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Office

Consultation on the Possession of Non-Photographic Visual Depictions of Child Sexual Abuse

Summary of responses and next steps

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Response to a joint consultation carried out by National Offender Management Service, now part of the Ministry of Justice, the Scottish Executive and the Northern Ireland Office. This response is on behalf of the Ministry of Justice and the Northern Ireland Office. This information is also available on the Ministry of Justice website: www.justice.gov.uk

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Introduction

This document is the post-consultation report for the consultation paper on the Possession of Non-Photographic Visual Depictions of Child Sexual Abuse, which was published by the Home Office, the Scottish Executive and the Northern Ireland Office on 2 April 2007. We are grateful to those who took time to respond. This report is on behalf of the Ministry of Justice and the Northern Ireland Office.

It covers:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting David Pearson at the address below:

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This report is available on the Ministry's website: www.justice.gov.uk. It is also available on Northern Ireland Office's website: www.nio.gov.uk.

Alternative format versions of this publication can be requested from the Criminal Law Policy Unit at the above address.

PART ONE: EXECUTIVE SUMMARY OF RESPONSES TO THE CONSULTATION EXERCISE

Overview

1. The total number of responses to the consultation in England, Wales and Northern Ireland was 87. Of these, 37 responses were from individuals and 50 were provided by organisations¹ and groups.
2. The issues raised in this consultation proved to be controversial and both sides of the debate were well represented in the responses received. Those in favour of further action to tighten the law generally supported the proposals put forward in the consultation paper to create a new offence of possession of non-photographic depictions of child sexual abuse. It was suggested that such images reinforced inappropriate views and feelings towards children, could be used by potential offenders to groom prospective victims, and were frequently found alongside illegal collections of images depicting real abuse. Concern was also expressed that this material was increasingly available and that technological developments were enabling the easy manipulation of photographic images of real abuse. Most organisations supported the proposals and were keen to allow for forfeiture of the images.
3. Frequently, those opposed to the proposals articulated unease about potential ‘thought crime’ and the regulation of artistic expression. A number of individuals also put forward the view that the images acted as a beneficial and victimless outlet for the inappropriate feelings of potential offenders. Those opposed to the proposals also raised issues of proportionality, the relationship of the material with other genres that may be deemed equally undesirable and also maintained that there was a lack of evidence of harm from the existence of this material.
4. General concerns were also raised about the implementation of any legislation, resources for law enforcement and the interaction of the proposals with programmes broadcast on television or works classified by the British Board of Film Classification (BBFC). In addition, it was suggested that any new legislation should work within the scope of the Obscene Publications Act 1959 (OPA) to avoid any duplication of legislation or confusion.

¹ ‘Organisations’ is taken to represent all responses not from individuals: this includes police forces, campaigning groups, charities, religious groups, professional bodies, government, and regulators.

5. Most respondents answered the question, 'Which of the options do you prefer?' The results are as follows:

	Option One	Option Two	Option Three	Not stated	Totals
Individuals	1	2	18	16	37
Organisations	10	29	3	8	50
Totals	11	31	21	24	87

6. Only 11 respondents preferred Option One, which was the proposal to extend the definitions of the Protection of Children Act 1978 (as amended) and the Protection of Children (NI) Order 1978. These laws refer to indecent photographs and pseudo-photographs of children under 18 and the proposal was to amend the legislation to include, for example 'any visual representation,' in order to cover cartoons, drawings, computer generated images (CGIs), etc. Of the 11 responses favouring this option, 10 were from organisations, with only 1 from an individual.
7. A total of 31 respondents chose Option Two, which was the proposal to create new free-standing offences of possession of any non-photographic visual depiction/representation of child sexual abuse. Of these, 2 responses were sent by individuals and 29 were provided by organisations.
8. Option Three, which was the proposal to 'do nothing,' was supported by 21 respondents, 18 of which were from individuals, and 3 of which were from organisations.
9. A further 24 respondents failed to indicate a preference for one of the prescribed options. 16 of these responses were from individuals, with 8 replies from organisations. The outcome of the consultation has not been based on a numerical assessment of those in favour, or those opposed to the proposal, but on a detailed analysis of the responses that have been submitted.

