CONTEXT, MOTIVATION AND OBJECTIVITY: NAVIGATING THE LEGAL QUAGMIRE OF CHILD SEXUAL EXPLOITATION MATERIAL OFFENCES IN AUSTRALIA

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Child sexual exploitation material (CSEM) is a significant threat to children and the community. As CSEM exploits vulnerable people, it is widely condemned and the law facilitates offender prosecution. CSEM law balances protecting children from CSEM harm; ensuring a person's actions, not their thoughts, are punishable; and avoiding community censorship. State and territory jurisdictions measure CSEM criminality according to whether a reasonable person would find the material offensive or whether the material is intended for sexual interest or arousal. This article will critique how superior courts fail to consistently interpret CSEM legislation, namely the reasonable person and the sexual arousal or interest tests, and how this can lead to definitional uncertainty, unnecessary acquittals, and unfair convictions. The most significant inconsistency in applying CSEM provisions relates to how context is used when interpreting CSEM legislation. This article will ultimately argue that context should be considered in interpreting CSEM offences and failing to account for it is a significant flaw in legislation.

I INTRODUCTION

Child sexual exploitation material (CSEM) is a significant threat to children and the community. CSEM refers to electronic or print materials which exploit children in some way, often characterised by capturing photo or video of children which is offensive or abusive. CSEM has been acknowledged as a significant problem because of the harm it can cause children, families and the community.[1] In fact, 'the material in question cannot [usually] come into existence without exploitation and abuse of children somewhere in the world.'[2] Every record of CSEM is evidence of child exploitation and/or abuse.[3] The viewing and sharing of CSEM, facilitated through the online environment, means there is 'pictorial evidence of exploitation and the degradation it causes' which is also a frequent reminder to victims of their

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[1] Jonathon Clough '"Just Looking": When does viewing online constitute possession?' (2012) 36 *Criminal Law Journal* 233 ('*Just Looking*').

[2] *R v Booth* [2009] NSWCCA 89, [41]. See also Tony Krone and Russell G Smith, 'Trajectories in online child sexual exploitation offending in Australia' (2017) 524 *Trends & issues in crime and criminal justice* 1.

[3] *R v Brown* [2019] NSWDC 845.

abuse.[4] Further, the nature of CSEM being shared in an online environment means the child victim is continuously victimised.[5] As the nature of CSEM is to exploit vulnerable people in such a horrifying way, CSEM behaviour is widely condemned. The law, then, addresses CSEM offending and facilitates offender prosecution.

CSEM laws have continuously evolved since CSEM began covertly emerging 'under-the-counter' in adult bookstores in the 1960s.[6] Since that time, CSEM has been acknowledged as a significant global threat.[7] Prevalence also continues to increase each year as more children access the internet and technological advancements enable online offending.[8] The online, and somewhat anonymous, nature of CSEM offending means legislators must be creative and adaptable to ensure relevant conduct is captured within the legislative definitions. The scope and elements of offending have expanded through regular legislative amendment and judicial interpretation to ensure it most effectively addresses CSEM offending including, for example, widening CSEM criminality from images to video with evolving technology.[9] CSEM provisions in criminal law legislation aims to protect children from harm;[10] uphold societal standards; and punish offenders for engaging in CSEM

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[4] Ibid, [25]; See, also, *R v Booth* [2009] NSWCCA 89; Ateret Gerwirtz-Maydan, Yael Lahav, Wendy Walsh and David Finkelhor, 'Psychopathology among adult survivors of child pornography (2018) 98 *Child Abuse & Neglect* 1.

[5] See, eg, Anthony Beech et al, 'The internet and child sexual offending: a criminological review' (2008) 13 *Aggression and Violent Behaviour* 216, 218; Susan S M Edwards, 'Prosecuting "child pornography": Possession and taking of indecent photos of children' (2000) 22 *Journal of Social Welfare and Family Law* 1.

[6] See, eg, C D Baker, 'Preying on playgrounds: The sexploitation of children in pornography and prostitution' (1977) 5(3) *Pepperdine Law Review* 809, 810.

[7] International Centre for Missing & Exploited Children, *Child Sexual Abuse Material: Model Legislation & Global Review* (9th ed, 2018) <https://www.icmec.org/wp-content/uploads/2018/12/CSAM-Model-Law-9th-Ed-FINAL-12-3-18.pdf>.

[8] Marie Henshaw, James R P Ogloff and Jonathan A Clough, 'Demographic, mental health, and offending characteristics of online child exploitation material offenders: A comparison with contact-only and dual sexual offenders' (2018) 36 *Behavioural sciences & the law* 198.

[9] See, eg, Jonathon Clough, 'Lawful Acts, Unlawful Images: The Problematic Definition of 'Child' Pornography' (2012) 38 *Monash University Law Review* 213.

[10] See, eg, South Australia, *Parliamentary Debates*, House of Assembly, 7 December 2004, 1196 (Robert B Such); Commonwealth, *Parliamentary Debates*, Senate, 17 September 2019, 2351 (Helen Polley).

offences.[11] The subtleties of CSEM offending, though, creates challenges for legislatures attempting to draft laws suitable to capture CSEM conduct because 'questions of what [CSEM] is, and determining the way in which it should be suppressed, involve very difficult questions of degree and balance'.[12]

All jurisdictions acknowledge the seriousness of CSEM. In parliamentary debate, politicians uniformly condemn CSEM as 'abhorrent',[13] 'a heinous exploitation of children';[14] and 'fill[ing] one with revulsion'.[15] Judges further add that CSEM is 'callous and predatory'.[16] While legislators agree CSEM must be unlawful, children must be protected and that criminal law must provide an avenue for CSEM prosecution, Australian jurisdictions cannot agree on the best way to legislate for CSEM reduction and prevention which is why the detailed contextual analysis undertaken in this article is so significant. The challenge of CSEM legal definitions is that 'laws regulating [CSEM] may produce perverse, unintended consequences'. [17] Such unintended consequences are explored further in this article and include courts interpreting the CSEM legal tests disparately, acquittals despite offensive behaviour and convictions for uncontroversial behaviour. While this article does not argue for uniform CSEM legislation, the discrepancies do produce 'unintended consequences' highlighted in this article.

Despite frequent and continuous refinement, the differences in CSEM legislation across jurisdictions causes confusion when interpreting and ascertaining the meaning of provisions. The precise intricacies of CSEM vary in each jurisdiction including the name of the CSEM offences. With each state and territory, as well as the Commonwealth, prescribing their own CSEM legislation, inconsistencies are inevitable which cause significant challenges for CSEM reduction and prevention. Capturing offending behaviour within the CSEM definitions, then, can be problematic when jurisdictions approach CSEM criminality in different ways. There was an attempt to create some

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[11] See, eg, Explanatory Statement, Crimes Legislation Amendment Bill 2004 (ACT) 2.

[12] *R v Morcom* [2015] SASCFC 30 [13].

[13] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 2019, 2579 (Richard Marles).

[14] South Australia, *Parliamentary Debates*, House of Assembly, 26 October 2004, 561 (Michael Atkinson).

[15] South Australia, *Parliamentary Debates*, House of Assembly, 7 December 2004, 1209 (Vicki Chapman).

[16] *R v Booth* [2009] NSWCCA 89, [40].

[17] Amy Adler, 'The Perverse Law of Child Pornography' (2001) 101 *Columbia Law Review* 209, 213.

consistency in the form of a model national (criminal) law in 2005.[18] The model national law was originally designed to provide uniform legislation Australia-wide given criminal law falls within the state and territory jurisdictions.[19] However, Australian jurisdictions could not agree on how best to address the CSEM threat, because of the 'intense and continuing political debate' concerning CSEM, so uniform legislation never eventuated.[20] What does exist is a somewhat piecemeal approach to addressing CSEM criminality, with some noteworthy similarities. While this article does not consider whether a uniform approach is more appropriate, it does acknowledge that the jurisdictional differences do make statutory interpretation and judicial application more difficult.

For CSEM law, there is a delicate balance between protecting children from the harms of CSEM; ensuring only a person's actions, rather than their thoughts, are punishable; and avoiding community censorship.[21] As it is parliament's role to prescribe legislation, that legislation needs to be clear and unambiguous. For CSEM legislation, all Australian parliaments prescribe a legislative test for determining whether, or not, material is CSEM. The state and territory jurisdictions prescribe that criminal culpability be assigned according to whether a reasonable person would find the material offensive or whether the material is intended for sexual interest or arousal. There is extensive case law and parliamentary commentary concerning whether these tests mean CSEM offences are measured objectively, subjectively or a mixture of both. There is also confusion amongst judges surrounding how best to apply the legislation to CSEM, and parliamentarians seem unwilling to clearly prescribe how they intend CSEM provisions to operate (or perhaps parliamentarians are unsure how the legal tests for CSEM work).

A significant challenge in prescribing a test for CSEM criminality lies in how best to capture offending conduct. Law makers are cautious to avoid legislative drafting which unintentionally classifies lawful and appropriate human behaviour as CSEM or which fails to capture criminal conduct which should be criminalised. In 2005, Tony Krone proposed that context is vital to CSEM criminality and that the context of making CSEM (the 'viewer's gaze')

[18] Carolyn Penfold, 'Child pornography laws: The luck of the locale' (2005) 30(3) *Alternative Law Journal* 123.

[19] Ibid.

[20] Ibid.

[21] *R v Morcom* [2015] SASCFC 30 [13].

and the context in which the CSEM is kept, should all be considered.[22] That view, all these years later, is still very much relevant to the existing debate.

The so-called 'gaze' is an important consideration. Taylor and Quayle identified how ordinary and lawful images can be sexualised and called this sexualisation the 'paedophilic gaze'.[23] Adler has identified that the law requires consideration of the offender's gaze 'to root out pictures of children that harbor secret p[a]edophilic appeal'.[24] This article will further explore how the 'gaze' can interact with Australia's CSEM law, assists in ascertaining context and relates to the tests for CSEM criminality.

Current CSEM legislation is drafted in such a way that context is subject to judicial interpretation producing (at times) inconsistent results. Context matters to CSEM offences. Research, to date, has not considered how CSEM offence legislative drafting has accounted for, or failed to account for, context and the impact of such an approach for judicial decision-making. This article will address that gap by analysing the contextual elements of CSEM offences to highlight the deficiencies. It will critique how the superior courts have failed to reach a consensus on the correct way to interpret the CSEM legislation, namely the reasonable person and the sexual arousal or interest tests. Such results mean uncertainty exists about what CSEM actually is and leads to unnecessary acquittals or unfair convictions.

