THE CONFLATION OF IMAGES AND THE PROBLEM OF MAKING

INTRODUCTION

The Protection of Children Act 1978 (PoCA 1978) marked a significant milestone in protecting children from what is now known as Child Sexual Abuse Material (CSAM).[1] CSAM is itself a subset of Image-Based Sexual Abuse (IBSA), an issue that has seen significant legislative attention in recent years. However, little consideration has been given to how these laws interact and whether the protection of children is being affected by the widening scope of IBSA.

PoCA 1978 introduced, for the first time, a specific set of offences that related to the production, distribution and advertising of CSAM.[2] Unlike (adult) pornography, which was based on the obscenity standard requiring proof of it depraving or corrupting persons,[3] PoCA 1978 set the threshold as 'indecent',[4] with the subject of the Act becoming known as indecent photographs of children (IPoC). By 1988, our understanding of the cycle of production and abuse inherent in CSAM led Parliament to introduce an offence of simple possession of IPoC. Rather than amending PoCA 1978, a new offence was introduced in the *Criminal Justice Act 1988*.[5] In hindsight, that decision marks the starting point of the conflation of offences, and it would have been better had PoCA 1978 been amended to include the new offence. As the law broadened to encompass forms of IBSA that involved adults, that confusion has grown. This article highlights some of these challenges and suggests that the law on CSAM is in need of review. Such a review would ensure that the laws are fit for the current technological age but, more importantly, are refocused on the sexual abuse and exploitation of children.

[1] The use of the term 'child porngraphy' has been phased out due to concerns that it was a problematic term that did not reflect the seriousness of what it portrayed.
[2] *Protection of Children Act 1978*, s.1.
[3] *Obscene Publications Act 1959*, s.1.
[4] In *R v Stamford* [1972] 2 QB 391 it was held that indecency and obscenity were at opposite ends of the same scale, and the question is whether the conduct offends contemporary standards of decency (see also *R v Graham-Kerr* (1988) 88 Cr App R 302).
[5] *Criminal Justice Act 1988*, s.160.

THE EXPANSION OF IPOC LEGISLATION

PoCA 1978 and the CJA 1988 have been amended several times over the years, perhaps most notably in 1994. Law enforcement and child safety campaigners were concerned that advancing digital technologies would not fall within the scope of PoCA 1978. Parliament sought to make PoCA 1978 fit for the digital era. It widened the definition of a photograph to include, 'data stored…which is capable of conversion into a photograph',[6] a definition we will return to momentarily. Two further key amendments were made. The first was to introduce the concept of a 'pseudo-photograph',[7] which is defined as '…an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph'.[8] The second change, and more relevant to us, was to insert the verb 'to make' into s.1 of PoCA 1978.[9]

These amendments recognised the shift from traditional to digital photography. In its traditional sense, a photograph is a photochemical reaction. Light is exposed to chemically treated film, which is then further processed. Prints are produced by exposing photosensitive paper to light passed through the negative, burning the image onto the paper. But digital technology shifted photography away from this. At one level, digitisation involved scanning these traditional photographs. This created an electronic version that could be sent to multiple people. A key advantage of digital images is that they do not degrade in quality. While the original photograph may be high quality, if it is copied and the copy is then copied, eventually the quality reduces as it proceeds through the chain (unless each copy is produced from the original negative). The same is not true of digital images; their quality remains the same regardless of who sends them. Digital images can, of course, be made available anywhere in the world. It is as easy for an image to be sent electronically from Preston to Sydney as it is to Glasgow. That can be contrasted with traditional photographs, which must be physically transported, making them susceptible to interception.

However, the digitisation of photographs was much more than this. Indeed, it began to change what we understand the term 'photograph' to mean. The basics remained the same

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[6] *Protection of Children Act 1978*, s.7(4)(b).
[7] *Criminal Justice and Public Order Act 1994*, s.84(2), (3).
[8] *Protection of Children Act 1978*, s.7(7).
[9] *Criminal Justice and Public Order Act 1994*, s.84(2)(a)(i).

– an image is produced by exposure to light – but instead of burning onto chemically treated film, the light is captured on a digital sensor, with the image recorded as a digital file. At one point, it was thought that this was technically a 'pseudo-photograph',[10] but we would now refer to this as a (digital) photograph, consistent with the term's etymology. 'Photo' is derived from the Greek word 'phos', which means light, and graph means 'drawing' or 'writing'. In other words, a photograph is an image created by exposure to light, meaning that digital or traditional film photographs should be treated the same, certainly, this is how the courts have subsequently acted.

What are pseudo-photographs? These are best thought of as digitally manipulated images.[11] For example, splicing would be a pseudo-photograph. This is where two or more photographs are spliced together to produce a single image (e.g. the 'head' of another person being put on the 'body' of another). Another example would be manipulation in which a photograph of an adult is digitally airbrushed to remove pubic hair and thin the hips, so that the resultant image looks like a child.[12]

While it was intended that computer-generated images would constitute a pseudo-photograph, this has arguably only come to pass comparatively recently. The wording of PoCA 1978 makes clear that it must 'appear to be a photograph',[13] something reinforced by the courts, who have noted that where an image is obviously not a photograph, it cannot constitute a pseudo-photograph.[14] Until recently (with the advances of AI), most computer-generated photos did not look realistic. Many were high-quality, but they still looked like a drawing or a rendering, and so did not 'appear to be a photograph'. To ensure there was no loophole in the law, Parliament enacted alternative laws to tackle such images.[15] That said,

[10] C. Manchester 'Criminal Justice and Public Order Act 1994: obscenity, pornography and videos' [1995] Crim LR 123 at 125.
[11] A.A. Gillespie *Child Pornography: Law and Policy* (2011, Routledge) 58.
[12] A.A. Gillespie *Child Pornography: Law and Policy* (2011, Routledge) 59.
[13] *Protection of Children Act 1978*, s.7(7).
[14] *R v Goodland* [2000] 2 WLR 1104.
[15] *Coroners and Justice Act 2009*, s.62. For a useful summary see S. Ost 'Criminalising fabricated images of child pornography: a matter of harm or morality?' (2010) 30 *Legal Studies* 230.

the latest advances, particularly so-called 'deepfakes', probably do meet the standard, meaning that where a child is depicted, they could now fall under PoCA 1978.

