

# **Scottish Executive Justice Department**

**Analysis of the Scottish Responses to the joint Scottish  
Executive and Home Office consultation on the possession  
of extreme pornographic material**

**June 2006**

# **Contents**

Acknowledgements	Page 3
Introduction	Page 4
Comments on the Consultation	Page 7
Responses to Consultation Questions	Page 11
Question 1	Page 11
Question 2	Page 15
Question 3	Page 19
Question 4	Page 23
Questions 5&6	Page 24
Question 6	Page 26
<b>Annex A - List of consultation respondents</b>	
<b>Annex B - List of cross border organisations</b>	
<b>Annex C - Table of responses to each question</b>	

## **Acknowledgements**

1. We are grateful to the respondents who contributed their views to the consultation on the possession of extreme pornographic material. The purpose of the consultation was to elicit the widest range of views possible and the responses to this consultation will help to inform policy in future.

## **Introduction**

### **Background**

2. The Scottish Executive and the Home Office consulted jointly on proposals to create an offence of possession of extreme pornographic material. The consultation sought to determine whether advances in technology, particularly the use of the internet, have resulted in a need for the law in this area to be strengthened.
3. The consultation set out options for creating an offence of possession of extreme pornographic material containing explicit actual scenes or realistic depictions of:
  - Intercourse or oral sex with an animal;
  - Sexual interference with a human corpse;
  - Serious violence in a sexual context;
  - Serious sexual violence (*“serious violence” means violence in respect of which a prosecution of assault to serious injury could be brought under Scots Law*)
4. The Consultation on the Possession of Extreme Pornographic Material was issued on the 30 August 2005. As well as being available online, hard copies of the consultation document were circulated to 254 Scottish recipients including BDSM groups<sup>1</sup>, legal professionals, police, local authorities, women’s groups and MSPs. Replies were requested by 2 December 2005.

### **Responses**

5. 93 Scottish responses were received, 59 of which were personal responses and 34 responses from organisations. In addition to these, responses from 49 cross border organisations have been included in the analysis of the Scottish results.

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<sup>1</sup> (BDSM indicates the consensual practice of Bondage, Discipline, Dominance, Submission, Sadomasochism and Mastery)

## **Respondents**

6. The table below shows the number of responses by respondent type, and includes the cross border organisations.

<b>Type of Respondent</b>	<b>Number &amp; %</b>
Individual	59 (41%)
Local Authority	11 (8%)
Criminal Justice Organisation	9 (6%)
Women's Organisation	14 (10%)
BDSM Organisation	7 (5%)
Civil Liberties Organisation	11 (8%)
Media Organisation	4 (3%)
Children's Organisation	5 (4%)
Religious Organisation	9 (6%)
IT/ISP/Telecoms Organisation	10 (7%)
Other	3 (2%)
<b>Total</b>	<b>142 (100%)</b>

7. A list of respondents who have given permission for their responses to be shared is provided at Annex A along with the list of cross border organisations at Annex B, whose views have been incorporated into this analysis.
8. Copies of the responses (except those marked confidential) are available from the Scottish Executive library at Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD ( telephone 0131 244 4565)
9. Responses can also be viewed on the Scottish Executive website at:  
<http://www.scotland.gov.uk/Topics/Justice/criminal/17543/ExtremePornographicMaterial/Response92>
10. Where a quote from a personal response has been used in the analysis, this has been referred to by the response number alone in order to preserve confidentiality. Where the response is from an organisation, the organisation has been named and the response number cited.

## **Approach to Analysis**

11. Although much of the analysis was based on descriptive free text, where it has been possible to apply quantitative analysis to the results, this has been recorded and these tables are attached in Annex C. Due to the open nature of the consultation questions many respondents provided more general comments, rather than responding to each question specifically and this is reflected in the main body of the text. With this in mind, qualitative figures should be viewed as indicative of the views of the group, rather than absolute.

### **Factual Accuracy**

12. The views presented in this analysis are the opinions and comments of the individuals and organisations who responded to the consultation. They have not been vetted for factual accuracy.

## **Comments on the Consultation**

13. The general content and approach of the consultation document itself prompted comments from those who were opposed to and those who were in favour of the creation of a new offence. As these comments fell outwith the scope of the individual questions these issues have been highlighted here.

### **Public Message**

14. Some respondents in favour of the proposals felt that to try to define some forms of pornographic material as distinct and different from others, and therefore requiring special treatment sent a message in favour of legitimising “mainstream” pornography.

*“Although the proposed new legislation would contribute to bridging the gaps between current legislation, it will leave significant cracks and will not be sending out the fundamental and crucial zero tolerance message that is needed to combat this genre of crime.” (Response no. 50)*

*“By legislating against ‘extreme pornography’ it is creating two tiers of pornography; one tier that is wrong and a second that is acceptable, therefore legitimising the sexual exploitation of (mostly) women involved in what the consultation refers to as ‘mainstream pornography’.” (Response no. 61)*

### **Consultation Questions**

15. Respondents for and against the proposals highlighted their disappointment at the phrasing of the consultation questions.
16. Several of the respondents felt that the definitions outlined in the consultation paper were poor and lacked clarity on what the legal position would be.
17. In addition, most of the respondents who identified themselves with the BDSM community and most of those who responded on behalf of civil liberties organisations felt that the consultation questions were loaded in order to solicit a positive response to the consultation.

