NOMS National Offender Management Service
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SCOTTISH EXECUTIVE

Consultation: On the possession of extreme pornographic material

Home Office

August 2005

FOREWORD

by the Parliamentary Under Secretary of State Paul Goggins MP
and Scottish Executive Minister for Justice, Cathy Jamieson MSP

The Internet has been the most spectacular communications development in the last 10 years. It is enhancing all our lives by making direct contact between people much easier and, with a few clicks of the mouse, allowing access to all kinds of information which was previously unavailable to us.

The Internet provides opportunities to communicate, learn and shop; and helps UK businesses to compete internationally. But the internet can also be misused, for example, by circulating indecent and abusive images of children. And we have put in place laws – with stringent penalties – to combat the making, distribution and simple possession of this material.

There is now also considerable public concern about the availability of extreme pornographic material featuring adults. We are not referring to what might be called mainstream pornography or to the kind of material classified for sale in licensed sex shops by the British Board of Film Classification. By "extreme" we mean material which is violent and abusive, featuring activities which are illegal in themselves and where, in some cases, participants may have been the victims of criminal offences. We believe most people would find this material abhorrent. It is already illegal to publish it under the Obscene Publications Act 1959 and in Scotland, the Civic Government (Scotland) Act 1982, but the global nature of the Internet means that it is very difficult to prosecute those responsible who are mostly operating from abroad.

This pornographic material was available in the past but never so easily or in such quantity as it is now. The nature of the Internet requires us to take a different approach if our controls on this kind of material are not to be undermined.

We are determined to act against publishers where we can but we believe that individuals also need to take greater responsibility. So we are proposing to strengthen the criminal law in respect of possession of a limited category of extreme material featuring adults. This will mirror the arrangements already in place in respect of child pornography. The intention is to reduce the demand for such material and to send a clear message that it has no place in our society.

This consultation paper contains four options for creating a new offence to help tackle this misuse of the Internet. Because the law applies offline as well as online, the proposal will apply to the possession of this material in whatever form it is held. We know that this is a worldwide issue and are raising it in our discussions with other governments, but we believe that closing a gap in our domestic law and discouraging the possession of this material in the UK will help reduce demand for it and lessen the human cost in its production.

Details of how to contribute to the consultation process are set out in the Executive Summary. We welcome your views.

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EXECUTIVE SUMMARY

This consultation document seeks views on a proposal to make illegal the possession of a limited range of extreme pornographic material featuring adults. The proposal will mirror the arrangements already in place in respect of indecent photographs of children, possession of which is already an offence.

There has been increasing public concern about the availability of this extreme material, highlighted by the case of a young woman who was murdered by a man who had been accessing extreme pornographic websites. This document sets out options for creating a new offence of simple possession of extreme pornographic material which is graphic and sexually explicit and which contains actual scenes or realistic depictions of serious violence, bestiality or necrophilia. The material in question would be illegal to publish, sell or import here under our existing obscenity legislation (the Obscene Publications Acts (OPA) 1959 and 1964 and in Scotland, the Civic Government (Scotland) Act (CG(S)A) 1982 but it is not currently an offence to possess it other than for gain in England and Wales or, in Scotland, with a view to sale or distribution.

The material depicts activities which are illegal in themselves and the participants may in some cases have been the victims of criminal offences. It goes well beyond what is available for sale in licensed sex shops, classified R18 by the British Board of Film Classification. Thus our mainstream entertainment industry, which works within the obscenity laws, would not be affected by the proposals in this document.

The issue arises due to the wide range of extreme pornography available via the Internet which cannot, in practice, be controlled by our existing laws. Extreme pornography featuring violent rape, sexual torture and other abusive non-consensual acts existed in various forms before the internet but the publication and supply could be controlled by the OPA, the CG(S)A and by Customs legislation (the Customs Consolidation Act 1876 and Customs and Excise Management Act 1979). Closing down sources of supply and distribution obviated the need for a possession offence. However, the global nature of the internet makes this approach much more difficult. We are determined to act where we can against publishers but require the individual to take greater responsibility if we are to maintain our controls on illegal material. We believe the material which is under consideration would be abhorrent to most people and has no place in our society.

Our intention in proposing a possession offence is to try to break the demand/supply cycle and to discourage interest in this material which we consider may encourage or reinforce interest in violent and aberrant sexual activity.

As to evidence of harm, conducting research in this area is complex. We do not yet have sufficient evidence from which to draw any definite conclusions as to the likely long term impact of this kind of material on individuals generally, or on those who may already be predisposed to violent or aberrant sexual behaviour.

It is not our intention to penalise anyone who accidentally stumbles across the material specified in the proposal, or who has it sent to them without their consent, or has a legitimate reason (such as assisting law enforcement) for dealing with it.

Our proposals to strengthen controls on extreme pornographic material are based on:

- a desire to protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victim of crime in the making of the material, whether or not they notionally or genuinely consent to take part;
- a desire to protect society, particularly children, from exposure to such material, to which access can no longer be reliably controlled through legislation dealing with publication and distribution, and which may encourage interest in violent or aberrant sexual activity.

The proposals would close a gap in existing legislation which has developed as technology advances to circumvent the controls already in place.

Any new offence would apply only to pornographic material containing explicit actual scenes or realistic depictions of:

i) intercourse or oral sex with an animal;
ii) sexual interference with a human corpse;
iii) serious violence in a sexual context;
iv) serious sexual violence.[1]

We have considered arguments both for and against several options: adding a possession offence to the Obscene Publications Act 1959 and the Civic Government (Scotland) Act 1982; adding a possession offence limited to the category of material we have set out but under the umbrella of the OPA and the CG(S)A; a new free standing offence in respect of the category of material we have set out (our preferred option); and doing nothing.

