

Information on the new offence of Possession of Extreme Pornographic Images

This note provides general information for members of the public on the new offence of possession of extreme pornographic images at section 42 of the Criminal Justice and Licensing (Scotland) Act 2010. This section is due to come into force on 28 March 2011 in Scotland.

It should be noted that this legislation applies to only to Scotland. In England, Wales and Northern Ireland, the law on extreme pornography is contained at sections 63-67 of the Criminal Justice and Immigration Act 2008.

This note is intended to answer some of the more frequently asked questions about the offence and should be read in conjunction with the Explanatory Notes on the Act which are available at <http://www.legislation.gov.uk/asp/2010/13/notes/division/2/2/14>.

The information in this note gives an explanation of the structure and content of the offence. As with any law, it is for the courts to interpret and apply it.

Introduction

Section 42 of the Criminal Justice and Licensing (Scotland) Act 2010 inserts a new section 51A into the Civic Government (Scotland) Act 1982 ("the Act") which creates a new offence, criminalising possession of 'extreme pornographic images'. It should be noted that the offence is not intended to extend the law to cover material that it is not currently illegal to publish, sell or distribute under section 51 of the 1982 Act <http://www.legislation.gov.uk/ukpga/1982/45/section/51>, which criminalises the publication, sale and distribution of obscene material.

The elements of the offence

There are three elements to the offence. An image must come within the terms of all three elements before it will fall foul of the offence.

Those elements are:

1. That the image is obscene;
2. That the image is pornographic;
3. That the image is extreme.

Obscene

The test of "obscene" means that the material must be of such a nature that it would fall within the category of the material whose sale etc. is already prohibited under section 51 of the Act.

This element of the offence must be read in conjunction with the other two elements. The test as to whether an image comes within the terms of the offence is not simply whether it is obscene, but whether all elements of the offence are met. An obscene, pornographic image depicting an extreme act would already be illegal to publish, sell or distribute under Section 51 of the 1982 Act.

Pornographic

The Act defines an image as being pornographic if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal. Whether this threshold has been met will be an issue for the court to determine. Just because an image has a sexual dimension does not necessarily mean that it can reasonably be assumed to have been produced **solely** or **principally** for that purpose.

Where an individual image is held in a person's possession as part of a larger series of images, the question of whether it is pornographic must be determined by reference both to the image itself and also the context in which it appears in the larger series of images. Where an image is integral to a narrative such as a documentary film which, taken as a whole, could not reasonably be assumed to be pornographic, it will not be found to be pornographic even if, considered in isolation, a contrary conclusion would have been reached. It is important to understand that the context in which the image appears is that in which it is held at any given time, not its original context. Thus a collection of images put together, perhaps from various different films, out of their original context, could be considered pornographic even if, in its original context, for example, a whole film or a documentary, it would not be considered pornographic.

Even if an image is pornographic, it will not come within the terms of the offence unless it also satisfies all the other aspects of the offence.

Extreme

An extreme act is one which depicts in an **explicit** and **realistic** way:

- An act which takes or threatens a person's life;
- An act which results or is likely to result, in a person's severe injury;
- Rape or other non-consensual penetrative sexual activity;
- Sexual activity involving (directly or indirectly) a human corpse;
- An act which involves sexual activity between a person and an animal (or the carcase of an animal)

Only these specific acts will be caught, and only in conjunction with the other two elements of the offence.

Life-threatening is not defined in the Act. It will therefore take its ordinary English-language meaning and will be a question of fact to be determined by the court. It could include depictions of hanging or suffocation.

What constitutes 'severe injury' is a question of fact. Generally, injuries will be regarded as severe when they are extensive, as in the case of multiple lacerations, or involve injury to an important organ, or fracture of an important bone.

The question of whether an act depicts in a realistic and explicit way an act of rape or other non-consensual penetrative sexual activity will be for the court to determine. An image or series of images made using actors may, depending on the context, nonetheless fall within the definition if the depiction is explicit and realistic.