*“I am disturbed that the tone of the consultation document is not neutral. It is actually structured in such a way as to lead ill-informed readers to the conclusion that some action should be taken despite confirming elsewhere in the document that no evidence can be found to connect extreme imagery with actual violence.” (Response no. 69)*

*“These consultation questions appear to be rigged in order to obtain the answers the government wants!” (Response no. 34)*

*“Although I have answered the questions as asked, I am very concerned that they seem heavily loaded in favour of creating an offence and punishing it harshly. In particular, asking “which penalty option do you prefer” is totally inappropriate, as it prejudices the issue of whether to legislate at all.” (Response no. 45)*

18. A few of the organisations representing the justice system in Scotland felt that it would be inappropriate for them to comment on the consultation document stating that they felt the issues were matters of policy development and therefore outwith the scope of their organisations. (Scottish Court Service (40) and Faculty of Advocates (12)). The Scottish Court Service did however highlight that additional costs may arise if a new offence is created.

### **References to Children**

19. A number of respondents in these groups also felt that the placement of paragraphs on child pornography immediately before the consultation questions was a deliberate attempt to skew the views of respondents in order to encourage them to consider the issues addressed in the consultation in the same light as child abuse.

*"It is morally wrong to attempt to put consensual BDSM activities in the same category as crimes such as bestiality, necrophilia and child pornography."*  
(Response no. 30)

20. Respondents to the consultation were universal in their condemnation of indecent images of children.
21. Other respondents highlighted the need to protect children from any danger of being exposed to material of the type described in the consultation. Views expressed around this were varied. Many people who were in favour of the proposals stated that they felt it was important that people in general and children in particular could use the internet without fear of coming across images of the type described in the consultation paper.
22. On the other hand, responses both in favour of and opposed to the creation of a possession offence indicated that they felt there were sufficient parental controls available for the internet, and that parents should themselves be taking proactive steps to supervise internet use and prevent children coming into contact with such images inadvertently.
23. Some of these responses also made the point that while there is undoubtedly an abundance of pornography on the internet, more specialist pornography like BDSM and fetish sites, as well as the more hardcore sites are unlikely to be found by accident, so the risk of accidental exposure is in their view minimal.

*"This material is generally of a highly specialised nature and considerable effort has to be made to find it. As such it's quite unlikely that general web use will result in anything more than superficial exposure to the innocent or unwilling."*  
(Response no. 4)

### **Comments from the BDSM Community**

24. A number of the BDSM respondents criticised the Home Office and the Scottish Executive for not taking the time to gather evidence and gain an understanding of BDSM as a sexuality. They highlighted the fact that BDSM is a well organised, well run and responsible community. Details of the protections which are in place on

BDSM community websites were highlighted as an example of how this community polices its own content and tries to ensure that anyone viewing the material is doing so knowingly. Many others stressed the point that all BDSM activity is dependent upon the informed consent of the participants and that this is paramount. The BDSM 'safe, sane and consensual' code of practice was also mentioned on numerous occasions.

25. In this regard the creation and distribution of images within this community was described as being used, not only for the purposes of sexual gratification, but also for the purposes of education, to ensure that the 'Safe, Sane and Consensual' code of practice is adhered to and that those experimenting with new techniques can do so safely. With this in mind the BDSM community felt that it was vital that any change in the law would not criminalise the possession of or prevent the distribution of this type of material.

## **Responses to Question 1 – Do you think the challenge posed by the internet in this area requires the law to be strengthened?**

26. Responses from police organisations were generally in favour of the creation of a new offence. While the Scottish Police Federation (SPF, 37) did not wish to comment specifically on the moral aspects of the creation of a new offence, ACPOS, Scottish Police Authorities Conveners Forum (SPACF, 67) and the Association of Scottish Police Superintendents (ASPS, 78) all cited technological advances as the main reason they consider a change in the law is required.

*“Existing legislation, in the main, was drafted long before the advent of the internet, and as such requires to be critically reviewed, amended, and strengthened.” (ASPS, 78)*

*“Members agree that the law requires to be strengthened as all of the existing statutes referred to in this consultation were drafted to protect the public from material of this nature relevant to the available means of communication at that particular point in time. The development of the Internet and other modern communication technologies has offered individuals a faster, more convenient and, more importantly, an anonymous means to collect and distribute pornography of this type.” (ACPOS, 43)*

27. The points raised by law enforcement organisations were similar to those of local authorities who agreed that technological advances required the law to be strengthened in this area. Some also stated, as three out of four police groups and the Scottish Court Service did, that it would be important to ensure that adequate enforcement provisions are developed along with any new legislation;

*“...care should be taken when drafting new legislation. Unless appropriate enforcement mechanisms are put in place, then unrealistic expectations could be raised, as enforcement would be largely ineffective” (City of Edinburgh Council, 63)*

28. These views were echoed by a number of individuals responding in favour of the proposals who raised concerns about whether new legislation would actually achieve one of the stated aims in the consultation paper of breaking the demand/supply cycle.