The Rise of Making

The newly-inserted verb 'to make' was initially thought to apply to pseudo-photographs and not digital photographs.[16] This seemed a plausible argument given the legislative context of the 1994 amendments. However, in *R v Bowden*[17] the term was given a much broader definition. The offender downloaded a series of IPoC from a website, stored them on a floppy disc, and printed some out. Where a person had custody of images, this had been thought to constitute the offence of possession, but this time the prosecution sought to charge making an IPoC.[18] Following an unsuccessful plea of no case to answer, he pleaded guilty but petitioned the Court of Appeal, arguing that the offence was not made out in law.

The appellant conceded that he was in possession of the photographs, but he argued he was not guilty of making, as this term was either linked to pseudo-photographs or meant creation, i.e., an original image. The first argument was dismissed quite quickly, noting that the plain wording of section 1 refers to the taking or making of a photograph or pseudo-photograph, not simply a pseudo-photograph.[19] The court also rejected the suggestion that the verb meant to create original images. They held that an image was now in existence on the defendant's computer that had not otherwise been there, and so that must mean the file (containing a photograph) had been made. They justified this approach by noting that images hitherto unknown in the jurisdiction could be brought here by downloading them. While that is true, it does not follow that a charge of possession could not be pursued, and the sentencing judge could treat downloading images that were unknown in this country as an aggravating factor.[20]

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[16] Criminal Justice and Public Order Act 1994' (1994) *Archbold News* 10(iv).
[17] [2001] QB 88.
[18] Contrary to *Protection of Children Act 1978*, s.1(1)(a).
[19] *Ibid*., at 95.
[20] It is likely that the court's comment about photographs not existing within the jurisdiction is almost certainly impossible to prove. The nature of the internet, and the fact that relatively few offenders are caught, means that a court could not possibly know whether the image already existed in this country.

The logic of *Bowden* was subsequently extended to viewing IPoC. In *R v Smith; R v Jayson*[21] two different first-instance cases were heard together at the Court of Appeal. Smith had been sent some emails that included IPoC. It is clear that he opened some of the images, and in doing so, a temporary file was created on his machine, which contained the IPoC. *Jayson* viewed images online but without downloading them. The Court of Appeal, applying *Bowden*, upheld their convictions for making IPoC, with the relevant image being that found in the cache.

The Court in *Jayson* went further and stated:

> In our view, the act of voluntary downloading an indecent image from a web page on to a computer screen is an act of making a photograph or pseudo-photograph. By downloading the image, the operator is creating or causing the image to exist on the computer screen.[22]

On the face of it, this suggests that the temporary file is unnecessary, since simply displaying the image on the screen suffices. That would make the offence very broad, and it must be put into the context that the technicalities of web browsers at the time meant that a file would have been saved in the cache. That is no longer as true (most browsers now include a 'private browsing' option that prevents an image being stored temporarily in the cache). Where a file is not stored in the cache, then it would be impossible to sustain a conviction for possession as the image is transient. That would mean the only possible charge would be making – applying *Jayson* – but that makes little sense. If you are watching a programme on the television, you would not suggest that the broadcaster has 'made' that programme. We would say that they are broadcasting it, and the person is viewing it, not making it. The comment above must be *obiter dictum*, but if viewing does not constitute making, then questions arise about what a person who watches a live-stream of CSAM would be guilty of.[23]

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[21] [2002] EWCA Crim 683.
[22] *Ibid*., at [33].
[23] Live streaming tends to be dealt with under the SOA 2003 rather than PoCA 1978 (see ss.48-50 when read in conjunction with s.51(2)(b). A person who watches a stream is likely to be taken as encouraging that offence (*Serious Crime Act 2007*, ss.44-46), particularly if they pay.

Setting aside that debate, the decisions in *Bowden* and *Jayson;Smith* are technically correct. As noted above, at its most basic, a file which is either a digital photograph or data 'capable of conversion into a photograph'[24] now exists when it did not before. That must rightly mean that the file was 'made'. However, as was conceded in *Bowden*, the offender could have been charged with simple possession under s. 160, so why was that course not adopted?

