



BRIEFING PAPER

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Extreme pornography

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Summary

In August 2005 a Home Office/Scottish Executive consultation sought views on whether to make it illegal to possess “extreme pornography” featuring adults. This was in response to increasing public concern about the availability of such material on the internet.

Following the consultation, the *Criminal Justice and Immigration Act 2008* made it an offence in England, Wales and Northern Ireland to possess “extreme pornographic images” - pornographic material that is grossly offensive, disgusting or otherwise obscene, and that explicitly and realistically depicts:

- life threatening injury
- serious injury to a person’s anus, breasts or genitals
- bestiality
- necrophilia

In Scotland, the *Criminal Justice and Licensing (Scotland) Act 2010* also made it an offence to possess extreme pornographic images. However the Scottish offence went further than the Westminster legislation in that it applied to images depicting rape or other non-consensual penetrative sexual activity. This material is sometimes referred to as “rape pornography”.

After criticism from women’s groups and academics, the *Criminal Justice and Courts Act 2015* amended the 2008 Act so that, as in Scotland, it is now an offence to possess “rape pornography”.

1. Policy background

1.1 Home Office/Scottish Executive consultation (August 2005)

An August 2005 Home Office/Scottish Executive consultation paper sought views on making it illegal to possess “a limited range of extreme pornographic material featuring adults...material which is graphic and sexually explicit and which contains actual scenes or realistic depictions of serious violence, bestiality or necrophilia”.¹

According to the paper, existing laws were not effective in controlling the availability of extreme material on the internet. Public concern had also increased, particularly after the murder of a young woman by a man who had accessed websites showing extreme pornography.²

The consultation document acknowledged that it was not possible to draw any definite conclusions from existing research about the long-term impact of extreme pornography on individuals generally, or on those already predisposed to violent or aberrant sexual behaviour.³ However, it said there was a small category of pornographic material that, like child abuse images, was so “repugnant” that possession of it should not be tolerated.⁴

The consultation’s proposals were based on a desire to protect society, particularly children, from exposure to extreme pornography and to protect those who may be the victims of crime during its making.⁵

One of the policy options – the preferred option – set out in the paper was the creation of a new offence of possessing a limited category of extreme pornography.⁶ Any new offence would only apply to 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; or
- serious sexual violence.⁷

On “explicit” and “realistic depictions” the paper explained:

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

¹ Home Office/ National Offender Management Service and Scottish Executive, [Consultation on the possession of extreme pornographic material](#), August 2005, p1

² Ibid, p1

³ Ibid, p9

⁴ Ibid, p10

⁵ Ibid, p10

⁶ Ibid, p12

⁷ Ibid, p2

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.⁸

1.2 Home Office response

The Home Office published its summary of responses to the consultation in August 2006.⁹

On a new offence of possessing extreme pornography, respondents were either strongly supportive or strongly opposed. Those who were in favour generally supported the arguments set out in the consultation paper. Nearly all of those opposed were worried that the inclusion of material featuring “sexual violence” and “violence in a sexual context” would criminalise possession of images of consensual sexual acts, such as private photographs taken by a husband and wife, or material created by those practising BDSM (BDSM includes the consensual practices of bondage, domination, submission and mastery, and sado-masochism).¹⁰

Many of those opposed also raised issues of proportionality, freedom of speech, lack of evidence of harm and police resources.¹¹

Some respondents were concerned that the categories of specified material were too broad and the definitions unclear.¹²

In response, the Government said that it had reconsidered the categories of “serious violence in a sexual context” and “serious sexual violence” and concluded that the reference to “in a sexual context” had caused confusion and was unnecessary in view of the pornography threshold. There would therefore be a single category of “serious violence”.¹³

The Government had also reconsidered the violence threshold and concluded that the offence should apply to images of acts that appear to be life-threatening or are likely to result in serious, disabling injury.¹⁴

In summary, material would need to be pornographic; explicit; real (or appearing to be real); and involving:

- serious violence, i.e. violence that appears to be life threatening or likely to result in serious, disabling injury
- intercourse or oral sex with an animal
- sexual interference with a human corpse¹⁵

Legislation would be introduced when the parliamentary timetable allowed.¹⁶

⁸ Ibid, p10

⁹ Home Office, [*Consultation on the possession of extreme pornographic material: summary of responses and next steps*](#), August 2006

