

Proposed legislation on ‘extreme’ pornography – why it’s wrong

The aim of this summary

This is a summary of criticisms of the Government’s proposed legislation to ban the possession of ‘extreme’ or ‘violent’ pornography, as set out in its consultation paper *On the possession of extreme pornographic material*. The criticisms were originally made in submissions to the consultation process.

Even in abbreviated form, there’s quite a lot here, because: (a) the Government uses a number of different arguments to justify its position, and the weakness of each justification needs to be demonstrated; (b) quite apart from that, if the proposals were implemented, they would lead to serious moral, legal and practical problems, and these need to be explained.

This summary provides an overview of the whole issue, but is also intended to serve as a handy reference for individual arguments. Rebuttals of each of the Government’s justifications are clearly labelled and comparatively brief, as are explanations of the additional problems. So key points can be referred to quickly.

Why is the proposal wrong?

In a nutshell, the proposal

- misrepresents the material under scrutiny
- fails to distinguish between morally distinguishable cases
- more generally suffers from inconsistency, occasional incoherence and a failure to base its claims on evidence
- will have unintended and problematic consequences

The Government’s justifications

The Government says it should be illegal to possess the material in question because:

- 1) The material ‘may encourage or reinforce interest in violent or aberrant sexual activity’. (Executive Summary, p.1; §27)¹
- 2) This would break the cycle of supply and demand for this material. (Executive Summary, p.1)
- 3) This would protect those who might actually be harmed in the production of this material. (Executive Summary, p.2)
- 4) This would protect society in general from exposure to this material. (Executive Summary, p.2)
- 5) This would protect children in particular from exposure to this material. (Executive Summary, p.2)
- 6) Most people would find this material ‘abhorrent’. (Foreword; Executive Summary, p.1; §11; §57)

¹ References are to the Government’s consultation paper *On the possession of extreme pornographic material*.

Rebuttal of the Government's justifications

A key clarification

The Government says it's only interested in outlawing a narrow class of 'extreme' material, i.e. pornography featuring:

- (i) intercourse or oral sex with an animal;
- (ii) sexual interference with a human corpse;
- (iii) serious violence in a sexual context, and
- (iv) serious sexual violence.' (§39)

This may seem reasonable, but in fact these categories are *misleading*. They don't capture the key *moral* distinctions here, i.e. between material featuring

- real vs fictional activity
- non-consensual vs consensual activity

Given that there are clear moral differences between real vs fictional activity, and non-consensual vs consensual activity, a more accurate picture emerges if we use the following distinctions:

- (I) real acts of non-consensual violence
- (II) real acts of consensual violence
- (III) fictional acts of non-consensual violence (performed consensually by actors)
- (IV) fictional acts of consensual violence (performed consensually by actors)

Everyone would agree that (I) above is genuinely objectionable. But remember:

- if there is any such material, it is *already illegal* everywhere
- it's not clear there *is* any such material on the web (the sites actually mentioned by the Government, e.g. necrobabes etc, fall into the other categories)

So, the argument here isn't about this kind of material – it's about whether material featuring (II)-(IV) is objectionable. That's what the Government's six justifications try to show.

A caveat about (II): there needs to be a limit on real acts of consensual violence (if not, we'd have to allow consensual killing). But, whatever that limit is, it should be set in consultation with the BDSM community.

An initial worry

The Government wants to outlaw the possession of 'extreme' pornography, but not other kinds of violent material – isn't this inconsistent? Shouldn't it outlaw all violent material, including mainstream films? In fact, the Government has a reply here: it says it has particular reasons – i.e. justifications (1)-(6) above – to single out pornography. So the question is whether those justifications work. Let's take a look.

Justification (1): Encouragement of interest in violent or aberrant sexual activity

The Government *admits* it lacks conclusive evidence for (1)!² If so, *there is no reason to believe it*. (It's irrational to admit this *and* argue for it.) Actually, though, the case is even weaker than this: contrary to what people with a religious or otherwise pro-censorship agenda typically say, most recent research *undermines* the claim that pornography is 'dangerous'.³

Here are some more specific reasons to *deny*⁴ (1).

