

## SPANNER TRUST

### **In the matter of the Consultation Paper on the Possession of Extreme Pornographic Material**

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#### OPINION

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1. I have been asked to advise on whether a proposed new criminal offence relating to the possession of extreme pornographic material is likely to be compatible with the European Convention on Human Rights (“the Convention”). The proposals are set out in a consultation document produced by the Home Office ‘On the possession of extreme pornographic material.’
2. The proposal is, in essence, to outlaw the possession of explicit pornography (meaning material that has been produced solely or primarily for the purpose of sexual arousal or gratification),<sup>1</sup> including all material, whether via the internet or not,<sup>2</sup> containing actual or realistic depiction of:
  - a. intercourse or oral sex with an animal;
  - b. sexual interference with a human corpse;
  - c. serious violence in a sexual context; and
  - d. serious sexual violence.

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<sup>1</sup> The consultation paper states that the proposed legislation is not intended to capture ‘medical or scientific material, educational, artistic, mainstream broadcast entertainment, or news footage.’ See consultation paper para. 37 and also para. 51.

<sup>2</sup> Consultation paper para. 36 – this suggests that all material falling within the prohibition would be targeted, irrespective of whether viewed via the internet, mobile phones, magazines, videos etc. However, at paragraph 50 it is stated that “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.” While TV broadcasts may therefore be excluded the possession of images in any other form is likely to be covered; the possession offence would be construed as it is in respect of indecent photographs of children under the Criminal Justice Act 1988 and the Sexual Offences Act 2003 (see paragraphs 50 and 24 of the consultation paper).

3. 'Serious violence' in (c) is explained as covering 'serious bodily harm in a context or setting which is sexual'. 'Serious sexual violence' in (d) is explained as involving or appearing to involve serious bodily harm where the violence is sexual.<sup>3</sup> The distinction and the necessity for it are unclear, but I assume that (d) is intended to cover for example rape, while (c) would cover bondage or beatings. 'Serious bodily harm' is meant to cover 'violence in respect of which a prosecution for grievous bodily harm could be brought in England and Wales or in Scotland, assault to severe injury.'<sup>4</sup> In effect, the new provisions would make it a criminal offence for an individual to possess pornography that uses images of serious violence in a sexual context, whether acted or real.
4. The consultation paper explains the use of the word 'explicit' as meaning an 'activity which can be clearly seen and is not hidden, disguised or implied.' 'Realistic depictions' are intended to 'capture those scenes which appear to be real and are convincing, but which may be acted.'<sup>5</sup>
5. The consultation paper states in the executive summary that the material in question would be illegal to publish, sell or import here under the Obscene Publications Acts 1959 and 1964 ("OPA") and in Scotland under the Civic Government (Scotland) Act ("CG (S) A"). In the body of the paper, the Government is not so categorical, stating only that it 'believes' such material would contravene the existing legislation.<sup>6</sup> That uncertainty derives from two factors. First, the current legislation proscribes 'obscene' material that is, material that would tend to 'deprave or corrupt' persons who are likely to see or hear it,<sup>7</sup> a test which depends on the likely audience as well as current moral views and the jury's perception of the material; there can be no certainty that a jury will find the

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<sup>3</sup> Consultation paper para. 40

<sup>4</sup> Consultation paper para. 41.

<sup>5</sup> Consultation paper para. 38

<sup>6</sup> See for example consultation paper para. 20

<sup>7</sup> 'Obscene' is defined in section 1(1) of the OPA, which provides: "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."

material to be 'obscene' or that it was likely to deprave and corrupt its likely audience. Secondly, uncertainty arises from the fact that the Government's favoured approach is to adopt a new definition of prohibited material that would not necessarily coincide with the definition of 'obscene' in the current legislation.

6. The Government's preferred option is to create a new 'free-standing' offence for the possession of the limited categories of material described in paragraph 2 above (see option 3, set out at paragraphs 49-51 of the consultation paper). This means that material which might not contravene the existing legislation could be caught by the new measures. That view is reinforced by the statement at paragraph 49 that anyone publishing or distributing such material could be prosecuted for the new offence rather than under the existing legislation. The consultation paper does not suggest that there will be any 'moral' test equivalent to the 'deprave and corrupt' test in respect of the material at issue. The possession offence would be construed as it is in respect of indecent photographs of children.<sup>8</sup> Thus the offence would depend solely on proof of possession of an image falling within the proscribed category, without regard to its effect on that particular individual. It appears that the test would be:

- a. Is the material 'pornography', that is: is it produced for the purposes of sexual arousal or gratification ?
- b. Does it include images falling within the definitions set out in paragraph 2 above?
- c. If the images fall within (c) or (d), is the violence (whether or not real) so serious as to amount to grievous bodily harm ?
- d. Are the images 'explicit' that is, not hidden, disguised or implied ?
- e. If so, possession would constitute a criminal offence.

