



Circular No. 2009/01

TITLE

Possession of Extreme Pornographic Images and increase in the maximum sentence for offences under the Obscene Publications Act 1959: Implementation of Sections 63-67 and Section 71 of the Criminal Justice and Immigration Act 2008

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For more information

Contact

Criminal Law Policy Unit

Telephone

020 7035 5015

Email

clpu@justice.gsi.gov.uk

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England and Wales

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Broad Subject

Criminal Justice

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Offences

Dear Chief Officer

- 1) POSSESSION OF EXTREME PORNOGRAPHY
- 2) PENALTIES UNDER THE OBSCENE PUBLICATIONS ACT 1959

Introduction

Section 63 of the Criminal Justice and Immigration Act 2008 and makes it an offence to possess a limited range of extreme pornographic material. Section 71 of the Act amends the Obscene Publication Act 1959 by increasing the maximum penalty for offences under that Act from three years imprisonment to five years imprisonment. The provisions will come into effect on 26 January 2009.

These changes will mean that:

- a range of extreme pornographic material – described below – will become illegal to possess
- the maximum sentence for offences committed under the Obscene Publications Act 1959 after 26 January will become subject to a maximum sentence of imprisonment of 5 years

These changes will come into effect on the date of implementation and will not be retrospective.

The guidance sets out the change in legislation and provides advice on how to achieve the successful implementation of the new system. The guidance is set out under the following headings.

- A) Background
- B) Change in legislation
- C) Frequently Asked Questions

Criminal Law Policy Unit
19 January 2009

A. Background

1. The Government has legislated in the Criminal Justice and Immigration Act 2008 to create a new offence of possession of extreme pornographic material punishable by up to either three years or two years imprisonment, according to the nature of the image.
2. The proposals were originally published in August 2006 as part of the Government's response to its consultation paper on the possession of extreme pornographic material. Material covered includes necrophilia, bestiality and violence that is life threatening or likely to result in serious injury to the anus, breasts or genitals.
3. The material to be covered by the offence is most likely to be hosted abroad, but accessed in the UK via the internet thus circumventing existing legislative controls on the publication and distribution of obscene material under the Obscene Publications Act 1959. The new offence will make the possession of such material illegal both online and offline.
4. The new legislation should only catch material which is already illegal to publish and distribute in England and Wales under the Obscene Publications Act 1959 and therefore material which is already legally available should not be affected.
5. The maximum sentence for publication and distribution offences under the Obscene Publications Act 1959 is also being increased from a maximum of three years imprisonment to a maximum of five years imprisonment.

B. Change in legislation

The elements of the offence (Section 63 subsections (2) to (8))

6. 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 pornographic;
 2. That the image is grossly offensive, disgusting, or otherwise of an obscene character; and
 3. That the image portrays in an explicit and realistic way, one of the following:
 - a. An act which threatens a person's life; this could include depictions of hanging, suffocation, or sexual assault involving a threat with a weapon.
 - b. An act which results in or is likely to result in serious injury to a person's anus, breast or genitals; this could include the insertion of sharp objects or the mutilation of breasts or genitals.
 - c. An act involving sexual interference with a human corpse; or
 - d. A person performing an act of intercourse or oral sex with an animal, and a reasonable person looking at the image would think that the animals and people portrayed were real.
7. The key to accurately assessing Section 63 is to apply all three elements to any example under consideration. To focus on just one element in isolation inevitably leads to false conclusions about what is caught.

Pornographic

8. The Act defines a pornographic image as one which must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal. Just because an image has a sexual dimension to it does not mean that it could reasonably be assumed to have been produced solely or principally for that purpose. Whether this threshold has been met will be an issue for the magistrate or jury to determine simply by looking at the image. It is not a question of the intentions of those who produced the image. Nor is it a question of the sexual arousal of the defendant.

9. 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.

10. 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, the image itself may be taken not to be pornographic even if considered in isolation, a contrary conclusion would have been reached.

11. 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 the original context, for example a whole film or a documentary, would not be considered pornographic.

Grossly offensive, disgusting or otherwise of an obscene character

12. The words 'grossly offensive' and 'disgusting' are not alternatives to 'obscene character' but are examples of it. They are drawn from the ordinary dictionary definition of 'obscene' and reflect different aspects of that concept. They are intended to convey a non-technical definition of that concept. It is a definition which is distinct from the technical definition contained in the Obscene Publications Act 1959, that definition being specifically geared to the concept of publication.

13. Again, 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 grossly offensive, disgusting or otherwise of an obscene character, rather it is a test of whether all elements of the offence are met. It is all three elements working together which should ensure that the only images which are caught are those which would also fall foul of the Obscene Publications Act 1959.

An Extreme Act

14. An extreme act is one which threatens a person's life, which results or is likely to result in serious injury to a person's anus, breasts or genitals, which involves sexual interference with a human corpse, or which involves a person performing intercourse or oral sex with an animal. Only these specific acts will be caught, and only in conjunction with the other two elements of the offence.

