

# Public Consultation response

## **From SM Scotland to the Scottish Executive and UK Home Office consultation over the possession of extreme pornography**

### Introduction

SM Scotland is an organisation formed to represent the interests of the estimated 300,000 Scots involved in the BDSM (Bondage, Domination, Sadism and Masochism) and Fetish scene in Scotland.

SM Scotland does not condone or support harm to anyone and in fact actively opposes and condemns any non-consensual activity of any nature, including by definition real acts of Necrophilia, Bestiality or Rape.

The issues raised by this consultation are far more complex than the questions asked would suggest and because of this we felt that it was necessary to respond more fully.

Specific answers to the consultation questions can be found in appendix A.

SM Scotland would welcome any comments regarding this response which will also be made available at [www.SMScotland.blogspot.com](http://www.SMScotland.blogspot.com) , please email any response to [SMScotland@gmail.com](mailto:SMScotland@gmail.com)

## The case against criminalising the possession of images of consensual sadomasochistic acts (sexual violence)

We do not believe that the Government's proposals to legislate against the possession of extreme pornography are necessary, workable, legal or morally right and we have tried to explain why in the response below.

With regards to the legality of the material itself, please be advised that whilst we as a community wish to protect our right to view images of consensual sadomasochistic acts between adults (which are currently legal), we, like the vast majority of people, abhor and condemn non-consensual acts such as rape, bestiality and necrophilia (which are already illegal).

However, the law already exists to punish perpetrators of these illegal acts, both here in the UK, and overseas particularly in Western Europe and the USA where the vast majority of this material originates.

And although we seriously question the governments assertions that such images of non-consensual activity are in fact readily available on the internet, or that such images have any causal effect with regards to sexual offending as there is significant evidence to the contrary, I cannot dispute the abhorrent nature of non-consensual images, if they are in fact images of real acts.

However the scope of the governments proposed legislation would go far beyond this. I cannot agree that there is any justification for criminalizing possession of fake images, or pseudo images, for any reason, and this would have a chilling effect on free speech and artistic expression.

Furthermore, the government has been frighteningly vague with regards to the definitions of "sexual violence". And as the proposals stand, the legislation would cover not just images of acts that most people could agree were abhorrent, such as non-consensual rape or violence, but also images of consensual, and completely legal, activities commonly practiced by the mainstream BDSM (bondage, domination, sadism and masochism) community in the UK and throughout Western Europe and the USA.

A community I should note that has an active, public, membership base well in excess of 100,000 people in the UK, and a non-public following that has been estimated by independent researchers as numbering in the millions within the UK alone.

The government in it's consultation has very disingenuously suggested that almost all acts covered under the category of "sexual violence" would already be illegal to perform, and that this legislation is somehow just "closing a loophole".

This is quite simply untrue.

An official Law Commission appointed by the UK Home Office, in 1995, came to the conclusion that sadomasochism, short of causing permanently disabling injury, should be no crime between consenting adults.

This was a very significant marked departure from the Spanner ruling of 1992, where the judge ruled the line was set at injuries that were more than "trifling and transitory".



In 1996, after the 1995 law commission findings, in the case of Regina V Wilson (where a man was accused of assault after branding his initials onto his wife's bottom), Three Appeal Court judges said: "Sexual activity between husband and wife in the privacy of their own home is not a matter for criminal investigation, let alone criminal prosecution."

The judges criticized the CPS for bringing the case to court and said it served 'no useful purpose'.

Also in Regina V Martin Church [the Club Whiplash case] at Southwark Crown Court on March 29, 1996, which established that BDSM clubs are not illegal. The 1751 Disorderly Houses Act was ruled not to apply and the jury threw the case out. It cost the prosecution over £285,000 in costs and they got nothing. No further raids on active BDSM clubs have taken place since.

To insinuate that there are no legal protections for BDSM, or that consent is irrelevant, is therefore entirely incorrect.

So under these proposals, the government proposes to make illegal the possession of images of legal acts.

Surely this would be an untenable position for any society that values civil liberties?

The majority of consensual BDSM clearly does not fall within this "illegal" category, yet hundreds of thousands of law abiding citizens would still be criminalised under these confusing and poorly written proposals.

With regards to the assertion that there is a causal link between the viewing of violent pornography and sexual offending, it would be helpful to consider the following:

The government has already admitted in its proposals that there is no proof of any causal link between extreme pornography and sexual offending.

What the government fails to mention is the large body of evidence that strongly suggests pornography of all types actually DECREASES sex crime rates, and that these proposals may in fact lead to an INCREASE in sex crimes and incidents of abuse.

A number of cathartic effects have been found for pornography, but perhaps the most widely cited is the so called "Danish experience." In the 1960's Denmark experienced a "porno wave", but rather than censoring this content, in 1967 the government lifted all restriction on pornography (save a 16 year old age limit for purchasing porn).

