



Memorandum of Understanding Between Crown Prosecution Service (CPS) and the Association of Chief Police Officers (ACPO) concerning Section 46 Sexual Offences Act 2003

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Introduction

The aim of this memorandum is to help clarify the position of those professionally involved in the management, operation or use of electronic communications networks and services who may face jeopardy for criminal offences so that they will be reassured of protection where they are acting to combat the creation and distribution of images of child abuse. This memorandum has been created within the context of child protection, which will always take primacy.

The Protection of Children Act 1978 (the 1978 Act) prohibits at Section 1(1)(a) the “taking or making” of an indecent photograph or pseudo-photograph of a child. Making includes the situation where a person downloads an image from the Internet, or otherwise creates an electronic copy of a file containing such a photograph or pseudo-photograph. To be an offence, such “making” must be a deliberate and intentional act, with knowledge that the image made was, or was likely to be, an indecent photograph or pseudo-photograph of a child (*R v Smith and Jayson*, 7 March 2002). So a person accidentally finding such an image already has a defence to that act of making. However, in some cases, it may still be necessary for that person, or others (for example a person to whom the accidental find is reported), to knowingly “make” another copy of the photograph or pseudo-photograph in order that it will be reported to the authorities, and clearly it is desirable that they should be able to do so without fear of prosecution.

The Sexual Offences Act 2003 includes at section 46 an amendment to the 1978 Act of creating a defence to a charge of “making”. A defence is available where a person “making” such a photograph or pseudo-photograph can prove that it was necessary to do so for the purposes of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings.

This reverse burden is intended to allow those people who need to be able to identify and act to deal with such images to do so. It also presents a significant obstacle to would-be abusers and those who exploit the potential of technology to gain access to paedophilic material for unprofessional (or personal) reasons.

It is important, therefore, to protect people whose legitimate duties expose them by necessity to potentially illegal material, so that they are able to report it with confidence to the appropriate authorities, whether that be law enforcement or the Internet Watch Foundation (IWF). It is also important that people who report such material indirectly, for example through an ISP abuse team or an internal escalation process, also benefit from this protection. The key is that the purpose of the act of making a copy is clear, and not a veil for abusive behaviour.

Purpose of the Memorandum of Understanding

Any person who falls within its provisions can claim the benefit of the defence, and have that claim tested by the authorities. However, many people working in all sorts of industries may be called upon to respond professionally to the presence of indecent photographs/ pseudo photographs, and this memorandum seeks specifically to give further reassurance to those people. It provides guidance to organisations and those whose work involves them in the discovery or reporting of indecent images of children in electronic communications media, in order to create the right balance between protecting children and effective investigation of offences. Law enforcement and industry have worked hard to create an excellent working partnership between themselves and interested organisations. The fight against this kind of crime would be damaged if people wishing to report such images felt they could not do so for fear of prosecution.

This memorandum therefore sets out, briefly, the major factors that law enforcement and CPS consider will be relevant to a decision on how to proceed in a particular case. It focuses on the new defence to “making” but inevitably there are links to the existing offences of distribution and possession of such indecent photographs, and their associated defences. In general, if the handling of a particular photograph or pseudo-photograph satisfies the tests set out below, it is highly unlikely that it would be in the public interests to embark on a prosecution.

General Principles

- Law enforcement retains primary responsibility for investigation in this area.
- CPS retains primary responsibility for decisions relating to prosecution.

- Law enforcement relies on the support and cooperation of service providers and others involved in working with computers and electronic communications services and systems. Those working in this field deserve clarification of the agreed approach between ACPO and CPS in relation to possible legal consequences of investigative actions.
- Individuals or organisations who accidentally discover criminal activity or to whom such activity is reported require protection from the risk of prosecution where, in order to report it, they make a copy.
- Society requires this protection to be appropriate and controlled in order to protect children from future or continuing abuse and to bring to justice those responsible.
- Vigilantism is not merely unnecessary it is unhelpful: anyone taking it upon themselves to seek out or investigate this kind of material where there is no legitimate duty to do so will be liable to prosecution.
- People with a legitimate role in knowingly investigating suspect images in order that they should be reported should be able to do so without fear.
- The IWF is the recognised notice and take down body for England and Wales.

Major factors to be taken into account

Whilst the facts of each case will be different the issues below identify when protection will be offered. The factors below indicate what may have been the intentions of individuals when they “made” a particular indecent photograph or pseudo-photograph.

It is the combination of all the circumstances that will guide investigation and prosecution decisions. Where the authorities are satisfied that the facts indicate that the intention of the “making” was genuinely to prevent, investigate, or detect crime under the 1978 Act a prosecution would not be pursued, because the defence would apply.

Generally, large and complex organisations involved in reporting of this kind of abusive image would be expected to have more formal guidance, setting out how suspect or illegal images should be dealt with, than smaller organisations. For an individual in a large organisation to be sure that they, individually, can benefit from the defence, they must have confidence that the internal systems of the organisation will show that they have not abused their position in relation to the image, and that the system as a whole was acting for the purposes set out. An individual in a smaller organisation may not need formal written procedures, but will still need to be able to show what was done, and that what was done is justified in pursuit of the purposes set out.

Where the “making” was genuinely carried out and reported in a timely manner by the person acting in their legitimate professional capacity, with the right intentions, the exception under section 46 of the Sexual Offences Act 2003 will apply and there will therefore be insufficient evidence to prosecute. If in exceptional circumstances the

section 46 defence did not apply to someone who was nevertheless operating in a legitimate professional capacity, it may still not be in the public interest to prosecute.

The section 46 defence would not apply where there was other evidence that the person was abusing their position with the intention of “making”.