- Sites showing consensual and/or fictional violence *don't* (as some have suggested) encourage real non-consensual violence – many of them explicitly *condemn* it.
- The material doesn't *cause* the sexual orientation, but meets a pre-existing need.
- The material does not 'stimulate' its audiences to real non-consensual violence. To say this misconceives the way fantasies actually work – as if a woman who has a rape fantasy would prefer to be raped for real than to engage consensually with a partner in a simulation of that scenario. The truth is that people who enjoy the relevant fictions/consensual material do not in general *wish* to commit acts of real, non-consensual violence.⁵ Also, it's far from clear that the material was responsible in the one case where someone did wish to commit such acts (i.e. Graham Coutts).⁶

Given that (1) is false, attempts by the Government and other interested parties to link the material in question with cases of real, non-consensual violence, such as domestic violence and the Coutts case, are either ill-informed, irrational or dishonest.

Justification (2): Breaking the cycle of supply and demand

All this would do is *repress*, not reduce demand. Repressed sexual needs tend to fester, rather than evaporate. So the effect could be the opposite of that intended: without a source of gratification and a community to help them understand their needs, some individuals might turn to real violent behaviour – which they might otherwise have avoided.

As for supply, nearly all the material is hosted abroad, so legislation here would have barely any effect.

Justification (3): Protection of those who might be harmed in production of the material

Physical harm: There is no need for protection from physical harm with material featuring fictional acts of *violence* (obviously – no one is actually getting hurt), or real acts of *consensual* violence within acceptable limits.

² Executive Summary, p.1.

³ See the submission to the consultation by Professor Martin Baker & Dr Ernest Mathijs. Baker and Mathijs conclude that the Government has 'irresponsibly' ignored the most relevant and up-to-date research.

⁴ For more details of these, see *EP Proposals - Critique S*, pp.4-8.

⁵ The degree to which the importance of consent, the distinction between real and fictional acts, and considerations of safety inform practices within the BDSM community (in which men often assume the submissive role) has been confirmed by various studies.

⁶ Again, see Baker and Mathijs's submission to the consultation.

If participants suffered real non-consensual violence (or real consensual violence that exceeds acceptable limits), the producers would have offered the evidence to prosecutors on a plate! So those who might be thus harmed are already protected.

Psychological harm: The Government also mentions ‘other’ harm, which presumably means psychological harm. But why assume that psychological harm occurs if performers participate consensually? In fact, the Government tries to dismiss the issue of consent (§34), apparently assuming that participants are (by definition?) not qualified to judge what is good for them – unlike the authors of the consultation paper.

Any relationship (business or personal) can be exploitative. People may find pornography featuring fictional and/or consensual violence distasteful, but that doesn’t mean the performers are being exploited. Sometimes the performers *are* the producers. And a scene of ‘serious violence in a sexual context’ may require no more of an actor than would be expected in, say, a mainstream horror film. The work can therefore be easier – depending on the preferences of the performer – than having sex in a ‘normal’ pornographic film.

Justification (4): Protection of society from exposure to this material

The Government simply doesn’t explain what we need protection from. It might have either of the following in mind:

- that the material might be harmful (either directly or through encouraging violent behaviour) – but we have just seen that this claim doesn’t stand up
- that people might find the material abhorrent – but ‘abhorrence’ in this context just boils down to squeamishness (though the Government conflates it with harm and moral objectionability – see the section on Justification (6) below)

Also: the material is not widely available and has to be sought out. So the members of society that would be ‘protected’ here would mostly be those who want to see it.

Justification (5): Protection of children from exposure to this material

Children should (of course) not be exposed to this sort of material. Nor should they be exposed to ‘normal’ 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 shouldn’t, but might see).

A more constructive proposal: a public information campaign on the many ways parents can control what their children see on the internet.