*“I have concerns over the lack of impact it would have on demand; your own research states only a slight number of prosecutions are expected. How will people who possess this material be caught? Will it be a by-product of other activity or will they actively be sought?” (Response no. 61)*

29. The issue of practical implementation of the proposed legislation was also picked up by broadcasters and media organisations including the BBC and Channel 4, as well as Internet Service Providers (ISPs), telecoms companies and IT infrastructure companies. Many of these organisations felt it would not be appropriate for them to comment specifically on this question but did outline some of their concerns in their responses to other questions.

30. Women's Groups and those groups working with Children were unanimous in their calls for new legislative measures. However, in most cases they called for greater legislative reform which would tackle all forms of pornography. Some groups, like Scottish Women Against Pornography (92) went so far as to reject the term "extreme pornography" as defined in the consultation document as they believe any distinction drawn between one type of pornography and another is meaningless. This sentiment was also included in a number of responses from individuals in favour of the proposals.

*"To work towards achieving true equality and eliminate discrimination against women in Scotland we need to address the mass of pornographic material that maintains and sustains this inequality. Pornography is hateful and is an incitement to sexual hatred of women. (SWAP 92)*

31. The majority of groups and individuals in favour of a new offence cited the advance in technology as a crucial factor in the spread and normalisation of pornographic material. Many highlighted the ease of access and availability of mainstream pornography as increasing the demand for ever more extreme and violent images as consumers become desensitised.

*"People accessing these images, especially when paying, create the demand for this market and are therefore equally responsible for its existence alongside the publishers. The anonymity of the internet provides safer refuge for illegal activity encouraging more and more extreme and violent images for as long as there is demand. Because of the ease of access and the perceived anonymity of this medium the law must be strengthened and strengthened publicly to provide a deterrent" (Central Scotland Rape Crisis and Sexual Abuse Centre 50)*

32. The point made in the Executive Summary of the consultation document; that the material in question is already illegal to publish, sell or import under the existing obscenity legislation, (Civic Government (Scotland) Act 1982) was picked up by Women and Children's groups and many of the individual's responding in favour of the consultation as a reason for new legislation. Their feeling was that the proposals would be able to bring the internet into line with existing legislation.

*"The level of extreme violence accessible to view and download on the internet is already illegal in any other form of pornographic material and legislation should be brought in line to include the internet." (YWCA Scotland 74)*

33. Scotland's Commissioner for Children and Young People (89) made the following comment;

*"There is a need to take account of the challenges posed by the internet in terms of exposure to children of potentially harmful materials...There are also important issues around accountability. The nature of the internet is such that it is not technically possible for any one entity to control all of the information on the Internet. Access to such material can no longer be controlled through legislation dealing solely with publication and distribution."(89)*

34. Almost all of the responses opposed to the proposals, whether from individuals or organisations identified themselves as representing the interests of the BDSM community, or civil liberties and anti – censorship. As a result the points highlighted by individuals and organisations representing these different groups, while all opposed to the proposals, highlighted different rationales for their responses to this question.
35. In the main, people opposing the proposals who either represented civil liberties groups or cited civil liberties as the reason for their objection, felt that adults should be allowed to take responsibility for the material they choose to view and that it should not be up to a “Nanny State”(Response no. 7 & 26) to decide what is and is not appropriate. The subjective nature of what is and is not obscene, disturbing and distasteful was also highlighted in this context as the reason these decisions should be taken by individuals and not Government.

*"State censorship should not be imposed on the internet, its freedom is essential. It is an extremely worrying trend that will lead onto a slippery slope and will remove the rights of humans to decide for themselves what is disgusting and acceptable to them." (Response no. 86)*

36. There were also several comments which suggested that the proposals would amount to an infringement of people’s human rights to freedom of expression and the right to a private life. These responses suggested that in spite of including a paragraph on human rights considerations in the consultation document (paragraph 57), this legislation would in fact be incompatible with the European Convention on Human Rights.
37. However, Rabinder Singh QC who provided an opinion to The Spanner Trust (228) concluded that while he considered the legislation as proposed to give rise to real concerns as to its compatibility with an individual’s rights under Articles 8 and 10 of the Convention, he also believed that as the aim of the proposed legislation would be the protection of morals, this would be accepted as legitimate by the domestic courts and Strasbourg courts.
38. Organisations and individuals responding with these views also commented on the lack of conclusive evidence about the causal link between viewing images of sexual violence and the perpetration of violent sexual offences. (These arguments will be referred to in greater depth in the analysis of responses to Question 2)
39. Many respondents here also cited curiosity as a reason why individuals might seek out material of this nature, rather than seeking to gratify a sexual preference. Many of these comments related particularly to images concerning bestiality and necrophilia.

*"Bestiality for instance is a subject that only a very small minority of people would find stimulating. Many would view it with curiosity and treat it in a light hearted manner before moving on." (Response no. 56)*

40. Respondents representing or identifying with the BDSM community opposed the introduction of a new offence of possession primarily because they feel that the new offence is likely to criminalise a large proportion of their community for practicing

their legitimate sexuality. To this end a number of responses drew parallels with the findings of the 1957 Wolfenden Report on homosexual practices which concluded that *“It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour”* (original text from Wolfenden Report)

41. BDSM respondents also cited society’s evolving attitudes to sexuality as another reason that legislation in this area is unnecessary. Again parallels were drawn with the way in which society’s attitude towards homosexuality has changed.