We consider that creating a new free-standing offence to operate alongside the OPA 1959 and the CG(S)A offers the most flexible and effective approach. On the question of penalties, we propose a penalty for possession of the material specified of up to 3 years. In order to maintain the distinction in seriousness between publishing and possession, we propose increasing the current OPA and CG(S)A penalty from a maximum of 3 years to a maximum of 5 years.

We are aware that these proposals will generate considerable interest and wish to ensure that there is an opportunity for comments from as wide a range of interests as possible.

You are invited to send your views by **Friday 2 December 2005** to:

Consultation on Possession of Extreme Pornography
Criminal Law Policy Unit
2nd Floor, Fry Building
2 Marsham Street
London SW1P 4DF

Tel: 020 7035 6981
Fax: 0870 336 9141
Email:
CLPUconsultations@homeoffice.gsi.gov.uk

For **additional hard copies** please contact us at the above address. Electronic copies of this document are also available at: http://www.homeoffice.gov.uk/inside/consults/

You should also contact the Criminal Law Policy Unit should you require a copy of this consultation in any other format, e.g. Large Font or Audio.

[1] By "serious violence" we mean violence in respect of which a prosecution of grievous bodily harm could be brought in England and Wales or in Scotland, assault to severe injury.

A summary of the responses received will be published within 3 months of the closing date for this consultation, and will be made available on our website.

Scotland

The Scottish Parliament would legislate separately to create any new pornography offences in Scotland because this is a devolved issue. If you respond on behalf of a UK-wide organisation, a copy of your response will be sent to the Scottish Executive. If you live in Scotland or your organisation is based in Scotland, please send your views to:

Consultation on Possession of Extreme Pornography
Criminal Justice Division
Justice Department
Scottish Executive
Regent's Road
Edinburgh
EH1 3DG

Tel: 0131 244 3348
Fax: 0131 244 2623
Email:
extremepornography@scotland.gsi.gov.uk

INTRODUCTION

Introduction

1. The purpose of this consultation document is to seek as wide a range of views as possible on a proposal to strengthen the criminal law in respect of possession of a limited range of extreme pornographic material featuring adults. The proposal will mirror the arrangements already in place in respect of indecent photographs and pseudo-photographs of children, possession of which is already an offence.

2. The proposal touches on many issues which are of interest and concern: freedom of speech, protection of the vulnerable, the impact of the Internet on the consumption of violent pornography and wider moral questions about whether some material is so violent, degrading and potentially harmful that its possession should be controlled.

3. We welcome responses to the questions which have been posed in the document and any further contributions or suggestions which you may have.

Background

4. This document sets out options for creating a new offence of simple possession of extreme pornographic material which is graphic and sexually explicit and which contains serious violence towards women and men. This material goes far beyond what is classified for mainstream cinema by the British Board of Film Classification (BBFC)[2] and beyond the material classified by the BBFC for sale only in licensed sex shops in the R18 category. We believe the material in question would be illegal to publish, sell or import here under our existing obscenity legislation. Thus our mainstream entertainment industry, which works within the obscenity laws, would not be affected by the proposals in this document. Neither should those who currently lawfully produce and distribute pornography. The issue arises due to the wide range of extreme pornography that is now available on the internet which in practice cannot be controlled by our existing laws.

5. It is not possible in a public document like this to give a great deal of graphic detail or description of the material in question. However, we can say that there are hundreds of internet sites offering a wide range of material featuring the torture of (mostly female) victims who are tied to some kind of apparatus or restrained in other ways and stabbed with knives, hooks and other implements. These acts are usually presented in a sexually explicit context so that it is clear that the purpose of the material is sexual gratification, although the violence itself may not be sexual. For example, some material contains sexualised images of women hanging by their necks from meat hooks, some with plastic bags over their heads. There is also extensive availability of sites featuring violent rape scenes. Within this category there is a growing trend for scenes purporting to be filmed in real time which heightens their impact. Depictions of necrophilia and bestiality are also widely available.

[2] For details of BBFC classification criteria go to: www.bbfc.co.uk

6. Internet take-up has accelerated rapidly over the last few years. According to a major research study published in April 2005 (UK Children Go Online[3]) 75% of 9-19 year olds surveyed had accessed the Internet from a computer at home and 57% of all 9-19 year olds surveyed who use the Internet at least once a week had come into contact with pornography online. The study did not distinguish between types of pornography but did reveal that most contact was accidental, for example via unsolicited emails or pop-up adverts but that a minority in this age group (10%) actively sought out pornography. According to the same study, figures produced by the Office for National Statistics[4] show that 58% of UK adults (aged 16+) had used the Internet by February 2004 (up from 49% in 2002 and 54% in 2003). By far the largest user group are young people aged 14-22 in full time education, as found in the Oxford Internet Survey[5]. The Survey also found that most users (93%) accessed the Internet from home.

7. The issue of accidental or legitimate contact with pornography of the kind described in this document will concern many people. It is not the intention to penalise people who accidentally stumble across the material specified in the proposal, have it sent to them without their consent, or have a legitimate reason (such as assisting law enforcement) for dealing with it. The proposal will mirror the arrangements already in place in respect of indecent photographs and pseudo photographs of children, possession of which is already an offence (as set out in the current legislation section in paragraphs 24-25 below).

8. As the studies mentioned above show, the Internet is transforming our lives, offering unparalleled opportunities to communicate, to discover and to learn. Alongside these benefits, the Internet also brings challenges for, amongst other things, the regulation of potentially illegal pornographic material which is readily accessible, often without payment, from a huge range of providers.

9. Illegal material has always been available and those who sold it risked prosecution under the Obscene Publications Act 1959 (OPA) and in Scotland, the Civic Government (Scotland) Act 1982. But there is some evidence that the boundaries are being pushed back and that even more extreme images are now being sought after and provided. In addition, this material has never been available so easily or in such quantity. In pre-Internet days, individuals who wished to view this kind of material would need to seek it out, bring it into their home or have it delivered in physical form as magazines, videos, photographs etc, risking discovery and embarrassment at every stage. Now they are able to access it from their computers at home (or from their place of work) with relative ease.