PART TWO: THE GOVERNMENT'S RESPONSE TO THE CONSULTATION AND PROPOSALS FOR THE NEXT STEPS

1. The formal period of consultation began on 2 April 2007 and ended on 22 June 2007. All responses, including those received shortly after the closing date, have been considered.
2. Prior to the consultation, the Criminal Law Sub Group of the Home Secretary's Task Force on Child Protection on the Internet had been considering the issues raised by computer generated images (CGIs), drawings and cartoons, which show graphic depictions of sexual abuse of children or child-like characters.
3. Meetings have also taken place with a number of interested parties to further evaluate the proposals. These groups included the Children's Charities' Coalition for Internet Safety (CHIS), the Child Exploitation & Online Protection Centre (CEOP), the British Board of Film Classification (BBFC) and the Lucy Faithfull Foundation.
4. The response to the consultation illustrated the sensitivity surrounding many of the issues raised. The creation of a new offence of the possession of cartoons, drawings, computer generated images and other material which depicts, or appears to depict, child sexual abuse is a significant step. It is recognised that these images, unlike those produced in the making of indecent photographs of children, do not involve harm to real children in their creation, and the Government has further deliberated on the proposals, in the light of the comments put forward. However, possession of the material in question (which would be caught by the Obscene Publications Act 1959 in respect of their publication) is cause for increasing concern. Recent technological advances have provided a challenge to the relevant legislative and physical protections that existed to obstruct the availability of these types of extreme images. It is important, in this changing environment, that the law is responsive and remains fully equipped to protect the public, and, in particular, the most vulnerable members of society. We continue to believe that tightening up the law to cover possession of such material is justified.
5. It was apparent from the responses to the consultation that many people viewed the 'definition of what will constitute 'pornographic'' as troublesome and consider 'pornography' and 'pornographic' as 'notoriously opaque concepts,'² further, pinpointing 'the age of an unreal representational figure' was seen as problematic. They noted that 'stylisations of animations freely mix aspects typifying different ages. The inevitably subjective allocation of an age would make impossible an assessment of legality.'³ In terms of the proposed new offence, the age of the fictional character would be a matter for the jury to take a view on.
6. A number of the respondents, including the IWF, Channel 4 Television Corporation, BBFC and Professor Clare McGlynn (Durham University), amongst others, asked that further consideration be given to providing a defence of 'public good,' similar to the terms of the Obscene Publications Act. It was recognised however that the conditions and applicability of 'legitimate reason' for possessing the material would need careful scrutiny, in collaboration with a number of interested parties.

² Professor McGlynn, Clare. Professor of Law, The Department of Law, Durham University.

³ Channel 4 Television Corporation.

7. The consultation paper stated that 'it is not the intention to criminalise the possession of works of art, historical artefacts or in any way hamper or limit police investigations or medical research, for example, the legitimate visual recreations of offences for investigative or risk evaluation purposes, or the medical care and treatment of adult abusers.' However, many of the responses conveyed significant concern that the measures could have an impact on valid artistic expression and it was suggested 'there is a danger that the precise proposals as outlined may have significant unintended consequences, including in relation to works classified by the BBFC.'⁴ Concern was expressed towards a potential breach of individual or personal freedoms and 'criminalizing the product of an individual's imagination'. It was felt that this could be a potential infringement of an individual's right under Article 10 of the ECHR to freedom of expression although others pointed out, it is not an absolute right and as such may be balanced with other rights and interests. The potential effect of the proposals on historical artefacts and judicial proceedings was also called into question, where sketches are used in court cases, for example.
8. Many of the responses also recommended that the defences for the possession of any material should adequately cover the legitimate activities of law enforcement, broadcasters and those involved in the internet industry (e.g. those who develop filter systems). The new offence will include a defence of 'legitimate reason' and aims to catch a range of material that is deemed pornographic; the terms of which are outlined later.
9. A number of respondents highlighted issues surrounding popular internet games and 'virtual worlds', such as the creation of childlike 'avatars'; these matters have been given further consideration. It is anticipated that the new offence may catch possession of material that depicts 'avatars' on the basis that it may meet the requirements and thresholds of the new offence.
10. Many responses cited the lack of specific research or scientific evidence showing any direct link between the possession of these images to an increased risk of sexual offending against children, as problematic. Among the respondents who argued that it was unjustifiable to make it illegal to possess the material in the absence of clinical research, there were a number who regularly viewed the material. In contrast, it was put forward that 'such research could not, and should not, be conducted as it would be unethical and potentially dangerous since it would mean exposing individuals to potentially harmful material with a risk of harm to children.' Secondly, it was argued 'the establishment of 'direct links,' to the causation of harm, is perhaps misconceived since human behaviour is not so reducible to only one influence (i.e. images of child abuse), but is a result of many different factors.'⁵ Strong views were also expressed about the possible role of the material in actual abuse, with many respondents suggesting that the material served as a legal outlet for potential offenders, whilst others suggested that the material reinforced inappropriate perceptions of children, allowing a sense of social acceptance towards actual child abuse. Since the close of the formal consultation period, we have held a series of meetings with interested parties on these issues and have considered the views and experiences outlined in the response to the formal consultation.

4 The British Board of Film Classification.

5 Professor McGlynn, Clare. Professor of Law, The Department of Law, Durham University

11. A large majority of those in support of further action to tackle non-photographic images of child sexual abuse supported the creation of a new, free-standing offence, as proposed in the consultation. Overall, of the respondents who expressed a preference, 42 respondents were in favour of further legislation in general, as opposed to the 21 respondents in favour of doing nothing.
12. Of the 87 responses, however, many failed to answer the questions posed in the consultation, but rather explored general problems surrounding the main issues.

The proposed offence

13. The consultation paper outlined the proposed offence itself, stating that it would have two thresholds. The first would be an objective test for the jury that the material was pornographic. In terms of the pornography threshold, the material should be of such a nature that it must reasonably be assumed to have been produced solely or principally for the purposes of sexual arousal. This test is intended to eliminate, for example, works of art, news and documentary programmes by mainstream broadcasters which are of public interest and works classified by the BBFC (other than those classified R18 for sale only in licensed sex shops.)