Bowden was arguably a creature of its time. It was a public policy response to significant changes to CSAM. As noted earlier, PoCA 1978 came into being at a time when photographs were physical objects, meaning it was quite tricky to obtain CSAM. Few people had the skill or equipment needed to develop their own photographs. Sending the images to a public processing laboratory would lead to the police being informed where the picture showed the sexual assault of a child, and so commercial production and distribution was more common.[25] Obtaining CSAM was also a challenge. While some sex shops would sell the material, many others did not, and a person would need to have the courage to ask the owner whether they stocked such material, risking an owner reporting him to the police for seeking such material. Some magazines would host carefully-worded adverts, usually from companies based abroad, that would imply CSAM could be purchased,[26] but that risked detection at customs. The net result was that these difficulties meant collections in the UK were small, often in the tens or very low hundreds.[27]

By the turn of the millennium, things had begun to change. Digital cameras and video recorders meant that home production became possible. Digital cameras did not require film to be processed like traditional photographs; they simply needed to be moved to a computer. At the same time, the internet became accessible at home rather than at the workplace.[28] The World Wide Web, newsgroups, and file-sharing sites made it much easier to obtain CSAM,

[24] *Protection of Children Act 1978*, s.7(4)(b).
[25] M. Salter and T. Whitten 'A comparative content analysis of pre-internet and contemporary child sexual abuse material' (2022) 43 *Deviant Behaviour* 1120 at 1121.
[26] M. Taylor and E. Quayle *Child Pornography: An Internet Crime* (2003: Routledge) 9.
[27] M. Taylor and E. Quayle *Child Pornography: An Internet Crime* (2003: Routledge) 157.
[28] A.A. Gillespie *Cybercrime: Key Issues and Debates* (3rd Edn, 2025, Routledge) 4.

with the number of people soliciting CSAM significantly increasing and collection sizes growing rapidly.[29]

When the possession offence was first introduced, it was a summary-only offence punishable by a fine.[30] The *Criminal Justice and Public Order Act 1994* increased the maximum sentence to six months' imprisonment, albeit leaving it as a summary-only offence.[31] This compared to PoCA 1978, where the offence was either-way and punishable by a maximum of three years' imprisonment.[32] The prosecution in *Bowden* almost certainly sought to use PoCA 1978 because they felt that, in the context of digital technology transforming the nature of CSAM, the maximum sentence for possession was no longer sufficient. The courts seem to have agreed since it would have been easy to restrict 'making' to the creation of original images without it contradicting the legislative aims of the 1994 legislation.

As Parliament recognised the radicalisation of CSAM enabled by technology, it responded by significantly increasing sentences. The *Criminal Justice and Court Services Act 2000* increased the maximum sentence for PoCA 1978 offences to ten years' imprisonment, and simple possession was increased to five years.[33] At that point, the courts adopted a different approach. The *Sentencing Advisory Panel* recommended that, for sentencing purposes, downloading should be treated as possession,[34] something the Court of Appeal implemented in *R v Oliver et al*.[35] The Sentencing Guidelines Council then followed this logic, followed by the Sentencing Council. Indeed, it remains a key part of the current guideline.[36]

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[29] M. Salter and T. Whitten 'A comparative content analysis of pre-internet and contemporary child sexual abuse material' (2022) 43 *Deviant Behaviour* 1120 at 1123.
[30] *Criminal Justice Act 1988*, s.160(3). The fine could not exceed level 5 on the standard scale (at that time, meaning a fine no more than £2,000).
[31] *Criminal Justice and Public Order Act 1994*, s.86.
[32] *Protection of Children Act 1978*, s.6(2).
[33] *Criminal Justice and Court Services Act 2000*, s.41.
[34] A.A. Gillespie 'Sentences for offences involving child pornography' [2003] Crim LR 81 at 82.
[35] [2002] EWCA Crim 2766 at [12], [14].
[36] The definitive guidelines are now web-based. The relevant guideline is https://sentencingcouncil.org.uk/guidelines/possession-of-indecent-photograph-of-child-indecent-photographs-of-children/ (Accessed 27.10.25).

Setting aside the technicalities used in *Bowden*, there is considerable logic in what the guidelines state. Let us take a somewhat old-fashioned example:

> Karl accesses an indecent photograph of a child on a website and downloads it. A third party sends the same image at his request to Lee by post.

If both Karl and Lee were to be arrested, one would be charged with making (Karl) and one with possession (Lee). Yet, the reality is that the behaviour is identical. Both now own a copy of the original photograph. Both are contributing to the sexual exploitation of the child.[37] But equally both are removed from the direct abuse the child suffered. It would be illogical for Karl to receive a sentence twice the length of Lee's. The conduct is the same. But that logic held true at the time of *Bowden*.

While the sentencing changes were to be welcomed, they cannot, of course, affect the precedent set by *Bowden*. The decision was almost certainly related to the sentencing powers the court had available, but the court could not be that explicit. Accordingly, *Oliver et al* did not distinguish or in any way call into question *Bowden*, and it continues to be precedent. However, as noted at the time of Bowden, the decision has quite significant implications for defendants, as it neuters a set of statutory defences included in the possession offence.[38] Let us return to the example above. Although on the facts given, it is unlikely that they would apply, Lee potentially has defences that are not available to Karl. The *Criminal Justice Act 1988*, s.160(2) sets out the circumstances when a person will not be guilty of possession:

> (a) that he had a legitimate reason for having the photograph in his possession,
> (b) that he had not himself seen the photograph and did not know, nor had any cause to suspect it to be indecent, and
> (c) that the photograph was sent to him without any prior request made by him or on his behalf, and that he did not keep it for an unreasonable time.

[37] For judicial recognition of this see *R v Beaney* [2004] EWCA Crim 449 and see Alisdair A. Gillespie *Child Pornography: Law and Policy* (2011, Routledge) 38.
[38] D.C. Ormerod 'Indecent photographs of children: whether downloading an image amounted to "making" a photograph' [2000] Crim LR 381 at 383.