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<sup>8</sup> Consultation paper para. 50

7. The underlying premise for the new offence is that such material has no place in our society.<sup>9</sup> The proposal seeks to tackle its circulation.<sup>10</sup> The various justifications for the proposed new offence found throughout the consultation paper are as follows:

- a. 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;
- b. 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, which may encourage interest in violent or aberrant sexual activity;<sup>11</sup>
- c. a desire to “send a clear message about this material, [which] will make it easier to combat it and may reduce demand for it”;<sup>12</sup>
- d. a means of trying to break the demand/supply cycle and to discourage interest in the material;<sup>13</sup>
- e. a belief that such material may encourage or reinforce interest in violent and aberrant sexual activity to the detriment of society as a whole, although there are no ‘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’;<sup>14</sup>
- f. the belief that technological advancement, and in particular the availability of the internet, has made it necessary to regulate possession of this

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<sup>9</sup> Consultation paper para. 11

<sup>10</sup> See for example Partial Regulatory Impact Assessment p. 21 para. (I) 3

<sup>11</sup> Consultation paper para. 34

<sup>12</sup> Consultation paper para. 26

<sup>13</sup> Executive summary para. 5, consultation paper para. 23.

<sup>14</sup> Consultation paper paras. 27 and 31.

material since it is no longer possible to 'rely on national norms of behaviour or understanding, or on border controls to limit the kinds of material consumed within the UK'.<sup>15</sup>

### **The European Convention on Human Rights**

8. The Government states that it believes the proposed legislation would be compatible with Articles 8 and 10 of the Convention because the material covered is at the extreme end of the spectrum, would be 'abhorrent' to most people and because the legislation would not restrict political expression or public interest matters or artistic expression.<sup>16</sup>

9. In my view that analysis is not sufficient. There can be no doubt that the criminalisation of the possession of pornographic material raises serious issues under both Articles 8 and 10 of the Convention. Not only would an actual prosecution for possession interfere with an individual's private life under Article 8 and right to receive information under Article 10, the threat of such a prosecution would also be likely to constitute an interference with those rights: *Norris v Ireland* (1988) 13 EHRR 186 (para. 31); *Bowman v United Kingdom* (1998) 26 EHRR 1 (para. 33). Accordingly, the very existence of the legislation would be likely to constitute an interference with Convention rights.

10. The relevant parts of Article 8 of the Convention provide:

"1. Everyone has the right to respect for his private and family life, his home and correspondence

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society...for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

11. The relevant parts of Article 10 of the Convention provide:

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<sup>15</sup> Consultation paper para. 32

<sup>16</sup> Consultation paper para. 57

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers...

2. The exercise of these freedoms, since it carries with it duties and responsibilities may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society...for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others....”

12. Both Articles 8 and 10 permit the state to regulate the receipt of material where that regulation is ‘prescribed by law’ (or ‘in accordance with the law’)<sup>17</sup>, in the pursuit of a legitimate aim and necessary in a democratic society.

**‘In accordance with the law’/‘prescribed by law’**

13. The requirement that a restriction on the freedoms under Articles 8 and 10 be ‘prescribed by law’ includes two main elements: that the measure is laid down in law and that the legal measure is sufficiently clear and precise in its meaning to allow individuals to regulate their conduct and reasonably foresee the consequences of their acts.

14. The latter is obviously crucial in this context: an individual must be able to know whether or not his or her viewing of a particular image would or would be very likely to constitute a criminal offence. Because ignorance of the law is no defence, so the law must be clear as to what it proscribes.

15. In contrast to the position in respect of children, there is no absolute prohibition on pornography involving adults. Unless the legislation intends to ban all images of sex with animals, necrophilia and sexual violence, the prohibition appears to depend on an understanding of the word ‘extreme’ or ‘serious’, which is clearly something that is dependent on individual sensibilities. While a publisher or distributor of such material might be expected to know or understand or even to seek advice as to where the legal boundaries lie, the same cannot be said of an individual user of pornography. How is an individual supposed to know whether

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<sup>17</sup> There is no significance in this difference in wording between Articles 8 and 10: *Silver v United Kingdom* (1983) 5 EHRR 347 (para. 85).

or not he/she would commit a criminal offence if he/she viewed a particular image ? Something that to one individual would be abhorrent and offensive, might to another be acceptable and indeed, desirable.<sup>18</sup>