This article will explore CSEM offences in Australia in five parts. The article comprehensively analyses the elements of CSEM in Part II, including (1) a child victim; (2) materiality; (3) offensive or sexual context; and (4) the material is dealt with in some way. It considers the jurisdictional differences and highlights that unintended outcomes are produced in relation to the contextual element. Part III analyses the contextual element according to whether a reasonable person finds the material offensive or whether the material is intended for sexual interest or arousal. Despite the differences in approaches, the CSEM legislation does not always clearly align with an objective or subjective test and there are inconsistencies in the application of context. Finally, Part IV discusses the challenges facing Australian courts when adjudicating CSEM, specifically how context should be used when

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[22] Tony Krone, 'Does Thinking Make It So? Defining Online Child Pornography Possession Offences' (2005) 299 Trends and Issues in Crime and Criminal Justice 1, 4-5.

[23] Max Taylor and Ethel Quayle, *Child pornography: an internet crime* (Brunner Routledge, 2003).

[24] Amy Adler, 'The Perverse Law of Child Pornography' (2001) 101 *Columbia Law Review* 209, 213.

interpretating CSEM legislation. Part V concludes that context matters in CSEM offences and failing to account for it is a significant flaw in legislation.

II NOTABLE FACTORS OF CSEM OFFENCES

A notable difficulty in legislating on CSEM is the difficulty that legislators face in accounting for all situations where a child is exploited and/or abused. While people may generally feel that they will 'know it when [they] see it' in relation to whether material is CSEM, a more definitive test than assessing one's intrinsic feelings is needed.[25] The challenge for legislators is to draft a sufficiently wide CSEM test to capture all offensive conduct but not so wide as to trap conduct which should fall outside CSEM.[26] It must also be sufficiently fluid to reflect changing societal attitudes.[27] Al-Alosi identifies that it is the 'grey area' that causes challenges for categorising material as CSEM, because where abuse is not explicit in material a CSEM definition may not capture it.[28]

Terminology is important for CSEM offences. The Australian jurisdictions label CSEM offences as either 'child exploitation material' or 'child abuse material' which evolved previously from 'child pornography'. The Commonwealth parliament was the last jurisdiction to convert CSEM offence naming conventions from 'child pornography material' to 'child abuse material', making the change in 2019.[29] The naming of criminal offences can influence the way parliaments, courts, offenders, and victims interact with that legislation.[30]

The commentary relating to criminal offence naming conventions indicate the name of offences is significant to the way offenders and victims interact with

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[25] *Jacobellis vi Ohio*, 378 US 184 (1964) [197] (Stewart J).

[26] See, eg, Thomas Crofts and Murray Lee, 'Sexting, Children and Child Pornography' (2013) 35(1) Sydney Law Review 85, 88.

[27] Anna Grant, Fiona David and Peter Grabosky, 'Child Pornography in the Digital Age' in Phil Williams (ed) *Illegal Immigration and Commercial Sex: The New Slave Trade* (Frank Cass Publishers, 1999) 171, 172.

[28] Hadeel Al-Alosi 'Australia's Child Abuse Material Legislation: What's the Artistic Merit Defence Got to Do with it?' (2018) 42 *Criminal Law Journal* 147, 156.

[29] *Combatting Child Sexual Exploitation Legislation Amendment Act 2019* (Cth).

[30] See, generally, James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217.

that legislation.[31] Namely, the offence labels have a 'public communication' function in which legislation declares the level of 'condemnation' that should apply to the offender.[32] 'Fair labelling' of criminal offences ensures the offences accurately reflect the offender's wrongful behaviour including the harm caused to the victim.[33]

For CSEM offences, labelling is especially significant. Classifying CSEM as 'child pornography' is controversial because it 'downplays the significance' of CSEM content,[34] does not convey the seriousness of the material,[35] fails to 'reflect the inherently abusive exploitive nature of such material',[36] and insinuates that it represents legitimate sexual material.[37] The alternative terms, such as child exploitation material and child abuse material are considered 'less harmful or stigmati[s]ing to the child'.[38] The Australian legislative instruments all use 'child exploitation material' or 'child abuse material' to refer to CSEM. ECPAT recommends the term 'child sexual exploitation material' be used to encompass sexualised material depicting children and not solely restricted to cases of sexual abuse.[39] It is acknowledged that under the legislation, CSEM do not always need to involve a sexual component in order to successfully prove the elements of the offence, as will be further considered below. However, when discussing the law, this article will refer to all relevant behaviour (that is, child exploitation material,

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[31] Ibid.

[32] Ibid 226; Andrew P Simester and GR Sullivan, *Criminal Law: Theory and Doctrine* (Oxford, 3rd ed, 2007) 30.

[33] Glanville Williams, 'Convictions and Fair Labelling' (1983) 42 *Criminal Law Journal* 85.

[34] Alisdair A Gillespie, 'Child pornography' (2018) 27(1) *Information & Communications Technology Law* 30, 30.

[35] South Australia, *Parliamentary Debates*, House of Assembly, 7 December 2004, 1209 (Vicki Chapman); T Tate, 'The child pornography industry: International trade in child sexual abuse' in C Itzin (ed), *Pornography: women, violence and civil liberties* (Oxford University Press, 1992) 203; Taylor and Quayle (n 23).

[36] Hadeel Al-Alosi, 'Criminalising Fictional Child Abuse Material: Where Do We Draw the Line?' (2017) 41 *Criminal Law Journal* 183; Beech et al (n 26) 218.

[37] ECPAT International, 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse', *Terminology and Semantics: Interagency Working Group on Sexual Exploitation of Children* (Web Page, 2016) <http://luxembourgguidelines.org/english-version/>.

[38] Ibid.

[39] Ibid.

child abuse material or any behaviour which sexualises or exploits children) as CSEM for consistency and clarity.

Commonwealth legislation provides the extraterritorial reach for prosecuting CSEM offenders acting outside of Australia.[40] Where an Australian citizen, resident, or body corporate deals with CSEM outside of Australia, the Commonwealth criminal law has jurisdiction. [41] There are also Commonwealth CSEM offences relating to telecommunications and using carriage services for CSEM purposes.[42]

For domestic CSEM offending, the states and territories prescribe the scope of CSEM criminality. State and territory CSEM offences comprise several elements. To establish a criminal offence, prosecution needs to satisfy the elements of the offence.[43] The elements for CSEM offences are generally as follows:

I the victims are children;
II the CSEM is 'material';
III there is an offensive or sexual context; and
IV the material is dealt with in some way such as it is possessed or distributed.[44]

The first three elements relate to establishing whether, or not, something is CSEM while the fourth element establishes the appropriate CSEM offence. Table 1 provides a very brief summary of the notable elements in the state and territory jurisdictions. Further detailed analysis of the elements, and the jurisdictional differences, will be undertaken below.

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[40] *Criminal Code Act 1995* (Cth).

[41] Ibid div 273.

[42] Ibid ss 474.22 – 474.25.

[43] See, eg, *Ryan v R* (1967) 121 CLR 205; *Koani v R* (2017) 263 CLR 427.

[44] *Criminal Code 1983* (NT) s 125A (definition of 'child abuse material'); *Criminal Code 1924* (Tas) s 1A (definition of 'child exploitation material'); *Crimes Act 1900* (ACT) s 64 (definition of 'child exploitation material'); *Criminal Law Consolidation Act 1935* (SA) s 62 (definition of 'child exploitation material'); *Criminal Code 1899* (Qld) s 207A (definition of 'child exploitation material'); *Criminal Code 1913* (WA) s 217A (definition of 'child exploitation material'); *Crimes Act 1958* (Vic) s 51A (definition of 'child abuse material'); *Crimes Act 1900* (NSW) s 91FB (definition of 'child abuse material').

Jurisdictions	CSEM Elements			
	Victim child	**Material**	**Context**	**Dealing with CSEM**
Australian Capital Territory	Under 18 years	Film, photograph, drawing, audiotape, videotape, computer game, internet or anything else	Sexual arousal or gratification	Trading, possessing
New South Wales	Under 16 years	Film, printed matter, data or any other thing	Reasonable person regards as offensive	Producing, disseminating, possessing
Northern Territory (NT)	Under 18 years	Does not define material	Reasonable person regards as offensive	Possessing
Queensland	Under 16 years	Data generating text, images or sound	Reasonable person regards as offensive	Making, distributing, possessing
South Australia	Under 17 years	Written or printed material; picture, painting or drawing; carving, sculpture, doll, statue or figure; photographic, electronic or other information or	Excite or gratify sexual, sadistic or perverted interest	Producing, disseminating, possessing

		data which re/produces image or representation; film, tape, disc or other object or system containing information or data		
Tasmania	Under 18 years	Film, printed matter, electronic data and any other thing	Reasonable person regards as offensive	Producing, distributing, possessing, accessing
Victoria	Under 18 years	Film, audio, photograph, printed matter, image, computer game, text, electronic material or any other thing	Reasonable person regards as offensive	Producing, distributing, possessing, accessing
Western Australia	Under 16 years	Object, picture, film, written or printed matter, data or other thing; anything re/producing text, sound or data	Reasonable person regards as offensive	Producing, distributing, possessing

Table 1: Summary of notable CSEM elements according to state and territory jurisdiction

A Child victims

CSEM offences relate to victims who are children. For most jurisdictions, any person under the age of 18 is considered a child and capable of being a victim of CSEM.[45] Legislation does not always make CSEM an offence where it relates to older children though. Queensland, New South Wales (NSW) and Western Australia (WA) make CSEM behaviour an offence where it relates to children under 16 years.[46] Because children do not reach the age of majority in those jurisdictions until 18,[47] CSEM legislation does not apply to 16 and 17 year old children despite them otherwise being considered children under the law. South Australia (SA) makes CSEM an offence where it applies to children under 17 so children who are 17 sit outside the CSEM legislation.[48]

There are further complexities to identifying a child victim for the purposes of prosecuting CSEM offenders. The jurisdictions use broad drafting terminology when establishing the potential child victims such as 'describes' or 'depicts' a child,[49] 'represents' a child,[50] or who 'appears to be',[51] 'is

[45] *Criminal Code 1983* (NT) s 125A (definition of 'child abuse material'); *Crimes Act 1958* (Vic) s 51A (definition of 'child'); *Criminal Code 1924* (Tas) s 1A (definition of 'child exploitation material'); *Crimes Act 1900* (ACT) s 64 (definition of 'child exploitation material').

[46] *Criminal Code 1899* (Qld) s 207A; *Criminal Code 1913* (WA) s 217A (definition of 'child'); *Crimes Act 1900* (NSW) s 91FA (definition of 'child').

[47] *Law Reform Act 1995* (Qld) s 17; *Age of Majority Act 1972* (WA) s 5.

[48] *Criminal Law Consolidation Act 1935* (SA) s 62 (definition of 'child exploitation material').