10. Particular concern has been raised recently about the accessibility of extreme pornographic material. This has been heightened by a recent tragic case where a young woman was murdered by a man who had been accessing such sites on the Internet. During the trial it was revealed that he had visited these sites prior to and after the victim's death[6].

11. The material under consideration does not depict consensual sexual activity, nor even the milder forms of bondage and humiliation which are common place in pornographic material. It depicts suffering, pain, torture and degradation of a kind which we believe most people would find abhorrent. The underlying premise of this document is that this material should have no place in our society. The fact that it is widely accessible over the Internet does not legitimise it.

[3] UK Children Go Online, Sonia Livingstone and Magdalena Bober, April 2005: www.children-go-online.net
[4] Office for National Statistics. www.statistics.gov.uk
[5] Oxford Internet Survey. www.oii.ox.ac.uk
[6] R V Coutts [2005] EWCA Crim 52.

Current Legislation

Obscene Publications Acts 1959 and 1964 – background

12. The principal control on published works, including material published via the Internet, is the *Obscene Publications Act (OPA) 1959*. The OPA, as amended, says that an article shall be deemed to be obscene if its effect, when taken as a whole, is such as to tend to deprave and corrupt persons who are likely to read, see or hear it. There is also a public good defence to ensure that genuine works of science, literature, art or learning are not penalised. Publication, as defined in the Act covers a range of activity including giving, hiring, lending and selling but simple possession of an obscene article is not an offence.

13. The 'deprave and corrupt' test has been controversial since its inception, and has both supporters and critics. Its strengths are said to be that it is flexible and capable of interpretation by juries in line with changing moral standards. Its focus is on the effects or the harm done by the material in question. The present test is consistent with our obligations under Article 10 of the European Convention on Human Rights, which guarantees freedom of expression and was incorporated into UK law in the Human Rights Act 1998. The perceived weaknesses of the test are the reverse of its strengths. Its flexibility and the subjective judgements required of juries in every case are considered by some to be its greatest drawbacks.

14. There have been several attempts to reform the OPA. In recent years, Gerald Howarth MP introduced a Bill in 1987 and Lord Halsbury introduced Bills in 1996 and again in 1999. However, these Bills failed to make progress and there was no consensus on a way forward.

15. The number of prosecutions under the OPA has fallen from 309 in 1994 to 39 in 2003. However, the number of prosecutions under the Protection of Children Act 1978 (as amended) or section 160 of the Criminal Justice Act 1988, which make it illegal to make, distribute, possess, etc. indecent photographs of children, has risen markedly from 93 in 1994 to 1,890 in 2003. It may be that the reduction in prosecutions under the OPA in part reflects a higher priority being given to combating the increasing availability of indecent photographs of children through the Internet.

16. The Obscene Publications Act 1964 added the offence of possession for gain to the 1959 Act, with the same penalties, i.e. a maximum of 3 years' imprisonment or an unlimited fine, or both. There are also restrictions on the sending of indecent and obscene material by post in section 85 of the Postal Services Act 2000 that was closely modelled on section 11 of the Postal Services Act 1953. The Customs and Excise Management Act 1979 also gives Customs' officers the power to take action against those who import prohibited goods which includes material that it is an offence to possess for gain under the OPA.

The Law in Scotland

17. In Scotland, section 51 of the Civic Government (Scotland) Act 1982 makes it an offence to publicly display, publish, sell or distribute any obscene material. It also makes it an offence to make, print, have or keep any obscene material with a view to its eventual sale or distribution. The maximum penalty on indictment for these offences is 3 years' imprisonment. The Act has been amended on a number of occasions to include broadcasting of obscene material, to increase the maximum penalty and to ensure that the term "publishing" includes transmitting electronic data.

18. The term "obscene" is not defined in the Act, however, courts will apply the common law test of whether the material is calculated to deprave and corrupt persons open to depraving or corrupting influences. This is a slightly different test of obscenity from that used in England and Wales but has the same advantages and disadvantages of flexibility discussed in paragraph 13.

19. Both the Postal Services Act 2000 and the Customs and Excise Management Act 1979 (see paragraph 16) apply to Scotland.

Recent Consideration of the Current Legislation

20. We believe the type of extreme material specified in the proposals would contravene the OPA and in Scotland, the CG(S)A.

21. We have considered the position of the OPA and the CG(S)A in the light of technological change. Despite the criticisms often made of the general test of obscenity, we are satisfied that it continues to provide a benchmark for society's tolerance of certain material at a given time, as expressed through the courts, which is generally understood by the publishing and other media, and their regulators. It offers a threshold below which publishers, broadcasting regulators and others can establish their own standards of what is acceptable to the public. The OPA and the CG(S)A, have also been used successfully in respect of material published via the Internet, where necessary links with publishers here have been made to enable a prosecution to be brought. The case of R v Perrin[7] is a recent example in England. This case involved a French national based in the UK who was publishing from abroad (in the USA). He was arrested and successfully prosecuted when he came to the UK. This judgement stated that the mere transmission of data constitutes publication and endorsed the decision in the case of R v Waddon, a Court of Appeal decision delivered on 6 April 2000 which states that publication on the Internet occurs when the images are uploaded and when they are downloaded.

22. We believe that very little potentially illegal pornographic material found on the Internet originates from within the UK. The Internet Watch Foundation (IWF)[8] received no reports of UK-hosted material in 2003 or 2004. The lack of UK-hosted material might be as a result of the deterrent effect of the OPA and the CG(S)A. The challenge now arises from the ease of circulation of this material from abroad and this requires a different approach.

