

Wilson J (Jim)

From:
Sent: 21 January 2009 21:22
To: Criminal Justice and Licensing Bill
Subject: Views on Proposal to Criminalise "Extreme" Images

I wish to offer my views on proposed legislation to criminalise possession of "extreme" pornographic material in Scotland (<http://www.scotland.gov.uk/Publications/2008/09/24132838/0>). You stated that, although not a formal consultation, we should write to this address to offer any views.

The claimed benefit is "Will help ensure society is protected from exposure to pornography that depicts horrific images of violence." Yet the law is one of possession, not publication or distribution. How will it protect people who are "exposed" to such material - by putting them in prison?

My concern is that the proposed law makes no distinction between staged or real images; and whether or not the participants consented. People will be criminalised for possessing images based on what they appear to show, rather than what actually occurred.

I am particularly concerned that the proposals are broader than even that of England, in that they include depictions of non-consensual penetrative activity. I have no objection to laws regarding images that show actual rape, but the law would include images staged with consenting adults. Consenting adults who make private images of themselves, either role-playing rape, or other acts that may appear non-consensual, would be turned into criminals, subject to three years imprisonment and forced to sign the Sex Offender register. Even worse is the issue of how is it decided if an image is meant to depict a non-consensual act (since the fact that the participants actually consented is considered irrelevant for this law)? Such a clause risks including not only images intended to depict rape, but any image where it might appear to a jury that the image portrays a non-consensual act, based solely on looking at the image. Images of "rough sex", or sex with gags or bondage, would also be at risk - even if the consent of the participants could be proven beyond reasonable doubt.

The English law includes a defence for those who directly participate in the image, though this does not remove problems with the law. The defence does not apply even for the photographer, or others who were present at the time. There are those, especially those in the BDSM (consensual bondage, discipline, sadism, masochism) community, who have open relationships. Consider a ménage à trois where an image is privately made involving two of them; this image would still be illegal if the third person was in possession of it. The law would still criminalise anyone who views images of consenting adults on the Internet. Anyone who visits BDSM forums and websites would be at risk, as these contain images that could be deemed to portray a threat to life (e.g., role-playing with knives) or appear to be non-consensual (images involving bondage or gags), and thus be illegal even if no one is harmed in the production, and they are made with consenting adults.

It is claimed that the Scottish law will only cover material already illegal to publish or distribute such material. I am sceptical, since the UK Government claimed the same thing, yet the resultant law does not include the required "deprave and corrupt" test of the UK's Obscene Publications Act. I presume that, unlike the English law, Scotland will not be criminalising images that are extracted from legal films? That is an example in the English law where images that are legal to publish become illegal to possess.

Even if the law only covers material already illegal to publish, there are many additional problems with a possession law:

* It is reasonable perhaps that someone seeking to publish should be aware of what would be illegal, and to have the work classified by the British Board of Film Classification. It is far less reasonable to expect an individual to be aware of what images are and aren't legal, when browsing the Internet, importing an unclassified film, or taking a private photo with his or her partner, nor is it reasonable or practical to have to subject every such image for classification. Since most sites on the Internet are not subject to the already-strict publication laws in the UK, anyone browsing adult sites on the Internet will be at risk unless they restrict their activities to UK BBFC-approved sites.

* The intent of censoring material under the OPA is out of fear of corrupting others. Who is corrupted if someone possesses an image? Who is the victim? The implication is that we need protecting from ourselves.

* What counts as "obscene" may change over time. For example, James Joyce's *Ulysses* was banned in the UK until the 1930s, and *Lady Chatterley's Lover* was banned until after the obscenity laws were updated in 1959. If publication is banned, it means that material cannot be published, but a law against possession means that the material must be destroyed. Imagine how much material would have been irrevocably lost if "obscenity" laws had always targetted possession? Whilst criminalising possession of some materials can be justified if the arguments are strong enough (e.g., the production involves unwilling participants), far greater consideration should be given before doing so.

There is the issue of international cooperation. The Government consultation itself admitted "We are not aware of any western jurisdiction which prohibits simple possession of extreme material". Since not even England and Scotland can reach a consensus on what material should be illegal to possess, how is any international cooperation going to be possible?

The International Watch Foundation has stated that it will not be blocking material under this new law [http://www.theregister.co.uk/2008/12/12/iwf_investigates_itself/], and it will only attempt to take down material hosted under the UK that is already illegal under the Obscene Publications Act. So this new law does nothing to "ensure society is protected from exposure". Instead, it puts them at risk; since the law is broader and more vague than child porn law and there is no international legal or ethical consensus on the matter, it is far more likely that viewers may come across such material, without even realising that it might be illegal. This is especially true if, unlike child porn, the IWF will not be blocking material to prevent the legal risk to UK citizens. Whilst there may be a defence for those who accidentally stumble across a website, how will this apply for someone who intentionally accesses an adult site, that may have some now illegal images on it?

I also dispute the claim that most of the responses to the consultation were in support of changes in the law, as claimed by the Scottish Government's consultation response. This is only true when you look at "Scottish responses" together with 47 "cross-border" organisations. Organisations will often not have a specific location, meaning that effectively they have been counted twice, by the Scottish and English responses! Organisations were also far more likely to support changes in the law than individuals (due to them being stacked with religious groups and children's charities, which would typically oppose porn despite having no specific expertise in this area), therefore looking at Scottish responses plus cross-border organisations significantly biases the result. To the consultation as a whole, most people were opposed to any changes in the law. (Also note that even for those who supported changes, many were responding only in the context of images involving non-consenting participants.)

If it was true that the Government was doing what most responses asked for, then the UK Government should have abandoned its plans, as most responses opposed them.

Whilst I do not live in Scotland, I hope you will consider my concerns and information on this law - perhaps you would count me as a "cross-border" response.

For more information on concerns of this law, please see:

<http://www.backlash-uk.org.uk/>

<http://www.caan.org.uk/>

<http://www.indexoncensorship.org/2008/06/10/something-must-be-done/>

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