[49] *Criminal Code 1899* (Qld) s 207A (definition of 'child exploitation material'); *Criminal Code 1995* (Cth) s 473.1 (definition of 'child abuse material'); *Criminal Code 1983* (NT) s 125A; *Criminal Law Consolidation Act 1935* (SA) s 62 (definition of 'child exploitation material'); *Criminal Code 1924* (Tas) s 1A (definition of 'child exploitation material'); *Crimes Act 1958* (Vic) s 51A (definition of 'child abuse material'); *Criminal Code 1913* (WA) s 217A (definition of 'child exploitation material').

[50] *Crimes Act 1900* (ACT) s 64(5); *Criminal Code 1995* (Cth) s 473.1 (definition of 'child abuse material'); *Criminal Code 1983* (NT) s 125A; *Criminal Code 1913* (WA) s 217A (definition of 'child exploitation material').

[51] *Crimes Act 1900* (NSW) s 91FB; *Criminal Code 1995* (Cth) s 473.1 (definition of 'child abuse material'); *Criminal Code 1983* (NT) s 125A; *Criminal Code 1924* (Tas) s 1A (definition of 'child exploitation material'); *Crimes Act 1958* (Vic) s 51A (definition of 'child abuse material'); *Criminal Code 1913* (WA) s 217A (definition of 'child exploitation material').

implied to be'[52] or 'apparently is'[53] a child. In so doing, the legislation circumvents creative defence arguments deflecting criminality where an adult victim just looks youthful or the child depicted is found to be entirely computer generated. The definitions are purposely broad to capture virtual (fictional) CSEM; that is, material which includes computer-generated images of children or material technologically manipulated to look like a child.[54] Because criminal law in Australia generally considers CSEM to involve a person who is, *appears to be* or *is implied to be,* a child, images do not need to depict an actual child, nor do courts need evidence that the subject of the CSEM is a child. For example, animated content, child characters from popular television show 'The Simpsons', was held capable of being CSEM where those characters were depicted performing lewd acts.[55] Despite virtual CSEM not always involving real children, it is still harmful to society because it may 'fuel the demand' for real children,[56] the technological advancements make it difficult to tell whether the victim is a real child or entirely computer generated,[57] and some virtual CSEM does, in fact, involve real children including where an innocent image has been altered to show a child engaging in sexual activity, for example.[58] As such, broad scoping in legislative drafting widened the definition of child to ensure virtual children fall within CSEM offending.

B Material

Legislation also prescribes the type of 'material'. The scope of material is generally wide enough to capture anything that could be a CSEM publication. Legislation generally prescribes CSEM to be print-form (hard copy) or

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[52] *Crimes Act 1900* (NSW) s 91FB; *Crimes Act 1958* (Vic) s 51A (definition of 'child abuse material').

[53] *Criminal Code 1899* (Qld) s 207A (definition of 'child exploitation material'); *Criminal Law Consolidation Act 1935* (SA) s 62 (definition of 'child exploitation material').

[54] Larissa S Christensen, Dominique Moritz and Ashley Pearson, 'Psychological perspectives of virtual child sexual abuse material' (2021) 25(4) *Sexuality & Culture* 1353; Laura Avery, 'The Categorical Failure of Child Pornography Law' (2015) 21(1) *Widener Law Review* 51.

[55] *McEwen v Simmons* (2008) 73 NSWLR 10.

[56] Ibid [26].

[57] Gray Mateo, 'The New Face of Child Pornography: Digital Imaging Technology and the Law' (2008) 1 *Journal of Law, Technology and Policy* 175, 175.

[58] Avery (n 54) 85.

electronic as well as being still images or video.[59] The Australian Capital Territory (ACT) prescribes CSEM to be 'anything that represents' CSEM and then further prescribes this to be a 'film, photograph, drawing, audiotape, videotape, computer game, the internet or anything else';[60] NSW determines material to be 'any film, printed matter, data or any other thing of any kind';[61] and SA includes a carving, sculpture, doll, statue or figure in their definition.[62] Some jurisdictions prescribe a catch-all provision of 'any other thing'[63] which is then interpreted according to the context or 'genus' of the prior words.[64] Realistically, anything capable of representing a child should be captured within these broad definitions.[65]

Most CSEM prosecutions occur because the offenders are dealing with CSEM files on a computer in the form of images and videos. Although, case law does highlight examples where different types of material have been held to be CSEM and that material goes beyond the standard images and videos. Courts have interpreted the provisions broadly with literary works, for example, portraying children in offensive contexts could be held to be CSEM.[66] Another example of material which has been determined to be CSEM is computer games.[67]

C Offensive or sexual context

Each jurisdiction establishes what context, or how much context, can be considered when determining culpability under a CSEM offence. CSEM offences capture a range of different harms to children. CSEM can range in severity from partial nudity to documenting the torture or rape of children. For most jurisdictions, the CSEM legislation prescribes the context element

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[59] *Criminal Code 1924* (Tas) s 1A (definition of 'material'); *Crimes Act 1958* (Vic) s 51A (definition of 'material'); *Criminal Code 1913* (WA) s 217A (definition of 'material').

[60] *Crimes Act 1900* (ACT) s 64(5).

[61] *Crimes Act 1900* (NSW) s 91FA.

[62] *Criminal Law Consolidation Act 1935* (SA) s 62 (definition of 'material').

[63] *Criminal Code 1924* (Tas) s 1A (definition of 'material'); *Criminal Code 1913* (WA) s 217A (definition of 'material'); *Crimes Act 1958* (Vic) s 51A (definition of 'material'); *Crimes Act 1900* (NSW) s 91FA (definition of 'material')

[64] *R v Regos* (1947) 74 CLR 613, 623; *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629, 647.

[65] See, eg, *R v Fuller* [2010] NSWCCA 192.

[66] *R v Campbell* [2009] QCA 128 [46]; *Assheton v The Queen* (2002) 132 A Crim R 237.

[67] *R v Finch; ex parte A-G (Qld)* [2006] QCA 60.

of CSEM to be material that causes offense to a reasonable adult and in a sexual; offensive or demeaning; or abusive context.[68] Importantly, the behaviour will relate to child exploitation or abuse but does not necessarily need to have a sexual element for CSEM to be established.[69] SA and the ACT do not consider the reasonable adult threshold, rather, the ACT considers material to be CSEM where it is for sexual arousal or gratification,[70] and SA considers material to be CSEM where it is for sexual, sadistic or perverted interest.[71] There are further complexities to establishing the offensive or sexual context element including whether this is an objective or subjective test. Issues related to the offensive or sexual context is the basis for discussion in this article and will be further addressed below.

The nature of the material, that is, the level of harm from exploitation is particularly relevant.[72] Methods have been developed to characterise or classify the material; distinguishing between material without a sexual nature versus gross assaults, sadism and bestiality is important when determining the level of offensiveness. Taylor and Quayle[73] developed the Combating Paedophile Information Networks in Europe (COPINE) scale, a CSEM categorisation tool, which has 10 levels of seriousness: indicative (non-erotic/sexualised pictures); nudist; erotica; posing; erotic posing; explicit erotic posing; explicit sexual activity; assault; gross assault; sadism and bestiality. The COPINE scale was developed to understand psychological perspectives of offenders with a sexual interest in children and has been used by Australian courts.[74] The Oliver scale, developed by the UK Court of Appeal, has been adopted in some Australian case law[75] and uses five levels of categorisation: images depicting erotic posing with no sexual activity being

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[68] *Criminal Code 1899* (Qld) s 207A (definition of 'child exploitation material'); *Crimes Act 1900* (NSW) s 91FB(1); *Crimes Act 1958* (Vic) s 51A (definition of 'child abuse material'); *Criminal Code 1924* (Tas) s 1A (definition of 'child exploitation material'); *Criminal Code 1983* (NT) s 125A (definition of 'child abuse material'); *Criminal Code 1913* (WA) s 217A (definition of 'child exploitation material').

[69] See, eg, *Criminal Code 1899* (Qld) s 207A. See also *Criminal Code 1983* (NT) s 125A; *Crimes Act 1900* (NSW) s 91FB.

[70] *Crimes Act 1900* (ACT) s 64(5) (definition of 'child exploitation material').

[71] *Criminal Law Consolidation Act 1935* (SA) s 62 (definition of 'pornographic nature').

[72] Kate Warner, 'Sentencing for child pornography' (2010) 84 *Alternative Law Journal* 384.

[73] Taylor and Quayle (n 23).

[74] Krone (n 22) 2.

[75] See, eg, *R v Sykes* [2009] QCA 267, [6]; *R v Silva* [2009] ACTSC 108.

level one while sadism and bestiality indicates level five.[76] The Child Exploitation Tracking System (CETS) has also been used in Australian case law, categorising the level of CSEM offending according to six categories, from no sexual activity to sadism, bestiality and penetration.[77] The categorisation tools can assist the courts to establish offensiveness of the material and can also assist in determining seriousness for the purposes of sentencing.[78]

D Dealing with the material

Once CSEM has been established, the final element relates to the applicable CSEM offence. CSEM offences address the offender's behaviour when dealing with the material. Legislation captures offences involving the offender viewing, accessing, or possessing that material. It further extends to all types of dealing with CSEM including creating, making, producing, distributing, publishing, offering, disseminating, trading in, and selling.[79] Each jurisdiction labels the offences in a different way so while they appear disparate, the themes in the type of offending behaviour show a similar trend.

Possessing CSEM is generally the applicable offence where an offender is found with CSEM files on their computer. It is also the most prevalent CSEM offence with Queensland statistics demonstrating that 51.5% of CSEM offenders sentenced in Queensland courts between 2006 – 2016 were sentenced for possessing CSEM (where that possession offence was their most serious offence).[80] Given the complexities of technology and file storage, establishing possession of CSEM is not always straightforward. Some jurisdictions provide statutory definitions of possession for the purposes of CSEM while others rely upon the common law understanding of possession. Possession in Victoria and NSW, for example, is considered to be

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[76] *R v Oliver* [2003] 1 Cr App R 28.

[77] See, eg, *R v Howe* [2017] QCA 7; *R v Porte* [2015] NSWCCA 174; *Heathcoate (a pseudonym) v The Queen* [2014] VSCA 37.

[78] Warner (n 72) 386.

[79] *Crimes Act 1900* (ACT) s 64A; *Crimes Act 1900* (NSW) s 91H; *Criminal Code 1983* (NT) s 125A; *Criminal Law Consolidation Act 1935* (SA) s 63; *Criminal Code 1899* (Qld) s 228C; *Criminal Code 1924* (Tas) ss 130A-B; *Crimes Act 1958* (Vic) s 51C-D; *Criminal Code 1913* (WA) ss 218-9.