Exclusion of classified films

The Act provides an exclusion from the scope of the offence of extreme pornographic images for classified films. The intention of this section is to give certainty to members of the public that they will not be at risk of prosecution for possessing a recording of a film which has been classified by the British Board of Film Classification (BBFC), even if the film contains an image or images, considered by the Board to be justified by the context of the work as a whole, which might otherwise be considered to fall foul of the offence at section 42. The fact that the images are held as part of a BBFC classified film takes them outside the scope of the offence.

However, the exclusion does not apply in respect of an image or images contained within **extracts** from classified films which must reasonably be assumed to have been extracted solely or principally for the purposes of sexual arousal.

The offence covers the deliberate extraction of images because the benefit of context can be lost once an image is removed and held either on its own or with other images (for example a depiction of rape or sexual assault extracted from a classified film for pornographic purposes).

The context within which the image is judged is the context in which the accused holds the image. If, it having already been decided that, having regard to that context the image is pornographic and extreme, the additional question is whether it must reasonably be assumed that the image was extracted (i.e. that particular part of the film was isolated) for pornographic purposes. This distinguishes between deliberately extracted extreme images and those extracts which have occurred through inadvertence, such as setting the wrong time for a recording, or which have been extracted for non-pornographic purposes.

Defences: general

There are three general defences to the offence. These are the same as for the possession of indecent images of children under section 52A(2) of the Act. They are:

- That the person had a legitimate reason for being in possession of the image. This will cover those who can demonstrate that their legitimate business means they have a reason for possessing the image. This would include, for example, the police and prosecution service, those involved in the classification of films, those dealing with complaints from the public about content in the mobile and internet industries and those creating security software to block such images.
- That the person was in possession of an extreme image but had not looked at it and therefore neither knew, nor had reason to suspect, that it was an extreme pornographic image; this will cover those who are in possession of offending images but are unaware of the nature of the images, for example, where a person is sent an electronic copy of an image which he saves without looking at it, or where another person has saved the image to a computer in his possession without his knowledge.
- That the person had been sent the image without having asked for it and, having looked at it, had not kept it for an unreasonable length of time. This will cover those who are sent unsolicited material by any means and who act quickly to delete it or otherwise get rid of it. What constitutes an unreasonable amount of time will depend on all the circumstances of the case.

Deleting images

Possession is defined in Scots law in terms of a person having knowledge and control of an item. In normal circumstances, deleting images held on a computer is sufficient to get rid of them – i.e. to divest possession of them. An exception would be where a person is shown to have intended to remain in control of an image even though that person has deleted it, for example, where a person has the capacity through skill or software to retrieve an image.

Accidental Access

The offence is not targeted at those who accidentally stumble across extreme pornographic images while using the internet. As with the position regarding deleted images, the key issue will be whether the person knowingly has control or custody and therefore possession of the image, and whether or not he keeps it for an unreasonable length of time.

Participation in consensual acts

An additional defence has been created for those who appear in extreme pornographic images as direct participants in the act or acts portrayed.

In order to benefit from the defence, the accused must prove that they directly participated in the acts or acts portrayed in the image and that the acts did not actually take or threaten to take a person's life, did not actually result, and was not likely to result in a person's severe injury, did not actually involve non-consensual activity and did not involve sexual activity with a real corpse or real animal.

Penalties

The maximum penalty on summary conviction is 12 months or a fine not exceeding the statutory maximum, or both. The maximum penalty on conviction on indictment is 3 years imprisonment or an unlimited fine or both. It is a matter for the courts to determine the appropriate penalty in each case, taking account of all the facts and circumstances of the case.

The "Sex Offenders Register"

A person convicted of the offence of possession of extreme pornography would not automatically be made subject to notification requirements under Part 2 of the Sexual Offences Act 2003 (often referred to as the "sex offenders register". The courts will be empowered to make a person who is aged 18 or over, and who receives a sentence of more than 12 months, subject to sex offender notification where the court determines it is appropriate. The maximum sentence that can be imposed by the summary courts is 12 months imprisonment, so an offender can only be made subject to the notification requirement where his offence has been judged to be serious enough to be tried on indictment (before a jury).

Frequently asked questions

Why are you criminalising people who access this material, rather than those who produce and distribute it?

