

Introduction

This document is a resource for anyone taking a view on the Government's proposed legislation on violent pornography. Its intention is to correct certain claims that have enjoyed some prominence in the public discussion relating to this proposal, but which are nonetheless unfounded or false. Parties to the debate can then draw their own conclusions based on accurate information.

The central issue here is not whether violent and abusive behaviour is defensible. It is not, as everyone agrees. Rather, the issue is whether this proposal will criminalise non-abusive activities engaged in by consenting adults.

The question that immediately follows is this: if the activities/material in question are not abusive, should they be outlawed because some (even most) people find them distasteful? It is worth remembering that a majority once took that view on homosexuality.

The document is divided into three parts. Part 1 is aimed at those whose time is limited and consists of the following:

- a brief description of the proposed legislation
- a corrective to false claims that have figured prominently in the debate

Part 2 offers brief discussions of:

- the justifications advanced by the Government in its consultation paper
- likely unintended consequences of the legislation
- further relevant issues

Part 3 refers to a way of amending the proposal that would avoid some of the problems discussed here.

PART 1

The proposed legislation

The proposed legislation targets material featuring:

- (i) intercourse or oral sex with an animal
- (ii) sexual interference with a human corpse
- (iii) serious violence (where this means ‘acts that appear to be life-threatening or are likely to result in serious, disabling injury’)

To count as illegal, the material must

- be pornographic, where this means ‘solely or primarily produced for the purpose of sexual arousal’ (i.e. two scenes could be visually indistinguishable, but have different legal status if produced for different purposes)
- feature real or realistic acts (‘realistic’ includes staged acts and is defined as ‘conveying a realistic impression of fear, violence and harm’)

The proposed maximum offence is three years in prison.

False/misleading claims

A number of claims have been made in support of the legislation. Those that have received the most attention can be summarised thus:

- most respondents to the consultation supported the proposal
- the proposed legislation will affect only a small number of people (those who possess the ‘most extreme’ material)
- material of this kind encourages violent behaviour
- much material of this kind features genuine abuse of non-consenting participants
- the proposed legislation is simply an ‘update’ of the Obscene Publications Act (OPA) that addresses the ‘loophole’ of internet access to pornographic material

These claims have been taken on face value by many, but they are at best extremely dubious, if not straightforwardly false. Grounds to suspect them are as follows:

‘Most respondents to the consultation supported the proposal.’	<p>False:</p> <ul style="list-style-type: none">• The Government cited 223 individuals against, 90 in favour; 18 organisations against, 53 in favour. This gives a total of 241 against, 143 in favour.• Of the organisations in favour, 21 were police forces/organisations. If the police are taken as a single entity, the number of organisations in favour drops to 33.• Much has been made of the 50,000 who signed the petition organised by Martin Salter and the Jane Longhurst Trust. But note the wording of that petition: signatories were invited to oppose ‘extreme internet sites promoting violence against women in the name of sexual gratification’. <i>Anyone</i> would object to material ‘promoting’ violence against women (as would this document). But the scope of the legislation is much wider than this. It criminalises material featuring consenting adults engaging in staged or controlled fantasies. Responses to the proposal on forums such as the BBC’s discussion boards suggest most people do <i>not</i> support this.
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‘The legislation will affect only a small number of people.’	No – a great deal of material, featuring consenting participants, typically enjoyed by the BDSM community, the Goth community and enthusiasts of thrillers/horror films could ‘convey a realistic impression of fear, violence and harm’, depending on who was judging that question. The number of people affected almost certainly runs into the hundreds of thousands, and probably the millions.
‘The material encourages violent behaviour.’	The Government’s own consultation paper explicitly says that the evidence does not support this. Supporters such as Martin Salter went on TV and made the claim anyway.
‘The material features genuine abuse of non-consenting participants.’	<p>Almost certainly false. Consider:</p> <ul style="list-style-type: none"> • The Government was not 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 with consenting actors, and say so explicitly on their front pages. • If people really were being maimed, murdered etc, such productions would leave behind either living, seriously injured adult victims or bodies that would need to be disposed of; producers would also need to deflect investigations instigated by family members, etc. Furthermore, assuming a rate of one production per producer per month (many sites offer several per week), the numbers would soon become unmanageable. It is worth remembering that despite the considerable interest in ‘snuff’ films, not one genuine example has been discovered, as a recent documentary on Channel 4 showed. • Much of the relevant material is produced and hosted in the US, where sites must conform to regulations requiring actors to sign release forms indicating that they are of legal age. Unless the Federal authorities are guilty of a massive dereliction of duty, it seems likely they would notice if actors were going missing or turning up in hospital with life-threatening injuries. (Again, the sites mentioned by the Government conform to these regulations.) • Most pornographic sites appear to use a small number of actors on a regular basis. With ‘extreme’ material, these actors would have to reappear each time miraculously recovered from the serious or even fatal injuries they have appeared to suffer previously. Either the Government has an explanation for this miracle, or the actors are not actually being injured.
‘The proposal is simply an update of the OPA.’	<p>This is highly misleading:</p> <ul style="list-style-type: none"> • An OPA conviction requires proof that material would ‘deprave and corrupt’ people exposed to it. With the proposed offence, it would only need to be shown that violent acts (which may be staged/consensual) feature in material intended to arouse sexually – a far less demanding test. • The move from policing what may be published to policing simple possession is not a mere ‘update’. Rather, it constitutes a serious incursion into private life. Such incursions can in principle be justified if the arguments are strong enough (as with child pornography), but it is misleading to describe this as merely ‘closing a loophole’.