23. As indicated above, it is not an offence simply to possess obscene material, although it is an offence in England and Wales to have an obscene article for publication for gain or, in Scotland, to have obscene material with a view to its eventual sale or distribution. When the present laws were passed, it was possible to cut off sources of supply of illegal material in the form of books, photographs and later, films, videos and DVDs, by taking action against publishers operating within the UK. Physical importation from abroad was prohibited by the Customs Consolidation Act 1876 and the Customs and Excise Management Act 1979, and gave Customs' officers the power to seize illegal material. Closing down sources of supply and distribution obviated the need for a possession offence. However, the global nature of the Internet makes this approach much more difficult.

[7] Stated by the Court of Appeal in two decisions: R v Waddon (unreported, 6th April 2000) and R v Perrin [2002] EWCA Crim 747.

[8] The Internet Watch Foundation – www.iwf.org.uk. The IWF is the body funded mainly by industry to which the public can make complaints about potentially illegal material online (principally indecent photographs of children and obscene and racist material).

We are determined to act where we can against publishers but require the individual to take greater responsibility if we are to maintain our controls on illegal material. Accessing extreme pornographic images, particularly on paid-for sites, fuels the demand/supply/demand cycle. We believe that an offence of possession of a limited category of extreme adult material, may help to break this cycle.

Possession of Indecent Photographs and Pseudo-Photographs of Children

24. A similar approach has been taken in respect of criminalising simple possession of indecent photographs and pseudo-photographs[9] of children. In England and Wales the Protection of Children Act 1978 made it an offence to take, make and distribute indecent images of children under 16. Ten years later Parliament decided, in passing section 160 Criminal Justice Act 1988, that it should also be an offence to simply possess such images. The Sexual Offences Act 2003, amended the 1978 Act so that both it and the 1988 Act apply to indecent photographs of children under 18. Possession of such material is an offence under the 1988 Act carrying a maximum 5 year penalty, while offences of taking, making and distribution are covered under the 1978 Act and carry a maximum 10 year penalty.

25. In Scotland, taking, making, distributing, showing or advertising indecent photographs and pseudo-photographs of children is an offence, by virtue of section 52 of the Civic Government (Scotland) Act 1982. The Criminal Justice Act 1988 made it an offence to possess such images, by inserting section 52A into the Civic Government (Scotland) Act 1982. The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 will make these offences apply to images of children under 18, rather than 16 as at present. Like England and Wales, the maximum penalty on indictment for possession of such material is 5 years' imprisonment and the maximum penalty on indictment for taking, making, distributing, showing or advertising such material is 10 years' imprisonment.

26. The primary purpose of this legislation is to protect children both from direct abuse and from the continued circulation of images of their abuse. Merely downloading an image from the Internet is regarded as a serious matter because to do so feeds the market for this kind of material, so increasing the likelihood of further abuse, to create further images. Although the arguments are less clear cut in respect of violent and abusive adult pornography, we believe that a possession offence will send a clear message about this material, will make it easier to combat it and may reduce demand for it.

Q. Do you think that the challenge posed by the Internet in this area requires the law to be strengthened?

Evidence of Harm

27. As previously stated, we believe that the material under consideration in this document has no place in our society and people should be prohibited from possessing it. We believe from the observations of the police and others who investigate it, that the material may often cause serious physical and other harm to those involved in making it; in some cases the participants are clearly the victims of criminal offences. We consider that it is possible that such material may encourage or reinforce interest in violent and aberrant sexual activity to the detriment of society as a whole.

[9] "Pseudo-photograph" means an image, whether made by computer graphics or otherwise howsoever, which appears to be a photograph. (Criminal Justice and Public Order Act 1994).

28. There is a substantial body of research which explores the effects of pornography on attitudes, beliefs and behaviour. There are many studies examining the impact of both mainstream and sexually violent pornography on individuals and society, which have been conducted since the 1970s and 1980s when the threshold of tolerance of pornographic material rose in many countries. These studies take different forms. Some of this research comprises empirical studies conducted to measure emotional, attitudinal and behavioural effects with different samples of males from the general population. There is also research with sex offenders which has attempted to learn how they may have been influenced by pornographic material. In addition, there are studies which involve rape victims and battered women to determine the part pornography may have played in the offences committed against them. Studies of volunteers' reactions to pornography have been conducted in laboratory conditions. There have also been a few large studies which have attempted to investigate whether there is a correlation of availability of pornography with rates of sexual offending.

29. The interpretation of the findings of this research has been the subject of reviews commissioned by governments in the US, UK, Australia and elsewhere over several decades, and the subject of public debate often coloured by a moral or political outlook. This has made it difficult to get a clear picture and understanding of the possible harmful effects of pornography.

30. Ethical considerations prevent research which involves exposing people to the extremely violent and degrading material which is under discussion in this document. This places certain limitations on the kinds of studies which can be conducted. Many of the available studies are therefore cross-sectional or retrospective; many are concerned with short term effects, for example in laboratory conditions, rather then the long term effects of exposure to material which examines the duration of effects and whether repeated exposure has cumulative effects. It is difficult to replicate, in laboratory conditions, the obsessive and repeated exposure to this material which may occur in real life situations.

31. Given the many different approaches to conducting the research and framing the questions, as well as differences in the nature of the material examined, we are unable, at present, to draw any definite conclusions based on research as to the likely long term impact of this kind of material on individuals generally, or on those who may already be predisposed to violent or aberrant sexual behaviour.

Q. In the absence of conclusive research results as to its possible negative effects, do you think that there is some pornographic material which is so degrading, violent or aberrant that it should not be tolerated?

The Proposals

Public policy rationale

32. Technological and social developments, including the widespread use of the Internet, mean we can no longer rely on national norms of behaviour or understanding, or on border controls to limit the kinds of material consumed within the UK. We also cannot ignore the fact that international enforcement of national standards in this area is highly problematic. We must consider whether further controls on particular forms of material that are made available for public consumption are necessary and justified.