[80] Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes: Final report* (July 2017) <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0017/531503/cem-final-report-july-2017.pdf> 116.

control of the material but not necessarily physical custody.[81] Possessing, according to common law, generally relates to knowingly being in custody and control of the thing.[82] Concepts of possession apply to digital image files.[83] Clough explains that possessing a computer or memory stick containing images would equate to possessing those images.[84] The act of downloading the images, even after they have been deleted off a computer, have still been held to be possession of CSEM.[85] Possession can also be established even when the material has not been viewed.[86] Further detail of the nuances of possession are beyond the scope of this article.

There is some conjecture about whether viewing CSEM only (without saving it or downloading it) can constitute possession.[87] Because possession relies on control of the material, offenders who might view the material online but fail to download it could avoid liability because they are not technically in control of the CSEM as a file. Although, viewing an image online or entering a website can leave a hidden trace on that person's computer so some debate exists about whether that also constitutes possession.[88] Some jurisdictions differentiate between possession of, and access to, CSEM. In Victoria, for example, access is considered to be viewing or displaying the material.[89] Common law has concluded that accessing CSEM can be established where 'an intention to access' CSEM exists; and the offender intentionally displays the images on the screen.[90] Notwithstanding, where viewing CSEM or access to CSEM provides a separate offence to possession, jurisdictions avoid the

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[81] *Crimes Act 1958* (Vic) s 51G(3); *Crimes Act 1900* (NSW) s 91H (definition of 'possess').

[82] *Moors v Burke* (1919) 26 CLR 265.

[83] Jonathan Clough, 'Now You See It, Now You Don't: Digital Images and the Meaning of "Possession"' (2008) 19(2) *Criminal Law Forum* 205.

[84] Clough, *Just Looking* (n 1) 235. See also Asaf Harduf, 'Criminalization Downloads Evil: Reexamining the Approach to Electronic Possession when Child Pornography goes International' (2016) 34(2) *Boston University International Law Journal* 279, 293.

[85] *R v Verburgt* [2009] QCA 33.

[86] *R x Sexton* [2016] SADC 155, [42].

[87] See Clough, *Just Looking* (n 1) 239.

[88] Jelani Jefferson Exum, 'Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses' (2010) 16(3) *Richmond Journal of Law and Technology* 1, 34.

[89] *Crimes Act 1958* (Vic) s 51H.

[90] *R v Finnigan (No 3)* [2015] SADC 166, [102].

need to undertake complex analysis related to whether viewing constitutes possession.

Distribution or dissemination are terms used analogously by Australian jurisdictions for CSEM offences that usually involve sharing the material with someone else. Dissemination is generally defined as to 'send, supply, exhibit, transmit or communicate' CSEM to another, making it available to someone else or entering into an agreement to provide it.[91] Queensland also adds 'attempt[ing] to distribute' to their definition of distribution.[92] Distribution has been established where an offender has used peer-to-peer software on their computer, for example, to allow others to access those files.[93]

Production is the final main form of dealing with CSEM and generally involves making the CSEM. Queensland's terminology for production is making or attempting to make CSEM.[94] Tasmania extends production to be making, filming, printing, photographing and recording CSEM.[95] Altering or manipulating any image to turn it into CSEM is considered to be production in NSW.[96] Altering or manipulating an image is also known as 'morphing' and is a common technique used to create virtual CSEM.[97] While CSEM production is arguably the most serious CSEM offence given it relates to the creation of exploitation and abusive material, it is perpetrated by the fewest offenders with only 3.5% of CSEM offenders sentenced in Queensland between 2006 – 2016 being sentenced for CSEM production offences.[98]

Penalties for the conduct are generally commensurate with the type of behaviour; producing and distributing attracts more significant penalties than accessing, viewing or possessing. For example, there is a maximum penalty of 7 years imprisonment for CSEM possession in the ACT which increases to

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[91] *Crimes Act 1900* (NSW) s 91H(1) (definition of 'disseminate'); *Criminal Law Consolidation Act 1935* (SA) s 62 (definition of 'disseminate'); *Criminal Code 1913* (WA) s 219(1); *Criminal Code 1924* (Tas) s 130B(2).

[92] *Criminal Code 1899* (Qld) s 207A (definition of 'distribute').

[93] See, eg, *R v Salsone; ex parte A-G (Qld)* [2008] QCA 220; *R v Carson* [2008] QCA 268.

[94] *Criminal Code 1899* (Qld) s 228B(4).

[95] *Criminal Code 1924* (Tas) s 1A (definition of 'produce').

[96] *Crimes Act 1900* (NSW) s 91H (definition of 'produce').

[97] Mateo (n 57); Avery (n 54) 85.

[98] Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes: Final report* (July 2017) <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0017/531503/cem-final-report-july-2017.pdf> 116.

12 years imprisonment for trading in CSEM.[99] SA increases penalties for subsequent offences or where offending falls within aggravated circumstances including age of the child or inflicting pain.[100] The larger penalties reflect the more serious conduct.

Sometimes legislation criminalises the offender's behaviour as CSEM yet their conduct should not be captured within the CSEM legislation. A clear example occurs with 'sexting'.[101] Sexting involves 'electronic communication of… images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner'.[102] Sexting can lead to child exploitation in some circumstances, such as where it is misused by adults[103] or where it is non-consensual (i.e. revenge pornography),[104] and in those circumstances, a criminal law response is appropriate and necessary. There are other circumstances that may call into question a child's consenting participation in sexting, such as gendered pressures.[105] Some jurisdictions have created a unique offence for sexting which separates criminal sexting conduct from other CSEM offending.[106] For most jurisdictions though, when children share sexual content of themselves with another child, it falls firmly within the CSEM definition because the victim is a child, the content shared is CSEM 'material' and it is objectively offensive or for the purposes of sexual arousal.

However, sexting is overwhelmingly a consensual sharing of content between peers.[107] As sexting usually occurs between children consensually, it is

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[99] *Crimes Act 1900* (ACT) ss 64A, 65.

[100] *Criminal Law Consolidation Act 1935* (SA) ss 5AA, 63A.

[101] Dominique Moritz and Larissa S Christensen, 'When sexting conflicts with child sexual abuse material: the legal and social consequences for children' (2020) 27(5) *Psychiatry, Psychology and Law* 815.

[102] Dan Jerker B Svantesson, '"Sexting" and the Law – How Australia Regulates Electronic Communication of Non-professional Sexual Content' (2010) 22(2) *Bond Law Review* 41, 41.

[103] *R v Symons* (2018) 130 SASR 503, 506.

[104] See, eg, David Plater, '"Setting the Boundaries of Acceptable Behaviour?" South Australia's Latest Legislative Response to Revenge Pornography' (2016) 2 *University of South Australia's Student Law Review* 77, 85.

[105] Murray Lee and Thomas Crofts, 'Gender, Pressure, Coercion and Pleasure: Untangling Motivations for Sexting between Young People' (2015) 55 *British Journal of Criminology* 454, 455.

[106] *Summary Offences Act 1953* (SA) s 26C.

[107] Kimberley J Mitchell, David Kinkelhor, Lisa M Jones and Janis Wolak, 'Prevalence and Characteristics of Youth Sexting: A National Study' (2012) 129(1) *Pediatrics* 13, 17.

appropriate that sexting is distinguished from CSEM, particularly with older children above the age to consent to sexual intercourse. There is some work to be done here for CSEM legislation to avoid inadvertently capturing sexting.[108] While a detailed analysis of sexting goes beyond the scope of this article, sexting is a good example of CSEM legislation not necessarily achieving what was intended by parliament.

E Culpability

CSEM legislation also provides exceptions to criminal culpability in the form of defences. CSEM conduct is often excused where it is for law enforcement, artistic, educational or research purposes; or it is for the public benefit.[109] A defence to CSEM culpability in the ACT exists where the defendant proves they 'had no reasonable grounds for suspecting' the material was CSEM.[110] The other jurisdictions provide differing options in relation to defences.

Artistic merit is a noteworthy example to consider in further detail. An artistic merit defence exempts artists from CSEM criminality where their art might otherwise depict CSEM but the art community recognises the merit of the work.[111] While an artistic merit defence prevents the stifling of artistic freedom,[112] it also does not allow for an offender to circumvent criminality where their alleged 'artistic' works are inherently pornographic.[113] Thus, the defences can provide a balance where the context of the CSEM and the offender's behaviour can be considered.

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[108] Moritz and Christensen (n 101). See also Shannon Shafron-Perez, 'Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting' (2009) 26(3) *John Marshall Journal of Computer and Information Law* 431; Robert Wood, 'The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint' (2009) 16 *Michigan Telecommunications Technology Law Review* 151.

[109] See, eg, *Crimes Act 1900* (NSW) s 91HA *Criminal Code 1899* (Qld) s 228E; *Criminal Code 1924* (Tas) s 130E; *Crimes Act 1958* (Vic) s 51L; *Criminal Code 1913* (WA) s 221A(1).

[110] *Crimes Act 1900* (ACT) s 65(3).

[111] See, eg, *Nugent v Western Australia* (2014) 246 A Crim R 165, 171 in relation to *recognised merit*.

[112] NSW Department of Justice and Attorney-General, *Report of the Child Pornography Working Party* (10 January 2010) 22; Brian Simpson, 'Sexualizing the child: The Strange case of Bill Henson, his 'absolutely revolting' images and the law of childhood innocence' (2011) 14(3) *Sexualities* 290.

[113] South Australia, *Parliamentary Debates*, House of Assembly, 1251, 8 December 2004 (Michael J Atkinson).

III THE OFFENSIVE OR SEXUAL CONTEXT OF CSEM

This article has, so far, outlined the legislative elements of CSEM under Australia's criminal law legislation to prosecute CSEM offenders and highlighted notable similarities and differences between the jurisdictions' approaches to CSEM legislation. Arguably, the most significant element of CSEM legislation is the offensive or sexual context element because it allows for, or fails to allow for, the context of the offender's motivation, the 'gaze', and circumstances surrounding the offending. It is this element which will be explored further in this Part. As mentioned above, the contextual element assesses whether the offender's behaviour was offensive or sexual in nature. An important consideration is whether the context is assessed objectively or subjectively.

Some jurisdictions prescribe CSEM as material which a reasonable person would regard as offensive.[114] The reasonable person part of the test suggests it is an objective test. At a most basic level, an objective test relates to an 'ordinary' or 'reasonable' person in a similar position to the accused. An objective test does not depend on the accused's state of mind at the time but relates to measuring the conduct of an ordinary or reasonable person in the position of the accused.[115] That ordinary or reasonable person is based upon 'the reasonable, ordinary, decent-minded, but not unduly sensitive, person'.[116] The reasonable person standard is also assessed at the time of the offending which means that what was reasonable in previous cases may no longer be reasonable in subsequent cases.[117] The difficulty with an objective test is that it is not always expressly written as such. Where the terms 'ordinary' or 'reasonable' are included in the legislative drafting, there is a clearer indication for them to be read objectively.