Content of material

14. The second threshold would be an objective test for the jury in respect of the content of the image. It was suggested in the consultation paper that the threshold for fantasy images should be different from that of 'indecent' which is used for images involving real children.
15. In the case of non-photographic depictions of the sexual abuse of children, the offence will outline a number of specific acts in order to provide clarity and precision. To some extent, this threshold will be based on the scale of seriousness in the Court of Appeal Sentencing Guidelines (R v Oliver and others (2003) 2 Cr.App.R(S) 15) and the revised guidance, published by the Sentencing Guidelines Council.⁶ The offence should criminalise non-photographic visual images depicting the following:
 - An image which focuses excessively on a child's genitalia
 - A person of any age performing an act of intercourse or oral sex with a child
 - An act of masturbation by, of or involving a child
 - Penetration of the vagina, anus or mouth of a child with a part of the person's body or with anything else
 - Bestiality involving a child

⁶ <http://www.sentencing-guidelines.gov.uk/guidelines/other/courtappeal/default.asp?T=Cases&catID=5&subject=PORNOGRAPHY&SubSubject=Making%20and%20distributing%20indecent%20photographs%20of%20a%20child>

The third element

16. It is not our intention to criminalise possession of material which it would be lawful to publish in the UK (material which would not fall foul of the Obscene Publications Act). To that end we envisage the offence having a third element to it, namely that the material caught is of an obscene character. It should be noted that this third element to the offence was not proposed in the consultation paper, but has been included to ensure that the offence catches the intended material.

Defences

17. We have considered the concerns expressed by broadcasters and those in the internet industry to ensure that there are adequate defences to cover those who need to have contact with the material in the course of their legitimate work, those who stumble across the material accidentally or are sent it unsolicited. These are likely to mirror the defences provided for the possession of indecent photographs of children in the Criminal Justice Act 1988 S160 (2): if the defendant can prove he had a legitimate reason for having the image; or he had not seen it and did not know or suspect it to be illegal; or it was sent to him unsolicited and he did not keep it for an unreasonable time.

Penalties

18. In the consultation, it was proposed that there should be a maximum penalty of three years' imprisonment, or an unlimited fine, or both for possession of material depicting non-photographic visual depictions of child sexual abuse. The offence will be an either way offence and, on summary conviction, the maximum penalty will be six months, or a fine up to the statutory maximum (currently £5,000), or both.
19. A maximum penalty of three years' imprisonment will place the offence in the sentencing framework below the offence of possession of indecent photographs of a child (section 160 of the 1988 Act) which has a maximum penalty of five years' imprisonment or a fine or both.
20. It is expected that prosecutions for the simple possession of non-photographic depictions of child sexual abuse would be extremely low, since the police generally find these images alongside indecent photographs or pseudo-photographs of children. One of the benefits of the creation of a new possession offence would be to give the police the power to forfeit these images, which at present they do not have.

Timing

21. The Government plans to bring forward legislation to introduce the new offence and a three year penalty, as soon as the Parliamentary timetable allows.

PART THREE: SUMMARY OF RESPONSES TO THE CONSULTATION EXERCISE

General Summary

1. Virtually all respondents agreed or implicitly agreed with the view that the current laws prohibiting images of genuine child abuse are justified and that, ultimately, the prevention of any abuse of real children is vital, regardless of the current proposals. More specifically, issues such as the prevalence of increasingly sophisticated forms of technology, the widespread availability of foreign art-forms and genres such as Hentai, the diversity and expectations of international culture and the increase in non-photographic images of visual depictions of child abuse hosted by foreign or international internet servers, were commonly raised or implicitly acknowledged by respondents from across the spectrum of opinion.
2. Support for the proposals was expressed by many organisations, particularly those in regular, professional contact with the material and those actively engaged with the protection of children from abuse, including the Crown Prosecution Service (CPS), Public Prosecution Service NI (PPSNI), Internet Watch Foundation (IWF), Police Federation of England & Wales, the Internet Service Providers Association, numerous child welfare organisations, 8 local police forces, religious groups and the British Association of Social Workers. In supporting the proposals, many of these groups called for clear legislation and definitions that worked in conjunction with existing legislation.
3. Numerous other organisations recognised the pressing need to tighten the law in this area and some supported the option of extending the definitions in the Protection of Children Act 1978 and the Protection of Children (NI) Order 1978. Support for this option, amongst others, came from the Children's Charities' Coalition for Internet Safety (CHIS), the Child Exploitation and Online Protection Centre (CEOP), Campaign to End Rape and two local police forces. However, Feminists Against Censorship and the Criminal Sub Committee of the Council of HM Circuit Judges, amongst others, felt it was justified to take no further action and opposed the proposals altogether. In particular, the Criminal Sub Committee of the Council of HM Circuit Judges cited low incidence of occurrence of this material and the capability of existing laws as reasons not to take further action.
4. Of the individual responses submitted, most were opposed to the proposals and set out their reasons in detail. Many individual respondents expressed concern about personal freedoms, the lack of evidence of harm and the possible use of the material as a legitimate outlet and diversion for potential offenders.
5. Many letters from individuals who were generally opposed to the proposals did not engage with the questions in the consultation document but rather explained problems and concerns surrounding the issues presented in the consultation.
6. Some organisations, principally media broadcasting organisations, were reluctant to give any opinion on the public policy aspects of the proposals, but did submit valuable information and comments on issues of practical implementation.

