

CRIMINAL JUSTICE AND IMMIGRATION BILL

Part 6: Possession of extreme pornographic images

This document addresses issues arising from the Government's proposed legislation on 'extreme' pornography, and draws attention to some of the unintended and undesirable consequences it seems likely to incur.

Violent and abusive behaviour (such as assault, rape, murder and necrophilia) is always indefensible and should be unreservedly condemned. However, this overly broad proposal will impede efforts to curb real acts of abuse by wasting law enforcement and criminal justice resources on non-abusive activities involving consenting adults. If it is to become law, it can and should be amended so as to concentrate exclusively on genuine abuse. Such an amendment is proposed at the end of the document.

Summary

In summary, the issues that arise from the proposal are as follows:

- This broad proposal will potentially affect - and thus criminalise - a much larger number of people than intended: hundreds of thousands, if not millions, who currently engage in non-abusive, consenting sexual activities in the UK. It appears likely to particularly affect the Lesbian, Gay & Bisexual community.
- The proposal will hamper efforts by responsible organisations to educate people about safe, sane and consensual BDSM* practices. This could result in real harm, i.e. people being injured or dying through accidents.
- Some will doubtless find such material abhorrent or offensive. However, sending people to prison on grounds of taste is not consistent with the values of a free and fair society.
- Including people who look at or engage in non-abusive, consenting activities on the Sex Offenders Register will dilute its effectiveness.
- The definition of 'extreme' pornography is vague and therefore can only be determined once brought to trial. So people will not know if they are breaking the law at the point at which they view material. This makes for unclear law – and therefore bad law.
- The evidence to date does not support the conclusion that such material encourages violent behaviour, as the Government itself has noted. In fact, there is evidence that access to pornography leads to falls in levels of violent behaviour.
- Nor has the Government shown that participants in such productions (i.e. adults) have been coerced or harmed. No genuine 'snuff' film has yet been discovered, let alone posted on the web.
- The breadth of the proposal will make illegal the possession of a wide range of currently legally-published material, criminalising large numbers of people who have bought such material legally.
- The Government admits the proposal breaches Articles 8 and 10 of the European Convention on Human Rights. Its justifications are unlikely to meet the Convention's requirements for such interference.

Key questions/issues

Doesn't this material encourage violent or abusive behaviour?

No. The Government admitted in its consultation paper (Executive Summary, p.1) that the evidence does not support this claim. Note: the issue is not that the evidence is 'not quite conclusive' – the evidence gets nowhere near proving the claim, and often undermines it (e.g. studies that suggest pornography has beneficial effects, and may reduce violent behaviour).

It is sometimes claimed that the material 'legitimises' or 'normalises' real abuse, and that anyone who uses it must therefore be morally and psychologically suspect. But the claim misconceives or ignores the nature of sexual fantasy and role play, assuming falsely that to entertain a fantasy about some activity implies a wish to engage in that activity for real. This reasoning easily produces absurd conclusions: for example, that a person who entertains a fantasy about being raped (and perhaps engages in consenting role play with their partner) would therefore want to be raped for real.

* BDSM is short for: bondage & discipline, domination & submission, sadism & masochism.

Doesn't the material feature actual abuse of non-consenting participants?

The Government has not been able to cite a single site featuring genuine abuse. The ones it has mentioned (apparently the most extreme that can be found) feature staged scenes performed by consenting actors.

If people were really being maimed, murdered etc, the material produced would constitute clear evidence of real crimes that could be used against producers. Such productions would also leave behind physical evidence – seriously injured people, bodies, reports of missing persons by family members, etc. Since the sites in question have not been prosecuted, it seems reasonable to infer that the scenes are in fact staged.

Also worth noting:

- Not one genuine 'snuff' film has yet been discovered, as a recent Channel 4 documentary showed.¹
- Producers seem in general to employ actors on a regular basis, who reappear unharmed despite the serious injuries they have 'appeared' to suffer previously – again demonstrating that no real harm has taken place.

There is a critical difference here from the production of paedophile material, which cannot (by definition) involve consent and is therefore always abusive.

Isn't the material already illegal to publish under the Obscene Publications Act?

No – this is very misleading. The OPA's conviction threshold is far more demanding – the prosecution must show that material would 'deprave and corrupt' someone who saw it, whereas the proposed legislation only requires proof that the material depicts certain actions and is intended to arouse. The lower threshold means the proposal would likely catch material that would not be found illegal under the OPA.

Note also:

- Because the OPA targets publishers of material, not individuals, the proposal constitutes a serious incursion into private life – without this being justified by a convincing argument that the material is harmful.
- Publishers are able to make judgements about whether material is lawful or not through their business experience and access to legal advice. An individual, by contrast, will be playing dice with three years of his or her life when acquiring material.

Is the proposal clear as to what constitutes 'extreme pornography'?