¹⁰ Ibid, p3

¹¹ Ibid, p3

¹² Ibid, p5

¹³ Ibid, p6

¹⁴ Ibid, p6

¹⁵ Ibid, pp6-7

¹⁶ Ibid, p7

1.3 Scottish Executive response

The Scottish Executive published its analysis of responses in June 2006.¹⁷ Law enforcement organisations and local authorities were generally in favour of strengthening the law.¹⁸ Women's organisations and groups working with children were unanimous in supporting new legislative measures although, in most cases, they called for greater reform which would tackle all forms of pornography.¹⁹ Almost all of the respondents in favour of strengthening the law supported the creation of a new offence.²⁰

The majority of responses opposing the consultation's proposals came from the BDSM community or from those representing civil liberties and anti-censorship groups who argued that adults should be allowed to take responsibility for the material they choose to view.²¹

There was again concern about the categories of material set out in the consultation, with many respondents concerned about the definitions of "serious violence" and "serious sexual violence".²²

Following the analysis of responses, a Scottish Executive working group was set up to consider how an offence of possessing extreme pornographic material might be constructed in Scottish law.²³

The Scottish Government's September 2008 paper, *Revitalising Justice*, said that a new offence would be introduced that would criminalise the possession of pornographic images which realistically depicted:

- life-threatening acts and violence that would appear likely to cause severe injury;
- rape and other non-consensual penetrative sexual activity, whether violent or otherwise; and
- bestiality or necrophilia²⁴

¹⁷ Scottish Executive, [Analysis of the Scottish Responses to the joint Scottish Executive and Home Office consultation on the possession of extreme pornographic material](#), June 2006

¹⁸ Ibid, p10

¹⁹ Ibid, p11

²⁰ Ibid, p23

²¹ Ibid, p12

²² Ibid, p19

²³ Scottish Government, [Policy Memorandum to the Criminal Justice and Licensing \(Scotland\) Act 2010](#), March 2009, p26

²⁴ Scottish Government, [Revitalising Justice: proposals to modernise and improve the criminal justice system](#), September 2008, pp17-8

2. Offences of possessing extreme pornography

2.1 Criminal Justice and Immigration Act 2008

Section 63 of the *Criminal Justice and Immigration Act 2008* made it an offence in England, Wales and Northern Ireland for a person to be in possession of an extreme pornographic image.

An image is pornographic if it is reasonable to assume that it was “produced solely or principally for the purpose of sexual arousal.”²⁵

An image is extreme if it is grossly offensive, disgusting or otherwise obscene²⁶, and explicitly and realistically depicts any of the following:

- an act which threatens a person’s life;
- an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals;
- an act which involves sexual interference with a human corpse; or
- a person performing an act of intercourse or oral sex with an animal (whether dead or alive).²⁷

For a person convicted on indictment, the maximum sentence for possessing images showing life-threatening acts or serious injury is three years imprisonment; for possessing images showing necrophilia or bestiality, it is two years. The maximum penalty on summary conviction is six months imprisonment.

Section 65 of the Act sets out a number of general defences for someone charged with possessing an extreme pornographic image:

- that the person had a legitimate reason for being in possession of the image
- that the person had not seen the image and therefore neither knew, nor had reason to suspect, that it was an extreme pornographic image
- that the person had not asked for the image and had not kept it for an unreasonable period of time

An additional defence for those participating in the creation of extreme pornography is given in section 66. A defendant must prove, on the balance of probabilities, that he directly participated in the act portrayed in the image and that the act did not involve the infliction of non-consensual harm on any person. Non-consensual harm is defined as harm which is of such a nature that, in law, a person cannot consent to it being inflicted on him or herself, or harm to which a person can consent but did not in fact consent.²⁸

²⁵ Criminal Justice and Immigration Act 2008 s63 (3)

²⁶ Criminal Justice and Immigration Act 2008 s63 (6)(b)

²⁷ Criminal Justice and Immigration Act 2008 s63 (7)

²⁸ Criminal Justice and Immigration Act 2008 s66 (3)

Where an image depicts necrophilia, the defendant must also prove that the human corpse portrayed was not in fact a corpse.

The defence does not apply to images of bestiality.

2.2 Criminal Justice and Licensing (Scotland) Act 2010

In Scotland, the *Criminal Justice and Licensing (Scotland) Act 2010* made it an offence to possess extreme pornographic images.²⁹ The Scottish offence went further than that in the Westminster legislation in that it also applied to obscene pornographic images realistically depicting rape or other non-consensual penetrative sexual activity, whether violent or otherwise. This type of material is sometimes referred to as "rape pornography".