What constitutes a 'legitimate reason' must be defined tightly, and the court should be slow to permit claims,[39] but there will be circumstances when this can be established. Where a person has custody of the image, that defence is open to them; but where they downloaded it or looked at the content online, they could not advance the argument, because the equivalent defences do not exist to 'making'. This has the potential for injustice, with a defendant in that position reliant wholly on prosecutorial discretion.[40]

RECOGNISING IBSA IN LAW

While PoCA 1978, and its subsequent amendments, represented a strong commitment to tackling CSAM, it took considerably longer to recognise that IBSA is an issue for adults too. It was not until 2003 that the first specific offence – voyeurism – was introduced into English law.[41] Nearly a decade later, an offence was created that sought to tackle those who shared intimate images of others without their consent.[42] Gradually, the law recognised the complexity of IBSA, and further offences followed.[43]

It is not the role of this article to set out a comprehensive analysis of IBSA laws. Instead, this article demonstrates that a challenge to effective laws is the overlap in how behaviours are prosecuted. If production of IBSA is considered, there are, in essence, two offences that are of relevance. The first is, as noted already, voyeurism, and the second is upskirting.[44] Neither of these technically requires the use of technology, and both could be committed by covertly looking at a person in the relevant circumstances. However, the more typical offence is the use of a digital camera to record intimate footage of the victim.

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[39] *Atkins v DPP*[2000] 2 WLR 1104.
[40] Presumably, the only remedy in such a situation would be to judicially review the selection of charges, but this is traditionally difficult to sustain; see, for example, *R v G* [2008] UKHL 37; *R (on the application of S) v CPS* [2016] EWCA Crim 544.
[41] *Sexual Offences Act 2003*, s.67.
[42] *Criminal Justice and Courts Act 2015*, s.33.
[43] Perhaps the key commentary on this area is C. McGlynn and E. Rackley 'Image-based sexual abuse' (2017) 37 *Oxford Journal of Legal Studies* 534.
[44] *Sexual Offences Act 2003,* s.67A as amended by the *Voyeurism (Offences) Act 2018*.

The offence of upskirting is interesting because it came into existence under somewhat confusing circumstances, which arguably contributes to the conflation of offences. The genesis of this offence was a successful campaign by Gina Martin. Ms Martin had pictures taken up her skirt while she attended a music festival. Two wrongs happened here. The first was the upskirting itself, which constituted an egregious interference with her personal dignity.[45] The second wrong, however, was committed by the police. When she reported the matter, a police officer told her there was no crime. In fact, this was a classic example of outraging public decency.[46] Ms Martin, believing that the law did not tackle such behaviour, successfully campaigned to change it.[47] The new offence is undoubtedly an improvement over the common-law offence, not least because it is now recognised as a sexual offence. The campaign was also helpful in bringing the issue to the public's attention, so if the incident were to be repeated, hopefully a police officer would now recognise that a crime had taken place. But the fact that the common law offence has not been repealed also highlights that we have overlapping offences.

CONFLATING CSAM AND IBSA

The fact that IBSA has been recognised in law must be welcomed. A recent Law Commission report recommended further changes to strengthen the laws on IBSA,[48] although not all of the recommendations have yet found their way into legislation.[49] The report did not address CSAM because the Commission, quite correctly, believed that CSAM raises specific issues that needed to be considered carefully and separately.[50] But, the fact that CSAM was not considered means that the potential for overlap exists.

When the IBSA legislation was introduced, critics argued that it failed to clearly distinguish between IBSA and CSAM.[51] Why does this matter? CSAM laws rest on the intrinsic

[45] C. McGlynn and E. Rackley 'Image-based sexual abuse' (2017) 37 *Oxford Journal of Legal Studies* 534 at 536.
[46] A.A.Gillespie ' 'Upskirts' and 'down-blouses': voyeurism and the law' [2008] Crim LR 370 at 372.
[47] Culminating in the *Voyeurism (Offences) Act 2019*.
[48] Law Commission *Intimate Image Abuse: A Final Report* (Law Com No 407, 2022)
[49] The General Election in 2024 saw the *criminal Justice Bill* (2023-24) fail. Many of the Law Commission's recommendations were contained in that Bill.
[50] Law Commission *Intimate Image Abuse: A Final Report* (Law Com No 407, 2022), chapter 14.
[51] A.A.Gillespie ' 'Upskirts' and 'down-blouses': voyeurism and the law' [2008] Crim LR 370 at 379.

wrongfulness of the material itself: each image embodies ongoing harm. The law recognises a cycle of production in CSAM, in which individuals at every stage — from creation to distribution and possession — are complicit in the sexual exploitation of children.[52] By contrast, IBSA involves different dynamics of harm, generally based on a lack of consent or a denial of dignity. CSAM typically justifies the criminal law engaging conduct that may not be culpable if it were against an adult. If we look at the case of *Henderson*, one of the relevant images showed the upper thighs of a schoolgirl.[53] The upskirting offence would only apply if the image showed the genital or anal region, or where it was covered only by underwear,[54] but it was not clear that this was the case here. However, PoCA 1978 states, 'photographs…shall, if they show children and are indecent, be treated…a indecent photographs of children'.[55] An adult taking a photograph up a child's skirt would be indecent,[56] and so the resulting photograph constitutes an IPoC, something confirmed by the Court of Appeal.[57]

The concern was (and is) that overlapping offences increases the potential that prosecutors will not recognise the specific circumstances of an offence and could select the wrong charge. This can be important because the sentencing regimes can be very different. For example, both voyeurism and upskirting are punishable by a maximum of two years' imprisonment,[58] compared to ten years' imprisonment under PoCA 1978. It is also about fair labelling.[59] CSAM is a particular threat to children and those who deliberately seek to engage with the material should be treated accordingly. The law recognises that children are particularly vulnerable, and in need of special protection, including managing those convicted of offences relating to CSAM.