Factors affecting the decision whether to accept a claim that “making” was covered by the new defence

1. The way the indecent photograph or pseudo-photograph was discovered or made

Those knowingly making abusive images will need to demonstrate that they have some identified role or duty, as a result of which they needed to respond to a complaint, or investigate the abuse of a computer or other electronic communications system, or otherwise access particular data, and that they “made” the images in the course of that duty.

2. The speed with which the indecent photograph or pseudo-photograph was reported, and who it was reported to

“Making” of an abusive image which is genuinely for the purposes of investigation, detection or prevention of crime will at some point result in a report to the relevant authorities, and will always be with the intention that such a report should be made. While this will not always be a direct referral, since investigation of a suspect image in a large organisation may involve more than one staff member, the timing of the report, bearing in mind the particular circumstances, would be material in deciding whether prosecutions would be in the public interest. Each staff member in such an organisation is responsible only for their own actions and good faith, and can benefit from the defence if those meet the requirements of this memorandum. The authorities will need to be satisfied that any delay was reasonable, and that failure to report was not intended to prevent or hinder effective investigation of an offence.

3. The handling and storage of the indecent photograph or pseudo-photograph was appropriate and secure.

What is done with an image in addition to “making” and reporting it will also be relevant to consideration of the applicability of the defence: physical mishandling or electronic misuse of an image, for example by irrelevant distribution or unnecessary personal storage, may raise questions about the motivation for the “making” resulting in investigation and possibly prosecution. On the other hand, handling involving demonstrable restriction of access to the image(s), and secure storage by the “maker”, for example, maybe evidence in support of the applicability of the defence.

4. Copying of photographs or pseudo-photographs must be the minimum to achieve the objective and be appropriate

Investigation should not involve making more images, or more copies of each image, than is needed in all the circumstances: an individual reporting an image seen on a site, for example, does not need to examine the rest of the site or similar sites. What is necessary will depend, amongst other things, on the purpose. For example, where the intent is simply to report an internet site to establish whether illegal material truly is present, relatively little is necessary, and doing more should be avoided. Where, on the other hand, there is a need to store very transitory data in order to report apparently illegal material, more extensive action is likely to be justified. A responsible person, acting in a legitimate professional capacity to secure evidence, may, as part of the preparation of a report on suspect images, take reasonable steps to preserve that data relevant to the discovery, including disc images, audit and log files, archives, mailboxes and the like. What is reasonable will depend on all the circumstances including the nature of the communications medium concerned. Where the action is proportionate and necessary it will not be in the public interest to prosecute.

5. Individuals should be expected to have acted reasonably

A prosecution is likely where there is evidence that the individual has deliberately flouted procedural safeguards, taken on an unnecessary self-appointed role as an investigator as cover for abuse, or otherwise gone out of their way to seek out indecent images for inappropriate reason.

Specific Agreements and Advice

Sometimes electronic communications providers - or others - handling considerable traffic or offering particular services may seek further guidance, for example in seeking endorsement in advance that internal processes would when followed result in indecent images being handled acceptably. Specific written authorities to undertake particular work in support of the legislation can be given by officers acting on behalf of a chief officer of ACPO or National Crime Agency (NCA). This will give additional certainty to individuals and organisations who are likely to need, frequently, to “make” indecent photograph or pseudo-photograph and, provided the conditions were adhered to, such activities would not be subject to a criminal investigation as it would not be in the public interest to prosecute.

These authorities might specify people, departments or organisations (such as IWF) to handle material specific to an individual investigation or for a wider remit (such as a National Image Database).

The authority will outline that it is given subject to it being:

- for the purpose of preventing / detecting / investigating an offence under the 1978 Act; or,
- for the purposes of preventing another from committing or continuing to commit an offence in connection with indecent images; or,
- to prevent the image being concealed, lost, altered or destroyed AND to preserve evidence.

An individual or body wilfully acting outside such guidance once it has been offered could not expect to benefit from it.

Similarly, even at an individual level, shortcomings may sometimes be identified in the way a particular abusive image has been identified or handled. Though not subject of a prosecution, this may mean that advice is offered by investigating officers on future conduct. Ignoring such advice would be a relevant factor in prosecution decisions as to sufficiency of evidence and public interest should the issue arise again.

Role of the IWF

The IWF is funded by service providers, mobile network operators, software and hardware manufacturers and other associated partners. It is supported by UK law enforcement and CPS and works in partnership with the Government to provide a 'hotline' for individuals or organisations to report potentially illegal content and to seek out illegal content online. It then assesses and judges the material on behalf of UK law enforcement agencies. It also exists to assist service providers to avoid abuse of their systems by distributors of child abuse content and to support law enforcement officers, at home and abroad, to detect and prosecute offenders. Reports made to the IWF in line with its procedures will be accepted as a report to a relevant authority.

If potentially illegal content is hosted in the UK the IWF will work with the relevant service provider and British law enforcement to have the content 'taken down' and assist as necessary to have the offender(s) responsible for distributing the offending content detected.

In cases where the potentially illegal content is hosted outside the UK, the IWF will work where possible in partnership with hotlines across the world and various Law Enforcement bodies at home and abroad to have the content investigated.

For the avoidance of doubt, the IWF assesses and traces potentially illegal child abuse content if it is judged to contravene UK law irrespective of where the content originated.

Members of the public who are exposed to indecent images of children can report their exposure by either, telephone, mobile, email, fax or preferably through an 'Internet hotline' at <http://www.iwf.org.uk>

Each law enforcement agency will have a single point of contact with service providers. Information on how to report crime is available on law enforcement websites www.police.uk

Signed by



Alison Saunders.



Simon Bailey

Alison Saunders CB
Director of Public Prosecutions
Crown Prosecution Service

Chief Constable Simon Bailey
National Policing Lead for Child
Protection and Abuse Investigation
Norfolk Constabulary