Yet rather than experiencing a wave of sex crimes as some had predicted, sex crimes actually declined. For example, Kutchinsky (1970; 1985; 1987; 1991) found that from 1965 to 1982 sex crimes against children declined from 30 per 100,000 in '65 to about 5 per 100,000 in '82. Similar evidence is found for rape rates. Kutchinsky concludes that this is likely the effect of pornography providing potential sex offenders an alternate means of sexual satisfaction, most likely through masturbation.

Another example of a nation with high amounts of pornography yet low sex crime rates is Japan. As Abramson and Hayashi (1984) have found, pornography in Japan is often featured in general interest newspapers and magazines, and can be seen on prime time television.



Not only is porn in Japan widely available but much of its adult content depicts the bondage and rape of young women. "In fact, one of the best ways to ensure the success of a Japanese adult film is to include the bondage and rape of a young woman (Abramson and Hayashi, 1984: p. 178)." Despite this, Japan's rape rate is roughly 8 times lower than that of the U.K.'s (2.4 rapes per 100,000 in Japan compared to 16 per 100,000 population in UK.).

This discrepancy can not be explained by variance in laws, or Japanese women's reluctance to report rape. Instead, the Japanese view the availability of such stimuli as a cathartic valve. It is presumed to provide vicarious satisfaction of a socially unacceptable behavior.

In a culture that endorses strict codes of behavior and highly defined roles, the depiction of rape also provides a context in which Japanese men can vicariously abandon all of the explicit signposts of good behavior. (p. 182).

Continuing with international evidence, Faust (1982) studied countries with the most and least equality achieved between men and women.

She found that in nations like the U.S. and the Scandinavian countries which highly value women's equality, pornography was widely available.

In contrast, in countries repressive towards women, like Iran, Saudi Arabia, and the former Soviet Union, little or no pornography was available.

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.

Which brings us to the issue of censorship.

Very limited censorship is a function of every modern state. The debate in this country has only ever been about the extent of that censorship.

There are, I would mention at this point, regimes in this world who have attempted to introduce and, indeed, have actually enacted laws such as the one being proposed, criminalising the expression or discussion of particular concepts of alternative sexuality, ideas or beliefs.

However, I am not sure that the United Kingdom (which already has the strictest censorship of any western nation) wishes to be so closely associated with the restrictions of regimes such as Saudi Arabia, Iran, Libya, Afghanistan, etc.

If and when the government proposes a model to actually censor the internet (and this consultation is not that model) there will be a very dynamic debate as to whether the traditional models of censorship are appropriate or even workable in the new age of the internet. That debate is happening, and this proposal pretends to be a part of it.

In fact it is not, it is something much worse.

If this legislation is successful, while a person who viewed an image is thrown in prison the picture he viewed will remain on the internet for others to view, (and perhaps then also be punished), as the vast majority of these images feature only acts between consenting adults and are thus completely legal in most civilised nations, where the websites are hosted.



This is a really fundamental point. These proposals censor nothing. They only punish. The proposal is to change the UK model of censorship from one that protects people from depravity to one that punishes people for depravity.

A proposal to lock up people for what they look at, rather than what they do, is a dramatic shift away from freedom in this country.

It is a gross authoritarian measure that doesn't even address the question of whether censorship (restricting the availability of material) is acceptable in the age of the internet.

The proposal involves the violation of privacy, snooping on personal electronic communications, and ultimately self-censorship through fear.

The point is that these proposals are not about censorship (restricting available material), but far, far worse intrusions into liberty and privacy.

"Locking up the deviants" smacks of Germany in 1939, and cannot be the right thing to do in a progressive member state of the European Union in 2005, surely no one can miss that point?

There is simply no possible legal, moral or ethical justification for attempting to criminalise possession of images of acts which are legal, no matter how morally distasteful they may be to some members of government.

The BDSM community is a significant sexual minority, and I fully accept various members of the Government may not agree with their activities, and may even find them distasteful.

Various UK Governments have in the past persecuted sexual minority groups purely on moral grounds. Sellers of hardcore pornography and homosexuals being prime examples.

Such persecution involved enormous distress and suffering to those unfortunate enough to be involved and were entirely unjustified and unnecessary, especially so in light of subsequent changes in law legalising such activities.

Therefore these crimes are in effect thought crimes, subject to the whims and temporary moral indignation of the day, and have no place in a civilised society.

When legislating over matters that seriously affect people's lives the law must be based on reliable evidence. We were very shocked to read that the Government appears to have abandoned this approach in favour of a more subjective and emotive one.

If it is acceptable to criminalise ordinary law abiding people in the absence of any reliable evidence of harm based on what is primarily intuition and moral arguments, then the basic fabric of our legal system and society is at risk from being subject to the constant whims of moral crusaders, and this is surely unacceptable to everyone.