[52] A.A. Gillespie *Child Pornography: Law and Policy* (2011, Routledge) 37.
[53] [2006] EWCA Crim 3264 at [7].
[54] *Sexual Offences Act 2003*, s.67A(1)(b). See A.A. Gillespie 'Tackling Voyeurism: Is The Voyeurism (Offences) Act 2019 a Wasted Opportunity?' (2019) 82 *Modern Law Review* 1107 at 1118 for a critique of this requirement.
[55] *Protection of Children Act 1978*, s.7(3).
[56] In that it such a picture would undoubtedly offend contemporary standards of decency.
[57] [2006] EWCA Crim 3264 at [31].
[58] *Sexual Offences Act 2003*, ss.67(5), 67A(4)(b).
[59] G. Williams 'Convictions and fair labelling' (1983) 42 *Cambridge Law Journal* 85.

The potential for IBSA and CSAM to become conflated was realised in the recent case of *R v Hargrave*.[60] This case shows how prosecutors and the courts can be confused by overlapping offences, meaning that CSAM behaviour was not picked up appropriately.

The facts of *Hargrave* can be summarised briefly. The offender (a serving police officer) installed a covert camera in his step-daughter's room and the family bathroom. This captured intimate pictures of the complainant when she was aged between 14 and 15. He stored the images gathered by the camera on a USB stick, although they were initially stored on a mobile phone. The offender's son (and half-brother of the victim) discovered the material, told his step-mother (the victim's mother), who contacted the police.

Over 200 moving and still images of the child were discovered, 87 of which were considered to constitute an indecent photograph of a child. The offender was charged with a series of offences, and eventually pleaded guilty to four; two counts of making an IPoC, and two counts of voyeurism. At the sentencing hearing, the prosecution and trial judge considered that the voyeurism offences were the 'lead' offences, despite having a lower statutory maximum.[61] The logic was that the IPoC offences had been charged as 'making' rather than 'taking', and concerned the storage of images rather than their production, meaning it was a secondary act rather than the primary act.

It is not clear why the CPS failed to charge taking IPoC. If the images constituted an IPoC (which they must have for making to be charged), then it must follow that the actual images were taken by the covert camera. Yet, the CPS appeared to look at the description of the activity – voyeurism – without concentrating on who the victim was. This left the making offence to cover the storage of the footage, in other words conduct that could clearly have fallen within possession. Perhaps the logic was that the footage was downloaded from the camera to the phone or storage device, but that is very different to what *Bowden* did, and is further evidence the prosecutors have not fully considered the actions of the offender.

[60] [2025] EWCA Crim 1233.
[61] [2025] EWCA Crim 1233 at [15].

As the offences all overlap, perhaps it could be said to be an easy mistake to make. It is easy to reach for the 'that's what it says on the tin' approach without considering the extent to which other laws may be appropriate. Similarly, the fact that making has become the default offence where actions involve the downloading or storage of IPoC has also contributed to the confusion. It appears that the prosecutors did not think about the actions of the offender and instead thought about the technicalities of the technology.

Changes within the CPS itself may also have contributed to this confusion. At one point, cases involving CSAM were conducted by specialist staff who were trained on technology-focused child sexual abuse. However, financial pressure and staffing changes has meant that this is frequently no longer the case. While specialist sexual offence prosecutors continue to exist, they tend to now focus on more serious sexual offences. This often leads to non-specialists making decisions on IPoC cases, and they may not necessarily understand the overlap of offending and the inherent hierarchy of the different offences.

Here, the prosecutor appears to have looked at the technology – the camera – and not the victim. The camera was concealed so, according to that logic, it is necessary to look at the offence of voyeurism. However, had technology not been the focus, a different result would likely would have been reached. Had the prosecutor thought, 'what offence applies where a person takes nude pictures of a 14-year-old girl?', the answer would have inevitably been PoCA 1978.

The judge accepted the pleas without question, and, as noted above, sentenced on the assumption that voyeurism was more serious than the keeping of the footage, presumably believing that he was bound by the prosecution case. Whether that was correct, will be picked up below (as the wording of the indictment could have permitted an alternative approach). When looking at the sentencing guidelines, the judge rightly considered that the voyeurism offences fell within Category 1 (raised culpability and raised harm), and that the indecent photographs constituted Category C (as they were nude, or partially nude photographs, that did not show any apparent sexual activity). The judge imposed an aggregate sentence of 13

months' imprisonment, suspended for two years.[62] Given the maximum sentence was two years imprisonment for the lead offences, this inevitably meant that the guideline on suspended sentences would apply, and the judge concluded that there was a realistic prospect of rehabilitation and noted that prison would be difficult for the defendant as a serving police officer.

The Solicitor General sought to appeal the sentence as unduly lenient.[63] The main submission was that the IPoC offences should not only have been the lead offences, but also categorised as production rather than the equivalent of possession. The Solicitor-General accepted that this was different to how the case was advanced at first instance, but noted that this is not a barrier to references being brought.[64]

It may be thought that the submission was somewhat brave since, following *R v Canavan*,[65] the offences under PoCA 1978 almost certainly constitute separate offences to be pleaded on the indictment. Therefore, it would not be open for a court to substitute 'taking' for 'making' as that should have been pleaded on the indictment. Was there an alternative approach even after the indictment was laid? Yes. If the logic of *Bowden* is that making applies to the creation of a file (containing an IPoC) that did not exist before, then that would be true of footage taken by a digital camera. As noted earlier, each image is now stored as a file (rather than a physical negative), meaning that making could have applied to the initial recording of the footage, even if 'taking' was not pleaded.