A further point: without making any clear statements on the matter, the Government has implied that there is a connection between this issue and that of child pornography. The truth is that the material in question features consenting adults and is aimed at consenting adults, and references to child pornography are, once again, extremely misleading.

PART 2

The Government's justifications

The following justifications were cited in the original consultation paper, and have been repeated since.

(1) The material encourages violent behaviour

The Government admits in its consultation paper that years of research do not support this claim, but makes it anyway. This is not evidence-based policy making. It is not even rational.

Note also: the issue is not that the evidence is 'not quite conclusive' – the evidence gets nowhere near proving the claim, and often undermines it.

(2) The legislation will break the cycle of supply and demand

People's sexual orientations cannot be legislated out of existence (as any gay person pre-1967 would testify). If anything, cutting off the supply may well make the demand stronger.

As for supply, nearly all the material is hosted abroad, and the UK is a small market – so legislation here would have barely any effect.

(3) People who feature in the material need to be protected

Consenting adults who participate in scenes that are staged are not suffering actual injuries and therefore do not need protection.

Consenting adults who participate in scenes featuring real acts that are not dangerous or life-threatening (even if they may *appear* so to those unfamiliar with the relevant practices) do not need protection either.

Acts involving participants who are *coerced* violate existing laws everywhere, and anyone foolish enough to put such material on the web would be offering evidence of their crimes to prosecutors. So those who might be thus harmed are *already* protected.

(4) Society needs to be protected from exposure to the material

The Government does not explain what 'society' needs protection from here. Given the weakness of the arguments alleging harm – i.e. (1) and (3) – this would seem to boil down to a need to be protected from material that some would find distasteful (see justification (6) below).

Bear in mind that 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.

(5) Children need to be protected from exposure to the material

This argument is used here selectively. *Of course* children should not be exposed to this sort of material. 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).

(6) Most people would find the material abhorrent

The Government uses this justification repeatedly, presumably because the justifications that need evidential support do not stand up to scrutiny.

In fact, the Government (perhaps unintentionally) conflates two senses of ‘abhorrence’ here – the morally wrong and the merely distasteful. If the arguments based on evidence of harm fail, this comes down to the latter. In which case, the question is whether distaste on the part of the majority justifies repression of a minority. Gay people found themselves in precisely this position pre-1967.

Unintended consequences

If this legislation is passed, it is likely to have serious unintended consequences, such as miscarriages of justice and other problems. These are briefly described below:

An unenforceable and easily abused law

‘Realistic’

Much concern has already been expressed at the decision to include staged material (as opposed to that featuring real acts and non-consenting participants). Staged material would be caught if it ‘conveys a realistic impression of fear, violence and harm’.

The question, of course, is: what counts as realistic? But there cannot be a clear answer to this because the criterion is in its very definition subjective.

The Government has said it is happy for this to be tested in the courts, but what this means in practice is that no one will know whether they are breaking the law (or not!) until they have been through the trauma of a trial. It may seem plausible to subject publishers, who can at least seek legal advice, to such a lottery, but individuals will find themselves playing dice with three years of their lives whenever they download an image.

It is also well known that unclear laws are easy to abuse. This is not to say that the police are corrupt, but opportunities for abuse should perhaps not be written into legislation.

Finally, the lack of clarity here is an issue that is expected to lead to problems under the ECHR and HRA (see the Opinion by Rabinder Singh, QC, §§13-17).