Question 1: In the absence of research into the effects of these images on offenders and the general public, do you think the proposal to make it illegal to possess the material described in this consultation is nevertheless justified? Please feel free to explain the reasons behind your decision here.

7. The slight majority of those who responded to this question saw the lack of research and evidence, as acknowledged in the original consultation paper, of a causative correlation between viewing non-photographic visual depictions of child sex abuse and the commission of offences as a reason not to legislate in this area. It was argued that 'while there may be behaviours of which most of us disapprove, these should not be criminalised unless they directly cause harm to others in society' and that 'an unsupported 'concern' cannot be sufficient to justify restricting the liberty of citizens.' Of the 34 respondents who expressed concern at the lack of research, 31 were individuals and the other three were Feminists against Censorship, Cyber-rights & Civil Liberties and the BBC. However, a significant proportion of respondents did not directly answer this question.
8. Many of the respondents thought that the proposals were tantamount to 'thought crime,' victimless activities or 'Orwellian behaviour' on behalf of the Government and were concerned about the possibility of viewers of these images being criminalised without harming children or ever intending to do so. Many individual respondents reiterated the principle that freedom of expression should not be limited to information or ideas favoured by the Government, or the majority, but rather the test of free expression was whether the Government criminalised a form of free expression that does no harm, on the grounds that the expression is abhorrent. Some suggested that enacting the proposed legislation would contravene the Government's commitment to 'evidence based' policy making, as there is no conclusive evidence of harm resulting from the viewing of non-photographic visual depictions of child sexual abuse. Similarly, concern was voiced that the proposals could result in needless action being taken against other genres of material.
9. In addition to notions of personal freedoms and a lack of evidence of harm caused by the images, the material was often presented as an avenue of 'release' for paedophiles, an outlet for an inherent mental condition and therefore a legitimate and victimless suppressant for potential offenders. It was suggested that the proposals could lead to an increase in the availability and impact of real photographic images of abuse or far more severe behaviour and harm.
10. Many individual respondents cited different pieces of research to corroborate their view that the material in question does not cause harm to those who view it. For example, a number of respondents alluded to Japan as an example of a country in which the absence of prohibitions on the material was related to lower numbers of sex crimes. However, many organisations offered experience to suggest that the material is frequently found alongside images showing the sexual abuse of real children and is often possessed by offenders, whilst one organisation offered evidence to suggest that the material is commonly intercepted on the way into prison and in particular, sex offender treatment establishments. In this instance, it was suggested that the demand for the material was created by the decreased likelihood of confiscation. It was also pointed out that there exists a community of non-offenders who collect the images.

11. Of the 43 respondents who provided an answer for Question 1 and felt it was necessary for the Government to take action in the absence of research, 4 were from individuals and 39 were from organisations and groups. The 39 organisations consisted of CEOP, CHIS, the British Association of Social Workers, the British Psychological Society, Childnet, South Essex Rape & Incest Crisis Centre (SERRIC), Nottinghamshire Multi-Agency Public Protection Service, BBFC, NICCY, 5 councils in NI, 1 Health Board in NI, PPSNI, Lord Chief Justices Office NI, CARE, the NEXUS Institute, Campaign to End Rape, CPS, 12 police forces or groups, 2 Church groups and 4 Local Safeguarding Children Boards.
12. Most of those responding in support of the Government's proposals agreed there exists a class of material that should not be tolerated, even in the absence of conclusive evidence that it caused offending behaviour. Numerous organisations offered anecdotal and observational evidence, having dealt with the practicalities of protecting children from abuse; 'we know from working with child sex offenders that many use images of child sexual abuse in order to become sexually aroused and for masturbatory fantasy...it is absolutely clear to us that any adult viewing any visual depiction of child sexual abuse presents a risk to children;⁷ 'this type of material is generally found on the computers seized from suspects that are being investigated for offences relating to child abuse images...the 'Spiral of Abuse' model, which was developed by a recognized authority on sex offenders Joe Sullivan MA (Crim) BA (Hons) CQSW, Dip Psych...The 'Spiral of Abuse,' indicates how the sexual fantasy and distorted thinking can potentially progress into sexual offending;' 'there is evidence (e.g. from COPINE) that a large percentage of sex offenders have access to images of child abuse, and indeed use such images to 'groom' their victims.' CEOP suggested that some offenders had said that the material had been an initial factor in undertaking criminal behaviour. Other respondents asserted that the possession of this material creates a supply and demand, which ultimately leads to the abuse of real children.
13. Professor Clare McGlynn of the Department of Law at Durham University expressed doubts about the entire concept, premise and plausibility of research in this area and 'an assumption that such research could ever be conducted and would produce reliable results, which is extremely unlikely...such research could not, and should not, be conducted as it would be unethical and potentially dangerous since it would mean exposing individuals to potentially harmful material with a risk of harm to children...' In addition, the concept of 'direct links' was queried, since human behaviour is seen as not reducible to only once influence, but is a result of many different factors.⁸

Q2. Which of the options do you prefer, why do you think this option is the best and do you have another suggestion that you would like to submit?