The modern sentencing guidelines for IPoC offences do not refer to each offence separately, but instead focus on the offender's behaviour. The guidelines are separated into possession, distribution and production. The guideline expressly states:

[62] *Ibid*., at [4].
[63] *Criminal Justice Act 1988*, s.36.
[64] See, for example, *R v Stewart* [2016] EWCA Crim 2238.
[65] [1998] 1 WLR 604.

> Production includes the taking or making of any image at source, for instance, the original image. Making an image by simply downloading it should be treated as possession for sentencing purposes.[66]

This is pertinent wording that applies here. The guideline does not consider the distinction between 'making' and 'taking' relevant and instead focuses on whether original footage was produced. In *Hargrave*, the answer was clearly 'yes'. Despite this, the Court of Appeal, in passing, decided that had the judge done this, it would have made no difference as the sentence 'could reasonably have fallen within the range…especially having regard to the mitigating factors in the case'.[67] They seemed happy to conclude '[t]he main offences were the voyeurism offences', but without explaining why, other than presumably because that is what was charged.[68] Even a cursory examination of the guidelines would show that production should have been treated as the lead offence. Producing Category C IPoC carries a range of 1-3 years' imprisonment, i.e. above the statutory maximum for voyeurism, with the starting point being 18 months' imprisonment compared to 26 weeks' imprisonment for voyeurism.[69]

This error was compounded by the Court of Appeal's dismissive suggestion that the sentences would be comparable. They appear to have reached that conclusion by comparing the final sentence for the voyeurism offence (i.e., after all aggravating and mitigating factors had been considered) with the starting point for the production offence, before noting that there would be mitigation. Yet the Court of Appeal has been very clear that the starting point is simply that. It is the point at which a judge should then move to reflect both aggravation and mitigation,[70] and here there was considerable aggravation.

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[66] https://sentencingcouncil.org.uk/guidelines/possession-of-indecent-photograph-of-child-indecent-photographs-of-children/

[67] [2025] EWCA Crim 1233 at [26].

[68] Technically, an offence of voyeurism should still have been laid to cover the installation of the covert camera (*Sexual Offences Act 2003*, s.67(4)) but the other offences should have been taking/making IPoC as production and making/possession for their storage.

[69] https://sentencingcouncil.org.uk/guidelines/voyeurism/

[70] See, most notably, *R v Naqui* [2024] EWCA Crim 958 at [34].

It is clear from the guideline that there are several aggravating features, most notably:

- […] vulnerability of the child depicted.
- Collection includes moving images.
- Attempts to dispose of or conceal evidence.
- Abuse of trust.
- Child depicted is known to the offender.

While it is necessary to ensure there is no double-counting in cases such as this, it is clear that the offender's actions constitute a gross breach of trust, as noted in the pre-sentence report.[71] This was a familial member who deliberately installed a camera to gather indecent photographs of his step-daughter in circumstances where she could have expected privacy (most notably, the bathroom, but also the bedroom, which a teenager would reasonably consider to be 'their' space). Both still and moving pictures were recorded, and the courts have long considered the presence of moving images to be an aggravating factor.[72]

Perhaps the most significant aggravating factor in this case is the attempt to conceal the crime. The son had copied the images to another device so he could show them to his mother and prevent them from being disposed of. The offender said that the mother and son would be in trouble for having the images.[73] This needs to be put into the context that he was a serving police officer, i.e. he told that mother and son that they had committed a criminal offence in the hope of putting them off.[74] He then, later, on at least two occasions, threatened to kill himself, saying that he would prefer to be dead than to go to jail.[75] Again, that must be considered an aggravating factor. It is placing significant emotional pressure on both his wife and son (who remains a child) not to report the matter to the proper authorities.

[71] [2025] EWCA Crim 1233 at [13].
[72] See, for example, A.A. Gillespie 'Sentences for offences involving child pornography' [2003] Crim LR 81 at 86.
[73] [2025] EWCA Crim 1233 at [7].
[74] Which, in any event, would not be true as they would have had a defence under *Protection of Children Act 1978*, s.1B, i.e. that it was necessary for the detection or investigation of crime. Nothing in that section limits it to law enforcement, and the defence could properly be claimed by someone who wanted to secure footage to pass it onto the police.
[75] [2025] EWCA Crim 1233 at [7].

Taking all of these aggravating factors into account, there would have needed to be a significant uplift from the starting point. It would, of course, then be necessary to consider the mitigation. These would seem to include:

- No previous convictions.
- Positive good character and/or exemplary conduct.
- Prospects of work.

The lack of convictions and positive good character (which service as a police officer is often taken to include) would seem the most obvious. However, it is not necessarily that simple. The guideline puts this factor into context by including the following text in bold:

- This factor is less likely to be relevant where the offending is very serious.
- Where an offender has used their positive character or status to facilitate or conceal the offending, it could be treated as an aggravating factor.

The second bullet point is particularly pertinent here. Again, being careful not to double-count, the offender used his status as a police officer to try to prevent it from being reported. More than that, however, he used his status to try to justify the offence in the first place. For example, he gave two separate explanations for why the camera was installed. The first was that he suspected that his son was committing theft from his step-daughter. The logic, therefore, is that a covert camera would show evidence of that theft. The second argument was that the camera was necessary because he feared that the step-daughter was self-harming. Again, the logic is that a camera is required to protect. While this may not be enough to turn the factor into additional aggravation, it should neutralise it as a mitigating factor.