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[114] *Criminal Code Act 1995* (Cth) s 473.1 (definition of 'child abuse material'); *Crimes Act 1900* (NSW) s 91FB; *Criminal Code 1983* (NT) s 125A; *Criminal Code 1899* (Qld) s 207A (definition of 'child exploitation material'); *Criminal Code 1924* (Tas) s 1A (definition of 'child exploitation material'); *Crimes Act 1958* (Vic) s 51A (definition of 'child abuse material'); *Criminal Code 1913* (WA) s 217A (definition of 'child exploitation material').

[115] Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) *Monash University Law Review* 197.

[116] *Phillips v SA* (1994) 75 A Crim R 480 [26]

[117] See, eg, *R v Silva* [2009] ACTSC 108 [32].

This compares to a subjective test which considers the accused's 'actual state of mind'.[118] A subjective test relates to a person who has chosen to engage in particular conduct 'having appreciated the consequences and risks of that choice'.[119] The person's behaviour is considered a personal decision assessed by their state of mind at the time. In that way, Colvin[120] suggests a subjective approach is most appropriate where the offending behaviour warrants severe and substantial penalties.

Determining objectivity and subjectivity is challenging because of the overlap. To assess a person's subjective state, objective consideration might be needed. In *Pemble v R*,[121] Barwick CJ acknowledged the difficulties of considering state of mind when assessing criminality:

> The state of mind of the accused is rarely so exhibited as to enable it to be directly observed. [It] must almost invariably be a matter of inference. Although what the jury think a reasonable man might have foreseen is a legitimate step in reasoning towards a conclusion as to the accused's actual state of mind, a firm emphasis on the latter as the fact to be found by the jury is necessary to ensure they do not make the mistake of treating what they think a reasonable man's reaction would be in the circumstances as decisive of the accused's state of mind… that conclusion [as to the accused's state of mind] could only be founded on inference, including consideration of what a reasonable man might or ought to have foreseen.[122]

Jury inference is often required to determine state of mind because the accused is unlikely to admit they possessed a state of mind which fulfils the subjective test for criminal responsibility.[123] To determine that state of mind using inference, then, a jury might need to consider the accused's conduct objectively to determine what state of mind was likely in the circumstances

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[118] Andrew Hemming, 'Reasserting the place of objective tests in criminal responsibility: ending the supremacy of subjective tests' (2011) 13 *University of Notre Dame Australia Law Review* 69, 75.

[119] Colvin (n 115) 197.

[120] Ibid 198.

[121] (1971) 124 CLR 107, 120-1.

[122] *Pemble v R* (1971) 124 CLR 107, 120-1 cited in Andrew Hemming, 'Reasserting the place of objective tests in criminal responsibility: ending the supremacy of subjective tests' (2011) 13 *University of Notre Dame Australia Law Review* 69, 74-5.

[123] Jonathon Clough and Carmel Mulhern, *Criminal Law* (LexisNexis, 2nd ed, 2004) 17.

of the offending behaviour.[124] As such, a test which appears *prima facie* subjective likely has objective elements. In fact, there are frequent examples in case law where elements of the subjective and objective tests are used to determine criminality.[125]

The difficulty with CSEM legislation is that it is not always entirely clear whether the tests are objective or subjective and so it is difficult for parties and courts to determine which test to apply. In the Australian jurisdictions, material or conduct is determined to be CSEM based upon either it is offensive to a reasonable person or material intended for sexual arousal. On its face, these two concepts seem to relate to objective and subjective tests respectively. However, the legislative drafting has created ambiguities in many jurisdictions' Acts which makes it more difficult to determine if the provision/s should be interpreted as objective or subjective tests. And, in fact, the interpretation can mean that the context of the offending is not considered. These issues will be explored further below.

A Reasonable person test

A majority of the Australian jurisdictions use an expressly prescribed reasonable person test for the contextual element of CSEM. The Commonwealth, NSW, NT, Queensland, Tasmania, Victoria and WA prescribe CSEM as material which a reasonable person would regard as offensive.[126] There are two considerations for classifying CSEM in these jurisdictions: the interpretation of 'offensiveness' and the 'reasonable person' test for offensiveness.

Courts have adopted differing interpretations of offensiveness. Offensiveness has been acknowledged as 'open to a very wide interpretation, particularly over time'.[127] The Queensland District Court, for example, considered the ordinary meaning for offensive from two English dictionaries which produced conflicting results: the Shorter Oxford Dictionary determined offensive to mean 'displeasing; annoying; insulting' while the Macquarie Concise

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[124] *Pemble v R* (1971) 124 CLR 107.

[125] See, eg, *Stevens v The Queen* (2005) 227 CLR 319.

[126] *Criminal Code Act 1995* (Cth) s 473.1 (definition of 'child abuse material'); *Crimes Act 1900* (NSW) s 91FB; *Criminal Code 1983* (NT) s 125A; *Criminal Code 1899* (Qld) s 207A (definition of 'child exploitation material'); *Criminal Code 1924* (Tas) s 1A (definition of 'child exploitation material'); *Crimes Act 1958* (Vic) s 51A (definition of 'child abuse material'); *Criminal Code 1913* (WA) s 217A (definition of 'child exploitation material').

[127] *Guerin v HB* [2017] NTSC 14 [20].

Dictionary defined the term as 'repugnant to good taste'.[128] A NSW Local Court interpreted 'offensiveness' to mean 'significantly offensive'.[129] A superior Queensland court decision, though, found that ordinary meanings of the term are potentially too wide and so must be narrowed to the context of the definition.[130] That context can be derived from surrounding words and paragraphs of the legislation.[131] The NT Supreme Court adopted a *Pregelj v Manison*[132] definition of 'offensiveness' taken from *Worcester v Smith*[133] which determined offensiveness was 'calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person'.[134] Considering the substantial judicial commentary, the Queensland Court of Appeal concluded, albeit unhelpfully, that 'there is scope for legitimate debate as to the meaning of "offensive"'.[135]

CSEM legislation in certain jurisdictions also requires the reasonable person test for classification of material as CSEM. The reasonable person test is a well-known and commonly used threshold under criminal law,[136] as well as other areas of law such as negligence.[137] The reasonable person is generally a measure of what an ordinary defendant might do, or characteristics they might have, in the position of the defendant.[138] The 'reasonable person' test is expressly an objective one for determining CSEM criminality and, in fact, CSEM legislators have affirmed their intention for reasonableness to be read as an objective test.[139] In jurisdictions with a reasonable person test, then, courts would need to determine whether the conduct was objectively offensive and any material falling outside of this scope would not fulfil the CSEM test.

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[128] *R v Melville* [2009] QDC 436

[129] *NSW Police Force v X* [2014] NSWLC 23.

[130] *R v SDI* [2019] QCA 135 [41].

[131] *Guerin v HB* [2017] NTSC 14 [23]

[132] (1987) 31 A Crim R 383, 387.

[133] [1951] VLR 316, 318.

[134] *Guerin v HB* [2017] NTSC 14 [38]-[39].

[135] *R v SDI* [2019] QCA 135 [49].

[136] *Stingel v R* (1990) 171 CLR 312.

[137] See, eg, *King v Phillips* [1953] 1 QB 429.

[138] See, eg, *R v Lavender* (2005) 222 CLR 67.

[139] See, eg, Explanatory Notes, Criminal Code (Child Pornography and Abuse) Amendment Bill 2004 (Qld) 7.

Caution should be applied when determining the scope of offensiveness to a reasonable person. Gillespie[140] identified the difficulties with an objective approach being that it may encompass material which should not be considered CSEM, such as a photograph of a naked child at the beach, rather than consider the context of the material. Australian legal authorities have established, however, that a young naked child at the beach would not be an offensive or demeaning context for a reasonable person.[141] NSW parliamentary debates, for example, emphasised specifically that 'innocent family photographs of naked children' should not be considered offensive to a reasonable person.[142] Something more than a child's nakedness is needed to indicate offensiveness by an objective standard.[143] Similarly, the South Australian Court of Appeal determined that were a young child to remove their swimwear to urinate on the beach, that action would not be regarded as offensive to the general community.[144] Urination goes beyond mere nakedness although an important nuance can be raised here. While very young children may be able to publicly urinate without causing offense or public ire, it is unlikely the same level of acceptance would be extended to older children who are pre-teens or teenagers. It is the context of that nakedness that is more important to assessing offensiveness. Further, what is objectively offensive (or inoffensive) at the time of a court's consideration may not remain objectively offensive (or inoffensive) in the future. The reasonable person test is subject to public standards which may change.

The objective approach causes further challenges. Examples where case law interprets CSEM offences is largely present in District Court (or equivalent) case law. While there have been some appellate court decisions, which will be discussed in this article, the lower court judgments provide helpful discussion of the interpretation process courts undertake when considering the contextual element of CSEM or determining whether the elements of CSEM have been established. The lower court judgments highlight some inconsistency in the interpretation process for CSEM offences.

In the context of the legislation, Queensland, for example, determines material to be CSEM where it depicts a child, is likely to cause offence to a

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[140] Alisdair Gillespie, 'Legal definitions of child pornography' (2010) 16 *Journal of Sexual Aggression* 19, 27.

[141] See, eg, *Phillips v Police* (1994) 75 A Crim R 480.

[142] New South Wales, *Parliamentary Debates*, Crimes Amendment (Child Pornography) Bill 2004, Legislative Council, 9 December 2004, 13727 (John Hatzistergos).

[143] See, eg, *Director of Public Prosecutions (NSW) v Annetts* [2009] NSWCCA 86.

[144] *Phillips v Police* (1994) 75 A Crim R 480, 493.

reasonable adult, and the child is depicted in an offensive or demeaning context.[145] In *R v Melville*,[146] prosecution were unable to establish that an accused's possession of six images were offensive or demeaning within the legislative definition of CSEM. The images depicted naked boys undertaking 'normal childhood interaction' such as bowling, talking and participating in school activities but they were 'relaxed with their nudity'.[147] It should be noted here that children being relaxed, smiling or expressing enjoyment in their activities can be contrived because the offender's behaviour may have contributed to the child victim's state, such as through grooming or drugs.[148] The offensiveness test determines the characteristics of that image: a child expressing pain is likely more objectively offensive than a child who appears relaxed and/or happy. While the prosecution conceded that the material itself was not objectively offensive, the potential for that material to be used offensively was significant.[149] The Court disagreed, finding that "the conduct of the accused is irrelevant to the definition of [CSEM] in section 207A", that "what is described or depicted in the material is the only thing to be assessed" and that a person can only be guilty of a CSEM offence where the material is, in fact, CSEM.[150] Despite the accused's possession of photos depicting naked children, the behaviour fell outside the CSEM definition because the photos themselves were not offensive to a reasonable person, despite being used for an offensive purpose or within an offensive context. The objective test needed to be satisfied for the court to further consider which CSEM offence (or possible defences) applied to the situation; where the material is not CSEM, there will be no criminal offence. The prosecution's submissions about material being used in an offensive way contains a subjective perspective requiring inference of the accused's motivations; an argument at odds with the objective nature of Queensland's CSEM legislation.

