



The Scottish  
Parliament

Mr Kenny MacAskill MSP  
Cabinet Secretary for Justice  
The Scottish Government  
Victoria Quay  
Edinburgh  
EH6

JUSTICE  
- 6 FEB 2009  
PRIVATE OFFICE

MCS  
hw 10/2

Our Ref: 01090046

27<sup>th</sup> January 2009

Dear Kenny

[REDACTED]

I write on behalf of my above constituent who has emailed me in connection with his concerns arising from proposals mooted on the legality of possessing "extreme" pornography.

I would be very grateful for your consideration of the points he makes in the enclosed letter from [REDACTED] together with your views on behalf of the Scottish Government on the legislative position.

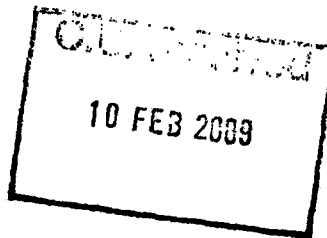
Your assistance in addressing my constituent's views is very much appreciated and I look forward to hearing from you.

My best wishes.

Yours sincerely

*Sarah Boyack*

SARAH BOYACK MSP



enc

> To: Boyack S (Sarah), MSP  
> Subject: Re: Scots possessing 'extreme' pornography to face jail  
>  
>  
> Dear madam,  
>  
> The function of the law is to provide rules and mechanisms for the  
> management of the interactions of the people in society. It is a  
> position characteristic of the most illiterate and ill-educated  
> republicans in the United States to strive for the legislation of  
> morality. It is a surprise that even the myopic and ill-educated SNP  
> are advancing such an agenda here. I refer to the proposed ban on  
> (some forms of) pornography reported this week.  
>  
> I wish to ask two questions:  
>  
> 1/ What purpose is served by this legislation? After all, whatever  
> act  
> is being watched has been done already. Therefore there are only  
> three  
> possibilities: to prevent the commission of more such acts, to  
> protect  
> the victim from further exposure or to protect the viewer from moral  
> decay. The first two presuppose that a crime has been committed,  
> which  
> is strictly not a requirement in this legislation. To criminalise the  
> viewing of an act which was legal to perform can only be justified on  
> moral grounds.  
>  
> In the case of child pornography, the only real precedent in this  
> area, the act was necessarily illegal; purchase of such pornography  
> certainly creates an incentive to harm more children, and the  
> distribution of such pornography is likely to cause further harm to  
> the victim. In that case, then, the argument is clear for the  
> prevention of distribution, though it is a somewhat ostrich-like  
> policy to prevent consumption rather than supply, nevertheless it is  
> easy to accept, in view of the severity of the crime, that  
> controlling  
> both is necessary.  
>  
> In the case of acts between adults, the question of consent is  
> paramount. No crime is necessarily committed in the performance of a  
> sexual act between consenting adults. More, this legislation is  
> intended (from its description) to cover instances in which a crime  
> has certainly not taken place, for example in plays and film. This is  
> repressive legislation which can only be proposed because a vocal  
> part  
> of the population - ageing, conservative, and sexless - will cheer  
> any  
> return to the values of the 1950s.  
>  
> 2/ How will such legislation be enforced? Will the Scottish  
> parliament  
> install high-powered firewalls like the Chinese to restrict and  
> monitor Internet access within Scotland? Perhaps rooms full of  
> computers like the NSA have in the USA to analyse and monitor  
> Internet

> traffic will be built? Will they rely on informers, pensioners with  
> glasses pressed to the wall in Edinburgh's tenement housing? The  
> potential for the abuse of any technological mechanism capable of  
> providing this monitoring is frightening, and the social damage  
caused  
> by encouraging one section of population to inform on another is  
> deeply inadvisable.

>

> The issue is more complicated than this anyway for technological  
> reasons. Pornography is usually distributed online via vast arrays of  
> thumbnails (grids of small images). These grids are randomised in two  
> ways: firstly what you click isn't necessarily what you get, secondly  
> the content of the array is at best loosely controlled. The first  
> point is worth explaining; the arrays are joined together such that a  
> random percentage of the time another array, rather than content, is  
> provided. These new, randomly selected arrays may have virtually any  
> content, and following such a chain more than a few steps can lead to  
> illegal or potentially illegal images. All of these images are likely  
> to be stored on the computer of a naive user; virtually anyone who  
> views pornography is likely to have images which they did not in any  
> way opt for stored on their computers. Nor should you imagine that  
> this only means thumbnails: random content is increasingly common.

>


> To successfully prosecute then, it will surely be remarkably  
difficult  
> to establish intent (to inadvertently view something cannot be  
illegal  
> one would hope). You would need to establish which images were  
> selected, versus which were randomly chosen. This will be  
> exceptionally difficult without logging an entire session from the  
> user's side (since which links are selected may be randomised at  
> either end). The ability to do this does not exist without the sort  
of  
> surveillance software found on corporate machines, but persuading  
> members of public to install such software on their own machines is  
> unlikely to succeed. Most likely trials will instead hinge on the  
> ability of the prosecution to bamboozle the jury into ignoring the  
> technological impossibility of being beyond reasonable doubt.

>

> Perhaps you will argue that they will seek to prosecute only people  
> who store such images deliberately. Since images of this kind are  
> freely available, there is no incentive to store them - you will  
> instead create "master criminals" with nothing "deliberately" stored  
> on their machines, but will have no effect whatsoever on their access  
> to them. Such a ban, then, is pointless without wider collaboration  
> with other countries to make such images less accessible. I doubt  
> there will be any success on this front: the rest of the world isn't  
> wringing its hands about what adults get up to on camera.

>

> I suspect from this analysis that the SNP merely wish to make a big  
> noise which will appeal to a section of the population, without going  
> so far as to upset anyone and actually pass it. However, one can  
never  
> predict when stupidity and ignorance will triumph. I hope you will  
> speak against this, for all the impossibility of being seen to be "in  
> favour" of pornography; one can at least be "in favour" of civil  
> liberties and common sense.

>  
> Yours sincerely,  
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