33. As set out earlier, we believe that there is a small category of pornographic material which is so repugnant that, in common with child abuse images, its possession should not be tolerated.

34. Our proposals to strengthen controls on extreme pornographic material are therefore based on:

- a desire to protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victims of crime in the making of the material, whether or not they notionally or genuinely consent to taking part;
- a desire to protect society, particularly children, from exposure to such material, to which access can no longer be reliably controlled through legislation dealing with publication and distribution, and which may encourage interest in violent or aberrant sexual activity.

35. The proposals would thus close what can be viewed as a gap in existing legislation which has developed as technology has advanced to circumvent the controls already in place.

36. Against this background (which would not itself be set out in any legislation) we set out a number of options below: in two of these options (including our preferred one) we propose making it an offence to possess limited types of extreme pornography against which, in particular, we believe action is needed. Although we have stressed the challenge posed by the technological developments, the offence would apply equally to offline pornography as it would to material accessed via the Internet or through other technologies such as mobile telephones.

Pornography

37. The intention is that any new offence would apply only to pornographic material. In other words, material that has been solely or primarily produced for the purpose of sexual arousal. It is not the intention to capture medical or scientific material, educational, artistic, mainstream broadcast entertainment, or news footage.

Explicit actual scenes or realistic depictions

38. The offence would be limited to explicit actual scenes or realistic depictions of the specified types of material. By "explicit" we intend the offence to cover activity which can be clearly seen and is not hidden, disguised or implied. The intention is also only to cover actual images or realistic depictions of the activities listed (but not, for example, text or cartoons). 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, particularly if the material comes from abroad. In addition, there is no requirement that the activity is real in the OPA or the CG(S)A.

Content of material

39. We propose restricting the offence to explicit pornography containing actual scenes or realistic depictions of:

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.

40. In (c) above, "serious violence" will involve or will appear to involve serious bodily harm in a context or setting which is sexual – for example, images of suffocation or hanging with sexual references in the way the scenes are presented. In (d) above "serious sexual violence" will involve or will appear to involve serious bodily harm where the violence is sexual.

41. By "serious bodily harm" we mean violence in respect of which a prosecution of grievous bodily harm could be brought in England and Wales or in Scotland, assault to severe injury.

42. Therefore the activities in a) and b) and the qualification of "serious bodily harm" in c) and d) bring this material within the scope of the OPA, and in Scotland, the CG(S)A, and ensure that what could be categorised as mainstream pornography (such as that classified R18 by the BBFC) is not included.

Q. Do you agree with the list of material set out in paragraph 39?

Q. Do you believe there is any justification for being in possession of such material?

The Options

43. **The options** are:

Option one – adding a general offence of possession of "obscene" material to the Obscene Publications Act 1959 and in Scotland, the Civic Government (Scotland) Act 1982;

Option two – adding a possession offence limited to the category of material we have set out but under the umbrella of the OPA and in Scotland, the CG(S)A;

Option three – a new free standing offence in respect of the category of material we have set out; and

Option four – do nothing.

44. We have considered the strengths and weaknesses of all the options.

45. *Option one* would be the simplest, retaining the general test of obscenity and amending the 1959 Act and, in Scotland the CG(S)A section 51, to add an offence of possession. However, it would cover a wide range of material and there are difficulties in squaring the purpose of the OPA with a simple possession offence.

46. For example, under the OPA in England and Wales, whether material is obscene depends on whether it would deprave or corrupt "those likely to read, see or hear it". This has been interpreted by the courts to mean that the threshold of obscenity can be lower if the likely audience or recipient is a child. We consider that the test of obscenity for a possession offence would probably have to be defined by reference to whether it would deprave or corrupt the person possessing it. Hence the degree of vulnerability of the person possessing the material might be a factor in determining its criminality and whether they were committing an offence. A young or naïve person might be at more risk of conviction than a more hardened consumer of pornography, which seems a rather perverse consequence. The alternative might be to say that the question is whether the material would deprave or corrupt an adult of ordinary sensibilities, though this raises its own problems, given the varying responses individuals can have. In Scotland, the common law test of whether material is obscene is whether the material is calculated to deprave and corrupt persons open to depraving or corrupting influences.

47. This proposal would significantly extend the scope of the OPA and the CG(S)A but would not achieve the clarity which would help individuals to identify material which was clearly illegal, when making personal decisions about viewing pornography.

48. *Option two* would offer greater clarity by limiting the material to be covered by the possession offence to the most extreme, such as material which showed (or purported to show) serious sexual violence, bestiality and necrophilia. This could be linked to the OPA and, the CG(S)A, so that it formed a sub-set of material. However, as for option one, there would be a mismatch between the purpose of the OPA and the amendment. In addition, there would be the possibility of confusion for the courts. The scope of the OPA and the CG(S)A might gradually become limited in practice by reference to the list of proscribed material, so that, over a period of time, only material falling within that defined category would be considered obscene by a jury. The flexibility of the test of obscenity which currently allows the Acts to deal with material featuring extreme violence (not necessarily with sexual overtones), drug taking, animal cruelty, scenes of coprophilia, urolagnia, etc. would be lost.

49. *Option three*, (our preferred option) would preserve the flexibility of the OPA and the CG(S)A to deal with the publication of a range of material and to develop a new, free-standing offence for possession of the limited categories of material described above. (Anyone publishing or distributing this material within the UK would also be prosecutable under the new offence since they would necessarily also possess it.) Defences would be included to protect those whose exposure to the material was accidental and those who had a legitimate reason for possessing it, such as the prosecuting authorities. We would consider the current arrangements in respect of indecent photographs of children in drawing up the defences.