Justification (6): Abhorrence

The Government is in a real muddle here. This is particularly worrying because, given that we already have laws that forbid real violence, and given the weakness of (1), it looks like ‘abhorrence’ is the Government’s *primary motivation* for proposing this legislation (it repeats the point no less than five times). There are two confusions:

Taste and morality: the Government confuses something's being distasteful with its being morally wrong. It talks about 'abhorrence', but ignores the fact it can mean two quite different things:

- a proper response to behaviour that is (genuinely) morally objectionable
- squeamishness – a sense of revulsion towards something that is morally neutral (e.g. a reaction to someone eating sheep's eyes)

Material featuring participants who are coerced would certainly qualify as morally objectionable (1st kind of abhorrence). But the same can't be said of material featuring real consensual acts (within acceptable limits) and/or fictional acts. So the 'abhorrence' the Government is talking about is squeamishness (2nd kind of abhorrence).

But squeamishness, even if felt by a majority, is not a good enough reason to curb people's freedoms and interfere in their private lives. (A reminder of how unreliable a guide to genuine moral objectionability this is: until recently, a majority in this country believed homosexuality to be 'clearly abhorrent'.)

Taste and harm: the Government confuses something's being distasteful with its being harmful. This emerges through a tortured attempt to characterise 'what we need protection from' in terms of morality (which it has already confused with taste), and references to the Obscene Publications Act (which makes the same mistake).⁷ These characterisations are presumably necessary because, as noted above, the Government admits that it has no actual evidence of the material causing harm.

This confusion of personal taste with questions of harm and morality is the very essence of the kind of bigoted thinking that minorities have had to live with throughout history.

A 'pragmatic' argument

The Government has a further 'pragmatic' argument against possessing 'extreme' pornography featuring only fictional acts:

'By realistic depictions we intend to capture those scenes which appear to be real and are convincing, but which may be acted. This follows the precedent of the child pornography legislation and is in part necessary to avoid the need to prove the activity actually took place, as this would be an insuperable hurdle for the prosecution.' (§38)

But the analogy with child pornography doesn't hold. Children cannot by definition consent to participate in pornographic material; so their *mere presence* in such material is enough to make it objectionable. So proving what specifically happened in the material, though important, is a secondary issue.

But adults *can* consent, so their mere presence in material featuring fictional acts is not analogously objectionable. So the material would only be objectionable if the acts were real, in which case fictional material can't be treated as equivalent to material featuring real acts.

⁷ See *EP Proposals - Critique S* (pp.10-11) for a demonstration of just how confused the Government's reasoning is here.

Interim conclusion

The Government wants to curtail people's freedoms, so it had to come up with good reasons for doing so. It hasn't done so – none of its justifications stand up to scrutiny (and seem motivated more by tabloid-inspired outrage than empirical evidence).

Next, we'll look at the separate question of the problems that would arise if the proposals were to be implemented.

Additional problems

Enforceability

Risk of ambiguity (I): realism

As we saw earlier, the Government intends to target 'realistic depictions' in fictional material (§38). But who is to say what counts as realistic? The police? But how are the police supposed to consistently apply such a subjective criterion? And how are individuals supposed to do so? The answer is: no one can. So the law would be unenforceable. Unless, of course, we say realism is whatever the police say it is – which means the law would be very easy to *abuse*.

Risk of ambiguity (II): pornography

Much published material, and many recreational practices, depict or involve acts of violence. Here, corresponding to our four categories, are some uncontroversial examples:

Type of activity/material	Examples
Type (I): real acts of non-consensual violence	<ul style="list-style-type: none">▪ News/documentaries▪ Histories of war▪ Art using film or photos of real events
Type (II): real acts of consensual violence (within acceptable limits)	<ul style="list-style-type: none">▪ Sports such as rugby and boxing▪ Japanese game shows▪ Tattooing▪ News/documentaries
Type (III): fictional acts of non-consensual violence (performed consensually by actors)	<ul style="list-style-type: none">▪ Mainstream/arthouse films – e.g. horror films/thrillers▪ Battle re-enactments
Type (IV): fictional acts of consensual violence (performed consensually by actors)	<ul style="list-style-type: none">▪ Mainstream/arthouse films – e.g. <i>In the Realm of the Senses</i> (Nagisa Oshima, 1976), <i>Matador</i> (Pedro Amaldivar, 1986)

The Government says it isn't targeting such examples. It says violent material will count as illegal if it is *pornography* – i.e. 'material that has been solely or primarily produced for the purpose of sexual arousal' (§37).