Given the admission that international cooperation is essential in combating violent pornography, and furthermore given the fact that this material is legal in most civilised Western Nations, then any attempt to criminalise possession in the UK will have absolutely no effect on supply and demand. The producers of this material are, and will remain, out of the reach of British law enforcement.



Although likely to be generally ineffective there would undoubtedly be some “success” in prosecuting known members of the BDSM community in the UK for possession, probably the more naïve and vulnerable members of this group, for the crime of enjoying their own innate sexuality in private.

This is not morally right, however “convenient” it might be for the police or the Government.

Despite the Governments assertion to the contrary, consumers of mainstream pornography would be in constant fear of contaminating their computer hard drives with illegal content. This risk is different in nature to that involving child abuse images because violent content is widely available mixed with other pornographic content and consumers might expect to encounter it regularly in searches for a variety of other pornographic material. In many cases it would be impossible to determine if images had been downloaded accidentally or not turning prosecution into a lottery.

The proposals would exacerbate the problems of repressed sexuality that are so endemic in British society increasing prejudice and irrational fear that might well lead many well intentioned parents to become overprotective and more interventionist in their teenagers sexual development. Such over protective action can cause serious resentment, frustration and anger which can be very damaging and in some individuals may help awaken the aberrant sexual behaviour that these proposals are aimed at suppressing. The proposals may in fact make the situation worse and what little reliable evidence there is concerning pornography supports this viewpoint.

Images of child abuse are different in principle to images of violent pornography. Children cannot give their consent by definition, being below the age of consent whereas adults are (at least at the time of writing) free agents who can. The case of apparently non-consensual violent pornography which constitutes the overwhelming majority of such images is the exact opposite of the case with images of child abuse as far as consent is concerned.

If it has been concluded that these proposals could be brought into law with universal support to provide a simple cheap and just way of dealing with immorality in society then we believe that a serious error of judgement has been made.

Any possession law based on these proposals would be a disaster for British justice, would be very costly in both human and financial terms and would be vigorously resisted by a sizable minority of the population, measured in millions throughout the UK.



# Legislation

## The Obscene Publications Act

The fall in prosecutions under the Obscene Publications Act may in part be due to a higher priority being given to combating child abuse, but there are other reasons as well. The law is heavily weighted in favour of the prosecution with wide spread use of destruction orders that prevent or discourage trial by jury in many cases. Of those cases that do reach the courts juries are increasingly reluctant to condemn their fellow citizens to years in prison based on what effectively amounts to distaste and subjective opinion.

The principle of regarding sexual expression such as pornography as an inferior and unworthy form of expression that is clearly apparent from prosecutions under the OPA is unjustified. Although we realise that there is no hope of making any progress in revising the OPA in this consultation, the OPA is in serious need of revision and in its present form should not be used as the basis to justify any further legislation of any kind.

## Comparing the principles in existing legislation with the new proposals

As the proposed legislation *does* rely heavily on the existing requirements of the OPA and CJA it is perhaps worth examining how the proposals relate to this legislation in more detail.

The CJA imposes possession restrictions that are absolute. There are no public interest exemptions and rightly so, as there can be no artistic, scientific or other grounds for abusing children, so there are not, and can never be, any contextual justifications for offences covered by this Act.

The OPA imposes distribution restrictions that are not absolute. There are public interest exemptions and rightly so, as there are artistic, scientific and other grounds for permitting the distribution of obscenity, so there can be contextual justification in some cases.

The proposed legislation would take the absolute possession restrictions of the CJA and apply them to content that required the contextual exceptions of the OPA. This would be unprecedented and would create many difficulties particularly in matters of context. There would be cases where material that was illegal to even *possess* in one context would be entirely legal to *distribute* in another, see appendix C for examples.

This would effectively lead to a new crime of possessing material out of context (for example extracting a single scene from a film thus excluding contextual justification). Such “contextual crimes” are (arguably) workable in the case of distribution where at least legal opinion can be sought *before* a crime is committed, but cannot reasonably be applied to possession. The manner in which people store or arrange content should not be a criminal offence. Contextual possession crimes amount to thought crimes because the difference between guilt and innocence lies solely in the mind of the accused.

The risks of criminalisation by change of context are bad enough for content that breaches the OPA restrictions on distribution, but would pose a totally unreasonable risk in the case of legally distributed media. Miscarriages of justice would be inevitable under these circumstances and this alone should be sufficient reason to block the proposed legislation. There is no place in British law for thought crimes. Such concepts are an obscenity unto themselves.



# Key Objections

## Realistic depictions

It is wrong in principle to criminalise the mere possession of images of apparently non-consensual acts (that constitute the overwhelming majority of the material that would be criminalised), for the purposes of ensuring that a small number of images of truly non-consensual acts can be prosecuted as well.