‘Pornographic’

The Government claims that ‘mainstream’ films that feature violent scenes will not be affected by the legislation, because violent material will count as illegal only if it is *pornographic* – i.e. ‘material that has been solely or primarily produced for the purpose of sexual arousal’. Again, the Government regards this definition as clear enough to be practical.

It is not. Fetishistic material in general need not be explicitly sexual (someone with the relevant fetish might be aroused by a picture of a teapot). So material of the kind under discussion might not depict a sex act at all – it might show a (staged/consensual) violent act instead. But how are such films to be distinguished from, say, low-budget horror films, which are often both sexually suggestive and violent?

Once again, the criterion is subjective – therefore unenforceable, easily abused and problematic under the ECHR and HRA.

A further point: to make the legal status of a scene dependent on what is in the mind of its producer (and viewers) is nothing less than the introduction of thought crime.

Further problematic consequences

- Large numbers of law-abiding people who pose no threat to society will be criminalised. Examples include:
 - the BDSM community – an estimated 10% of the adult population, i.e. up to 4 million people (a *News of the World* survey found that around 50% of people had at some time engaged in some form of BDSM activity)
 - the Goth community, members of which enjoy material featuring depictions of death that could easily be counted as pornographic under the proposed definition
 - people who own low-budget thrillers/horror films
- Anyone who falls foul of this law is to be placed on the Sex Offenders Register. So the SOR will cease to concentrate on paedophiles and genuinely dangerous offenders, and its importance will be correspondingly diluted.
- Police resources will be diverted from matters that involve proven harm to matters that do not.
- This legislation would very likely prove incompatible with the European Convention on Human Rights (and therefore the Human Rights Act), according to Rabinder Singh QC.
- The legislation will undermine the BDSM community, which allows individuals with similar interests to get together, and offers advice and education on consent and safe practice. Undermining this community will *create* a problem that the Government says it is trying to address – safeguarding individuals involved in these kinds of practices.

Further issues

The position of the British Psychological Society

The Government has cited support from the British Psychological Society for its proposal. However, this is misleading.

The BPS response was written by two psychologists who offered their own particular view on the topic rather than a representation of opinion within the profession as a whole. A genuine survey would have shown that opinion within the profession is deeply divided on the effects of pornography – hence the Government’s admission that the research is inconclusive! – and that many psychologists would in any case have felt uncomfortable about endorsing a law of this kind. However, once the official BPS response emerged, it was too late for dissenters to contribute.

A letter of protest representing one group was sent to *The Psychologist*. Interestingly, the BPS president’s reply did not dismiss the group’s position as that of a negligible minority – it simply observed that they had had their chance to include their views in the official response, and had missed it.

A study in hypocrisy

Coherent policy-making? Consider the following inconsistencies:

‘It should be illegal to possess extreme pornography.’	<p>Why just pornography?</p> <ul style="list-style-type: none"> • Given that the Government’s specific reasons (i.e. justifications 1-6) for singling out pornography don’t work, it’s inconsistent not to ban all violent material (e.g. mainstream horror films). • It’s also inconsistent not to ban the practices that correspond to the pornography – i.e. consensually violent sexual activities and (consensual) role play of non-consensual activities. <p>Why the inconsistency? Because the Government is essentially telling people how to have sex, but pornography is an easier target.</p>
‘Violent material should be illegal to possess if it was produced primarily for the purpose of sexual arousal.’	<p>Why not also make it illegal to possess violent material if it is <i>owned</i> primarily for the purpose of sexual arousal (regardless of why it was produced)? I.e. if someone is aroused by watching mainstream horror films, why not make that illegal too?</p> <p>Again, pornography is an easier target.</p>
‘Extreme pornography might be seen by children.’	<p>But so might</p> <ul style="list-style-type: none"> • normal pornography • certificate 18 films
‘Extreme pornography causes violent behaviour.’	<p>Aside from doubts already mentioned, there’s a much better case for saying the same of</p> <ul style="list-style-type: none"> • religious practices and materials • alcohol

PART 3

A possible amendment

The Government was invited to consider alternative proposals that would have targeted only material involving abused and non-consenting participants, while excluding material featuring consenting participants in staged and otherwise non-abusive productions. This seemed to reflect ordinary, common sense principles – why target situations where everyone consents and no one is abused?

Indeed, most of the problems with the Government's proposal 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 Government rejected the alternative proposals on the ground that since it would be difficult for prosecutors to prove actual abuse or lack of consent in some cases, it would simply criminalise non-abusive productions featuring consenting participants too.