A [policy memorandum](#) to the *Criminal Justice and Licensing (Scotland) Bill* said that the definition of "extreme pornography" adopted in England and Wales was "insufficiently broad":

In particular, that definition does not extend to images of rape, unless they depicted activity likely to result in serious injury to the victim's breasts, anus or genitals or to threaten that person's life.³⁰

The memorandum notes that the Scottish Executive working group had concluded "that there was little justification for excluding images of rape from an offence intended to combat extreme pornography".³¹

²⁹ Criminal Justice and Licensing (Scotland) Act 2010 s42

³⁰ Scottish Government, [Policy Memorandum to the Criminal Justice and Licensing \(Scotland\) Act 2010](#), March 2009, p26

³¹ Ibid, p26

3. “Rape pornography” and the 2008 Act

The 2008 Act attracted criticism from academics and women’s groups for not making it an offence to possess “rape pornography”.³² Rape Crisis South London said this material:

(...) wrongly and dangerously promotes the beliefs that physical force, coercion and drugging are acceptable sexual practices and that women enjoy rape. ‘Rape pornography’ allows rapists to normalize and justify their behaviour and can be triggering for those who have survived rape and/or other forms of sexual violence.

In our own research into the freely available content on ‘rape porn’ websites, we found many of the videos’ themes to be endorsing and promoting various criminal acts including kidnapping, additional physical violence and child sexual abuse.

These images are explicitly defining themselves as being rape, non-consensual or forced sex...The viewers of these sites are encouraged to believe these images are real, that they are watching ‘real rape’. The loophole in legislation means that alongside images of rape, simulations of incest and child sexual abuse are freely, legally accessible in England and Wales as long as all participants in the image can be identified through digital imaging as being 18 or over, regardless of young appearance or contextual factors...³³

A June 2013 [letter](#) to the Prime Minister asked him “to urgently close a loophole” in the 2008 Act “which allows the lawful possession of pornographic images depicting rape which promote sexual abuse of women and girls in England and Wales”.³⁴ The letter was signed by over 100 academics, women's groups and other campaigners.

In a July 2013 speech on internet safety, the Prime Minister announced that the Government would make it an offence to possess internet pornography depicting rape.³⁵

Rape Crisis South London said this was a “significant step forward in challenging the eroticisation of violence against women and girls.”³⁶

3.1 The Criminal Justice and Courts Act 2015

The law was changed through the *Criminal Justice and Courts Act 2015*. Section 37 extends the definition of an extreme image set out in

³² McGlynn, Clare & Rackley, Erika (2013), [“Criminalising Extreme Pornography: lessons from England & Wales”](#), *Durham Law School Briefing Document*, Durham University; See also McGlynn, Clare and Rackley, Erika (2009), [“Criminalising extreme pornography: a lost opportunity”](#), *Criminal law review*, (4), pp245-260

³³ Rape Crisis South London, [Closing the Loophole on Rape Pornography](#), Undated

³⁴ Rape Crisis South London, [Open letter to the Prime Minister to ban the possession of ‘rape porn’](#), 7 June 2013

³⁵ [“The internet and pornography: Prime Minister calls for action”](#), Prime Minister’s Office, 22 July 2013

³⁶ [“Extreme Porn: Women’s Groups welcome criminalisation in new Justice Bill”](#), End Violence Against Women News, 5 February 2014

the 2008 Act by adding two further categories of prohibited material - images portraying, in an explicit and realistic way:

- an act which involves the non-consensual penetration of a person's vagina, anus or mouth by another with the other person's penis, or
- an act which involves the non-consensual sexual penetration of a person's vagina or anus by another with a part of the other person's body or anything else³⁷

A Ministry of Justice [factsheet](#) said there was "some evidence that viewing these images may have an effect on young peoples' attitudes to sexual and violent behaviour, and that that some men can exhibit heightened aggression towards women after exposure to violent pornography". It also said that "most people" would find such images "disgusting and deeply disturbing".³⁸

In addition to the existing defences (section 2.1 of this note), there is a defence to possessing an image portraying one of the above acts where a person who is a participant in the image, as well as the possessor, can prove that, despite appearances, consent was given freely and by someone who had the capacity do so.³⁹

Section 37 came into force on 13 April 2015.⁴⁰

³⁷ Criminal Justice and Courts Act 2015 s37

³⁸ Ministry of Justice, [Criminal Justice and Courts Bill: Extension of the offence of Extreme Pornography \(possession of pornographic images of rape and assault by penetration\)](#), October 2014; An [Impact Assessment](#) on extending the offence of possessing extreme pornography was also published (IA No: MOJ229, 11 February 2015)

³⁹ Criminal Justice and Courts Act 2015 s37(3)

⁴⁰ [2015 No. 778 \(C. 44\)](#)

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