It would be no more reasonable to convict a person for committing a crime where there was insufficient evidence or where the jury found it too difficult to decide if they were guilty or not. Such a position defies natural justice and common sense. It is not reasonable for thousands of innocent people to be convicted in order to ensure the successful prosecution of a very small number of criminals. The old saying “better a thousand guilty men go free than one innocent man go to prison” would be turned on its head.

It may be “convenient” to apply blanket restrictions that apply to all acts but such restrictions would not be based on justice, are not proportionate to the actual risk and are themselves immoral.

To say that there is no requirement that the activity is real in the OPA ignores the fact that there is also no prohibition on simple possession in the OPA. If the proposals were to be enacted we could see the ridiculous situation of people being convicted of owning pictures of themselves carrying out staged acts that involved no breach in the criminal law.

## Accidental possession

It is wrong in principle to criminalise the possession of material the exact content of which people would not be aware of until after it had been downloaded and was in their possession.

It is simply not good enough to suggest that the intention is not to prosecute people for accidental possession. There have been many cases of convictions for possession of images of child abuse that rested on the possession of a single deleted image and violent sexual images are far more widely available than images of child abuse and are also available mixed with other pornographic content much of which is now, and would remain, legal to possess.

Despite claims that there is no intention to prosecute accidental possession, we believe that the chances of sorting accidental acts from deliberate acts would be virtually impossible in many cases and that consequently miscarriages of justice would be a common occurrence as is already the case with prosecutions for possession of images of child abuse.

Many foreign pornographic websites do not sell specific titles, simply hours of viewing. Customers may select any content from many thousands of titles in hundreds of different categories. In many cases it would not be possible to determine the legality of such content prior to viewing.

A person who was legitimately seeking pornographic content would be likely to encounter a large amount of illegal material in their search given the international nature of the Internet and the legality of violent pornography in other jurisdictions. In these instances such a person might well delete such content; however significant amounts of such material might well still be found on their computer hard drives by forensic means.



In our opinion the chances of prosecution in such a situation would be high as to do otherwise would allow much non-accidental use to be claimed as accidental. If the answer is that the person shouldn't be looking even for this relatively mild pornographic material then it is clear that the intention is to prosecute a much larger range of material than has been stated. Where there is an indistinct borderline between permitted and prohibited content what would constitute an accident and how many accidents would people be permitted before they were put in prison?

## Precedent

If primarily moral arguments can be used to prohibit the possession of images of consensual acts (realistic depictions) between adults in the total absence of any reliable evidence of any harm caused, there is no logical reason to stop at violent pornography. If the proposed legislation were enacted it would provide a precedent for further restrictions. It would appear likely (and in our view inevitable), that such a precedent would be used as the basis for further inroads into personal liberty and freedom in the same way that the protection of 16 and 17 year olds in the Sexual Offences Act is already being used to justify the current proposals.

## Morality

It is worth reflecting that until recently hardcore pornography was considered so harmful to society that despite the lack of any evidence of harm, those who distributed it were often prosecuted and sent to prison. R18 rated hardcore pornography is now on sale from high street sex shops across the country following a High court ruling that was lost by the BBFC on the basis that there was *no evidence that the material was harmful to anyone*. Was it morally right to send all those people to prison?

The true goal of this legislation lies at the very heart of the problem. The real aim clearly has nothing to do with prevention of possession of anything, but everything to do with a wish to control the way in which people think. In this instance the desire to prohibit sexual thoughts about violent content. Criminalising people for what they think rather than what they do is itself immoral and repugnant.

The morality arguments used within the consultation gives the impression that the Government regards people who get enjoyment from the material described as evil. This is entirely inaccurate and shows a serious lack of understanding of the complexities of human sexuality and of the community that will be criminalised. Much greater efforts need to be made to understand these issues from all perspectives.

People who enjoy violent pornography do not enjoy it by choice and did not learn to do so by being exposed to it. These people have an innate attraction to it, possibly reinforced by a sexually repressive upbringing. Such people come to terms with their alternative/aberrant sexuality and manage to live entirely ordinary lives in other respects. They are victims as much as anyone else. Is it right to put these people in prison because of moral objections to their sexuality by others?

Current plans would effectively criminalise the BDSM community and such action shows very worrying similarities with the persecution of homosexuality in the past. Homosexuality was once considered abhorrent and immoral by the majority despite the lack of evidence of harm, children were considered to need protecting from it and thousands were persecuted for their sexuality and had their lives ruined.



It is all too clear from the perspective of those who enjoy pornography that the proposed legislation is likely to become a weapon to be used against pornography in general. If the proposals were to be enacted it would no longer be safe to surf the Internet for certain types of fetish material for fear of encountering other material that crosses some indistinct line and is considered to be illegal to even possess. No doubt the opponents of pornography would see this as a highly beneficial outcome, but for those millions who enjoy pornography it would curtail freedoms that have long been enjoyed, creating a great deal of fear for many and untold misery for the few unlucky or naive enough to be caught.

