taken by appellant.	TES 14 yrs imp. Equivalent to 9 yrs 4 mths imp after implementation of transitional provisions. EFP.	Child pornography sentences reduced to 1 yr each count. TES reduced to 11 yrs imp. EFP.
2.	R v Jones [1999] WASCA 24 Delivered 24/05/1999	43 yrs at time sentencing. Convicted after fast track PG. No prior criminal record. Married 24 yrs; 2 teenage daughters; successful career; educated; highly intelligent. Deprived childhood; mother died appellant aged 4 yrs; maltreated by father. Media exposure and shame as result charges; retired from job as result charges (substantial loss future income).	1 x Poss child pornography. 162,600 images found on 11 discs and 3 computer hard drives. Allowance for duplication reduced number to 80, 000 images. Images described as appalling perverted and degrading.	2 yrs imp. TES 2 yrs imp susp 2 yrs.	Allowed. TES 18 mths immed imp substituted. History of child pornography legislation briefly described. NB double jeopardy applied to State appeals.
1.	Kirk v The Queen Supreme Court Library No 980067 Delivered 17/02/1998	37 yrs at time trial. Convicted after trial. No relevant prior criminal record.	1 x Poss child pornography. 1 x Sexual relationship with child under 16 yrs. Pornographic and indecent photos and video of victim in sexual relationship charge.	2 yrs imp. TES 8 yrs imp. Equivalent to 5 yrs 4 mths imp after implementation of transitional provisions.	Dismissed. Sentence for child pornography not disturbed. TES reduced to 6 yrs 6mths.

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