15. Life-threatening is not defined in the Act. It will therefore take its ordinary English meaning and will be a question of fact for the magistrate or jury.

16. Serious injury is not defined in the Act. It will be a question of fact for the magistrate or jury. The intention is that 'serious injury' should be given its ordinary English meaning. The reference to "serious injury" was not intended to expressly link into the case law with respect to 'grievous bodily harm' under Sections 18 and 20 of the Offences Against the Person Act 1861 which has been interpreted as being capable of including psychological harm.

17. As well as being appropriately specific, an extreme act must be explicit and realistic. Both those terms take their ordinary dictionary definition. Taking an example which was raised during parliamentary debates on the Criminal Justice and Immigration Bill, the anal sex scene in "Last Tango in Paris", even if it were to be considered pornographic and of an obscene nature, would not be caught by the offence, because it is not explicit and does not portray an act resulting or likely to result in serious injury to a person's anus.

18. A further requirement in respect of an extreme act is that a reasonable person looking at the image would think that the people and animals portrayed were real. The practical effect of that requirement is that only photographs and films, and images which are indistinguishable from photographs and films, will be caught by the offence.

Exclusion of classified films (Section 64)

19. The intention of Section 64 is to give certainty to members of the public that they will not be at risk of prosecution if they possess a video recording of a film which has been classified by the British Board of Film Classification, 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 nevertheless fall foul of the offence in Section 63. The fact that the images are held as part of a BBFC classified film takes them outside the scope of the offence.

20. However the exclusion does not apply in respect of 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.

21. 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.

22. The context within which the image is judged is the same under both Sections 63 and 64, that is, the context in which the defendant holds the image. It will already have been decided under Section 63 that, having regard to that context, the image is pornographic. The question which is asked under Section 64 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. The effect is to distinguish 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.

Section 65: Defences; general

23. There are three general defences set out in Section 65. These are the same as for the possession of indecent images of children under Section 160 (2) of the Criminal Justice Act 1988. 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 the prosecuting authorities, 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 and which gave rise to no suspicion that it might be extreme pornography.
- that the person had been sent the image without having asked for it, on their own behalf or through someone else, 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 depends on all the circumstances of the case.

Deleting images

24. Case law supports the view that, in normal circumstances, deleting images held on a computer is sufficient to get rid of them, i.e. to divest oneself of possession of them. An exception would be where a person is shown to have intended to remain in control of an image even though he has deleted it - that will entail him having the capacity (through skill or software) to retrieve the image. *Porter* [2006] 1 WLR 2633

Accidental Access

25. The offence is not targeted at those who accidentally stumble across extreme pornographic images while surfing the Net. As with the position regarding deleted images the key issue will be whether the person has control and custody and therefore possession of the image in question.

Section 66: Participation in consensual acts

26. The law recognises that there are many people who may take photographs of themselves participating in private sexual activity. An additional defence has been created for those who appear in extreme pornographic images as direct participants in the act or acts portrayed. The defence is not available to those who participate in the creation of images of bestiality or of necrophilia which involves a real corpse, because of the lack of ability of animals and corpses to consent (as reflected in the existing sexual offences of having intercourse with an animal or a corpse).

27. In order to benefit from the defence, defendants must prove, on the balance of probabilities, that they directly participated in the act or acts portrayed in the image and that the acts did not involve the infliction of non-consensual harm on any person. Where the image depicts necrophilia, defendants must prove that the human corpse portrayed was not a real corpse.

28. The defence cannot be claimed by onlookers and this will include those filming an activity if they are not also direct participants in the activity.

Non-consensual harm

29. Non-consensual harm is defined in the Act as harm which, in law, a person cannot consent to or harm to which a person can consent but did not in fact consent. Under current law, consent to the intentional infliction of actual bodily harm or grievous bodily harm will ordinarily be deemed invalid on public policy grounds. That principle was established in the House of Lords case of *R v Brown* [1994] 1 AC 212 and was subsequently upheld in the European Court of Human Rights which found that the interference with the defendants' private lives (and thus their rights under Article 8 of the European Convention of Human Rights) was justified on grounds of 'protection of health'. The defence in Section 66 is constructed so that if the law on that point should change, the defence would move with it.

Section 67: Penalties

30. The new offence of possession of extreme pornographic material is triable either way.

31. If a case is heard in a Magistrates' Court in England and Wales the maximum penalty available will be six months' imprisonment, or a fine of up to £5,000 or both. The maximum available prison sentence in the magistrates' courts in England and Wales will rise to 12 months when section 154 (1) of the Criminal Justice Act 2003 is brought into force. Where a case is heard in the Crown Court, the maximum sentence is imprisonment for three years for possession of images covered by Section 63(7)(a) or (b) (life threatening acts, or serious injury) and imprisonment for two years for possession of images of bestiality and necrophilia. In both cases an unlimited fine may also be imposed.