## **Human Rights Considerations**

What people do or do not find abhorrent has no bearing on restricting Human Rights. There is no exception under article 10 for cases where public opinion favours restriction. The appropriate test is based on considerations of harm. The basic Human Right to free expression specifically includes material that many would find offensive; indeed this is where free expression needs protecting the most.

We do not share the Government's view that the proposed legislation can be considered compatible with the Human Rights Act. Freedom of expression is a basic Human Right and although not an absolute right, Lord Bingham of Cornhill former Lord Chief Justice had this to say on Human Rights:

"The European Court of Human Rights has imposed a strict test of necessity, relying on such concepts as pluralism, tolerance and broad-mindedness. The overriding principle is clear: since the right in question is to be regarded as fundamental, any restriction of it must be strictly justified."

So whilst it is certainly permissible to restrict free expression or any other non-absolute right, any such restrictions must be strictly justified. The level of evidence provided by the Government (i.e. none) is hardly compatible with this statement particularly since the prohibition refers to simple possession rather than distribution.

Furthermore, if this legislation is enacted the Government can expect to face immediate, costly, and vocal legal challenges in every avenue possible.

## **Human Rights Law**

Rabinder Singh QC of the Matrix chambers, a recognized expert on the European Convention on Human Rights, says the government's current proposal would not solve the problems it is meant to address and could see thousands of people arrested for doing something they didn't even know was illegal.

He also said the proposals are incompatible with Articles section 8 and 10 of the Convention.

(see attached file, QC opinion)



## **International position**

No other foreign Government in the western world agrees with the proposals of the British Government. This does not make it "more important that we act against possession domestically", it makes it more important that the Government reconsiders what it is doing and why it is totally isolated.

If international co-operation is essential for effective action against the production of extreme material then the total lack of co-operation means that the chances of effective action are zero.

We suggest that the reason why the United Kingdom is isolated over the proposals concerning possession of extreme material is because some foreign Governments have a far greater respect for the personal freedom, autonomy and common sense of their citizens.

## **Concerning recent events**

The terrible acts of Graham Coutts have coloured this debate to a disproportionate extent and there is a need to consider the greater picture. Peter Sutcliffe brought about another terrible tragedy of even greater proportions by killing 13 women because "God told him to". Those of a religious persuasion who blame pornography for society's ills should consider the above case and what would happen if the logic used in the Government's proposals were to be more widely applied.

The psychopathic behaviour of criminal minds is not caused by violent pornography or by religious fervour, although in some cases both may be symptomatic of such behaviour. Society is unlikely to be protected from psychopaths by reactive legislation forced through by emotional pleas that do not take proper account of the evidence, the consequences for prevention or understanding of the serious knock on effects for millions of people.

It is entirely unreasonable to create laws that affect the sexuality of the whole of society in an attempt to control a few individual madmen. Tens of millions enjoy "mainstream" pornography and hundreds of thousands enjoy pornography containing Bondage and Sadomasochism.

It is morally wrong to interfere with people's personal and private sexuality without very good evidence that such action is fully justified. Ignorance of this minority of people is no excuse for condemning them to a life of sexual frustration, fear and imprisonment.



## **Arguments raised in the consultation**

A number of reasons for the proposed legislation were presented in the body of the consultation document. These reasons are discussed below.

### **Public abhorrence**

Most people would find this material abhorrent; however public distaste in matters of private morality that simple possession represents is not an appropriate basis for legislation. Large numbers of people find vivisection, abortion, homosexuality and the war against Iraq abhorrent, yet there is no suggestion that these matters should be decided by popular opinion. It is disingenuous to claim support from public opinion only when it agrees with Government intentions.

Public opinion is borne out of ignorance rather than insight. What is desperately needed is rational thought, discussion and understanding of these complex issue. Emotional demands that the Government must do something only serve to create fear and intolerance in society over sexual orientation and should be resisted.

### **Breaking the demand/supply cycle and discouraging interest**

Without international co-operation there is not the remotest chance that supply would be significantly affected and because of the innate sexual drive involved people would not have their "interest discouraged" any more than an interest in mainstream sexuality would be discouraged by making that illegal.

### **To prevent the encouragement and reinforcement of violent and aberrant sexual activity**

The vast majority of people would be repelled by sexually violent material no matter how much they were exposed to it. A minority of people specifically seek out this material, as they find it sexually stimulating. Both sorts of reaction are innate and will not be changed one way or the other. The few psychopaths who this legislation is really targeted at will continue to view this material with impunity leaving the more naïve and vulnerable members of the general public to act as scapegoats.

### **To protect those who participate in the creation of sexual material containing violence, cruelty and degradation**

Crimes committed against people living in the UK are a matter for the police. Crimes committed abroad are a matter for foreign Governments. The best way to prevent criminal abuse is by prosecuting the abusers not criminalising an ever increasing range of images in the hope of ensnaring one or two of the guilty amongst a multitude of the innocent. The vast majority of the material under discussion consists of consensual staged acts and originates in countries such as Western European nations and the United States that are very heavily regulated. We would question to what extent the participants who the Government are trying to protect have even been consulted before drawing up the consultation document?