50. Possession will be construed as it is in respect of indecent photographs of children. Viewing material accessed via the Internet on computers or mobile phones will therefore be covered. The offence would not generally be relevant to broadcast material since we already have controls in place to prevent such material from being available on television. Broadcasting such material on television would already be an offence under either the OPA or the CG(S)A. The Department for Culture, Media and Sport also has the power to issue a Proscription Order to deal with any such material broadcast from elsewhere in Europe.

51. As indicated above, the offence would be limited to explicit pornography material, that is material produced solely or primarily for the purpose of sexual arousal or gratification. It is not the intention to impinge on the freedom of the media in respect of news coverage, or of analysis or documentary footage of real events, including atrocities committed in other countries.

52. *Option four*, doing nothing, would risk sending a message that we considered accessing such material was harmless, or not worthy of attention. But although we recognise that accessing such material does not necessarily cause criminal activity, we consider the moral and public protection case against allowing this kind of material sufficiently strong to make this option unattractive.

Q. Which option do you prefer?

Q. Why do you think this option is best?

Penalties

53. There would need to be an appropriate maximum penalty for the offence, which should be consistent with the penalties available under the OPA and the CG(S)A. At present the maximum penalty for offences under section 2 of the OPA and section 51 of the CG(S)A is 3 years' imprisonment or an unlimited fine or both. There would clearly be difficulty if the penalty for possession of material was greater than that for distribution of the same material, or if the penalty for possessing images of what may be an offence exceeded the penalty for committing the offence itself. (In England and Wales the offences of bestiality and necrophilia carry maximum sentences, of 2 years' imprisonment. In Scotland, these are common law offences so the penalties are not prescribed by statute.) On penalties therefore, we believe the options are:

- to impose a maximum penalty for possession less than the current OPA and the CG(S)A penalty of 3 years, or
- to impose a penalty for possession of three years and increase the penalty for OPA offences and offences under section 51 of the CG(S)A, to maintain the distinction, to 5 years. (Arguably, the maximum penalty for possession of material in a) and b) could not exceed 2 years, the maximum penalty in England and Wales for bestiality and necrophilia, so there might be a need to differentiate within the new offence for different types of material.)

54. It may also be relevant to note that the maximum penalty for possession of indecent photographs of children is 5 years' imprisonment. In sentencing, various factors are taken into account including the severity of the images.[10]

Q. Which penalty option do you think is preferable?

International position

55. International co-operation is essential for effective action against the production of extreme material. However, there is considerable variation in the approaches and law regarding publication of adult material within the international community. The majority of western countries (including the other G8 countries) have controls based on distribution of material deemed to be obscene by the courts, similar to the position in the UK; others have controls aimed solely at preventing children from seeing potentially corrupting material. We are not aware of any western jurisdiction which prohibits simple possession of extreme material.

56. Given this wide disparity in the law regarding publication, the chances in the short term of achieving an effective international agreement covering publication of extreme pornographic material are limited. This makes it more important that we act against possession domestically in the interim.

[10] R V. Oliver, Hartrey and Baldwin (2003) 2 Cr App R28: (2003) Crim LR 127.

Human Rights Considerations

57. The proposal which we have set out will impact upon the freedom of individuals to view what they wish in the privacy of their own homes. However, the material which we intend to target with this new offence is at the very extreme end of the spectrum and we believe most people would find it abhorrent. There will be no restriction on political expression or public interest matters, or on artistic expression. It is not the intention that this offence should impact upon legitimate reporting for news purposes, or information gathering for documentary programmes in the public interest and, in drafting the offence, we will give careful consideration to the best means of ensuring this. In the light of this, we have considered whether there are implications for our obligations under the European Convention on Human Rights and our view is that both our domestic courts and the Strasbourg court will find our proposal compatible with Article 10 (freedom of expression) or Article 8 (private life) if that is raised.

Annex A
Consultation Questions

Current Legislation (Page 7)

1. Do you think the challenge posed by the Internet in this area requires the law to be strengthened?

Evidence of Harm (Page 9)

2. In the absence of conclusive research results as to its possible negative effects, do you think that there is some pornographic material which is so degrading, violent or aberrant that it should not be tolerated?

Content of Material (Page 11)

3. Do you agree with the list of material set out (in paragraph 39)?

4. Do you believe there is any justification for being in possession of such material?

Options (Page 12)

5. Which option do you prefer?

6. Why do you think this option is best?

Penalties (Page 14)

7. Which penalty option do you prefer?

Annex B

The current legal framework in England and Wales

Obscene Publications Act 1959 and 1964

The test for obscenity is set out in section 1(1) of the Act – "for the purposes of this Act an article shall be deemed to be obscene if its effect, or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it." Under section 1(3) of the Act a person publishes an article who distributes, circulates, lends on hire, gives, lends it or offers for sale for letting on hire. Publication also includes showing, playing, projecting or transmitting.	
Publication of an 'Obscene' article. Section 2(1) Note – S2(1) was amended in 1964 to include possession of an obscene article for gain.	On summary conviction – up to six months imprisonment or a fine (level 4). On conviction on indictment – up to three years imprisonment or an unlimited fine, or both.

Protection of Children Act 1978

Taking, making, distributing, showing, possession for distribution, publishing or advertising indecent photographs or pseudo-photographs of children. (Section 1) The term 'indecent' is not defined in the Act and is a matter for the courts.	On summary conviction – up to six months imprisonment and/or a fine. On conviction on indictment – up to 10 years imprisonment or a fine or both.

Criminal Justice Act 1988

To have any indecent photograph or pseudo-photograph of a child in your possession. (Section 160 (1))	On summary conviction – up to six months imprisonment and/or a fine (Level 5). On conviction on indictment – up to five years imprisonment or a fine or both.