It is hard to see how, as key terms used in its definition are either unclear or subjective or both. For example:

(i) *Risk and level of injury.* An image can count as 'extreme' if it depicts an act that 'appears to threaten a person's life' (§64.6(a)) or 'appears to result (or be likely to result) in serious injury' to the sexual parts of the human body (§64.6(b)).

But how are people to judge what counts as serious injury, or the relevant level of risk? The Explanatory Notes refer to 'the insertion of sharp objects' and 'mutilation'. But this could describe any number of activities that are both consensual and comparatively harmless (though some might find them distasteful). In which case, how are people to tell what level of injury counts as 'serious'?

(ii) *Whether an act appears real.* All proscribed acts must either be real or 'appear to be real to the viewer' (§64.6; Explanatory Notes, §384). In the latter case, the issue is not whether the acts depicted are real, but whether someone might think they are – even if they aren't! But how is anyone to know how real someone else might think an image is?

Whether someone could 'reasonably' conclude that a staged act 'appeared to be real' would turn on further subjective questions, such as whether 'real' in this context simply means 'realistic'. If so, there would then be arguments about whether the style of acting was in fact 'realistic'. Or contextual factors might indicate that although a given scene was realistically acted, it was nonetheless not real – though this would again be a matter of subjective judgement.

¹ The documentary, *Does Snuff Exist?*, was screened on April 18, 2006. See also Kerekes and Slater, *Killing for Culture: an Illustrated History of Death Film*, for an exhaustive debunking of the 'snuff' film myth.

(iii) *Whether an image counts as pornographic.* An image counts as 'pornographic' if 'it appears to have been produced principally for the purpose of sexual arousal' (§64.3), or if it appears to have been extracted from a classified work for such purposes (§65.3). Once again, how is anyone to know whether someone else would draw that inference?

Aside from this, the question is almost impossible to answer in itself: for how is anyone supposed to know what the producers' intentions are? Given that fetishistic material often does not show explicit sex acts, how is 'extreme pornography' to be distinguished from, e.g., low-budget horror films and thrillers?

(iv) *Conclusion.* The above problems give a flavour of how vague, ambiguous and subjective the criteria that determine guilt or innocence are. The Government appears untroubled by such concerns. However, the consequence of using such criteria is that people will not know if they are breaking the law (or not) until they have been through the trauma of a trial. Equally likely, people will have their lives ruined by investigations that are subsequently dropped. This makes for highly unclear law – and therefore bad law.

Surely this will only affect small numbers of people?

The Government claims the proposal is targeted 'at the extreme end of the spectrum' and will only affect small numbers of people (Explanatory Notes, §803; Consultation Paper, Annex C.1(III)). In fact, it is likely to criminalise much larger numbers because of the lack of clarity described above and the refusal to exempt productions featuring consenting participants.

Those likely to be affected include:

- The BDSM community – an estimated 10% of the adult population have this orientation, i.e. up to 4 million people. Various surveys have found that much higher percentages of people have at some time engaged in some form of BDSM activity.
- The Goth community – material catering to it features depictions of death, vampirism, etc, that could easily be counted as pornographic under the proposed definition.
- People who own low-budget thrillers/horror films.

The view, expressed by the Government and others, that the legislation is specific enough to exclude the above is hopelessly optimistic. Such a view

- (a) inexplicably ignores the subjectivity and lack of clarity in the proposal discussed above;
- (b) exhibits ignorance of the material in question, and of common BDSM activities (such as certain forms of bondage or the consensual role play of non-consensual scenarios) that could erroneously appear dangerous or abusive to those unfamiliar with them.

The legislation will in particular undermine the BDSM community, which allows individuals with similar interests to get together, and offers advice and education on consent and safe practice. Proper supervision and education is crucial to preventing tragic accidents such as that which befell Stephen Milligan MP.

Does it matter if more people are caught by this proposal?

Yes. This is a serious concern. The overbreadth described above is likely to result in:

- a swamping of the Sex Offenders Register
- a diversion of police resources from serious offences (such as real violence and paedophilia) to non-abusive activities involving consenting adults
- a larger number of investigations that do not subsequently result in a conviction – with lives nevertheless ruined in that process
- more overcrowded prisons

Remember: those criminalised will include people who have not harmed or abused another person, and do not own material in whose production some person was harmed or abused.

Didn't most respondents to the consultation support the proposal?

No:

The Government cited 223 individuals against, 90 in favour; 18 organisations against, 53 in favour (of which 21 were police forces/organizations). If the police are taken as a single entity, the number of organisations in favour drops to 33.

The Government sent out the consultation almost exclusively to organisations that were likely to support the proposal. Many organisations concerned with civil liberties, film production (e.g. film schools, production companies, postproduction houses) and sexual minorities were not consulted (though a small number that heard about the consultation submitted responses on their own initiative).