## **To protect society particularly children**

A modern up to date Internet filter will remove virtually all unwanted content. Even without such a filter the extreme material in question has to be sought out, it does not appear on desktops unbidden and will not be removed by the proposed legislation. In order to protect society it is necessary to have a better understanding of the effects that the presence or absence of this material would have on society. Children would be far better protected by a campaign to increase media literacy and empower parents than ineffective legislation that would create fear and intolerance.

The proposals also carry a serious risk to children. By malicious email or other means children might unwittingly expose their parents to prosecution for possession of illegal images. Any such prosecution would undoubtedly have serious consequences for the child.

Protecting people from harm is a worthy aim, but if such protection forcibly overrides individual autonomy with the Government acting in loco parentis for the entire adult population then it degrades and diminishes everyone.

## **To close the gap in existing legislation and be consistent with the approach to child pornography**

There is no gap in existing legislation. What is proposed is to extend the law into areas previously considered private and personal, areas in which only the very strongest evidence of harm provide sufficient justification. Child abuse provides such justification as the images represent a record of non-consensual activity by definition. Extreme pornography on the other hand does not. Despite appearances the vast majority of this material is consensual. It is easy to recreate apparently non-consensual acts with trick photography, good acting and makeup and it is entirely inappropriate to confuse acts that are non-consensual with acts that appear to be non-consensual. Non consensual acts are rightly criminalised; apparently non-consensual acts are an entirely different matter.

## **To send a clear message that it is wrong**

This is a particularly worrying reason. Governments tend to have poor track records in legislating on moral issues. As has already been mentioned, homosexuality and the selling of hardcore pornography were once "wrong". Persecution of this sort should be a thing of the past.

Police enquiries that are carried out with religious zeal and that ignore the basic legal principle of "innocent until proven guilty" are also wrong. Such events have become all too common as can be seen from the disgraceful miscarriages of justice that are now emerging from Operation Ore which has already claimed more than 40 lives through suicide of accused members of the public. If laws are to be introduced that cover an even wider range of material that are even less well defined and far more accessible it would be a disaster for British justice and freedom.

It is only wrong if it causes real harm. Consensual make believe images created by adults for adults cause no harm and are not "wrong". Police investigations which destroy people's lives but are later dropped due to lack of evidence are also wrong, very wrong and need no further encouragement.



## **To make it easier to combat activities that are illegal in themselves**

Many of the activities that would be criminalised are not illegal in themselves. It is not illegal to create images that imitate criminal acts by use of special effects, make up and good acting as can be seen in the majority of dramatic content broadcast on commercial television including everything from Miss Marple to Dawn of the Dead and pornography is no exception.

## **Applying restrictions to pornographic material only**

Given the vagaries of differentiating pornography from art it is hard to believe that restrictions on pornography would not impact other areas. Our concerns over the extent and degree of material that would be covered by the new proposals were not eased by the response we received from the Home Office to questions concerning definitions where we were told that "it would be a matter for the courts to decide".

The CJA to which so much comparison has been made allows no exceptions and the OPA does not criminalise possession. The message sent by the new proposals is that images of torture are acceptable for entertainment purposes as long as they are not sexual entertainment purposes. This makes no sense.

The question must be asked, why is "artistic" entertainment considered worthy entertainment where as sexual entertainment is considered worthless? Entertainment is entertainment; tastes vary but allowing highbrow entertainment greater latitude is simply class based intellectual snobbery.

Sexual expression deserves as much protection as any other form of free expression does. In the absence of any evidence of harm all free expression should be protected equally. Similarly in the face of serious actual harm there is no reason to allow non-sexual expression any greater leeway than sexual expression.

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# Appendix A - Answers to the consultation questions

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

No. The challenge that now faces the Government is to resist the temptation to “do something” amidst emotional pleas that something must be done, in the absence of any reliable evidence and based on a single tragedy.

The Internet is arguably the single greatest aid to human communication and free expression that has ever existed. It is powerful because it is free and restricting it calls for the strongest of evidence based justifications. Such justifications do not exist in this case.

Attempts to censor content on the Internet deserve to be properly debated in a wider public arena than that provided by this consultation. Introduction of state censorship to remove content other than child pornography raises very serious issues concerning who would decide what was censored and under what circumstances.

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

No. The impression is given that the negative effects of pornography are undisputed but merely lacking final confirmation. This is simply untrue. In the presence of research results<sup>1</sup> that show that deregulation of pornography (including violent pornography) correlates with a very significant **\*reduction\*** in sex crimes it is necessary to tolerate such material for the good of society.