Legal Framework in Scotland

Civic Government (Scotland) Act 1982

Obscene material Section 51 To display obscene material in a public place or where it can be seen publicly, or to publish, sell or distribute, or with a view to its eventual sale, make, print, have or keep, any obscene material. The term "obscene" is not defined in the Act and is a matter for the courts, who apply the common law test of whether the material is calculated to deprave and corrupt persons open to depraving or corrupting influences. "Publishing" includes playing, projecting or otherwise reproducing, or, where the material is data stored electronically, transmitting that data.	On summary conviction – up to six months imprisonment or a fine or both. On conviction on indictment – up to three years imprisonment or an unlimited fine or both.
Indecent photographs etc of children Section 52 To take or permit to be taken, distribute or show, possess with a view to its being distributed or shown by himself or others an indecent photograph or pseudo-photograph of a child, or to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such an indecent photograph or pseudo-photograph, or intends to do so. The term "indecent" is not defined in the Act and is a matter for the courts, who apply the same test as for "obscene".	On summary conviction – up to six months imprisonment or a fine or both. On conviction on indictment – up to 10 years imprisonment or a fine or both.
Possession of indecent photographs etc of children Section 52A To have any indecent photograph or pseudo-photograph of a child in your possession.	On summary conviction – up to six months imprisonment and/or a fine (Level 5) or both. On conviction on indictment – up to five years imprisonment or a fine or both.

Annex C

Partial Regulatory Impact Assessment

1. Purpose and intended effect

(I) Objective

The objective of this proposal is to consult with key stakeholders on the creation of a new offence of simple possession of extreme pornographic material which is graphic, sexually explicit, and which contains serious violence or sexualised violence towards women and men. In particular, explicit actual scenes or realistic depictions of the following activities will be covered:

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.

(II) Background

Illegal pornographic material has always been available and those who sell it risk prosecution under the Obscene Publications Act 1959 (OPA) and in Scotland the Civic Government (Scotland) Act (CG(S)A) 1982. There is now some evidence that the boundaries are being pushed back with more extreme images are now being sought after and provided. In addition, due to the development of new technologies, which are increasingly available to everyone, access to this material has never been available so easily or in such quantity. In pre-Internet days, individuals who wished to view this kind of material would need to actively seek it out, bring it into their home in physical form (e.g. magazines or video-tapes) or have it delivered, risking discovery and embarrassment at every stage. Now they are able to access it from their computers at home (or from their place of work) with relative ease.

The material under consideration is of an extreme nature; it does not depict consensual sexual activity, nor even the milder forms of bondage and humiliation which is available in legal pornographic material. It depicts suffering, pain, torture and degradation of a kind which we believe most people would find abhorrent. The underlying premise of the consultation is that this material should have no place in our society and the proposal seeks to tackle its circulation.

(III) Risk Assessment

It is difficult to quantify accurately the financial impact of the new offence although it is felt to be low – due to the extreme nature of the material involved and its limited attraction for most individuals. The material covered will already be illegal to publish or distribute under the OPA and CG(S)A, so the only new area of criminality will be its possession. Prosecutions under the OPA 1959, for the publication of such material (and also some further types of material not covered by the present proposals, except for option A) have fallen over recent years from 131 in 1999 to 39 in 2003, although this may be in part due to the police focus on tackling child pornography and tolerance, expressed through the courts, of material which 10 years ago would have been found to be obscene.

The main risk addressed is that possession of extreme pornographic material is part of a cycle of supply and demand, encouraging the production of such material which may lead to the harm of the individuals involved in making it, whether or not they consent to participate. Developing technology also enables the easier distribution of such material, the vast majority of which comes from abroad, thus evading current controls. The new offence will help close the gap in existing controls and tackle demand at source.

2. Options

Option one – adding a possession offence to the Obscene Publications Act 1959 and in Scotland the Civic Government (Scotland) Act (CG(S)A) 1982.

Option two – adding a possession offence limited to the category of material we have set out in the Consultation Paper but under the umbrella of the OPA and the CG(S)A.

Option three – a new free standing offence in respect of the category of material we have set out in the Consultation Paper.

Option four – do nothing.

3. Benefits

For options one to three our proposal to strengthen controls on extreme pornographic material will:

(i) help to protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victims of crime in the making of the material, whether or not they notionally or genuinely consent to taking part;

(ii) help to protect society, particularly children, from exposure to such material, to which access is increasingly difficult to control;

(iii) enable the enforcement authorities to take action against individuals who, by procuring such material by whatever means, encourage its further production.

With regard to Option 4 – do nothing – there will be no additional benefit.

4. Costs

Option one would be the simplest, but possibly the most costly approach, retaining the general test of obscenity and amending the 1959 Act and the CG(S)A section 51 to add an offence of possession. However, this would cover a wide range of material and there are difficulties in squaring the purpose of the OPA with a simple possession offence. For example, under the OPA whether material is obscene depends on whether it would deprave or corrupt "those likely to read, see or hear it" and this has been interpreted by the courts to mean that the threshold of obscenity can be lower if the likely audience or recipient is a child. This proposal would significantly extend the scope of the OPA and the CG(S)A, possibly leading to an increase in prosecutions, but would not achieve the clarity which would help individuals to identify material which was clearly illegal, when making personal decisions about viewing pornography.

Option two would offer greater clarity by limiting the material to be covered by the possession offence to the most extreme as set out, such as material which showed (or purported to show) serious sexual violence, bestiality and necrophilia. This could be linked to the OPA and, the CG(S)A so that it formed a sub-set of material covered by the "deprave and corrupt" test. However, as for option one, there would be a mismatch between the purpose of the OPA and the amendment. In addition, there would be the possibility of confusion for the courts. The scope of the OPA and CG(S)A might gradually become limited by reference to the list of

proscribed material, so that, over a period of time, only material falling within that defined category would be considered obscene. The flexibility of the test of obscenity which currently allows the Acts to deal with material featuring extreme violence (not necessarily with sexual overtones), drug taking, animal cruelty, etc. would be lost. It is believed that, in view of the nature of this material there would only be a small number of proceedings, but, in the light of the issues above these could be time-consuming and costly proceedings.