While possession of obscene material has not previously been an offence in itself (other than indecent images of children), laws have long been in place to prevent obscene material being published, sold or imported into Scotland. However, developments in production and distribution technology, including the emergence of the internet, have offered individuals faster, more convenient and anonymous means to publish and distribute material of this type. By implementing a new criminal offence for the possession of extreme pornographic material, we intend to protect society from exposure to such material, to which access can no longer be reliably controlled through existing legislation dealing with publication and distribution.

Whom do I report material to?

Where material is found in hard copy or on a computer it should be reported to the police in the same way as any other criminal offence.

If you believe you have stumbled across potentially criminal pornographic material on a UK hosted website then it should be reported to the Internet Watch Foundation via www.iwf.org.uk. The IWF already accept reports about extreme pornography hosted in the UK. The IWF will trace and assess the content to determine where the website is hosted and whether or not it is showing material which may potentially breach UK legislation.

What should I do if I accidentally download material from the internet and believe some of it to be illegal?

If you believe you have downloaded any potentially illegal material from the internet then you should immediately delete it.

How can I get rid of material if I think it is illegal

If the material is on a computer, you should delete it. If it is in another form, such as paper, video or DVD, you should destroy it and dispose of it responsibly.

What about films such as Baise Moi or Irreversible which contain violence and scenes of real sex?

The BBFC already take obscenity legislation into account when they classify films and there is an exemption for films classified by them or broadcast on a licensed television channel.

Why is there an exemption for BBFC-classified material?

The exemption gives protection and certainty to members of the public who possess BBFC classified material. Based on the BBFC's stated policy concerning the classification of sexual material, we think the BBFC would not in any case classify material that would constitute extreme pornography.

What about cartoons and illustrations depicting 'extreme acts'?

For an image to be considered 'extreme' it is necessary that it depicts an act in an explicit and realistic way. As such, hand-drawn cartoons would be unlikely to fall within the terms of the offence.

What other sources of information are available which may help show what pornographic material is legal and illegal in Scotland?

Section 42 of the Act gives considerable detail about the material which is covered. In addition to specifying that the material must be 1) pornographic and 2) obscene, there is a list of the extreme, explicit and realistic images which are caught. Information is also available at the BBFC website, www.bbfc.org.uk, about the sort of sexual material they refuse to classify.

What differences, if any, are there between the extreme pornography offence in England, Wales and Northern Ireland and the Scottish offence?

The most significant difference is that the Scottish offence covers all obscene, pornographic images depicting rape or other non-consensual penetrative sexual activity. The Scottish offence covers obscene, pornographic images which depict an act which results or is likely to result in a person's severe injury. This is wider than the offence in England, Wales and Northern Ireland, which covers only images depicting an act which results or is likely to result in serious injury to a person's breasts, buttocks or genitals.

Why is there not a simply list of material which is illegal?

There is a very wide range of pornographic material available and it is not possible to produce a comprehensive list in this way. The legislation itself is already very descriptive in outlining the type of material which it will be illegal to possess.

I have heard that the new legislation is aimed at people who engage in Bondage, Domination and Sado-Masochism and will criminalise many thousands of people. Is this true?

No. The new legislation is not aimed at any particular group and will only catch a subset of material which it is already illegal to publish or distribute under section 51 of the Civic Government (Scotland) Act 1982. BDSM material which it is currently legal to distribute should not be caught by the new offence.

However, this defence does not apply to extracts taken from films and placed elsewhere (e.g. a depiction of a person being raped extracted from a film for pornographic purposes).

What is meant by 'severe injury'?

The term 'severe injury' is used to denote an aggravation to the common law crime of assault. What constitutes 'severe injury' is a question of fact. Generally, injuries will be regarded as severe when they are extensive, as in the case of multiple lacerations, or involve injury to an important organ, or fracture of an important bone.

What is meant by 'pornographic'?

An image is defined as being pornographic if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal. Whether this threshold has been met will be an issue for the court to determine. Just because an image has a sexual dimension does not necessarily mean that it can reasonably be assumed to have been produced **solely** or **principally** for that purpose.

What is meant by 'obscene'? The term is not defined in the legislation.

The term 'obscene' has been used in legislation concerning the publication and distribution of obscene materials for many years. Its interpretation is left to the courts to determine.