Much has been made of the 50,000 who signed the petition organised by Martin Salter and the Jane Longhurst Trust. But the scope of that petition was much narrower than the current proposal: signatories were invited to oppose 'extreme internet sites promoting violence against women in the name of sexual gratification'. Anyone would object to material 'promoting' violence against women (as would this document). But comment in much of the press, as well as responses to the proposal on forums such as the BBC's discussion boards, suggest most people do not support the much broader proscriptions of the proposed legislation.

Won't this legislation break the cycle of supply and demand?

As discussed above, there are good reasons to doubt the existence of a market for genuinely abusive material of the kind described. Even if there were such a market, (a) curbing supply could easily increase rather than reduce demand, and (b) nearly all material is hosted abroad, so legislation in the UK would have barely any effect.

Doesn't society need to be protected from exposure to the material?

Given the weakness of the arguments alleging harm, this boils down to protection from material that some would find distasteful. Sending people to prison on grounds of taste is not consistent with the values of a free and fair society.

Note:

- Material of this kind is not widely advertised (unlike mainstream pornography); one has to go and find it. So the members of society that would be 'protected' here would mostly be those who want to see it.
- The current proposal would cover images produced by private individuals or couples for their own personal use.

Don't children need to be protected from exposure to the material?

Of course children should not be exposed to this sort of material. But nor should they be exposed to mainstream pornography or certificate 18 films, both of which are far more widely available, and therefore more likely to be encountered by children. Presumably, then, these should be banned too (along with anything children should not see, but might).

Is the proposal compatible with the Human Rights Act?

While the consultation paper claimed (§57) that the proposal would be compatible with Articles 8 (private life) and 10 (freedom of expression) of the European Convention on Human Rights, the Bill now concedes (Explanatory Notes, §802) that the proposal would interfere with these rights. It argues that such interference meets the 'prescribed by law' and 'necessary in a democratic society' tests for the following reasons:

1. Most people would find the material abhorrent (Explanatory Notes, §803).
2. The proscribed activity cannot legally be consented to (Explanatory Notes, §803).
3. In the case of staged activity, the proposal would protect individuals from participating in degrading activities (Explanatory Notes, §804).
4. The proposal would help break the cycle of supply and demand (Explanatory Notes, §805).
5. The proposal would prevent the encouragement of violent behaviour, or desensitisation to it (Explanatory Notes, §805).
6. The proposal would protect children and vulnerable adults from exposure to the material (Explanatory Notes, §806).

(1) is unconvincing. Material that might offend, shock or disturb the State or any sector of the population does not by itself justify interference in Convention rights under Article 10. It is hard to see what 'degrading' in (3) means, beyond some equivalent of 'offensive', in which case that justification is also weak (especially given that consenting participants are unlikely themselves to find the activities degrading).

(2) is unconvincing because

- (a) the proposal covers a wider range of actions than the case cited (R v Brown); note that the Government's response to the consultation conceded (Summary of Responses and Next Steps, §14) that the GBH threshold (used in Brown) would be too wide, imprecise and difficult to apply;
- (b) consent has been allowed for some actions that the proposal could be taken to cover (R v Wilson (1996) 2 Cr App Rep 241);
- (c) one can legally consent to staged actions or fictional role play.

It has already been shown above that the proposal would be unlikely to curb either supply or demand, in which case both (4) and (6) are unconvincing.

It has already been shown above, and the Government admitted in its consultation paper (Executive Summary, p.1), that the evidence does not support the claim of encouragement, in which case (5) is unconvincing.

More generally:

- the 'prescribed by law' test will not be met because of the lack of clarity described above;
- the 'necessary in a democratic society' test will not be met because (a) the law is unlikely to meet its intended objectives, and (b) it is disproportionate when set against Articles 8 and 10 of the Convention.

For details see Counsel's opinion.

How can the proposal be improved?

Most of the problems described above stem from concentrating on 'what is depicted in the material', instead of the real issue of what happens to participants during production. This is to turn existing practice on its head: extremely violent horror films featuring consenting actors are commonly passed for release; but a non-violent film whose actors were coerced and abused into participating would surely be banned.

The natural way to avoid the problems would be to target only material involving abused and non-consenting participants, while excluding material featuring consenting participants in staged and other non-abusive productions. This reflects ordinary, common sense principles – why target situations where everyone consents and no one is abused?

The proposal could be improved further by making the viewing of such material inadmissible as a defence or mitigating factor in trials of those who have engaged in real, non-consensual abuse or violence.

The Government's only ground for resisting this appears to be to 'protect' individuals from participating in activities it considers offensive or 'degrading', even if they are consenting adults and do not find the activities degrading. Given the failure to demonstrate that such participation causes harm, this appears to contradict Tony Blair's statement in September 2006 that 'it is not for the State to tell people they cannot choose a different lifestyle, for example in issues to do with sexuality'.