Option three, would preserve the flexibility of the OPA and the CG(S)A to deal with the publication of a range of material and to develop a new, free-standing offence for possession of a limited category of material. (Anyone publishing or distributing this material within the UK would also be prosecutable under the new offence since they would necessarily also possess it.) The offence would be limited to pornographic material, that is material produced solely or primarily for the purpose of sexual arousal or gratification. It is not the intention to impinge on the freedom of the media in terms of news coverage, or of analysis or documentary footage of real events, including atrocities committed in other countries. It is believed that, in view of the nature of this material there would only be a small number of proceedings and the cost would be "de minimus".

Under *Option 4* – do nothing – there will be no additional cost but there is a risk of sending a message that we considered accessing such material was harmless, or not worthy of attention. In addition, the benefits from the proposals would not be realised, which carries a human cost for individuals and society.

5. Sectors and groups affected

Business

It is our belief that no business sector in the UK should be adversely affected by these proposals. The material covered by the new offence is already illegal under the Obscene Publications Act 1959 and the Civic Government (Scotland) Act 1982. There would therefore be no impact on the legitimate UK adult film, video or computer-game industry. The mainstream broadcast entertainment sector would also be unaffected as would those with a legitimate reason to posses the material.

Similarly there would be little impact for British Internet Service Providers. It is recognised that ISPs act as transporters of information across the internet but that they are not responsible for the data itself, as they are unaware of what is being transmitted. (Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 that ISP's are protected from civil or criminal action in respect of the unlawful activity of which they have no knowledge). UK ISPs already work with the Internet Watch Foundation, an industry funded body, in removing material which is considered to be in breach of the Protection of Children Act 1978 or the Obscene Publications Act 1959 or the Civic Government (Scotland) Act 1982. We will clearly seek the detailed views of the Internet and entertainment industries during the course of the consultation about any concerns they may have about the proposed offence.

Citizens

In recent years there have been a declining number of arrests under the OPA 1959 and information is not available about the ethnic background of those arrested. It is not apparent to us that the proposed changes in the law will have any adverse effect on black and minority ethnic (BME) groups but as part of the consultation, numerous organisations, including BME groups will be asked for their views.

With regard to gender, the vast majority, of small number of defendants (in 2003, 38 defendants out of 39 proceedings) who are prosecuted under the OPA 1959 are male. Anecdotal evidence would suggest that the vast majority of those who may be forced to participate in the production of the material involved in the consultation are female, but the proposed offence does not distinguish between the gender of the "participants".

6. Small Firms Impact Test

Small businesses should not be adversely affected by this proposal as the commercial distribution of such material within the UK is already illegal, although the offence may make it easier for legitimate businesses to distinguish between legal pornography and clearly illegal obscene material. Where the offence takes place on work premises – ie material is downloaded on an employer's PC, it is the intention of the offence to apply to the staff involved, who would be regarded as being in possession. Many firms already have Internet access polices, prohibiting the downloading of such material in the workplace but smaller employers are less likely to have internet policies. It is clearly good practice for employers to have internet access policies and, it would appear to us, that there would be minimal cost in doing so. We will liaise further with the small business sectors to ensure that they are consulted on this issue. But, as with other areas of the criminal law, the proposals contain no requirement on businesses to put such mechanisms in place.

7. Competition assessment

A competitive filter has not been completed because the proposal concerns material which is already illegal.

8. Enforcement, sanctions and monitoring

Options 1 – 3 will require primary legislation and enforcement of any legislation will be the responsibility of the UK enforcement agencies. Under Option 4 no further enforcement would be required.

9. Monitoring and Review

A scheme to monitor and review the effectiveness of any change in legislation will be put into place after a preferred option has been identified.

10. Consultation

(I) Within Government

Department for Culture Media and Sport

Department for Trade and Industry

Department of Health

Crown Prosecution Service
HM Revenue & Customs

Scottish Executive

Northern Ireland Office

National Assembly of Wales

(II) Public Consultation

A number of stakeholders have been identified for involvement in the public consultation process. The list includes the Association of Police Authorities, the Association of Chief Police Officers, the Association of Chief Police Officers in Scotland, the British Board of Film Classification, representatives of the entertainment industry, representatives of the Internet industry and the wider business community.

The list is not complete at this point and the identification of further contacts is being investigated.

11. Summary and Recommendation

This partial RIA identifies that there will be a risk of (small) increased enforcement activity for all UK enforcement agencies and the courts but the circulation of extreme pornographic material should be inhibited. The costs and risks to business are difficult to quantify but seem very low. The consultation process should help develop the evidence base for the options outlined in the proposal.

Annex D

Consultation Code of Practice

This consultation follows the Code of Practice on Consultation the criteria for which are set below.

The six consultation criteria

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.

3. Ensure that your consultation is clear, concise and widely accessible.

4. Give feedback regarding the responses received and how the consultation process influenced the policy.

5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.

6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The full code of practice is available at: http://www.cabinet-office.gov.uk/regulation/Consultation/introduction.htm

Consultation Coordinator

If you have any complaints or comments about the consultation process, you should contact the Home Office consultation coordinator Pio Smith by email at: pio.smith31@homeoffice.gsi.gov.uk

Alternatively, you may wish to write to:
Pio Smith
Consultation Coordinator
Performance and Delivery Unit
Home Office
3rd Floor Seacole
2 Marsham Street
London, SW1P 4DF

Annex E

Responses: Confidentiality & Disclaimer

The information you send us may be passed to colleagues within the Home Office, the Scottish Executive, the Government or related agencies.

Furthermore, information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Please ensure that your response is marked clearly if you wish your response and name to be kept confidential.

Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.

The Department will process your personal data in accordance with the DPA – in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

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