It could be argued that material captured may be offensive depending on the circumstances of its use. A child's parents capturing an image of a naked child as a family photo is much less offensive than a sexual offender capturing that same photo for their own sexual gratification or a person posting the photo to a CSEM website for others to download. The reasonable person test does not necessarily account for circumstances of use, omitting that important

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[145] *Criminal Code 1899* (Qld) s 207A (definition of 'child exploitation material').

[146] [2009] QDC 436.

[147] *R v Melville* [2009] QDC 436 [8].

[148] Avery (n 54); Alisdair Gillespie, 'Sentences for Offences Involving Child Pornography' (2003) *Criminal Law Review* 81, 82.

[149] *R v Melville* [2009] QDC 436 [10].

[150] Ibid [11].

contextual approach which can consider the motivations of the offender. Taylor and Quayle argued that 'the extent to which a photograph may be sexualised and fantasised over lies not so much in its objective content, but in the use to which the picture may be put'.[151] The 'gaze' of the viewer or offender could affect the offensiveness of the material. Without considering the context of the material, a purely objective test risks material which perhaps should be classified as CSEM being exempt from the legislative scope as in *R v Melville*.

Despite clear language in an Act, statutory provisions are subject to judicial interpretation. In *R v Melville*, the court adopted an objective test when interpreting Queensland's CSEM offence, however, this was not followed in *CCI v The Queen.*[152] The accused in *CCI v The Queen* covertly filmed two pre-pubescent girls undressing and showering over a period of years. Objectively, and following similar reasoning to *R v Melville*, it could be argued that footage of children showering, albeit doing so while naked, is not objectively offensive given it is an everyday act. The District Court in *CCI v The Queen* did not follow a similar line of reasoning though. Reid J distinguished *R v Melville* as 'materially different' because the images in *CCI v The Queen* contained some close-up visuals of girls' genitalia and the images were stored alongside adult pornography, suggesting there were motivations of sexual gratification.[153] Reid J refused to distinguish the context of the CSEM from the objective test; that the CSEM was both stored amongst adult pornography and captured in such a way that the victims were unaware they were being filmed were contextual elements deemed relevant to the consideration of offensiveness yet separate to the images' constitution.[154] While the Queensland District Court is not bound by its own previous decisions,[155] and so *CCI v The Queen* did not need to follow *R v Melville*, the different approach to applying the objective test is disconcerting. Therefore, the *CCI v The Queen* decision brought in a contextual element at odds with a close reading of the CSEM definition.[156]

Superior courts also do not agree on the correct approach to applying the reasonable person test. The *CCI v The Queen* approach, which considered the

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[151] Taylor Quayle (n 23) 33.

[152] [2011] QDC 375.

[153] *CCI v The Queen* [2011] QDC 375.

[154] Ibid.

[155] *Valentine v Eid* (1992) 27 NSWLR 615, 621-2.

[156] Which requires that material be objectively assessed as offensive and depicting a sexual, demeaning or offensive activity, see *Criminal Code 1899* (Qld) s 207A (definition of 'child exploitation material').

context of the offending, was affirmed as the correct approach in a Queensland superior court decision.[157] The Queensland Court of Appeal in *R v SDI*[158] held that when examining CSEM material the court could, in fact, consider broader contextual circumstances of the offending. Specifically, the context, as in the *sexual context*, can give rise to positioning material as offensive to a reasonable person because it is the context which separates CSEM from innocuous material. Conversely, in the NT Supreme Court decision of *Guerin v HB*,[159] the circumstances related to the alleged CSEM's creation were determined as *not* relevant to determining the context of the CSEM, following a similar line of reasoning as the *R v Melville* approach. The accused, in *Guerin v HB*, was a photographer who had photographed his naked children and displayed those photographs around his home. Blokland J considered that the legislative drafting of the CSEM 'is clearly directed to the quality and character of the image'.[160] Blokland J held that the image itself is subject to scrutiny rather than the broader circumstances of the image's creation or possession (the context).[161] Her Honour further acknowledged how other case law authority had come to a different conclusion regarding relevance of the broader CSEM context to classifying CSEM and suggested these interpretations are 'highly statute specific' and other statutes may have 'allowed more latitude' compared to the NT legislation.[162] The NT and Queensland legislation may have been marginally different, in terms of individual wording, but the contextual elements between the two jurisdictions are so similar that such polarised interpretation of the reasonable person test is concerning and confusing.

Given the frequent disagreement about the correct approach to CSEM classification, CSEM legislation should be considered critically. An interesting analogy was raised in *R v Morcom*[163] in relation to determining objectivity for the purposes of satisfying a criminal offence. Specifically, if a person possesses an illicit drug, the possession of that drug is often contingent on the drug having the chemical composition of an illicit drug. Should the material be merely white powder that is not an illicit substance, the accused's belief that what they possessed is an illicit drug would not be enough to

[157] *R v SDI* [2019] QCA 135.

[158] [2019] QCA 135 [55].

[159] [2017] NTSC 14.

[160] *Guerin v HB* [2017] NTSC 14 [28].

[161] Ibid.

[162] Ibid [30].

[163] [2015] SASCFC 30.

convict them.[164] Applying the reasoning to CSEM, the material's constitution as CSEM is significant. A person's understanding or motivations are irrelevant. According to SA, the possessor's belief in the illicit nature of the substance is not sufficient to establish the offence; the nature of the drug falling within the legislative definition is the only thing which can be used to ensure criminality.[165] Comparatively, in CSEM, fulfilling the definition is vital, whereas the accused's belief that they possess CSEM (or otherwise), or their intentions to deal with that material in a particular way, is not relevant and cannot factor in to an assessment of whether, or not, material is CSEM.[166]

Queensland does not follow this reasoning. Possession requires knowledge of a thing's existence but not its character; according to *Clare v R,*[167] a person who believes they possess an illicit drug are criminally liable for that possession despite the thing not being illicit in character. The High Court of Australia affirmed *Clare v R's* interpretation of possession in a 3:2 majority.[168] While *Clare v R* related to drug offences (rather than CSEM), it shows how the *R v Morcom* analogy, used to determine objectivity, cannot apply across jurisdictions. Such an analogy is unlikely to be helpful in resolving the clear dichotomy of considering context in the reasonable person jurisdictions.

In *Director of Public Prosecutions (NSW) v Annetts*,[169] the NSW Court of Appeal considered their jurisdiction's CSEM definition. In that case, boys were covertly filmed while undressing in a public swimming pool changing room. The content of the videos was found to be the only thing relevant to determining whether, or not, they were CSEM. Specifically, neither the fact that the material was secretly recorded nor the circumstances which motivated the offender were found to be relevant to satisfying the legislative test.[170] What was relevant can be informed by 'the number of images, the gestures of those photographed and the portion or portions of the body, including the genitalia, depicted'.[171] So, the factors that show material to be CSEM relate to the particulars of the material itself, such as a close-up view of a child's genitalia, rather than it being secretly recorded or captured for sexual gratification. In this way, footage showing boys showering is not offensive

[164] *R v Morcom* [2015] SASCFC 30 [26].

[165] *R v Morcom* [2015] SASCFC 30.

[166] Ibid [26].

[167] [1994] 2 Qd R 619.

[168] *Tabe v R* (2005) 225 CLR 51.

[169] [2009] NSWCCA 86.

[170] Ibid [10].

[171] Ibid [11].

but close-up footage of genitalia is likely to be. This distinction appears to be crucial to assist courts interpreting the 'reasonable person' test objectively.[172]

The NSW Court of Appeal, in a later case, followed similar reasoning to their decision in *Annetts*. In *Turner v The Queen*,[173] the accused filmed female children known to him, and in various stages of undress, over a period of approximately five years. The Court of Appeal considered four grounds of appeal, one of which is relevant to this discussion: an alleged error in the assessment of the objective seriousness of the offences. The NSW Court of Appeal found that the motivations of the CSEM offender are not relevant to an objective test because they are not part of the CSEM definition.[174] As such, the nature of the material is the only relevant consideration of an objective test. If an offender uses material that is not objectively offensive, such as a naked child on the beach, for devious or sexual purposes, that is not CSEM behaviour where there is an objective test.

However, omitting the motivations of the offender seems to be a significant flaw in the legislative drafting. An innocuous photo of a child which has been exploited for a person's own sexual gratification is, of itself, offensive. Yet the nature of that image is not objectively offensive so it falls outside CSEM criminality. Surely such an approach does not correspond with parliament's intentions to protect children, reduce CSEM in the community and hold offenders accountable.[175] Context is clearly missing from such an interpretation.

Because an objective approach requires consideration of a *reasonable person*, there may be differing societal standards to meet that threshold. Take the Bill Henson controversies as an example. Henson, a Sydney artist, regularly exhibits photographs he has taken depicting children posing in revealing and sexualised ways including in states of nudity.[176] In 2008, there was public outcry which caused community re-evaluation of acceptable standards from

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[172] *Director of Public Prosecutions (NSW) v Annetts* [2009] NSWCCA 86.

[173] (2017) 271 A Crim R 54.

[174] *Turner v The Queen* (2017) 271 A Crim R 54, 64.

[175] See, eg, *R v Morcom* [2015] SASCFC 30 [13]; Commonwealth, *Parliamentary Debates*, Senate, 17 September 2019, p. 2351 (Helen Polley); Victoria, *Parliamentary Debates,* Legislative Council, 30 August 2016, p. 3967 (Rachel Carling-Jenkins).

[176] Roslyn Oxley9 Gallery, *Bill Henson* (2021) <https://www.roslynoxley9.com.au/artist/bill-henson>; Brian Simpson, 'Sexualizing the child: The Strange case of Bill Henson, his 'absolutely revolting' images and the law of childhood innocence' (2011) 14(3) *Sexualities* 290.

journalists, social commentators and even Prime Minister at the time, Kevin Rudd.[177] The widespread condemnation changed society's perception of CSEM and art to such an extent that NSW's criminal law removed artistic merit as a defence to CSEM.[178] However, Henson hosted an art exhibition in 2021 featuring his style of controversial child models which did not attract the same level of condemnation as the 2008 art exhibition.[179] Perhaps society has evolved to be more accepting of risqué art or maybe it was 'old news' and the community had bigger societal concerns than standards of artwork at the time. What is *reasonable,* though, could be difficult to quantify particularly in relation to art. A more progressive society may diminish the current protections from an objective test because society may evolve in such a way as to permit previously unacceptable behaviour.[180] Likewise, society could regress deeming previously acceptable behaviour to be offensive. As society changes, offensiveness may change which can be problematic when the standard for CSEM classification is objectivity.