16. Take for example a situation where an individual enters a licensed sex-shop and purchases a magazine, which turns out to include images prohibited under the proposed legislation, that individual would be guilty of the proposed offence. How should that individual have known that the images were prohibited ? At what point does pornography become criminal ? Similarly, if an individual pays for and enters an internet site that provides pornography, and views images which have not been removed from the internet by the Internet Service Provider (“ISP”), how should that individual know when or which of the images are prohibited ?<sup>19</sup> The only safe course would be for individuals not to view any pornography containing any images of the acts set out in paragraph 2 above. That might be the preferred result for the Government, but it is not the stated intention of the legislation.
17. Far from being obvious, as the Government suggests in the consultation paper, defining the material covered to a sufficient degree of clarity, would be difficult. I therefore consider that real concerns arise about whether the proposed legislation would be sufficiently precise and foreseeable to meet the ‘prescribed by law’ test in the context of an individual possession offence.

### **Legitimate aim**

18. I assume that the legitimate aim sought by the proposed legislation would be the protection of morals and that this would be accepted by the domestic and Strasbourg courts.

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<sup>18</sup> See, for an example of a case where the European Court of Human Rights held that a legal rule in the UK did not amount to “law” under the Convention because it was too imprecise, *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241 (paras. 37-38). That case concerned the power to bind a person over to be of “good behaviour”, which was defined in domestic case law as behaviour which is “right in the judgment of the majority of contemporary fellow citizens”.

<sup>19</sup> Notably, as the consultation paper recognises, the ISP would be protected from civil or criminal action because they are unaware of what is being transmitted: Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002.

## Necessary in a democratic society and proportionate

19. The requirement that a measure is necessary in a democratic society means that the measure must be more than 'reasonable', 'useful' or 'desirable', it must meet a 'pressing social need': *Sunday Times v United Kingdom* 2 EHRR 245 (para. 59). That 'pressing social need' must accord with the requirements of a democratic society, the hallmarks of which are tolerance and broadmindedness: *Handyside v United Kingdom* 1 EHRR 737 (para. 49). In particular, the measure must be proportionate to the aim pursued. This requires that the reasons given to justify the measures of "interference" are 'relevant' and 'sufficient' (ibid para. 50). As Lord Steyn said in the leading domestic law case on the subject, *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (para. 27), proportionality requires the following questions to be asked:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

20. Where the interference involves an intimate aspect of private life, particularly weighty reasons are required for its justification: *Dudgeon v United Kingdom* (1982) 4 EHRR 149.

21. In the context of freedom of expression, the Court has stated that this "constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual. Subject to paragraph 2 (art. 10-2), **it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population**": *Mueller v Switzerland* (1991) 13 EHRR 212 (para. 33, emphasis added). Any interference with the right to freedom of expression must be 'convincingly established': *Barthold v Germany* (1985) 7 EHRR 383 (para. 58). Where the measure has the ultimate effect of reducing the right 'in



such a way or to such an extent that the very essence of the right is impaired', the interference will by definition be disproportionate: *Rees v United Kingdom* (1987) 9 EHRR 56 (para. 50).

22. In my view, serious concerns arise as to whether the proposed legislation is necessary in a democratic society for the reasons set out below.

**Are the measures capable of meeting the objective pursued ?**

23. The Government states that the proposed new measure is necessary because:

- a. the growth in the internet has meant it is no longer possible to regulate supply and that this offence would break the supply/demand cycle;
- b. participants in the making of such material, who may be the victims of criminal offences, need to be protected;
- c. children need to be protected from exposure to such materials.

24. Dealing with (a), it is difficult to see how the proposed offence would break the supply/demand cycle. As the Government states, very little of this material is produced in the United Kingdom and almost all of it originates from other countries.<sup>20</sup> No other country has or proposes to adopt a possession offence. That being the case, a measure in the United Kingdom would be very unlikely to have any effect on supply.

25. Further, if the need for the measure originates from the growth in pornography on the internet, the measure would be confined solely to that medium. What is the reason for extending it to all other media, save for broadcast media, particularly if it really is intended to relate only to material that is already covered by the OPA and the CG(S)A ? There is no explanation as to why new measures are needed to regulate, for example, print media.

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<sup>20</sup> Consultation paper, para 22

26. As regards (b), again it is difficult to see how the measure could protect participants in the making of the relevant material if the material is in fact all made abroad. Even if it is produced in the UK, the proposed measures extend to realistic depictions of the relevant acts, including presumably realistic drawings, paintings and images produced through computer imaging with no individuals involved, provided the images are 'pornographic'. Why is it necessary for the measures to extend to images that are produced without the involvement of real individuals ?