*“Go back one quarter of a century from 1982 and one could still be jailed for consensual homosexual behaviour. The current legislation is very far out of date and leaves the issue subject to the individual whims of local council officials and local police forces, rather than an informed public at large.”* (Violate, 18)

42. Other respondents felt that the UK should not create an offence of possession when it would not be possible to pursue those who were guilty of producing and distributing the illegal material - firstly, because the majority of this material is being produced outwith the UK. Secondly because there is currently no international support for these proposals. These factors contributed to the view that the creation of this possession offence would not achieve one of the stated aims of the consultation; to prevent harm to the individuals who may have been victims of crime in the production of these images.

*“The consultation paper refers to “technology advances to circumvent the controls already in place” but the authors “are not aware of any Western jurisdiction which prohibits simple possession of extreme material” The only circumvention of controls occurs when a content provider sends an image that it is illegal to distribute (but legal to possess). The country of origin is almost always a Western jurisdiction. (A recent survey shows that 81% of pornographic images come from the USA.) As these countries have similar social, moral and legal standards to the UK, the best solution to this problem is simply to co-ordinate with other governments to convict the distributors in the country of origin. “International co-operation is essential for effective action against the production of extreme material”* (Response no. 45)

43. The international support and co-operation on Child Pornography was cited as a good example of how this can be effective. A few respondents indicated that they would have been more supportive of the proposals if there had been evidence that other countries were considering a similar approach. It was also made clear that respondents would not wish to disrupt the on-going international effort to tackle child pornography which was seen by everyone as the key priority.

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

44. Whether the answer to this question was yes or no, the vast majority of respondents indicated that they think images where either i) no consent could be given (e.g. child pornography, necrophilia, bestiality or ii) where the images were clearly of genuinely non-consensual activity, should not be tolerated. It should be noted that a few respondents who answered No to Question 1 answered Yes to Question 2 on this basis.

### **Absence of Conclusive Research Results In Relation To the Negative Effects of Extreme Pornography**

45. This element of Question 2 prompted the expression of strong views on both sides of the debate.
46. Many of the groups and individuals who responded in favour of the proposals expressed a strong view opposing the statement in the consultation document that no conclusive evidence is available about the long term impact of this type of material. As mentioned in the previous section, many individuals and organisations who supported the proposals indicated that they believed the scope of these proposals did not go nearly far enough and that violence against women is implicit in all pornography, whether the images represented consensual activity or not.
47. Organisations representing the interests of women and children, religious groups and many of the individual responses believe that there is strong evidence that exposure to pornography more generally, and not just exposure to extreme pornography leads to unacceptable sexual behaviour.

*"I must take issue with your first statement. In the first place I have yet to learn of any research that demonstrates the benefits and positive effects of pornography so at best we start from a neutral stance. However, there are specific research results which demonstrate conclusively the negative effects of pornography... This evidence indicates the desensitising effects of exposure to pornography and the effects this has on men's attitudes to violence against women, including the trivialisation of the harm of rape. This desensitisation effect is in itself more than adequate to justify taking legal action to control this material." (Response no. 90)*

48. The Scottish Women's Convention (64) includes a quotation from sexual crime specialist Ray Wyre in their response to this question;

*"Pornography is incredibly powerful in creating and maintaining distorted thinking, the rape myths and child abuse myths that exist in society. From pornography sex offenders get rape myths: women mean yes when they say no; women ask for it; women like force - pornography reinforces those myths, they only have to look at pornography to acquire those myths"(Wyre 1991)(SWC 64)*

49. Two of the organisations representing police officers in Scotland responded specifically on this point. The Association of Scottish Police Superintendents (ASPS 78) offered view on this issue in light of the fact that no detailed and relevant research has been carried out in this area. They stated that in their view;

*“exposure to extreme pornographic material, particularly at a young age, may irreparably adversely affect an individual’s behaviour, psychological profile and social skills.” (ASPS 78)*

50. The Association of Chief Police Officers in Scotland (ACPOS 43) went further than this in their response citing comparable behavioural patterns between individuals who collect extreme pornographic images and those demonstrated by paedophiles.

*“It has been proven that the majority of paedophiles begin by collecting images and then pass stages of fantasy and normalisation, which can lead to direct abuse of children. The progression to acts of an obscene nature by individuals who collect this material cannot be ruled out.” (ACPOS 43)*

51. This assertion was echoed in a few other responses in favour of legislation.

52. A number of individuals and organisations who answered no to this question highlighted the lack of evidence that viewing these images could lead to sexual violence as one of the main reasons they were opposed to the proposals;

*“there is no evidence that the increased availability of pornographic material on the internet is a problem or will cause any harm to society. If there is any real danger, then it can only be met by a public more informed about and comfortable with sexual issues. We simply don't yet have enough understanding of the role the internet will play in our society to justify this kind of intrusion onto free exchange of information. It is too soon to decide what people should be allowed to look at in their own homes. As a society we need to get over our obsessive interest in sexual transgression, and concentrate on stamping out real violence.” (Response no. 81)*

53. A number of the respondents who answered this question agreed with the sentiment of the last sentence in the quote above and felt it was wrong to look at the question of the harm caused to society by images of sexual violence, without addressing violent imagery more broadly. One individual in particular referred to the recent “happy slapping” (Response no. 56) phenomenon as evidence of the type of extreme violence, easily accessible in mainstream media having a direct impact on social behaviour.