14. Option One, which was the proposal to extend the definitions of the Protection of Children Act 1978 and the Protection of Children Order 1978 (NI), which refer to indecent photographs and pseudo- photographs of a child under 18 to include, for example 'any visual representation,' in order to cover cartoons, drawings, CGIs, etc, was supported by 11 respondents. 10 of the responses were from organisations, with 1 individual favouring this option.

⁷ Gamble, Jim. CEOP.

⁸ Professor McGlynn, Clare. The Department of Law at Durham University.

15. A total of 31 respondents voted for Option Two, which was the proposal to create a new free-standing offence of possession of any non-photographic visual depiction/representation of child sexual abuse. Out of these, 2 responses were sent by individuals and 29 were provided by organisations.
16. Option Three, which was the proposal to do nothing, was supported by 21 respondents. Of these, 18 responses were put forward by individuals, with 3 organisations offering support for the proposal.
17. Those in favour of amending the Protection of Children Act 1978 generally agreed that all images depicting child sex abuse, both photographic and non-photographic should be treated uniformly. More specifically, CHIS expressed the view that existing legislation is not exclusive to real images of sexual abuse because pseudo-photographs caught by existing legislation may portray unreal children and events. Some police representatives shared the belief that all images should be considered and treated consistently. In addition, many of these respondents suggested that the threshold should be aligned with existing legislation covering real or pseudo-photographs of abuse and that there was no reason for any distinction. This may reflect the view of many respondents including police representatives that fantasy images are often seen as more explicitly detailed than genuine images of abuse.
18. Concern was also expressed that creating a lesser offence and penalty could imply some sense of acceptance or toleration of the material and its associated behaviour.
19. On a practical level, it was suggested that amending existing legislation would be the simplest option to apply.
20. Of those in favour of the creation of a new, free-standing offence, many supported the viewpoint outlined in the consultation, i.e. that a new offence would be the clearest and simplest way forward and would allow for a distinction between indecent photographs and pseudo-photographs of children and depictions of fantasy material.
21. It was also suggested that new, free-standing legislation would maintain the purposes and penalties of the Protection of Children Act 1978, which they felt was primarily aimed at preventing the abuse of real children. The IWF, for example, thought it sensible to distinguish between non-photographic images and photographs of real abuse.
22. Many respondents, particularly those involved in the protection of children, felt that technological advances presented a continuing challenge in this area of law and it was suggested that a new free-standing offence could form an accessible basis for future amendments. By the same token, many respondents saw the creation of a new independent offence as a public indication that legislation is capable of keeping up with developing technology.
23. Of those in support of doing nothing, many opposed potential 'thought crime' and the regulation of artistic expression. A number of individuals also put forward the view that the images act as a legitimate and beneficial outlet for potential offenders. In addition, it was suggested by one respondent that people who perpetrate the sexual abuse of children are opportunist offenders for whom the issue of non-photographic images of child sexual abuse is irrelevant.

24. The material was often presented as being harmless, victimless and distanced from any reality or serious threat.
25. In a number of the responses, practical difficulties were put forward as a reason to do nothing. For example, many individuals saw it as unfeasible to determine the age of cartoon characters. It was also suggested that the amount of images produced and hosted abroad would mean that the proposals would have little impact.
26. The justification for the proposals was commonly queried by individuals. In particular, the proposals were seen as censorship based on matters of taste rather than evidence of harm. It was suggested that police and child welfare groups possessed agendas and distorted views of the material under discussion. Some individuals questioned the availability of judicial and prison resources to deal with the proposals.
27. The Council of Circuit Judges felt that existing legislation, such as the Obscene Publications Act 1959, including its limited powers of forfeiture were adequate to deal with publication and circulation of this material and this was reason not to act in this area.

Q3. Do you think the defences will adequately cover all those instances that need to be excluded from criminalisation, for example: for the visual reconstruction of an offence for risk assessment purposes, legitimate research, etc?

28. The vast majority of respondents failed to answer directly the question of defences but rather offered general discussion around the issue or sought further clarification.
29. However, 1 individual and 30 organisations including, amongst others, 10 police forces, 2 Church Groups, 4 Safeguarding Children Boards, the British Association of Social Workers, CHIS, ISPA UK, Yahoo UK, NICCY, CARE, NEXUS Institute, Campaign to End Rape, CPS, BT and Internet Watch Foundation felt that the defences were adequate. 9 respondents concluded that the defences were inadequate, of which 6 respondents were individuals, alongside the Council of Circuit Judges, BBFC and the BBC.
30. Including the concept of a defence of 'public-good,' similar to the terms of the Obscene Publications Act, was a suggestion outlined by a number of the respondents, including Channel 4 Television Corporation, IWF, BBFC and Professor Clare McGlynn.
31. The Criminal Sub-Committee of HM Council of Circuit Judges expressed concern that adequate protection should exist for child victims of sexual offences who may be encouraged to explain their abuse by drawings. In the same vein, a number of respondents also considered that defences should cover social workers helping victims explain offences or recover from offences and the illustrative reconstruction of offences with offenders for risk assessment. The British Psychological Society discussed the issues of therapeutic and research work.
32. The BBC raised concerns that the defences were not sufficiently specific and may not cover certain legitimate activities such as journalism, programme making or art criticism. Similarly, the BBFC put forward concerns that 'the BBFC and its officers may well be in possession of such material for quite legitimate reasons. These reasons include unsolicited receipt of submissions from clients.'