Even research commissioned by the Home Office itself fails to substantiate the claims made. In 1979 the Williams committee<sup>2</sup> threw doubts on the ability of films to “deprave and corrupt” and in 1990 a further Home Office report by Cumberbatch and Howitt<sup>3</sup> failed to find any link between the availability of pornography and sex crime. Not only is reliable evidence of harm hard to find, but there is evidence of beneficial effects.

Research results such as those from Japan and elsewhere<sup>4</sup> simply cannot be ignored, however unpalatable or inconvenient they might be and we are particularly concerned that the Government appears to have abandon the evidence based approach. An evidence based approach was taken during the review leading up to the SOA legislation as is apparent in the document “setting the boundaries reforming the law on sex offences” from July 2000 (executive summary 0.4).

Sexual repression is the source of many of the problems in society that are placed at the door of pornography. Human sexuality is a very complex and individual thing and any Government attempts to constrain it by brute force of legislation will be counter productive. Although it is entirely understandable and reasonable that the Government should want to prevent harm, the sad truth is that the proposed measures would create more harm than they prevented.

1. Pornography, Rape and sex crimes in Japan by Dr Milton Diamond Int. J. Law Psych. 22(1): 1-22. 1999

2. Home Office Report of the Committee on Obscenity and Film Censorship chaired by Bernard Williams between 1977 and 1979

3. Pornography - Impacts and Influences a Home Office research report, by Dr Guy Cumberbatch and Dr Dennis Howitt in 1990

4. Pornography, Sex Crime and Public policy by Dr Beryl Kutchinsky Int. J. Law Psych. 26: 47-64 1991



The real problem that needs to be tackled in society in this area is fear of sexuality and fear of differences in the way that sexuality is expressed. This is all too clearly apparent by the hysterical reaction that often results when a new sex shop is opened. These measures would serve to increase public fears, parents would become more fearful for their children's behaviour out of all proportion to the actual dangers. Overprotective and interventionist control of young adult's sexuality can create huge amounts of resentment, frustration and anger and in some individuals might help awaken exactly the sort of "aberrant" sexual problems that these measures are aimed at preventing but would in fact exacerbate.

Whether a few individual psychopaths would be encouraged or discouraged in acting out their fantasies for real by the type of content described in this consultation is extremely doubtful and is not supported by evidence.

However the majority of psychologists suggest that such extreme material may in fact act as a release mechanism for people, and actually decrease the level of sexual crimes.

Watching violent pornography is symptomatic behaviour, not causative behaviour. 99.999% of the sexual minority who watch violent pornography are not psychopaths, never will be and present no threat to the public whatsoever.

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

Perhaps unsurprisingly we do not agree with the list. The question assumes that the respondent has agreed with the Government in answering the first two questions, the possibility of disagreement does not appear to have been considered.

The list represents an arbitrary collection of types of content that some people find particularly objectionable on moral grounds and no doubt the list will have grown considerably by the time the consultation has finished. Any number of alternative types of content could have been included depending on the subjective judgement of abhorrence of those choosing.

Violent acts involving animals, coprophilia and images of what appears to be real harm that have nothing to do with sex could all have been included (and we would object to all of these on similar grounds), but were not because being honest, the proposed legislation is a tribute to one person. The legislation is aimed at "doing something" following an appalling tragedy and so concentrates primarily on the events relevant to that case.

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

YES

The question might well be reversed, "what level of proof of harmlessness must be provided before material is accepted for public consumption"? Or even "do you believe that the human right of free expression has any value"?

### **5. Which option do you prefer?**

Option 4. Do Nothing.



## **6. Why do you prefer this option?**

Option 4 is preferred as none of the options would prevent sex crimes nor prevent madmen murdering people nor do anything to prevent the availability of violent sexual content originating from abroad.

The proposals would merely encourage an atmosphere of intolerance over sexual orientation in society, creating wide spread fear in the mind of the public over the dangers of such material that would be entirely disproportionate and unjustified. The serious penalties proposed would also have seriously chilling consequences for freedom of expression in other areas.

Imprisoning people for their innate sexuality and creation of thought crimes are themselves abhorrent concepts that have no place in a civilised society and are probably illegal under the Human Rights Act, at least where realistic depictions of legal acts between consenting adults are concerned.

The emotional moralistic approach that is being pursued with these proposals would be likely to encourage some members of the Police to engage in what would amount to witch hunts. Such persecution would be unlikely to go unchallenged by the community who would be criminalised or by those who were ensnared by accident leading to extensive and costly court battles which would waste valuable police resource not to mention large sums of public money.

The inconsistency and confusion within the proposals concerning definition and areas of application would undoubtedly lead to many miscarriages of justice and the Human cost in terms of broken families, lost homes, lost jobs and even loss of life through suicide of those falsely accused would be entirely unacceptable and would not be limited to the "guilty".

Abandonment of evidence based legislation in favour of prejudice and hearsay would set a terrible legal precedent that would pave the way for the totally unnecessary censorship of a wide range of materials and push British justice concerning free expression back into the dark ages.