If objectivity is based upon community standards, judges themselves determine that standard. Bray CJ in *Attorney-General v Huber*[181] expressed that

> it is the average contemporary Australian standard which must be applied, not the standard of the judge himself as a private individual, whether that standard is laxer or, as is perhaps more inherently probably, stricter than the average contemporary Australian standard.

Ultimately, it is parliament's role to prescribe acceptable limits of behaviour. So perhaps parliament is responsible for addressing potential confusion in those jurisdictions. While Queensland's appellate court interprets objective circumstances of offending according to broader context, NSW's equivalent

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[177] *Sydney Morning Herald*, 'Rudd revolted' (online, 23 May 2008) <https://amp.smh.com.au/entertainment/art-and-design/rudd-revolted-20080523-gdseuc.html>.

[178] *Crimes Amendment (Child Pornography and Abuse Material Act 2010* (NSW). See also Hadeel Al-Alosi, 'Australia's Child Abuse Material Legislation: What's the Artistic Merit Defence Got to Do with It?' (2018) 42 *Criminal Law Journal* 147; Mark McLelland, 'Australia's 'child-abuse material' legislation, internet regulation and the juridification of the imagination' (2011) 15(5) *International Journal of Cultural Studies* 467.

[179] See Chloe Wolifson, 'With his latest works, Bill Henson manages to pause time', *Sydney Morning Herald* (online, 24 May 2019) <https://www.smh.com.au/entertainment/art-and-design/with-his-latest-works-bill-henson-manages-to-pause-time-20190524-p51qxb.html>.

[180] Al-Alosi (n 28) 157.

[181] (1971) 2 SASR 142, 168.

appellate court does not. While judicial interpretations are certainly 'statute specific',[182] legislation is similar enough that the dichotomous interpretations are unhelpful. Clare J in *R v Melville* stated 'if parliament chose to outlaw naked pictures of children it could do so in simple terms'.[183] The fact that the reasonable person test for CSEM remains in six of Australia's jurisdictions suggests either parliaments are unaware of, or unconcerned with, the unintended consequences of their legislative drafting, namely that omitting context from CSEM definitions in the objective jurisdictions may result in fewer convictions.

B Sexual interest or arousal test

There are currently two jurisdictions which use the accused's sexual interest or arousal to determine whether material is CSEM. SA defines CSEM to be 'material that describes or depicts a child under, or apparently under, the age of 17 years engaging in sexual activity (or where a child, or their bodily parts, have been depicted) and that 'is of pornographic nature'.[184] *Pornographic nature* is then defined as 'material intended or apparently intended to excite or gratify sexual interest; or to excite or gratify a sadistic or other perverted interest in violence or cruelty'.[185] In that way, non-sexual behaviour, such as abuse or torture, could be included within the scope of the definition. SA allows circumstances of the CSEM's production or use to be taken into account when determining the nature of the material.[186] While 'pornographic nature' relates to exciting or gratifying sexual, sadistic or perverted interest, the definition does not appear to be restricted to personal sexual motivation. A person who deals with CSEM for financial gain, for example, may still fulfil 'pornographic nature' because they are facilitating another's sexual interest. *R v Shore*[187] provides clarity here: "[i]t is plain that the intention (or apparent intention) to excite or gratify sexual interest (and other interests)… is not the intention of the viewer of [CSEM]. It is the intention of the producer of the material." Where the material was produced to gratify someone's

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[182] *Guerin v HB* [2017] NTSC 14 [30].

[183] *R v Melville* [2009] QDC 436, [16].

[184] *Criminal Law Consolidation Act 1935* (SA) s 62 (definition of 'child exploitation material'). Note, the definition also includes images, representations of or bodily parts of a such where they are under, or apparently under, 17 years; or relate to a child-like sex doll.

[185] *Criminal Law Consolidation Act 1935* (SA) s 62 (definition of 'pornographic nature').

[186] Ibid s 63C.

[187] [2013] SADC 135 [30].

interest in some way, it does not matter if the person creating the material had no sexual motivation. In that way, context is appropriately addressed.

ACT follows a similar definition to SA featuring 'sexual arousal or sexual gratification'.[188] The sexual arousal or gratification specifically relates to 'someone other than the child' so, again, it does not circumvent a producer who has a financial, rather than sexual, interest in the CSEM. These provisions relate to the purpose for which the material is being used by an offender rather than whether the material might, itself, be offensive. The provisions were designed in this way to 'ensure, for example, that a photo taken by a parent or an artist is not caught unless it is done substantially for sexual purposes'.[189] It is worth noting, here, that the below discussion refers to 'sexual interest' more broadly. Such terminology is used, in a wide sense, to also include sexual arousal and gratification, as well as sadistic or other perverted interests which are not necessarily sexual in nature.

Courts have helped to shape the legislative definitions for CSEM's contextual element. The SA Court of Criminal Appeal decision in *Phillips v Police* influenced SA's statutory response to CSEM offending.[190] In that case, the Court considered whether video material of boys urinating in public toilets was 'indecent, immoral or obscene'; this threshold is similar, in nature, to offensiveness. The Court found that the legislation posed an objective test and only the 'nature and form of the material' was relevant to an objective assessment rather than the circumstances relating to the material's creation. In that way, the legislation aligned with the 'reasonable person' tests for CSEM discussed above in this article. The Court in *Phillips v Police* determined that boys urinating was not 'indecent, immoral or obscene' regardless of how that material might have been used by an offender because the act of urination is not 'offensive to the contemporary standards in the Australian community'.[191] The Court emphasised their role in addressing the nature and form of the material, that is, the content of the films which depicted boys urinating, rather than the circumstances which brought the material into existence, namely the nefarious nature of covertly recording those boys for sexual or other inappropriate purposes. Such an approach corresponds with the reasonable person and offensiveness test in the other Australian jurisdictions discussed above. South Australian parliament, being dissatisfied with such a result (that a person could be acquitted because the circumstances or context of their offending is deemed irrelevant), sought to address the

[188] *Crimes Act 1900* (ACT) s 64(5).

[189] Explanatory Statement, Crimes Legislation Amendment Bill 2004 (ACT) 3.

[190] (1994) 75 A Crim R 480.

[191] Ibid 497.

deficiencies in the legislation which allowed for the defendant's acquittal in *Phillips v Police*. As such, SA legislation was amended to adopt the 'sexual arousal or interest' threshold rather than considering offensiveness which allowed subsequent case law to better consider context.

SA's definition incorporating 'intention or apparent intention' has caused considerable confusion in relation to the definition's practical application to alleged criminal conduct. Particularly, from members of parliament relating to the difference between 'intention' and 'apparent intention'. Parliament resolved that if intention is 'apparent on the face of the material presented to it', there is sufficient scope to establish intention.[192] Intent, in some circumstances, will be immediately obvious, such as 'with hardcore child pornography'.[193] However, intent will be more difficult to establish in cases which might not be obvious cases of CSEM. The SA Parliament suggested that it is for these cases that 'apparent intention' is important. 'Apparent intention', according to parliamentary debate, is an opportunity to catch offenders where "[i]t would be unduly onerous to require proof of the actual intention in every case" and can be proven through circumstances and inferences.[194] For example, having a catalogue of material depicting boys under the age of 16 would be an apparent intention because one instance of that material might not be pornographic but the circumstances relating to the possession, such that an offender has made an attempt to compile a catalogue, would be sufficient to demonstrate an 'apparent intention'.[195] Context is clearly established here because the distinction between intention and apparent intention allows for contingencies in the circumstances which could affect whether CSEM is established. Such an approach corresponds with criminological findings that suggest common features of CSEM offenders may include a 'collection' of CSEM which is kept in a methodically structured manner, able to be shared with others and is almost never destroyed, even when the offender is under police investigation.[196]

Courts have further articulated the difference between intention and apparent intention. In a dissenting judgment, Stanley J suggested an accused's actual

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[192] South Australia, *Parliamentary Debates*, House of Assembly, 26 October 2004, p. 561 (Michael Atkinson).

[193] South Australia, *Parliamentary Debates*, House of Assembly, 8 December 2004, p. 1252 (Michael Atkinson).

[194] South Australia, *Parliamentary Debates*, House of Assembly, 26 October 2004, p. 561 (Michael Atkinson).

[195] South Australia, *Parliamentary Debates*, House of Assembly, 8 December 2004, p. 1252 (Michael Atkinson).

[196] See, eg, Krone (n 22); Max Taylor, Gemma Holland and Ethel Quayle, 'Typology of paedophile picture collections' (2001) 74 *The Police Journal* 97.

intention can be inferred from their conduct but apparent intention can be inferred from the surrounding circumstances of the offending.[197] As such, this distinction between intention and apparent intention has been acknowledged as a 'compendious concept'.[198]

An unintended effect of prescribing a sexual interest test might be that prosecution may have difficulties proving material was intended to be used for sexual purposes given possession or access might not automatically equate to establish sexual interest. Establishing whether someone intends to use the CSEM for a sexual (or otherwise offensive) purpose "sets a fairly high barrier in relation to a successful prosecution" and is, therefore, challenging, however, it is also a safeguard against "innocent family… photographs" becoming CSEM.[199] In *Western Australia v RPK*,[200] Eaton J suggested that 'the fact that [the accused], in private, had an interest in collecting, viewing, storing and organising child exploitation material does demonstrate that he had a sexual interest in children'. As such, relevant circumstances could allude to the offender's intent rather than establishing their state of mind at the time of the offending.

The challenge of the sexual interest or gratification contextual element was specifically highlighted in *R v Murdock*.[201] The accused was charged with producing and possessing CSEM after images and videos of a naked child were found on his phone. The prosecution alleged the material was graphic, not "normal or everyday common pictures" and were of "a prurient nature… beyond the realm of common decency".[202] Muecke J found the material to be CSEM and the accused was convicted on the basis that he intended to excite or gratify sexual interest. The circumstances of the possession and production of the CSEM were considered including that the accused indicated he was a disciplinarian with a strong moral compass to know right from wrong. Such an interpretation of the legislation is a subjective approach because it considers the accused motivations rather than the nature of the material.[203]

The *R v Murdock* decision, resulting in a conviction, seems to lead to the correct outcome. If the test used in *Murdock* was the reasonable person test,

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[197] *R v Morcom* [2015] SASCFC 30 [118]

[198] Ibid [22].

[199] South Australia, *Parliamentary Debates*, House of Assembly, 7 December 2004, p. 1209 (Vicki Chapman).

[200] [2017] WADC 42, [33].

[201] [2009] SADC 109.

[202] *R v Murdock* [2009] SADC 109 [37].