The "Sex Offenders' Register"

32. Offenders aged 18 or above who receive a sentence of two years' imprisonment or more can be made subject to notification requirements under part 2 of the Sexual Offences Act 2003.

DPP consent

33. In England and Wales and in Northern Ireland, the consent of the relevant Director of Public Prosecutions is needed before a case of possession of extreme pornographic material can be taken to court.

C. Frequently Asked Questions

What exactly is the relationship between the test of obscenity in the OPA, and the test of “grossly offensive, disgusting or otherwise of an obscene character” in this offence?

The OPA criminalises the publication of obscene articles, and defines an obscene article as one which is such as to tend to deprave or corrupt those likely to read, see or hear it. It is not - and never has been - our intention to criminalise possession of material which it would be legal to publish. However, we deliberately chose not to directly build upon or draw from the OPA, as the language of that Act is structured around the wider concept of publication and thus does not translate easily to the context of possession. Moreover, it covers a much broader range of material than that which is covered by this possession offence.

The addition of the “grossly offensive, disgusting or otherwise of an obscene character” test to this offence was intended to respond to concerns that the offence as drafted could be construed as catching material which would not be caught by the OPA. The test draws upon the ordinary dictionary definition of ‘obscene’ rather than the technical definition which is contained within the OPA and which is geared around the concept of publication. We nevertheless are of the view that the practical effect of this change - taken in conjunction with the existing elements of the offence - will be to ensure that this offence only catches material which would be caught by the OPA were it to be published in this country.

Are “grossly offensive, disgusting or otherwise of an obscene character” intended to be three separate concepts, any one of which could satisfy the requirements of the offence?

Grossly offensive, disgusting or otherwise of an obscene character are not intended to be read as three separate concepts. Rather, they are drawn from the ordinary dictionary definition of ‘obscene’ and are intended to convey a non-technical definition of that concept.

Do “grossly offensive, disgusting or otherwise of an obscene character” appear anywhere else on the statute book?

The concept of obscene occurs in the Obscene Publications Act 1959 where it has a technical meaning of tending to deprave or corrupt the likely audience.

In section 127(1)(a) of the Communications Act 2003 the phrase “grossly offensive or of an indecent, obscene or menacing character” appears in the context of an offence of improper use of a public electronic communications network.

What is meant by serious?

This word will have its ordinary meaning and it will be for the court to decide.

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.

What about extracts from classified films?

Where extracts are taken from a film and placed elsewhere they lose that exemption

Why do the bestiality and necrophilia categories go beyond the offences in the Sexual Offences Act 2003?

This offence is about the possession of extreme pornographic images and the impact of such images on the viewer. It is not limited to depictions of criminal offences.

Will the proposed law cover text?

Section 63 of the Criminal Justice and Immigration Act 2008 proposal covers film, video, photographs etc of actual events or depictions. It does not cover text or fantasy drawings. In some circumstances however, publication of text or non-photographic imagery describing or showing these activities may be illegal under the OPA.

People might accidentally view this material?

It is not the intention to penalise people who stumble across this material or have it sent to them without their consent, and there are defences to cover these situations. The proposals mirror arrangements in respect of indecent photographs of children, possession of which is already an offence.

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

Those who produce this material in the UK may already be covered by current legislation where a crime is committed, as well as those who publish it. Very few of these people are based in the UK; they operate from Eastern Europe, the USA & elsewhere, beyond our jurisdiction in respect of the OPA 1959. Hence the need for a new possession offence.

We are raising the maximum penalty for the publication of obscene material from 3 years imprisonment to 5 years imprisonment to reflect the greater seriousness of circulating this material.

Why is the BBFC being protected?

The BBFC (British Board of Film Classification) is not 'protected' by this clause. The clause gives protection and certainty to members of the public who possess BBFC classified material.

Does this not invite the BBFC to classify more explicit material?

No. The BBFC are already under a duty to take obscenity legislation into account when they classify films and they will need to take into account the new offence in the same way.

Are cinema films also covered?

The exemption does not apply to films shown in cinemas (as opposed to the versions of such films which are classified for DVD or video release).

Why are cinema films not covered?

The exemption will ensure that members of the public are not at risk from prosecution. Possession by the public does not arise in respect of viewing a film in the cinema. Cinema staff and others involved in the classification process will be covered by the defences in Clause 66.

Won't this exclusion be confusing for people? How can a scene be legal to possess in one scenario but illegal to possess in another?

The purpose of this clause is to ensure that the few images which meet the definition of "extreme image" in clause 64 but are contained in classified films are not extracted and used as part of a different collection of images, where their effect on the viewer can be very different.

What about young people who share pornographic material via mobile phone?

The legislation will also catch extreme pornographic material held on mobile phones. If such material is being distributed amongst young people then that may already be a breach of the Obscene Publications Act 1959.