

## Summary

There have been several amendments to decency legislation in recent decades. This research was concerned with acquiring information on the effects of the amendments to the decency legislation as envisaged by parliament, how the amended legislation is being handled, in legal practice in particular, and whether it has achieved the intended objective.

This evaluation is concerned with the amendments to Articles 240b, 243, 248a, 248c and 250 of the (old) Penal Code. The most drastic amendment is to the child pornography provision. The emphasis of the report is therefore on the interpretation of this child pornography provision and its execution.

The research employs a combination of methods and resources, in particular a survey of case law, an analysis of parliamentary papers and a literature survey, a legal-statistical investigation, a qualitative study of files related to child pornography, and interviews with respondents from the criminal justice chain.

### Envisaged effects

A major objective of the 2002 amendments to the decency provisions was to enhance the protection of minors against forms of sexual abuse. The child pornography provision was duly tightened (Art. 240b of the Penal Code), extraterritorial jurisdiction was extended (Arts. 5 and 5a of the Penal Code) and other forms of sexual exploitation of minors were made an offence (Arts. 248a, 248c and 250a of the Penal Code). The requirement that a complaint must first be lodged before a person can be prosecuted was also rescinded completely, and replaced with a duty to grant a hearing (Art. 167a of the Code of Criminal Procedure). The protection of other vulnerable groups was tightened by adding an element of 'reduced consciousness' to Articles 243 and 247 of the Penal Code. Various intermediate objectives were formulated according to type of offence.

#### *Tightening of the child pornography provision*

The objective of tightening the child pornography provision is to combat specific sexual abuse of children and to discourage the market in child pornography. The market in child pornography implies the risk that minors will be persuaded to participate in sexual acts that are then captured in the form of images, which is a harmful practice for the minors. The intention of amending the penalty provision on four points was to simplify the process of prosecution or sentencing in child pornography cases. The penalty provision was amended by adding 'apparently involved' and by raising the age limit. Furthermore, 'in stock' was replaced by 'in possession', and the extraordinary statutory defence was rescinded.

The intention of adding 'apparently involved' was to relieve the Public Prosecution Service of the obligation to prove that the image relating to the charge was concerned with a real minor; the image concerned must create an appearance of an actual sexual act. The Public Prosecution Service may suffice by making a plausible case that the person in the image looks like an underage child. Raising the age limit from sixteen to eighteen years arose from the ratification of the ILO Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour. Determining the apparent age of the minor is left to the discretion of the judge hearing the case. The intention of raising the age limit was to make it easier to prove the possession of images of child pornography depicting minors of fifteen or sixteen years of age; the question as to whether the image was of a minor of fifteen or sixteen years of age is no longer relevant. Replacing the element 'having in stock' by 'having in possession' constituted the legalization of the Supreme Court's position that 'having in stock' does not demand a plurality of images. The parliamentary debate acknowledged that merely looking at child pornography did not fall within the scope of Article 240b of the Penal Code. Parliament stressed that the emphasis does not lie on the

morally reprehensible nature of looking at images of child pornography, but on the enforceability of the law: enforcement would appear to require acts of some substantial scale and duration, which show evidence of a certain intention.

The extraordinary statutory defence was rescinded with a view to the risk of unlimited distribution that is inherent in the digital nature of images of child pornography. This exception enabled the possession of child pornography with impunity for academic, educational or therapeutic purposes. The expediency principle can always be used in prosecution because the objective of the (child pornography) material is not expedient.

In other words: the amendment of the child pornography provision is intended to simplify the onus of proof for the Public Prosecution Service and to curb market creation, within the limits of enforceability of the law.

#### *Extension of extraterritorial jurisdiction*

The intention of extending the extraterritorial jurisdiction was to enhance the opportunities for prosecution: the extension enables suspects arrested abroad who leave the country while on bail to be arrested and prosecuted on their return to the Netherlands. This measure could deter potential perpetrators. A wider awareness of the chance of prosecution in the home country may also make others more alert to signs of child sex tourism. People's willingness to report would thus be enhanced, in particular in respect of co-travellers. The amendment to the law envisages emphatically highlighting the standard that child sex tourism is unacceptable.

#### *Sexual exploitation of minors*

An explicit point is that inciting a minor to commit sexual acts *alone* has been made an offence, by deleting the words 'with him' in Article 248a of the Penal Code. Furthermore, a new Article 248c was added to the Penal Code, making it an offence to be a spectator of a sex show involving minors. The objective is also to penalize other forms of sexual services by minors besides prostitution.

#### *Addition of 'reduced consciousness'*

Another vulnerable group comprises people who, possibly under the influence of alcohol, drugs or medication, are asleep or in a state of semi-sleep. The intention of adding 'reduced consciousness' to Articles 243 and 247 of the Penal Code is to provide additional protection against undesirable sexual contacts, which did not fall under the penalty provision before the amendment to the law, because of the strict interpretation of powerlessness. Parliament determined that victims have a responsibility for their behaviour prior to the reduced consciousness: making advances or being in a state of reduced consciousness through the victim's own actions have consequences for the suspect's criminal liability.