33. The IWF sought reassurances for their staff and IT professionals that defences would cover the instances where it is necessary to gather information from potentially illegal websites. Other organisations referred to customer care agents in the industry who come across the material in the course of their work. In contrast, a number of respondents called for a cautious approach and one respondent favoured a 'system of mandatory reporting, for example to CEOP, if anyone has possession of such images even if for legitimate reasons.'⁹
34. Many individuals, particularly those familiar with the material, expressed concern that the legislation could affect possession of unsolicited images of Hentai, received unintentionally amidst more mainstream Manga images.
35. A couple of respondents felt that the proposals might draw in too much 'innocent' material created by children such as graffiti on a wall or doodles, for example. Feminists Against Censorship expressed their concern that parents would become afraid that their children were breaking the law and this would prevent them from dealing normally with the issue.

Q4. Do you think that it is appropriate that a new offence should cover the sort of material described? Is there any other material that needs to be captured?

36. The majority of respondents entered into dialogue and discussion about the material but withheld any conclusive answer to the question of material to be covered by legislation. However, 33 respondents agreed that the material to be covered was broadly appropriate, including 1 individual and 32 organisations, made up of 12 police groups, 3 church groups, 4 Safeguarding Children Boards, Yahoo UK, the British Association of Social Workers, Nottinghamshire Multi-Agency Public Protection Service, IWF, CHIS, NEXUS Institute, CARE, NICCY, 2 NI Councils, LCJ, PPSNI and CPS. In comparison, 9 individuals and Campaign to End Rape and the Council of Circuit Judges saw it as inappropriate that a new offence should cover the sort of material described. Many of those opposed to any action in the first place declined to comment further on this issue.
37. Many respondents pointed to the difficulties in placing non-photographic depictions of children in an age group and cited a number of popular Japanese art forms, customs and stylisations that could prove to be particularly ambiguous.
38. CHIS called for legislation to cover further genres of material such as sound recordings of abuse and raised the question of online virtual environments; this issue was frequently raised in other correspondence. In addition, a number of other organisations were keen for any legislation to tackle material available both online and offline.
39. Some respondents contended that fictional works (particularly biographies and autobiographies) describing child sexual abuse are an enduring and permissible form of literature, which could be further discussed and evaluated.
40. A number of respondents also presented the variable, changing and loose definitions of art as problematic. Some, including a religious group, asked for sculptures and holograms to be covered by legislation and police representatives mentioned the availability of images with superimposed animal features. One organisation also suggested that the offence should include clothing, merchandise, advertising, magazines, publications, journals, mobile phone screen savers and mobile phone videos.

⁹ British Association of Social Workers

41. Issues surrounding the definitions of art were extensively discussed. The BBFC raised the issue of historical artefacts which depict indecent material and continue to be valued as works of art. Some respondents, including Durham Constabulary, were apprehensive about legislation covering freehand drawing altogether. The Lucy Faithfull Foundation highlighted the appeal to a youth market of some of the material.
42. In addition to non-photographic depictions of child sexual abuse, Campaign to End Rape requested that similar depictions of sexual violence against adults be included in legislation; this sentiment was echoed by Nottinghamshire Multi Agency Public Protection Team. The impact of the proposals on other genres of material was an issue frequently discussed, with many individuals predicting that the proposals could cause an inconsistency in respect of other material that could be deemed inappropriate and that this was a well-founded reason to withhold from taking action in this area.
43. The Council of Circuit Judges suggested that ‘possession of such an image could not be sensibly treated as criminal unless the image was pornographic. Effectively we believe this means that any material would have to be material that would fall within the Obscene Publications Act 1959...’
44. Some individuals opposed to a new offence did suggest that images manipulated from real depictions of abuse or found alongside real images should be addressed by legislation.

Q5. Do you feel that the thresholds we have suggested are workable and will capture images at the right level of seriousness?

45. The majority of responses failed to comment on the issue of thresholds although 25 respondents agreed that the suggested thresholds in the consultation were broadly correct and believed that separate and distinct thresholds, between ‘real’ and ‘fantasy’ material were necessary. In comparison, 17 respondents disagreed with the suggested thresholds, including the Council of Circuit Judges, CHIS, BBFC and CEOP.
46. South Yorkshire Police voiced a concern, shared by many individuals that low thresholds may result in overzealous policing and enforcement. Whilst numerous organisations, including the Police Federation of England & Wales and a number of police forces, recognized the power and value of forfeiture of the material, the practicalities of this power were questioned by some individuals aware that non-photographic visual depictions of child sex abuse can be promptly re-produced and re-circulated. CHIS elaborated on this concern and said that ‘we are well aware that it is impossible to remove photographic images from circulation once they are on the internet (and it will be the same with this material).’
47. The BBFC stated that the material should not represent less of a concern than actual images of abuse and ‘with the development of CGI and other image manipulation technologies, distinguishing a pseudo-photograph from a non-photographic image may prove to be increasingly problematic.’ CHIS also advocated the alignment of thresholds and penalties with those of The Protection of Children Act 1978. CEOP concurred that ‘those possessing such images should be treated and managed in the same way as those possessing other types of images.’