The Court of Appeal placed great emphasis on the offender pleading guilty at the earliest opportunity to the IPoC offences,[76] but that is a mischaracterisation. He pleaded guilty, in essence, to possession of those images. He initially did not plead guilty to the voyeurism

[76] [2025] EWCA Crim 1233 at [26].

offences, partly because he maintained there was a reason for the recordings. Along with the theft and self-harm explanations, he also advanced the theory that the camera was placed in the bathroom because he wanted to film his wife for sexual gratification.[77] At one level, this is an odd explanation, as it would constitute the offence of voyeurism,[78] but it perhaps serves as a notice that the offender continued to minimise the fact that his target was the step-daughter. Given this, it does not follow that had the IPoC offences related to the filming rather than storage, he would have pleaded guilty at the first opportunity, as he initially denied filming the child. It would seem plausible that the plea would be equivocal at best, so it would not follow that the full guilty-plea discount would be awarded.

Similarly, it should have been difficult to argue that there was genuine remorse, not least because, even during the preparation of the pre-sentence report, the offender minimised his conduct and cast aspersions on his family, including the possibility that his son was a thief.[79] That is not the actions of a remorseful person, and a plea of guilt should not, by itself, be taken as remorse.

It would seem, therefore, that the aggravating factors considerably outweighed the mitigating factors. It would seem inevitable that the sentence would, if analysed correctly, have been higher. It cannot be known whether it would have fallen within the range of sentences that would allow it to be suspended. It certainly cannot be ruled out, but at the very least, it would have led to an increased notional period of imprisonment.

Confusion and Collation

Hargrave is simply one case, but it is symptomatic of the confusion that exists in this area. PoCA 1978 is undoubtedly showing its age. While it has been heavily amended, these have primarily been technical in nature. What cannot be denied is that the behaviour around CSAM has changed significantly since the 1970s. Always-on superfast internet speeds (both mobile and wifi) mean that concepts such as downloading are no longer as relevant. Possession is

[77] [2025] EWCA Crim 1233 at [12].
[78] As any intimate images of his wife would have been obtained without her consent and in circumstances where she would have a reasonable expectation of privacy.
[79] [2025] EWCA Crim 1233 at [12].

also a changing concept. Nowadays, media is often streamed rather than downloaded, and people are more likely to use cloud storage than traditional storage mediums. For people who want to act illicitly, this is safer because fewer traces can lead to detection, particularly when a VPN is used.[80] But this raises questions about whether legislation written nearly 50 years ago can keep pace with these technological advancements.

The legislation has not captured these changes to behaviour and technology, and arguably, PoCA 1978 now focuses on the wrong thing. It focuses on technology and not behaviours. A modern law should, as set out in the sentencing guideline, prohibit three behaviours:

1. **Accessing**. While we have historically used the term 'possession', this does carry challenges, not least in the context of custody and control,[81] which can be challenging in many instances, including potentially cloud storage. A better approach would be to criminalise access to IPoC. This could encompass not only physical possession, including the storage of material, but also circumstances in which people intentionally view material online, including streamed footage, thus clarifying the dictum in *Jayson*.
2. **Distribution**. The second form of behaviour would be distribution. This should include both active and passive forms. In other words, it is not only deliberately sending images to someone, but also knowingly making them available for others to access.[82] The latter is essential because this is increasingly how material is made available, including through streaming.
3. **Production**. The final form of behaviour is production. This should mean creating original images, most notably by taking photographs. It will be irrelevant for these purposes whether that is overt or covert; this is a matter for the sentence. Creation should encompass pseudo-photographs, so taking an existing image and digitally manipulating it to create an image that looks like a child would suffice, but it would

[80] Virtual Private Networks – a way that an internet connection is routed through other servers to disguise the actual connection. They have both legitimate (cybersecurity) and illegitimate (hiding) uses (see, for example, C. Wise and J.Barnford 'How online offenders evade detection' in C. Wise and J.Barnford *Understanding the Technology Behind Online Offending* (Routledge, 2025)).
[81] See, for example, *R v Porter* [2006] 1 WLR 2633 discussed in A.A. Gillespie *Child Pornography: Law and Policy* (Routledge, 2011) at 146.
[82] Such a provision can already be found in PoCA 1978, s.1(2).

render null the logic of *Bowden*, which concerned the technicalities of file creation rather than image creation.

These three categories should replace the existing offences,[83] and will ensure that they are focused on the offender's behaviour. This approach will lead to a more common-sense and appropriate understanding of the acts. Thus, copying an image falls under 'accessing', as a new image is not created, and a person is now in possession of an additional image. If they then send that copy to someone else, that would constitute distribution, but mere copying can be treated as access. When a person downloads an image from a website, this should be considered accessing. They have accessed the image. It does not matter that the image has been sent from one location (the web location) to another (the storage device). That would not constitute distribution because the downloader could not be said to be distributing the image to another, although the site owner could be guilty of distribution because they have made the files available to others.

Would this approach have made a difference in *Hargrave*? Potentially. A more simplified approach should have led prosecutors to understand that what had happened here was production, not access. But would this have stopped the prosecution from looking at voyeurism instead of IPoC? Perhaps not. It has been suggested that one solution would be to restrict the IBSA offences to victims aged 18 or over, but the Law Commission noted that this could have unintended consequences.[84] Where the age of the victim is unknown, a prosecutor would have to plead IPoC and IBSA offences on the indictment as alternatives, as they are not implied alternative offences. That could bring an additional layer of complexity that could be unhelpful and potentially introduce a new layer of confusion.