There are two problems with this:

- (a) A case could arise in which two pieces of film were indistinguishable, but only one was produced for sexual arousal. So the only difference would be the producer's intentions. If that's what makes possession of it criminal, this is a *thought crime*.
- (b) With sexual fetishes in general, arousal can occur as a result of material that is not explicitly sexual; with 'extreme' pornography, the material need not

depict a sex act, but could show a (fictional and/or consensual) violent act instead. So who's to tell what counts as pornographic and what isn't? Once again, the criterion becomes subjective – therefore unenforceable, and/or easily abused.

The Government will presumably say that it will be 'easy' to tell whether something is pornographic, but in fact the reverse is true. Many horror films are both sexually suggestive and violent. Who is to say what the producer's intentions were? The Government says it isn't targeting mainstream films, but what counts as mainstream? Budget? So anyone who buys a low-budget horror feature or short is risking their freedom? Will the producer be sought out and interviewed, or will the police infer those intentions from the producer's intentions? If someone who possesses such a film enjoys spanking, should the police infer that the film is pornographic, because the possessor is generally 'perverted'? Will it be a defence to say that spanking *per se* doesn't feature in the film? What about a documentary on the body-piercing practices of African tribes? OK to own, unless you're a masochist?

You really don't have to think about this for long to see how many absurd cases could arise – and how arbitrary the law would be in ruining people's lives.

Effect on respect for the law and policing

We have just seen that the proposed legislation would be impossible to enforce consistently, and would be easy to abuse. The abuse could consist not simply in police officers defining vague terms as they see fit, but in making the investigation itself punitive (seizure and retention of computer equipment for long periods, leaking names to the media without substantial evidence). The point here is not that the police cannot in general be trusted to enforce the law properly. Rather, it is that good policing requires clear law, and this proposal offers the exact opposite.

Here are some further problematic consequences:

- Large numbers of law-abiding people who pose no threat to society would very likely be criminalised, making the law appear both absurd and oppressive. Examples include:
 - The BDSM community. This at any one time comprises 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.
 - Enthusiasts of low-budget 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.

Effect on the BDSM community

The constituency most obviously threatened by the proposed legislation is the BDSM community. As already mentioned, it has been estimated to number in the millions, and is represented across the UK by munches (informal get-togethers), clubs, exhibitions and workshops.

The Government says it is not targeting ‘milder forms of bondage and humiliation’, but this ignores the fact that many activities enjoyed (e.g. ‘less mild’ forms of bondage and humiliation, and role play of non-consensual scenarios) would fall outside this category. It seems to have mistakenly identified social attitudes towards BDSM, which are increasingly relaxed and tolerant, with those of tabloid editors, who are primarily concerned with fostering outrage. The irony is that the community is well known to lay considerable emphasis on

- the importance of consent, and of being clear about giving it
- maintaining a clear distinction between fantasy (fiction, role play) and reality
- safe practice

Pornography tends to be produced for enthusiasts by enthusiasts (of either sex), for little commercial gain, and in line with the above principles. This contrasts with the Government’s ‘exploitation’ characterisation.

In fact, it’s not surprising that the Government’s grasp of the whole issue is so out of touch. Research⁸ has shown that critics of controversial material such as ‘extreme’ pornography systematically impose their own, false interpretation (‘It’s exploitative’, ‘It condones violence’) on it. In this case, the Government violated the Cabinet Code of Practice on Consultations by publishing its proposals without bothering to research or consult with the BDSM community.