54. As well as rejecting the notion that there may be a causal link between viewing violent pornography and committing violent sexual offences a few respondents made the point that someone with criminal intent will be impervious to the creation of new legislation preventing them from viewing extreme pornographic material. This led them to believe that the creation of a new offence to prevent this would be unlikely to have any impact in reducing sexually violent crime.

55. A few other respondents opposed to the proposals highlighted evidence to suggest that individuals with a predisposition to sexual violence will impose this on mainstream imagery in order to create their own material.
56. A few of the respondents who were opposed to the proposals suggested that pornography was actually a positive influence in our society and has a cathartic effect on the viewer which would have a positive impact in preventing violent sexual crime rather than promoting it. SM Scotland (*Response no. 93*) referred to the Japanese and Danish experiences where pornography is widely available, and in the case of Japanese pornography, much of it depicting bondage and rape of young women, however both of these countries exhibit a lower incidence of sexually motivated crime than the UK.

*“In all of these cases, the cathartic effect of pornography is believed due to a substitution effect, by which potential sex offenders receive sexual gratification from pornographic content, rather than from criminal acts against individuals.”*  
(SM Scotland, 93)

57. Some respondents in favour of the proposals highlighted issues with the accuracy of the Japanese and Danish experiences (*Mediawatch-UK, 255*) by expressing the view that the decrease in sexually motivated crime in Denmark at the time of liberalising the law on pornography could be explained by the repeal of eleven categories of sexual crime in the same period.

### **Evidence of Harm - To Those Involved In the Production of Extreme Pornography**

58. It was clear in all of the responses to the consultation, whether for or against, that one of the key issues to be addressed in terms of the potential harm these images may do was not just in relation to the viewer, but to those involved in the production of this material.
59. Some of the responses in favour of the proposals referred to the fact that often the people in the images are themselves victims of crime. This view is highlighted in The Law Society of Scotland’s (75) response to this question;

*“There is a human dimension to be considered. These are not victimless crimes. As is indicated in the consultation document, the material under discussion involves activities which are criminal and which may cause serious physical and other harm to those involved in making it. This is the justification for creating new criminal offences and thereby, reinforcing the message that society will not tolerate this type of conduct or the availability of this type of material.”* (The Law Society of Scotland 75)

60. The international dimension was touched upon here by some respondents who felt that the lack of international support for these proposals would mean the creation of a possession offence would not reduce demand to such an extent as to protect those who are the victims of crime.
61. Others thought that it was positive that the UK would be seen to be leading the way on this issue

*"At the very least, the creation of some material may involve harm, though probably to persons not domiciled in Scotland. That may be difficult for the law of any one country, but Scottish citizens have often reached beyond national boundaries [to] retrain a free market, as with other issues such as slavery, apartheid and now child labour, on ethical grounds."(Response 15)*

62. Many of the individuals and organisations who answered no to this question suggested that one could not demonstrate harm to the participants as it may not be possible to determine whether consent was given. This question of realistic depictions as opposed to non-consensual images is addressed in the responses to Question 3

### **Freedom of expression**

63. Those opposed to the proposals on the grounds of freedom of expression responded to this question with the view that no matter how distasteful or potentially harmful one might perceive images to be, it is not the right of the Government to act as censor for the internet or any other form of communication.

*"this is a matter of taste. Some people shouldn't be criminalised just because other people don't approve of something - there has to be definite harm or coercion before the law is involved." (Response no. 65)*

*"what is offensive to one person is exciting to another - prosecutions should still focus on the producers of material which breaches obscenity laws rather than those who possess images" (Response no. 44)*

## Responses to Question 3 – Do you agree with the list of material set out in paragraph 39?

Paragraph 39 defined the material being considered in the consultation document.

### **Paragraph 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) interference with a human corpse;**
- iii) serious violence in a sexual context, and**
- iv) serious sexual violence**

64. Those who rejected this list outright were either of the view that the proposed measures do not go far enough or were of the view that there should be no censorship of the internet.
65. Many who responded no to this question did so because they feel they cannot agree to the definitions as they are outlined at the moment, particularly in relation to parts (iii) and (iv). They feel that they are unenforceable, will not give people a clear indication of whether material they wish to make, create or possess in the context of consensual BDSM activity will fall foul of the law.
66. The following excerpt from Violate (18) indicates the views expressed by the majority of respondents to this question who answered no or accepted the list in part.

*“The only type of pornography that should be banned, including possession, is that which depicts non-consensual activity, but only if it can be clearly established that the activity was non-consensual. We view consent as only available to those who actually can consent to sex under the present law. It would therefore obviously exclude children, animals and the dead. Any other consensual activity should be allowed.” (Violate 18)*

### Necrophilia & Bestiality

67. The majority of respondents had no issue with the inclusion of necrophilia and bestiality in the list of material. Most people who responded found the idea of these images repugnant and felt that there could be little interest or call for them other than curiosity, black humour or historical record (e.g. The Good Old Naughty Days, BBFC, 194). Many cited the lack of consent as another reason for their contentment with the inclusion of these two, and others stated they were happy with the inclusion as it is clear that these are already criminal offences.
68. It should be noted here that, although contentment was expressed at their inclusion, several respondents commented on the disparity between the definitions for necrophilia and bestiality as outlined in paragraph 39 of the consultation document and the definitions given within the Sexual Offences Act 2003 which is applicable in England and Wales. These respondents highlighted the incongruous situation that

would result if one could be prosecuted for being in possession of an image depicting oral sex with an animal but not for creating the same image. In Scotland there is a common law offence of bestiality which is defined as “*unnatural carnal connection with a beast*” which would be closer to the proposed definition in the consultation document. It is not clear what offence is committed in Scots Law where a person has sexual contact with a dead body.