#### *From complaint to duty to grant a hearing*

Rescinding the requirement that a complaint must first be lodged before a person can be prosecuted, and introducing the duty to grant a hearing in Articles 245, 247 and 248a of the Penal Code are intended to simplify the investigation and prosecution of cases of sexual abuse of juveniles. The duty to grant a hearing is not formulated in absolute terms: underage victims must be heard 'if possible' regarding possible prosecution.

### **Applicability and achievement of objectives**

What do the amendments to the law mean for investigation, prosecution and trial? And have the envisaged objectives been achieved in legal practice?

### *Applicability and achievement of objectives of the amended child pornography penalty provision*

There has been a marked increase in the number of reported violations of Article 240b of the Penal Code. The rise had actually started before 2001. The cases recorded at the Public Prosecution Service also show a clear increase. The disposal of child pornography cases by the Public Prosecution Service and district courts is showing a shift to fewer dismissals by reason of unlikelihood of conviction, and acquittals. The statistical analysis shows a link between the amendment to the law and the reduction of the problems of evidence.

The research reveals that the problems of evidence surrounding apparent age have been solved, because prosecution is now for the possession, production or distribution of images of child pornography where the children are well below sixteen years of age, in line with the Instructions on Child Pornography. In legal terms, it is harder to prove that someone is apparently underage than apparently below sixteen years of age, because in the first case there are no criteria, while in the second case use can be made of the Tanner criteria. The amendment to the law makes it easier to prosecute if the images of child pornography are concerned with the group of children from twelve to fifteen years of age. Although it is an offence to possess pornographic images of minors of sixteen and seventeen years of age, no prosecution takes place.

The addition of 'apparently involved' has also contributed to easing problems of evidence surrounding apparently real children. There is also some discussion as to whether the possession, distribution or production of some virtual images of child pornography, such as a virtual animated film, should not also fall under the penalty provision with regard to expanding the market for child pornography. On the other hand, the question has been raised as to whether making virtual child pornography an offence is actually legitimate, because no immediate damage is inflicted on the child. A majority considers this penalization to be a logical conclusion to protection-oriented legislation.

Replacing 'in stock' by 'in possession' is considered to constitute setting down in the law what was already established practice in the courts. Proving an intent to possess or distribute child pornography generally raises few special problems in practice, which is related to the group of suspects being prosecuted, who are mainly end-users, and often confess to the possession of child pornography. From a legal point of view, however, there are genuine problems of evidence surrounding the intent to possess child pornography. The criterion is that the following three interrelated elements must be satisfied: recording, intent, and some degree of possession. Merely looking is insufficient. The research has revealed that it is not always simple to establish the intentional possession of images of child pornography with the current digital techniques, for example, if internet users set up a shared site with images of child pornography, to which access is possible without downloading the material to the user's computer.

Rescinding the extraordinary statutory defence has led to no discussion in legal practice.

The increase in the number of reports to the police and cases registered with the Public Prosecution Service had already started in the years before the law was amended. It may therefore be deduced that the increase could not have been a consequence of the amendment to the law.

The research reveals several obstacles to investigation and prosecution.

The quantities of image material currently involved are enormous. Technological developments in ICT are causing specific problems for investigation. Traditional methods of investigation will have to be augmented with digital methods. An important organizational problem that emerged was a lack of sufficient digital expertise in the police: both a sufficiently strong specialist digital knowledge among certain individuals, and a broad elementary digital knowledge. The same is true of the Public Prosecution Service. It would also be in the interest of the judiciary to have some digital knowledge

in order to pronounce a judgment on, for example, the possession of child pornography. Sufficient digital expertise, sufficient capacity, and international partnership are necessary in order to tackle child pornography, and to investigate and prosecute not only the end-user, but also the networks and producers.

The most important external factor in achieving the objective is the way in which digitalization and distribution capabilities on Internet have taken off, allowing people to view images of child pornography in relative anonymity at any hour of the day. Possession is on a larger scale and the nature of the material is more serious than some ten years ago. Cases are increasingly being brought before the three-judge section, whereas a police court summons used to be more common.

Another role is played by the international nature of the crime. This is one of the reasons that the police, the National Police Services Agency (KLPD) and the Public Prosecution Service are investigating and prosecuting mainly end-users, but paedophile networks only to a smaller extent. Although the police and Public Prosecution Service are aware of the producers and commercial distributors, international cooperation is needed in order to tackle them, and they encounter legal obstacles of an international criminal law nature that make it hard to get the prosecution of the producers off the ground.