48. Whilst the Council of Circuit Judges suggested that the material could be caught by existing legislation and the Obscene Publications Act, it was also thought that a two tier approach to thresholds would be disruptive. Childnet expressed concern about differing thresholds between photographic and non-photographic images.
49. The IWF, who operate a hotline for reports of images of child sexual abuse, understood the threshold terms of Sentencing Guidelines Council at Level 3, although they requested further clarification of the terms and definitions of the material.
50. Representatives from some police forces called for increased sentences where images are accompanied by graphic text and requested a distinction between images which began as genuine depictions of abuse and those of entirely non-photographic images.
51. Some individual responses thought that the paper was confused in that it advocated the pornography test whilst suggesting 'that the current POCA test is too low for such images...There is no logical reason for distinguishing the sentence for these images from that of possession of photographs of the same abuse.'¹⁰

Q6. Do you believe the maximum penalty of 3 years imprisonment for possession is appropriate?

52. For those opposed to the proposals, the issues surrounding penalties were irrelevant, although some of the respondents expressed the view that more attention should be given to the victims or potential victims of genuine abuse. The British Association of Social Workers queried the provisions made available for treatment and supervision of victims of abuse.
53. The matter of penalties was particularly contentious, with the majority of respondents failing to answer the question directly. 21 respondents approved the level of penalties suggested, including 1 individual and 20 groups consisting of 10 Police groups, a council in NI, CARE, NEXUS Institute, 3 Safeguarding Children Boards, a Church Group, British Association of Social Workers, Childnet, Council of Circuit Judges, with 16 responses disagreeing with the suggested penalty level. Of these, there were 9 individual responses as well as CHIS, a Police group, CEOP, CPS and one Safeguarding Children Board, NICCY, PPSNI.
54. Nearly all police representatives who responded to the consultation offered support for the proposed penalties, frequently backing the potential power of forfeiture. This resonated with an issue brought to light by Nottinghamshire Multi Agency Public Protection Team; 'the Prison Service reports a significant quantity of non-photographic visual depictions of child sexual abuse being intercepted on route to serving prisoners...Similar experiences are also being recorded by Probation Staff engaged with Internet Abusers and associated treatment programmes that form part of community sentences.'
55. The issue of whether any new legislation should make the offender subject to the registration requirements under Part 2 of the Sexual Offences Act 2003 was frequently discussed, particularly by police representatives, with strong support for this proposal. Further clarification on this matter was called for.

¹⁰ Greater Manchester Police

56. Many people were keen for legislation to include distinctions within the offence, including a higher sentence for distributing or making this type of material, for those images manipulated from real images of abuse or those used to groom children for abuse. Wirral Local Safeguarding Children's Board recommended that a penalty should be a rising scale of up to 5 years to reflect the severity of the offence.
57. Of those opposed to the proposals, Greater Manchester Police, NICCY, PPSNI, CHIS & CEOP suggested the offence was as severe as any offence caught under the Protection of Children Act 1978 and that the penalty should reflect this, supporting the notion of amending existing legislation and imposing a maximum 5 years imprisonment. The Crown Prosecution Service also suggested the penalty should be 5 years and that a lesser penalty would create a discrepancy with those convicted to 5 years for the possession of pseudo-photographs. One police representative expressed concern that sentencing would be less for non-photographic depictions than real life pictures and that, in practice, it would almost certainly be non-custodial. The Council of Circuit Judges put forward the view that the penalty should be consistent with the Obscene Publications Act 1959 and that such offences should be covered by this existing legislation.
58. Of those opposed to any new offence, many felt the proposed penalty was disproportionate for non-photographic and fantasy images. Many individual respondents expressed particular concern about the sensitivity and stigma surrounding such an offence and conviction.

Comments on the Partial Regulatory Impact Assessment

59. The IWF provided evidence that a significant amount of material would be assessed as potentially illegal under the proposals. However very little of the material would be hosted from the UK and thus reported to the IWF, should the government request that IWF become the reporting body.
60. Numerous police representatives were keen to state that the proposals would not place an unnecessary or undue strain on their resources.
61. CHIS suggested that the proposals should be accompanied by measures to increase public awareness, particularly for those youngsters familiar with sexualised comic images.

PART FOUR: CONDUCT OF THE CONSULTATION EXERCISE

1. This chapter explains how the consultation exercise on the Possession of Non-photographic Visual Depictions of Child Sexual Abuse has been conducted in accordance with the six criteria set out in the Cabinet Office Code of Practice on consultation exercises.

Criterion 1 – Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation exercises at least once during the development of policy.

2. The formal consultation exercise was launched on 2 April 2007 and ran until 22 June 2007, although responses received shortly after that date were accepted and included in the analyses.
3. The consultation document was jointly published by the Home Office, the Scottish Executive and the Northern Ireland Office, who have all worked closely throughout the consultation.
4. After the end of the consultation period, a number of meetings were held with interested groups to discuss in greater detail issues which had been raised in their consultation responses. These included: The Children's Charities' Coalition for Internet Safety (CHIS), the Child Exploitation & Online Protection Centre (CEOP), the British Board of Film Classification (BBFC) and the Lucy Faithfull Foundation.