69. In terms of consent and bestiality some people made the point that acts of bestiality were less harmful than killing an animal for food or fur.

### **Serious Violence in a sexual context and serious sexual violence**

Paragraph 40 of the consultation document defined “serious violence” and “serious sexual violence” as follows;

**Paragraph 40. “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.**

**“serious sexual violence” will involve or will appear to involve serious bodily harm where the violence is sexual.**

70. All those who identified with BDSM community, ISPs, IT and Telecommunications organisations, the BBC, Channel 4, the BBFC and many of those who responded in favour of the consultation found these definitions to be too subjective, unclear and liable to criminalise a much broader range of images than it appears the consultation paper intended.

71. There was concern over what the definitions of “serious bodily harm” as outlined in paragraph 41 of the consultation would mean in practice, as although it is stated that this would be violence which would amount to a charge of assault to severe injury in Scotland, there were questions about how individuals would know when they were on the right side of the law, as there is no statutory definition for this offence.

*“My only qualification is that qualitative terms such as ‘serious’ and to a lesser extent ‘sexual context’ are going to be difficult to pin down as they are open to considerable interpretation.” (Response no. 3)*

72. The BBFC also highlight some of the issues with such broad definitions, and echo the views of the BDSM community who fear they may fall foul of a new offence;

*“The BBFC notes and appreciates that the intent of the proposal is to catch only material which goes some way beyond that currently classified ‘R18’. However, it may be difficult to define ‘sexual context’ in the legislation in a manner which does not risk accidentally including a significant number of titles passed ‘R18’ by the BBFC” (BBFC, 194).*

## **Realistic Depictions**

Paragraph 38 of the consultation document outlines the scope of material which should be captured by the definition “realistic depictions” as follows;

**Paragraph 38 – By realistic depictions we intend to capture those scenes which appear to be real and are convincing, but which may be acted.**

73. The idea of realistic depictions being included within the scope of a possession offence was an issue for most organisations and individuals who opposed the proposals, in a few cases this was the main reason for their opposition. This was also an issue which was picked up by a number of individuals and organisations who were in favour of the proposals
74. A number of individuals responding in opposition to the legislation as well as civil liberties groups felt that the idea of criminalising the possession of images which were acted was not acceptable or advisable.

*“How can something not be allowed when it is make believe? I am sure the majority of people can tell the difference between what is real and what is not.”  
(Response no. 10)*

75. One suggestion to address this issue was to adopt for a similar system to that in the US where there is a system of registering consent to participate in pornographic material or publications which shows the participants name, age and signature to show that they have consented. *(Response no. 16)*
76. Quite a few individuals and organisations including the BBFC (194), expressed the view that with the continuing technological advances in computer generated imagery it would soon be possible to create such convincing images artificially that prosecution could be brought where no one was involved in the creation of the image. (paragraph 38)

*“As technology and 3D rendering techniques become more sophisticated and realistic it is possible to render the scenes you wish to ban in which there is no human participation at all.” (Response no. 56)*

77. The definition of what would be included as a realistic depiction also led to questions about how works of art and written descriptions might be dealt with in this legislation. Although it is stated in paragraph 38 that the intention is not to capture text or cartoons.
78. Channel 4 (235), The British Computer Society (285), The Campaign Against Censorship (217) and others felt that if realistic depictions were to be included, the reach of the legislation would inevitably be much further than the consultation document intended, possibly including works of art and historical artefacts.
79. The BBFC in particular thought this would create an issue for them, as *“realistic depictions of serious violence are a very common feature of modern, mainstream films and videos, and many such depictions will have a sexual context.” (BBFC194)*

### **Widening the scope of the proposed material**

80. As had been mentioned in responses to earlier questions, Women's groups, Children's groups, Religious organisations and a number of individuals do not believe that the scope of this consultation goes nearly far enough and have urged the Scottish Executive and the Home Office to extend this to include all pornographic material.
81. In addition to the reasons set out in response to previous questions, some of these responses cited the BBFC as partly responsible for the increase in the level of sexually explicit and violent material which is now considered mainstream. These respondents argued that material currently classified as R18 by the BBFC should be brought within the scope of this proposal. *(Response no. 3 & 55)*
82. Some respondents also mentioned television broadcasters, particularly Channel 4 as contributing to this trend;

*"I subscribe to a cable TV channel Film Four. While I enjoy most of the films I am amazed at some of the simulated violent sexual acts that are often broadcast in their Midnight "extreme" slot in the name of art." (Response no. 54)*

## **Responses to Question 4 – Do you believe there is any justification for being in possession of such material?**

83. Many respondents to this question, particularly those identifying with the BDSM community felt that they should not be required to justify the possession of consensual images which reflect their sexuality.