The effect of the legislation will be to drive people back into the closet, thus undermining an ethical, self-policing community, and creating a gap which will inevitably be filled by criminals. This will *create* a problem that the Government says it is trying to address – safeguarding individuals involved in production.

Better legislation

The wrong criterion

We’ve seen that a law based on the ‘pornography’ criterion would be unenforceable/easy to abuse – in which case, how do we meet the need to curb the traffic of genuinely objectionable material – i.e. pornography featuring *real* acts of *non-consensual* violence (or consensual violence exceeding acceptable limits)?

A dilemma? No. The problem is making *pornography* the focus here. This misses the point because

- what matters is the *acts* people suffer in making the material (these would be just as bad in *non-pornographic* material – e.g. bigots torturing minorities)
- there isn’t anything objectionable about pornography which *doesn’t* feature such acts (unless you’re against *all* pornography)

So *being pornographic* isn’t what matters here. In which case, it’s hardly a good basis for a law which would in any case be unenforceable.

⁸ See the submission to the consultation by Baker and Mathijs.

A better criterion

So much for the problem. The solution is to apply a better criterion of illegality. Here is one possibility: *it should be illegal to knowingly acquire material (pornographic or not) featuring real acts of non-consensual violence (or acts of consensual violence that exceeds acceptable limits), where those acts were perpetrated in order to produce the material, and where the acquisition helps perpetuate the market for such material.* This approach has two virtues:

- it aligns the law with the *moral* considerations that motivate it
- it disposes of the problems of enforceability described earlier

Prosecutors would have to show beyond reasonable doubt that

- the acts depicted in the material were real
- that the possessor of the material knew that
 - they were real
 - they were perpetrated to produce the material
 - in acquiring them he/she was helping to perpetuate the market for such material

This is a higher but fairer burden of proof – indeed it is in line with the Government’s stated intention to target only those who knowingly seek this sort of material, rather than those who acquire it inadvertently.

A study in hypocrisy

So far we've looked at why the Government's justifications for this proposal don't work, the problems it would produce and a better alternative. It is also worth noting, just as a measure of how ill-considered and unfair this proposal is, the degree of hypocrisy in its assumptions and claims. Some of these have emerged already, but here is a list:

<p>'It should be illegal to possess extreme pornography.'</p>	<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 <i>all</i> violent material (e.g. mainstream horror films). ▪ It's also inconsistent not to ban the <i>practices</i> that correspond to the pornography – i.e. consensually violent sexual activities and fictionally non-consensual role play. <p>Why the inconsistency? Because the principle the Government is applying to pornography has profound implications for the state's capacity to interfere with private life and freedom of expression. It seeks to disguise this by arbitrarily restricting the application of that principle to an easy target.</p>
<p>'Violent material should be illegal to possess if it was produced primarily for the purpose of sexual arousal.'</p>	<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>The Government introduces one kind of thought crime, and to be consistent should allow the other – but again, that would make the target of the law wider than pornography, so it would be less easy to sell.</p>
<p>'Extreme pornography might be seen by children.'</p>	<p>But so might</p> <ul style="list-style-type: none"> ▪ normal pornography ▪ certificate 18 films
<p>'Extreme pornography causes violent behaviour.'</p>	<p>But there's a much better case for saying the same of</p> <ul style="list-style-type: none"> ▪ religious practices and materials ▪ alcohol

Conclusions

- The proposal is a gross infringement of private life and freedom of expression.
- The Government's justifications don't stand up to scrutiny.
- The proposed law would be unenforceable and easy to abuse.
- Alternative proposals can be formulated that would avoid these problems and specifically target genuinely objectionable material – i.e. that featuring real acts of non-consensual violence (pornographic or not).
- The Government's position is shot through with hypocrisy.
- The Government appears more concerned with sounding 'tough' for the tabloids than addressing the issue in a rational and evidence-based fashion.
- Therefore, the Government's proposal should be rejected.