Criterion 2 – Be clear about what your proposals are, who may be affected, what questions are being asked and the timescales for responses.

Consultation points

5. The main points were summarised in an executive summary (pages 1 – 2) and the consultation questions were repeated in Annex A (page 10). The Partial Regulatory Impact Assessment in Annex C (pages 15 – 18) outlined the sectors and groups likely to be affected. The consultation document was sent to a wide range of organisations and interest groups.

Deadlines

6. The consultation paper, and the Home Office website, included the closing date for responses and this was repeated in all correspondence. Responses received soon after the closing date were accepted and extension granted where reasonable.

Criterion 3 – Ensure that your consultation is clear, concise and widely accessible

7. The consultation paper included an executive summary of the proposals and a separate list of the consultation questions. A contact phone number and email address were included in the consultation paper for use in the event of any query.

Accessibility

8. The consultation paper was provided free of charge to anyone who requested a copy. On publication, it was circulated to approximately 470 organisations and individuals. Copies were placed in the libraries of both Houses of Parliament. The paper and details of how to respond to the consultation were also placed on the Home Office website.

Criterion 4 – Give feedback regarding the responses received and how the consultation process influenced the policy.

9. The consultation paper received 87 responses from individuals and organisations. All responses were recorded on a database and were analysed carefully. A summary of the responses is included in Part Three of this document.
10. A number of changes to the proposals were made as a result of the consultation exercise. The Government has taken account of the concerns expressed about the clarity of the definitions and threshold levels of the proposed new offence. They have sought to target more precisely the material which is the subject of the consultation and to avoid drawing in unintended material.
11. They have also listened carefully to concerns expressed about defences and will ensure, in the process of drawing up legislation, that defences are included which meet the legitimate requirements set out in some consultation responses.

Criterion 5 – Monitor your department’s effectiveness at consultation, including through the use of a designated consultation co-ordinator.

12. A designated consultation co-ordinator was available to receive comments on complaints about the consultation process. His details were included in the consultation document in Annex D (page 19).

Criterion 6 – Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

13. The consultation paper included a Partial Impact Regulatory Assessment (RIA) and a full RIA will be produced to consider cost implications to the public sector, the voluntary sector, businesses and charities, in connection with drawing up legislation.

List of Respondents

1. Mr C by email	31. Anonymous
2. Seventh Day Adventist Church	32. Mr M of Hants
3. Mr B by email	33. Mr F by email
4. Mr J by email	34. Mr H
5. Ms T by email	35. Anonymous
6. Anonymous	36. Cyber-Rights & Cyber Liberties
7. Ms R by email	37. CHIS coalition
8. Ms S by email	38. Nottingham City Safeguarding Children Board
9. Mr D of Lincolnshire	39. Mr B by email
10. Mr B by email	40. Feminists Against Censorship
11. Ms T by email	41. Anonymous
12. Mrs M of Glamorgan	42. Surrey Safeguarding Children Board
13. South Yorkshire Police	43. Mr T by email
14. West Mercia Police	44. ISPA UK
15. Heddlu Dyfed-Powys Police	45. Police Federation of England & Wales
16. Kent police	46. Thus
17. Hampshire Constabulary	47. The British Association of Social Workers
18. Mr T of Lincolnshire	48. Mr F by email
19. Mr M of Hampshire	49. The Criminal Sub-Committee of Circuit Court Judges
20. Northamptonshire Police	50. Nottinghamshire Multi Agency Public Protection Service
21. Mr D by email	51. Internet Watch Foundation
22. Greater Manchester Police	52. Mr H of Rotherham
23. Ms S by email	53. Yahoo
24. Cleveland Police	54. Professor Clare McGlynn of Durham University
25. Halton Safeguarding Children Board	55. British Board of Film Classification
26. Mr S of Cambridgeshire	56. Mr P of Essex
27. Mr A of Elland	57. Durham Constabulary
28. Mr B of London	58. Mr D by email
29. Ms M by email	59. Churches Child Protection Advisory Service
30. Mr R by email	60. Mr A by email

61. CEOP	75. Police Service of Northern Ireland
62. Campaign to End Rape	76. Lord Chief Justice's Office Northern Ireland
63. Anonymous	77. Superintendents' Association of Northern Ireland
64. Mr R of London	78. Northern Ireland Commissioner for Children and Young People (NICCY)
65. Channel 4 TV	79. Limavady Borough Council
66. Wirral Local Safeguarding Children Board	80. Moyle District Council
67. BBC TV	81. Eastern Health & Social Services Board
68. Crown Prosecution Service	82. Antrim Borough Council
69 BT	83. CARE
70. The British Psychological Society	84. Public Prosecution Service for Northern Ireland
71. Childnet	85. The NEXUS Institute
72. Lucy Faithfull Foundation	86. Lady Hermon MP North Down
73. South Essex Rape & Incest Crisis Centre	87. Ards Borough Council
74. Anonymous	

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation process rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 7210 2622 or email her at consultation@justice.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Gabrielle Kann
Consultation Co-ordinator
Ministry of Justice
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given on page 3.

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

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