*“If such material is produced consensually I don’t think anybody requires justification for possession.” (Response no. 16)*

84. Most of the respondents from this group put forth the view that the proposals amounted to an attempt to criminalise a legitimate sexuality “by the back door” without any evidence of harm.
85. Civil liberties groups and individuals identifying with this view also felt that individuals should be allowed to view and possess whatever material they choose without the interference of government.
86. Many of those in favour of the consultation did not feel that there was any justification for being in possession of this material as they regarded it as totally abhorrent.

### **Suggested Exemptions and Defences**

87. Where respondents indicated that there was some justification for being in possession of these images these have been listed below;
- It was universally agreed that individuals engaged in law enforcement should not be prosecuted.
  - ISPs and other organisations involved in regulating and investigating the content of the Internet
  - Journalists and documentary filmmakers who may come across explicit material in the course of their research and investigation (many respondents suggested the introduction of a licensing scheme or register so that this kind of access could be monitored)
  - Trading standards
  - Researchers engaged in genuine academic research
  - Legal defence teams
  - Government officials undertaking research to inform policy
88. The main defence that respondents felt should be in place if legislation is taken forward is one of inadvertent access or unsolicited material.

## **Responses to Question 5 and Question 6 – Which option do you prefer and why do you think this option is best?**

The options outlined in paragraph 43 of the consultation document are as follows;

**43. The options are;**

**Option One – adding a general offence of possession of “obscene” material to the Obscene Publications Act 1959 and to the Civic Government (Scotland) Act 1982;**

**Option Two – adding a possession offence limited to the category of information 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.**

89. Almost all of the respondents who answered yes to Question 1 supported the creation of a new free-standing offence. This was the option that was cited by those who selected it, as the one most likely to achieve the stated objectives of the new legislation. It was thought that a new, free standing offence would provide clarity and ensure that people would be aware of whether they were in danger of falling foul of the law.

90. It should be noted that a number of those who identified with the BDSM community also selected Option 3 or indicated that, although accepting Option 4, they would welcome Option 3, a new free standing offence, as long as the definitions in Question 3 were amended to ensure that consensual BDSM imagery was not within the scope of the offence.

*"We prefer option four simply because the other options are a recipe for disaster if the final two definitions referred to in 3 above and paragraph 39 on the consultation papers are left as they are...If such a change were made then we would favour the creation of a new free standing offence..."(Violate, Response no. 18)*

91. Options 1 and 2 were generally rejected as the OPA and the CG(S)A were seen as being too vague to be usefully amended in light of the nature of the material being considered. There was also the feeling that amending these existing acts would continue to muddy the waters around the legality of different images and would not enable people to ensure they were abiding by the law.

92. Those who suggested Options 1 and 2 cited the convenience of amending existing legislation which has been effective in preventing sale and distribution of this material in other media for many years. They felt that since this legislation was a known entity, it would be easier for people to adapt to the change in law.

93. Option 4 was favoured by civil liberties groups and a number of the BDSM respondents.

*"leaving the law as it stands will allow people who find themselves interested in unusual sexual activities to continue to explore those interests in the safety of their own homes." (Response no. 81)*

## Responses to Question 7 – Which penalty option do you think is preferable?

Paragraph 53 of the consultation document outlined the different penalty options views were being requested on.

### 53. Penalties

- 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 3 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.

#### Less than 3 Years

94. Those who cited this option as their preference did so because they felt it was not necessary to impose more severe penalties than are currently in place for sale and distribution within the CG(S)A therefore it would be appropriate to set a lower penalty for possession, which they view as a less serious offence.

*“As is implied, it would be ridiculous for possession to carry greater penalties than distribution.” (Response no. 39)*

#### 3 Years

95. The vast majority of people who responded in favour of the proposals and who gave a response to this question, felt that the category of material was so extreme, possession of it merited a penalty of 3 years and justified the increase to 5 years for sale and distribution.

#### Alternative Penalties

- Fines – several people suggested that a fine may be a more appropriate penalty for this type of possession offence. Many of those who suggested this as an option also felt that it would be appropriate to confiscate computers and any DVD/video copying equipment.
- Counselling and sex therapy – this option was generally referred to in addition to a custodial penalty. Those who suggested this were of the view that there is a causal link between the consumption of extreme pornography and violent sexual behaviour. They felt that it would be important to tackle the root cause and also suggested that this would allow research into behavioural patterns to take place.
- Inclusion on the sex offenders register was also cited by some as an additional measure to the 3 year penalty.

### **Alternative Solutions**

96. These options were offered as alternative or additional options to the creation of an offence of possession of extreme pornography.

- Registration system similar to the US where the creators of the sexually explicit images have to create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.
- All ISPs should refuse to host this material on their sites and take down any offensive material once they have been alerted to it.
- Credit card tracking schemes

## **ANNEX A – LIST OF SCOTTISH RESPONDENTS**

This list details the response numbers and names of those Scottish respondents who have consented to their name and their response being shared.