27. As regards (c), it is again difficult to see how the relevant measures will assist in preventing children from being exposed to such images. Since the measures are unlikely to have any significant effect on the supply/demand cycle, they will still be available on the internet. The existence of a criminal offence is unlikely to have any impact on a child's chances of being exposed to such images. The only way the chances of such exposure are likely to be reduced is through better regulation by ISPs.

**Proportionality: a fair balance between the interference and the general interest ?**

28. In my view, it is seriously arguable that the proposed measures go too far to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights. Put another way, I am not convinced that the reasons provided by the Government for the measures are sufficient to justify the extent of the interference in the individual's freedoms.

29. First, a prosecution or the threat of a prosecution, with the potential penalty of three years imprisonment, for looking at adult pornography in private is a very serious interference in an individual's right to respect for an intimate aspect of their private life under Article 8 and their freedom of expression under Article 10. It requires a powerful justification. Its justification must be stronger than that required to regulate the publication and distribution of pornography by

commercial operators because the interference in the rights of the individual are so much more serious.

30. As the Government admits, there is no proof that the use of such images by individuals causes or induces violence. The enormous amount of research to which the Government refers has yielded no clear results.<sup>21</sup> It is difficult therefore to see why there is any need to prosecute individuals for looking at this material in the privacy of their own homes.
31. Secondly, in so far as the legislation is intended to cover realistic depictions where no individuals are necessarily involved in the process of production, it is difficult to see the difference between such images and those that are produced by the imagination through reading descriptions. There is no suggestion that the Government intends to ban the possession of written pornography that involves the same subject matter as this proposed legislation. Otherwise the Marquis de Sade would certainly have to be banned, as would Nancy Friday's 'My secret garden' and much other widely read pornographic literature. Under the proposal however, it appears that realistic illustrations to such books would be unlawful (and the possession of the illustrated book would be a criminal offence).
32. Thirdly, the possession offence would apply irrespective of who possessed the image or in what circumstances and whether or not any harm to anyone was or could have been caused. In contrast, the European Court was careful to point out that Article 10 was not contravened by the imposition of a fine on the exhibitors of a public art exhibition that showed images of sex with animals *because of the circumstances* (rather than the nature of the material) namely, that the exhibition was free and had no age limit and the public had been actively encouraged to enter: *Mueller v Switzerland* (1991) 13 EHRR 212 (para. 36). The proposed new legislation is aimed, however, at entirely private situations, and an offence could be penalised not by a fine but by up to three years imprisonment.

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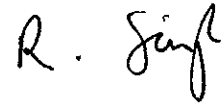
<sup>21</sup> Consultation paper, para. 31

33. Fourthly, the offence would also presumably catch those who create these images themselves in their own homes for their own gratification in the context either of a consensual relationship or by the use of photo-imaging or other means of depiction. This would be the case even where there was no risk to anyone of any physical harm. This is in contrast to the position in the case of *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39, where the Court accepted that a prosecution for extreme sado-masochistic acts, even though consensual, did not constitute a violation of the defendants' private life. It did so on the basis that in that case the "sado-masochistic activities involved a significant degree of injury or wounding which could not be characterised as trifling or transient..." Where no physical harm or even risk of harm is involved, it is difficult to see how an interference in such private activities could be justified, particularly as such circumstances would not involve any public distribution of the images.
34. Fifthly, other objectives given by the Government have already been considered at paragraphs 23 to 27 above: there appears to be no rational connection between the measures and the objectives they seek to achieve.
35. Sixthly, as explained above, it is likely that an individual will find it difficult to assess under the legislation whether he/she is committing a criminal act by viewing particular material. The effect of that uncertainty may be that the individual feels he/she cannot risk looking at any pornography at all, however mild. In those circumstances, the restriction could impair the very essence of the rights, so necessarily constituting a disproportionate interference. In the context of freedom of expression the Convention law has always been alive to the danger of such a "chilling effect."
36. Finally, in assessing what is necessary in a democratic society, it is relevant to consider the position in other member states of the Council of Europe. It is

notable that in not a single western country is the simple possession of such pornography a criminal offence.<sup>22</sup>

### **Conclusion**

37. In conclusion, I consider that the legislation as proposed gives rise to real concerns as to its compatibility with an individual's rights under Articles 8 and 10 of the Convention.



**RABINDER SINGH Q.C**

**Matrix Chambers  
Gray's Inn,  
London WC1R 5LN.**

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<sup>22</sup> Consultation paper, para. 56