

Wilson J (Jim)

From: MCGLYNN C.M.S. [clare.mcglynn@durham.ac.uk]
Sent: 17 December 2008 13:04
To: Criminal Justice and Licensing Bill
Cc: RACKLEY E.; MCGLYNN C.M.S.
Subject: Extreme Pornography: Lessons from England

Attachments: Scottish Government letter to Jim Wilson.doc; Pornographic Rape Web Sites info.doc; McGlynn and Rackley Crim LR Spr 2009.pdf



Scottish Government letter to
Pornographic Rape Web Sites in...
McGlynn and Rackley Crim LR Sp..

Dear Mr Wilson

I am emailing regarding the Consultation on the Criminal Justice and Licensing Bill, and in particular the Extreme Pornography provisions. The letter includes suggestions regarding the justifications for such measures and the statutory language to encapsulate images of rape and sexual violence.

Please do not hesitate to contact me should you have any queries. I am sending a hard copy in the post, and I am copying the letter to the Cabinet Secretary for Justice.

Yours sincerely

Clare McGlynn

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Jim Wilson
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16 December 2008

Dear Mr Wilson

**CONSULTATION ON CRIMINAL JUSTICE AND LICENSING BILL
CRIMINALISING EXTREME PORNOGRAPHY**

We are writing in connection with your proposed measures to criminalise the possession of extreme pornography to be included in the Criminal Justice and Licensing Bill 2009. We write in our capacity as experts on the English provisions on extreme pornography, as enacted in the Criminal Justice and Immigration Act 2008. In this regard, we enclose a copy of an article examining the English measures which is due to be published shortly in the *Criminal Law Review*.

We welcome the proposals to introduce a new offence in this area and, in particular, the specific reference to rape and other non-consensual sexual activity. However, we wish in this letter to sound a note of caution regarding the statutory language to be used, drawing on the lessons learnt from the English legislative process.

Images of rape and non-consensual penetrative sexual activity

Your consultation document states that you intend to include within the scope of the provisions:

- * Life-threatening acts and violence that would appear likely to cause severe injury;
- * Rape and other non-consensual penetrative sexual activity, whether violent or otherwise; and
- * Bestiality or necrophilia.

While we are of the view that it is fundamentally important to include pornographic images of rape within the scope of these new measures, in

our view the language of 'rape' or 'non-consensual penetrative sexual activity' is not the most effective way of achieving this result.

Alternative drafting

In our view, it would be more defensible to expand the scope of the first criterion so that it includes images of rape, but without necessarily labelling it as 'rape'. It would therefore read as:

- * 'an act which threaten a person's life; or
- * an act which results, or threatens to result, in serious injury'

The language 'threatens' (as opposed to 'likely to') will cover a wider range of factual circumstances and, most importantly in the context of rape, will cover all acts of rape (all of which *threaten* serious injury, but not all of which are *likely* to result in serious injury). In this context, 'injury' must be taken to include, or be specifically defined as including, mental harm and injury. (English criminal law already includes mental harm within the scope of its criminal provisions on assault and battery and therefore the term 'injury' will include mental harm.)

Justification for alternative drafting: clarity and ease of understanding

The use of the term 'rape' in any possible legislation may give rise to complicated questions of proof regarding lack of consent or belief in consent. In other words, it is not always obvious that an image is a depiction of 'rape', in view of how such term is legally defined. That is, a defendant could raise very complicated legal issues regarding whether or not there is an actual depiction of a 'rape'. Equally, those who consider that the consent of pornography actors is dubious could make the argument that all pornographic images of sexual intercourse are included as all involve rape.

Therefore, encompassing images of rape within the statutory language of 'threatening to result in serious injury' may be a more effective way of ensuring that images of rape are covered by the measures.

Similarly, 'non-consensual penetrative sexual activity' is potentially too broad to be included within the scope of a measure criminalising the possession of material. That is, it could cover a wide range of (consensual) sado-masochistic activity which arguably should not come within the scope of the measures; for example, an image of someone under restraint engaging in activity with a sex aid. Further, the use of the language of 'non-consent' invites complex legal debates about the state of minds of participants.

Both of these concerns would be obviated by language referring to the nature extent and level of the injury being depicted, whether consensual or not. It would also ensure that harmful activity beyond penetration can also be covered.

Justifying Measures on Extreme Pornography: Cultural harm

The Scottish Government consultation states that these measures are being proposed in order to 'help ensure society is protected from exposure to pornography that depicts horrific images of violence'.

We would urge the Government to make the strong case that the measures are justified on the basis of the cultural harm of these images, as we argue in our *Criminal Law Review* article. That is: those who view extreme pornography will not necessarily commit sexual offences, but their use (and indeed the very existence of such material) sustains a culture in which rape and sexual violence is normalised; in which a woman's 'no' is not taken seriously. Extreme pornography not only glorifies violence against women, but is also inimical to the values of equality and dignity.

This justification is distinct from the debate over whether there is a direct causal link between sexual violence and pornography. The existence or otherwise of such a link is highly contentious. Indeed, it is not clear to us that any research study could ever convincingly demonstrate such a strong causation. But that does not dispose of the case for legislation. We must move beyond the sterile cause/effect arguments (which will remain unproven), and discuss the wider issue of the harm which extreme pornography does to the culture in which we live.

Please do not hesitate to contact us if you wish to discuss any of these issues further. We also enclose a copy of a document we have produced on the nature of some pornographic rape websites for your information.

Yours sincerely

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