Perhaps the better approach is to ensure that prosecutorial advice is updated and explicitly recognises the importance of selecting the correct charges. There does not appear to be

[83] Advertising IPoC is currently illegal (*Protection of Children Act 1978*, s.1(1)(d)). This may require an additional offence although in many instances it could be considered to fall under distribution via making material available to another.
[84] Law Commission *Intimate Image Abuse: A Final Report* (Law Com No 407, 2022) para 14.7.

specific prosecution guidance on voyeurism, unlike the position for many sexual offences.[85] Indeed, the offence is not mentioned in the list of offences that should be considered for rape and sexual offences.[86] There is specific guidance on the prosecution of IPoC offences,[87] but voyeurism and upskirting are not mentioned in that guidance. Thus, a non-specialist prosecutor is faced with behaviour such as that in Hargrave, for which there is nothing to suggest the appropriate offence. That should change. As noted, the number of crimes targeting IBSA has grown significantly, with more planned.[88] Specific guidance should be produced for intimate image offences, and that should include specific reference to the fact that where the image is known to be of a child, the starting point should be PoCA 1978 unless there are strong and cogent reasons to do otherwise.

CONCLUSION

Hargrave is simply one case, but it demonstrates two significant flaws in the modern approach to tackling CSAM and IBSA. The first is the danger of conflation. We are now regularly seeing new legislation that introduces offences that cover conduct already criminalised. At one level, this can be said to ensure that there are no legislative gaps. However, it can also confuse law enforcement, prosecutors, and the courts, thereby missing an opportunity for a more appropriate offence.

The second flaw is a long-standing one: we have moved away from the original aim of PoCA 1978. Its long title is:

> An Act to prevent the exploitation of children by making indecent photographs of them; and to penalise the distribution, showing and advertisement of such indecent photographs.

[85] https://www.cps.gov.uk/prosecution-guidance/prosecution-guidance-search?subject_area=2358.
[86] https://www.cps.gov.uk/prosecution-guidance/rape-and-sexual-offences-chapter-7-key-legislation-and-offences#a34a
[87] https://www.cps.gov.uk/prosecution-guidance/indecent-and-prohibited-images-children
[88] The *Crime and Policing Bill* currently before Parliament at the time of writing contains several measures to implement the recommendations of the Law Commission (see Schedule 9).

Interestingly, that title was used before the verb 'to make' was inserted into the Act, and long before the court's decision in *Bowden*. It emphasised that the point of the Act was to prevent the sexual exploitation of children and focused on core behaviours by a person. As technology transformed CSAM, we began to lose sight of this primary aim. Later amendments were focused on technicalities and technology. This was followed by law enforcement and other criminal justice agencies, who considered CSAM to be a cybercrime or 'hi-tech crime'. To an extent that is understandable. Technology has radicalised CSAM, posing significant challenges to policing it. But it has perhaps also meant that the focus shifted from exploitation to the changing technology and technical amendments to advance it.

More than this, however, it arguably marked a shift towards examining the technology and technicalities rather than the offender's behaviour. We stopped focusing on what the offender had done ('obtained an IPoC') and began examining the technicalities of file creation. That was then taken further when the courts decided that it applies to opening emails and displaying images on a screen. *Porter*[89]is arguably another example. The court spent considerable time deciding whether an image that could be recovered only with forensic software was in the offender's possession. Had the offence instead simply required proof that an offender had accessed an IPoC, such technicalities would have been irrelevant.

Of course, it is not the courts' fault that such wordsmithing was required. The legislation did not keep track of technological advancements. While it was extended to cover computer-generated or manipulated images and their derivatives, this narrowed the focus. The amendments relate to the advancement of technology, not the behaviour of offenders. Suppose someone uses graphic manipulation software to blend a pornographic picture of an adult with a picture of a child so that the resulting image is a pornographic representation of a child. In that case, they have created an IPoC. It is an original image. Although the two separate photos existed before, they did not exist in a blended format. Thus, it is creating a new image. The actions of *Bowden* did not constitute creation (as the court itself recognised). His actions were analogous to possession, and had they occurred after 2000, when the

[89] [2006] 1 WLR 2633.

tougher sentences were introduced, the courts would likely have treated them accordingly, and the law would almost certainly be in a better place.

The Law Commission undertook a thorough review of (adult) IBSA, but IPoC were expressly excluded from that work. That was the correct decision because it would have been challenging to address all the issues comprehensively. CSAM is a distinct behaviour that deserves attention. However, realistically, there has never been a comprehensive analysis of how the law responds to CSAM. The origins of PoCA 1978 do not lie in policy documents or consultations, but rather in a Private Members' Bill.[90] No detailed analysis of the law has taken place, with each of the many amendments that have taken place since 1978[91] being added in piecemeal fashion. This, it is submitted, means that the law has deviated from what the long title intended. A comprehensive analysis of the law is overdue. While our knowledge of CSAM has expanded, it remains a prolific threat to children. We must ensure that modern understandings of CSAM safeguard children and that we know how to tackle it. That means turning away from the logic of *Bowden* and reframing PoCA 1978 to refocus on the behaviour of those who seek to exploit children sexually through IBSA. Until that happens, the risk of the wrong offences being charged remains. That has the potential to fail children. It is not using the full powers of the law, and this should change. Simplifying and refocusing the law would be a good place to start.

[90] The Bill was initially introduced by Cyril Townsend, a Conservative Member of Parliament for Bexleyheath.
[91] If you include s.160, *Criminal Justice Act 1988* as a *de facto* amendment of PoCA 1978, which is not unreasonable given the direct links between the statutes.