3. David Mackie
9. Alex Cruickshank
10. Andrew Tucker
15. John B Dick
18. Violate
20. D Ovington-Brown
24. Peter Brand
26. Douglas Pickering
29. Keith Redford
30. Susan Davie
31. Rachel Twaites
32. Justin Semiramoth, Jr
34. Neil Robertson
38. West Dunbartonshire Council
40. Scottish Court Service
41. Aberdeen City Council
42. Celia McKenna
43. Association of Chief Police Officers in Scotland
46. Angus Council
47. South Ayrshire Rape Crisis & Survivors of Child Sexual Abuse
49. Andy Taylor
50. Central Rape Crisis & Sexual Abuse Centre

- 52. Alexander Lennox
- 54. Martin Leech
- 57. South Lanarkshire Council
- 58. W.S. Society
- 60. Scottish Children's Reporter Administration
- 61. Lynn Anderson
- 62. Renfrewshire Council
- 63. The City of Edinburgh Council
- 64. Scottish Women's Convention
- 65. Scott Reddell
- 66. Hamish MacDonald
- 67. Scottish Police Authorities Conveners Forum
- 68. Edinburgh Women's Aid
- 69. Barry Slemmings
- 71. West Lothian Council, Social Policy
- 73. J Moir
- 74. YWCA Scotland
- 75. The Law Society of Scotland
- 77. David Witts
- 79. Women's Support Project, Glasgow
- 82. Maria Blackwell
- 83. Aberdeenshire Council
- 85. The Catholic Church
- 86. James Louttit
- 87. Andrew G. Robertson

## **ANNEX B - RESPONSES FROM CROSS BORDER ORGANISATIONS**

249.	BBC
395.	BT - Response Number
80.	Feminists against Censorship
124.	Cyber-Rights & Cyber-Liberties
193.	Ofwatch
241.	(Backlash paper attached)
285.	British Computer Society
301.	Sexual Freedom Coalition
305.	Unfettered
318.	Feminists against Censorship
386.	Melon Farmers
39 & 228.	Spanner Trust (incl. QC legal opinion) - Response Number
95.	World Federation Of Methodist and Uniting Church Women
201.	British Association of Women in Policing
219.	Justice for Women
234.	Care
255.	Mediawatch UK
261.	Mediamarch
262.	Conservative Party
295.	Lawyers Christian Fellowship
323.	Church of Jesus Christ of Latter-Day Saints
330.	The Christian Institute

- 88. Scottish Council of Jewish Communities
- 92. Scottish Women Against Pornography
- 93. SM Scotland

- 351. Salvation Army
- 376. Campaign to End Rape
- 326. Rights of Women
- 357. Object
- 235. Channel 4 TV Corporation
- 244. Newspaper Society
- 254. UKERNA
- 288. ISPA
- 359. Telewest
- 371. NTL
- 373. Yahoo
- 374. Liberty
- 390. Mobile Broadband Group
- 217. Campaign against Censorship
- 20. Kidscape
- 142. British Psychological Society
- 151. National Council of Hindu Temples (UK)
- 176. Barnardo's
- 394. Children's Charities Coalition for Internet Safety (CHIS)
- 194. British Board of Film Classification
- 210. Internet Watch Foundation
- 53 + 211. Thus (Demon ISP)
- 365. British Association of Social Workers
- 375. Women's National Commission, Sexual Violence sub-group (endorsed by several other groups)



## ANNEX C - TABLES OF RESPONSES TO CONSULTATION QUESTIONS

**Responses to Question 1 – Do you think the challenge posed by the internet in this area requires the law to be strengthened?**

Response	Yes	No	Did Not State
Individual	23	36	
Organisation	51	17	15
Total 142	74 (52%)	53 (37%)	15 (11%)

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

Response	Yes	No	Did Not State
Individual	31	28	
Organisation	46	18	19
Total 142	77 (55%)	46 (32%)	19 (13%)

**Responses to Question 3 – Do you agree with the list of material set out in paragraph 39?**

Paragraph 39 defined the material being considered in the consultation document.

**Paragraph 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) interference with a human corpse;
- iii) serious violence in a sexual context, and
- iv) serious sexual violence

Response	Yes	No	In Part	Did Not State
Individuals	14	35	8	2
Organisations	34	15	10	24
Total 142	48 (34%)	50 (35%)	18 (13%)	26 (18%)

## Responses to Question 5 and Question 6 – Which option do you prefer and why do you think this option is best?

The options outlined in paragraph 43 of the consultation document are as follows;

**43. The options are;**

**Option One – adding a general offence of possession of “obscene” material to the Obscene Publications Act 1959 and to the Civic Government (Scotland) Act 1982;**

**Option Two – adding a possession offence limited to the category of information 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.**

	Option 1	Option 2	Option 3	Option 4	Did Not State
<b>Individuals</b>	1	2	14	32	9
<b>Organisations</b>	2	1	46	2	33
<b>Total 142</b>	<b>3 (2%)</b>	<b>3 (2%)</b>	<b>60 (42%)</b>	<b>34 (24%)</b>	<b>42 (30%)</b>

## Responses to Question 7 – Which penalty option do you think is preferable?

Paragraph 53 of the consultation document outlined the different penalty options views were being requested on.

**53. Penalties**

- 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 3 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.

Response	Less Than 3 Years	3 Years	No Penalty	Did Not State	Other
<b>Individuals</b>	2	5	19	29	3
<b>Organisations</b>		32	2	49	1
<b>Total 142</b>	<b>2 (1%)</b>	<b>37 (26%)</b>	<b>21 (15%)</b>	<b>78 (55%)</b>	<b>4 (3%)</b>

97. Although they have been expressed in separate columns in the table above, it should be noted that most of those who have not stated a response to this questions had selected option 4 – do nothing, as the answer to the previous question. As a result these respondents may not have felt it necessary to respond to this question.