#### *The criminal law approach to child sex tourism*

No figures can be found on the number of reports and cases of child sex tourism registered at district public prosecutor's offices. The experience of the police, Public Prosecution Service and judges that we interviewed is extremely limited. Investigation and prosecution are difficult because of the international nature of these issues; the approach is more of a national matter than one that can be tackled on a regional level, and it demands international cooperation.

It is an open question whether the law has a preventive effect. The deterrent effect and wider awareness that were envisaged appear not to have materialized. The necessary multisectoral cooperation (i.e. of the Ministries of Justice, Foreign Affairs and Economic Affairs) for providing information to travellers and tour operators, and police training in the countries involved, would appear to be behind schedule so far.

#### *Other forms of sexual exploitation of minors*

There is little experience to date in legal practice in the investigation and prosecution of offences under Articles 248a and 248c of the Penal Code. The amendment to Article 248a and the introduction of Article 248c of the Penal Code have indeed simplified investigation and prosecution, but the number of cases is modest. The period between the amendment and this evaluation has been too short to demonstrate statistical effects.

The number of cases in which minors perform sexual acts (alone) through *chatboxes* in front of a *webcam* is increasing. Charges are based on Article 248a and primarily article 244 of the Penal Code as a safety net.

The investigation and prosecution of child sex shows would appear to be simplified by the amendment to the law. However, gathering the evidence is no simple matter. There is some discussion surrounding the interpretation of Article 248c of the Penal Code, for example on the requirement for the physical presence of the spectator. Does it also cover watching through a television circuit? And can users with a shared internet site containing image material of child pornography, which they can look at without downloading it onto their own computer, be viewed as a virtual cinema and therefore be dealt with under Article 248c? The question is whether in future the requirement for 'a place provided for the purpose' may cause problems.

It would finally appear that it is not always clear whether a situation should be classified under Article 248a or 248c of the Penal Code: when is it correct to speak of a spectator (Art. 248c) and when of a co-perpetrator in seduction (Art. 248a)? The interpretation of these articles will crystallize in future.

#### *Use of the duty to grant a hearing*

There is no sanction for failing to fulfil the duty to grant a hearing. Failing to fulfil the duty to grant a hearing may give rise to the prosecution being barred or the proceedings being deferred. In legal practice, the duty to grant a hearing almost never leads to problems, because it is sufficient for the report to contain evidence that the victim wishes criminal proceedings. Furthermore, a possible omission may be rectified by examining witnesses at a later stage.

The amendment to the law has helped make it easier in practice to deal with 'loverboys' (pimps who recruit young girls) and gang rapes. Nonetheless, the duty to grant a hearing is sometimes seen as an obstacle by the Public Prosecution Service in situations where there are several victims, and parents report sexual abuse by a sport teacher, for example. In cases of this kind, hearing the underage victims can increase the commotion and exacerbate the emotional burden on the parents and children.

#### *Addition of 'reduced consciousness'*

There was an enormous increase in cases of violating Article 243 of the Penal Code (rape of an unconscious or mentally disturbed person) in the year following the amendment to the law, but this could be a coincidence: the future will have to reveal whether the frequency of reports will fall again, remain stable, or continue to rise. A significant difference in disposals can be observed before and after the amendment to the law, attributable to a decline in dismissals by reason of unlikelihood of conviction, and acquittals.

The addition of 'reduced consciousness' has been received with approval in legal practice; situations that did not previously fall under the criminal statutes, now do. There are other situations in which there is an element of reduced consciousness because of drink, medication or drugs that now fall under the criminal statutes, which is not to imply that the problems of evidence have been solved. It remains hard to prove that the suspect had insight into and abused the victim's state of reduced consciousness, in particular if the defence states that the victim had performed several voluntary (sexual) acts prior to the sexual incident. The future will have to reveal how far the victim's responsibility extends, and the interpretation to be given to 'reduced consciousness'.

#### *Conclusion*

It is always hard to determine whether an amendment to a law has been effective; it is difficult to attribute changes directly to the amendment to the law rather than to other developments.

The problem of evidence has been reduced where tackling child pornography is concerned. The question that remains is whether the decline in the proportion of dismissals by reason of unlikelihood of conviction and of acquittals is solely attributable to the amendment to the law. Other factors that might play a role are digital capabilities, which have greatly enhanced the opportunities for distribution on Internet, the increased seriousness of child pornography, the priorities set down in the Instruction on Child Pornography, and changing social attitudes. Paedophile networks and producers have hardly been tackled since the amendment to the law, despite being a priority in the Instruction on Child Pornography. However, this is less an impact of the penalization than of obstacles in prosecution and of an organizational nature. The envisaged improvement in the protection of children against forms of sexual abuse and their exploitation seems to have been set in motion by the change in the law. For example, sex shows with minors are being investigated and prosecuted.

The future will have to reveal whether new technical developments on Internet, with new forms of sexual abuse of minors and other vulnerable groups, are covered by the current legislation.