[203] *R v Morcom* [2015] SASCFC 30 [21].

it is likely the outcome would have been the same. The material itself was offensive to a reasonable person because the videos breached common decency. However, because SA relies upon the sexual interest test, the court did not consider offensiveness. The subjective approach, in this case, resulted in an outcome which considered the context of the offending and produced a result favourable to ensuring inappropriate behaviour was condemned. However, the subjective approach has limitations which are outlined below.

The SA Court of Criminal Appeal in *R v Morcom*[204] clarified the CSEM legislation in a way that its parliament found difficult. In *Morcom*, the accused was a solicitor practising from his home when police conducted a search for CSEM. Following a police search, 16 electronic images alleged to be CSEM were seized and the accused was charged with six counts of possessing CSEM. Relevant to this discussion, the Court on appeal considered whether the seized material was 'pornographic' according to the legislative definition. Despite the Court of Criminal Appeal analysing a previous amendment of the CSEM legislation, the amendments did not 'materially alter the substance' of the previous legislation so *R v Morcom's* analysis is relevant for the purposes of this discussion.[205]

Peek and Blue JJ determined that establishing 'child exploitation material' (or 'child pornography' as it was labelled in *Morcom*) requires meeting one of two 'alternative requirements' in each of the two parts to the definition.[206] As identified above, part (i) of CSEM, in SA, requires establishing a child engaging in sexual activity; a representation of the child (or bodily parts); or dealing with a child-like sex doll. If the 'physical characteristics' threshold is met, prosecution then needs to establish part (ii) which is a 'functional or purposive characteristic' and relates to either: excite or gratify sexual interest; or excite or gratify a sadistic or other perverted interest in violence or cruelty. The test for CSEM in SA, therefore, requires prosecution to establish two limbs:

(a) 'The *physical* characteristic of depicting a child engaging in sexual activity; and
(b) The *functional or purposive* characteristic of the material being intended or apparently intended to excite or gratify a sexual (or perverted or cruelty) interest.'[207]

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[204] [2015] SASCFC 30.

[205] *R v R, GS* [2017] SADC 136 [123].

[206] *R v Morcom* [2015] SASCFC 30 [15].

[207] Ibid [17] (emphasis added).

Based upon the two limbs for satisfying CSEM, some interesting points arise. For the first limb, the physical characteristic of determining whether the victim is a child is clearly an objective one.[208] While it does not import a reasonable person standard like other objective tests, it does not depend upon any person's state of mind. However, determining the objectivity, or otherwise, of the second limb is less straightforward.

Two competing arguments in relation to the more contentious second limb were made in *Morcom*. The applicant argued that the second limb was an objective construction because determining whether material is intended or apparently intended to excite or gratify sexual interest is an objective consideration of "the content and attributes of the material and the context and circumstances of its production and intended use" and any subjective intention related to the accused's motivations were irrelevant.[209] On the contrary, the respondent argued that material satisfies the definition where the intention is manifested by either the objective circumstances or where the accused subjectively intends to use the material for sexual interest, in response to an approach adopted in the District Court of SA in *Murdock*.[210]

An objective approach was adopted in *Morcom* and a subjective approach was expressly rejected. Peek and Blue JJ (by majority) cautioned against applying a subjective test to determine whether material would excite sexual interest, using examples:

(a) if a shop catalogue shows a fully dressed child, and a person uses that catalogue to excite sexual interest, that could *subjectively* be CSEM despite the image potentially containing no nudity or sexual poses whatsoever;[211] and
(b) if a male teenager shares a (non-sexual) photo of himself to impress, or foster attraction with, a female teenager of the same age, that could *subjectively* be CSEM because the subjective intention is to excite sexual interest.[212]

Example two, above, is specifically relevant to 'sexting', addressed earlier in this article. The Court in *Morcom*, by majority, ultimately dismissed the

[208] Ibid [18]
[209] Ibid [18].
[210] [2009] SADC 109.
[211] *R v Morcom* [2015] SASCFC 30 [56].
[212] Ibid [51].

appeal. The objective approach upheld the jury verdict in finding the accused culpable of CSEM offences.

Some notable observations can be made arising from comparing the differing *Morcom* and *Murdock* approaches. Both cases resulted in offenders being held accountable for conduct breaching SA's CSEM legislation; however, *Murdock* relied upon a subjective approach which was rejected in *Morcom*, with *Morcom*, instead, applying an objective approach. Adopting a subjective approach could capture conduct which is unequivocally *not* CSEM. [213] As such, an objective approach to the sexual interest test results in some consideration of context, where that context of the offending is considered objectively, without considering the motivations of the offender, nor the potential for capturing conduct which should not be criminalised. The words 'intended or apparently intended' need to be read together and it is unhelpful to suggest for them to be defined individually. In that way, Peek and Blue JJ hold that the terms are used '*ex abundanti cautela'*.[214]

IV CHALLENGES OF THE CSEM APPROACH IN AUSTRALIA

Adopting a purely objective or subjective approach to classifying CSEM produces unhelpful results. To re-emphasise those difficulties, an objective CSEM test often using a reasonable person as a threshold, means a person could possess material for their own sexual gratification or for the purposes of promulgating CSEM, without becoming captured by a CSEM definition because the material in question is not offensive enough, of itself, to warrant engaging the provision. The objectivity lies in assessing the offensiveness of the material rather than an offender's intention to deal with the material. Where the material is inoffensive, yet is used for offensive reasons, the reasonable person test cannot capture it. Where the material is a shop catalogue, for example, it seems reasonable that CSEM culpability should not apply even where that material might be used for sexual or exploitative purposes. However, where the material is a naked child, even where that material is objectively inoffensive, there seems to be a gap in reasoning which means an offender possessing that image for sexual purposes cannot be held criminally responsible for their conduct. Law enforcement would then be relying upon other circumstances which suggest objective offensiveness, such as a close-up shot of genitalia or material being stored with adult pornography, to pursue prosecution. Where an offender possesses a catalogue of child nudity, for example, but avoids the objectively offensive accompanying

[213] See *R v Murdock* [2009] SADC 109.

[214] *R v Morcom* [2015] SASCFC 30 [38].

material, they may be able to avoid culpability. In that way, the objective approach applied in the reasonable person test can fail to address the important context of offending, including the motivations of the offender, which can result in an unwarranted acquittal.

Conversely, a purely subjective approach to the sexual interest test could capture material that might excite sexual interest but might not be offensive. Using the shop catalogue example again, a subjective approach accounts for an accused's motivations regardless of the content of the material and could result in culpability which is not warranted. An objective approach which considers the material's ability to excite one's sexual interest (whether the viewer's sexual interest themselves or another person's interests) seems to appropriately address the primary purposes of CSEM legislation which is to protect children from harm.[215] As such, an objective approach to the sexual interest test seems to be the preferable approach for holding offenders accountable for their interactions with CSEM.

Notwithstanding the comprehensive case law development which has occurred so far, it is worth mentioning that relying upon an objective or subjective test arguably minimises the harm that children suffer from CSEM. Limiting CSEM to material which would be offensive to a reasonable person, or for the purposes of sexual gratification, removes consideration of the victim's potential suffering. CSEM which is not offensive, and outside the CSEM definition, might still cause harm to a victim. Hessick[216] identified that 'whether an image is obscene does not necessarily indicate "whether a child has been physically or psychologically harmed in the production of the work" – that is, whether an image "required the sexual exploitation of a child for its production"'. As such, Al-Alosi advocates for a harm-based approach which considers 'how the material was produced rather than its effect on the viewer'.[217] Harm is also relevant to context because material which harmed a child in its making is contextually wrong. A purely harm-based approach is unlikely to be helpful given CSEM does not always depict overt child harm. It seems a delicate balance is needed to capture materials in the right way and that balance can be found with *context*. It is the context of capturing, and keeping, material which signifies its harm to the community.

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[215] See, eg, *R v Morcom* [2015] SASCFC 30 [13]; Commonwealth, *Parliamentary Debates*, Senate, 17 September 2019, p. 2351 (Helen Polley); Victoria, *Parliamentary Debates,* Legislative Council, 30 August 2016, p. 3967 (Rachel Carling-Jenkins).

[216] Carissa Hessick, 'The Limits of Child Pornography' (2014) 89 (4) *Indiana Law Journal* 1427 quoting *New York v Ferber* 458 US 747 (1982).

[217] Al-Alosi (n 28) 156.

V CONCLUSION

CSEM is a significant challenge for legislators, courts and the community. In response to changing technology and an increasing prevalence of offending,[218] CSEM legislation must be responsive to the challenges of capturing conduct which is harmful enough to be criminalised. However, legislation must also ensure that conduct outside the scope is not inadvertently and unintentionally captured within the definition. Legislative drafters and parliamentarians, then, have a difficult task to capture the nuances of complicated and continuously evolving criminal behaviour to hold offenders accountable for their conduct. As CSEM legislation differs across Australian jurisdictions, there are substantial differences in interpreting the provisions, leading to ambiguity in their application by courts and parliament alike.

CSEM legislation is challenging because of the differing, and sometimes contradictory, approaches to assessing the circumstances of offending. CSEM offences are largely characterised by four key elements: the victim is a child; the CSEM is 'material'; there is an offensive or sexual context; and the material is dealt with in a way that constitutes a discrete offence, such as possession or production. It is the offensive or sexual context element which causes considerable judicial commentary and some parliamentary confusion.[219] The state and territories' approach to the contextual element of CSEM offences is largely an objective one. In the jurisdictions which assess offensiveness, a 'reasonable person' test is used. Such an approach encourages courts to consider the nature of the material; that is, whether that material is objectively offensive. The broader context of the behaviour or its intended use have no relevance to determining offensiveness in some jurisdictions while other superior courts have interpreted the CSEM test to allow consideration of context. Courts have interpreted CSEM's reasonable person test differently, leading to conflicting opinions in the superior courts and state and territory jurisdictions. Some superior courts allow the context perspective while others do not. Such results create uncertainty around what CSEM actually is, leading to unnecessary acquittals or unfair convictions. The uncertainty relates to how context is used when interpretating CSEM legislation.

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[218] Henshaw, Ogloff and Clough (n 8).

[219] See, eg, South Australia, *Parliamentary Debates*, House of Assembly, 26 October 2004, p. 561 (Michael Atkinson); *R v Morcom* [2015] SASCFC 30; *R v SDI* [2019] QCA 135; *Director of Public Prosecutions (NSW) v Annetts* [2009] NSWCCA 86.

Jurisdictions which use the sexual interest or arousal test have a stronger likelihood of obtaining offender CSEM convictions because context plays a greater role. Despite an objective construction of the provisions, the offenders interests can be considered. SA and ACT parliaments have managed to incorporate context within the boundaries of an objective approach. While such an approach does not extend to any broader circumstances of the offending, considering interests of the offender allows for some consideration of context. Context matters in CSEM offences and failing to account for context is a significant flaw in state and territory legislative frameworks.