## **7. Which penalty option do you prefer?**

We prefer no penalty. People who have not committed a crime should not be penalised for their sexuality. However as penalties are proposed we feel obliged to comment.

It is not proportionate to simply make the penalty for possession "less" than the penalty for the actual act itself. Penalties should be in proportion to the harm caused by the crime committed. The harm caused by possession of images that are staged is indistinct and probably non existent, whereas the harm caused by real acts of serious violence against real people is very clear distinct and obvious. The difference in penalties does not reflect this position.

It is not appropriate to equate the penalty for possession of indecent images of children reflecting real non-consensual harm, with a penalty for the possession of content that may not have involved any harm or even any physical crime at all.

We also object to the rationale for increasing the penalty for distribution under the OPA. Penalties should not be increased for the purposes of trying to making new offences proportionate, new offences should be given appropriate penalties consistent with the existing legal framework.

Notwithstanding any other considerations we do not believe that oral sex with an animal is currently even an offence under the SOA.



## Appendix B - Regulatory Impact Assessment

The Human cost of implementing the Governments proposals have not been mentioned but would be very high. Many lives would be ruined because of them. Every prosecution brought would also bring a serious risk of children losing parents, loss of livelihoods, loss of homes, destruction of marriages and in some cases even loss of life through suicide and these effects would not be limited to the “guilty”. Evidence for this can be clearly seen in operation Ore which has already claimed more than forty lives.

The regulatory impact assessment makes no mention of restricting free expression; yet imposing such extreme penalties for indistinct crimes would have a very serious chilling effect upon areas far beyond the scope intended.

The chances that no business sector in the UK would be adversely affected by these proposals are slim. Although there is clearly no intent to create uncertainty, criminalisation of mere possession coupled with the severity of the penalties proposed and criteria that are open to interpretation by the courts will lead many to avoid contentious content.

Considerable problems might be expected for companies that need to edit, distribute, review or otherwise handle film materials that might even remotely be considered to present a risk of prosecution. Equally, considerable problems would be felt by Professional Dominants or providers of BDSM accessories or Leatherwear who would be unable to advertise using illustrative pictures without fear of prosecution.



## Appendix C – Examples of problematic content

### **Crimes of context**

Some *clips* taken from films may become illegal to possess under the new proposals under what we have described above as a crime of context. The following films, all certified by the BBFC, contain images or scenes that if found on someone's computer would result in criminalisation under this legislation.

Shown below is just a tiny sample of such material for illustration; there are hundreds of other examples:

### **The Good old naughty days" (R18 film certificate)**

The film contains scenes that include graphic and explicit images of oral sex that involve a dog. It is not currently a criminal offence under the Sexual Offences Act to engage in oral sex with an animal, but under the new proposals it would become an offence to even possess images of such an act so every copy of this film would presumably have to be destroyed.

### **Baise-Moi**

A well known recent film that includes a violent and explicit rape scene (18 certificate)

### **The Evil That Men Do: Starring Charles Bronson**

Includes a scene with a man tied naked to some sort of trapeze device and tortured with electricity in a workshop on interrogation techniques.

### **Six Feet Under (series 2 episode 7)**

An autoerotic asphyxiation gone wrong - explicit choking with a belt is shown (male victim).

### **Power Play, starring David Hemmings and Peter O'Toole**

About a coup d'état in an unnamed country where a teenage girl suspect is tortured by secret police with electricity through her nipples.

### **Law and Order: Special Victims Unit (broadcast in May this year)**

The opening scenes show BDSM scene gone wrong (or is it a murder?) that shows a nude woman hung up with, welts and burn marks all over her body.

### **Salo (Pasolini)**

This well known cult classic has a BBFC 18 certificate but clips from this film would be likely to contain illegal content if the Government's proposals became law.



## Appendix D - Definitions

The need to be clear about definitions is of paramount importance and the following terms are used throughout this document:

“Consensual” refers to participants who take part in activities of their own free will.

“Apparently non-consensual” refers to participants who take part in activities of their own free will, but where it appears that no consent was given due to acting or special effects.

“Non-consensual” refers to participants who were forced to take part in activities against their will.

BDSM refers to Bondage and Sadomasochism

“OPA” refers to the Obscene Publications Act 1959 and 1964 as well as the Civic Government (Scotland) Act 1982, which for our purposes amount to the same thing.

“CJA” refers to the Criminal Justice Act 1988

“SOA” refers to the Sexual Offences Act 2003



## 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

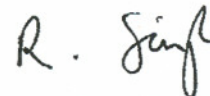


33. Fourthly, the offence would also presumably catch those who create these images themselves in their own homes for their own gratification in the context either of a consensual relationship or by the use of photo-imaging or other means of depiction. This would be the case even where there was no risk 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  
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**18 November 2005**

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



