

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty response to the Home Office Consultation Paper on the Possession of Extreme Pornographic Material**

**December 2005**

## **About Liberty**

Liberty (The National Council for Civil Liberties) was founded in 1934, and is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## **Liberty Policy**

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at

[www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml](http://www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml)

Parliamentarians may contact Gareth Crossman, Director of Policy at Liberty.

Direct Line: 020 7378 3654

Email: [GarethC@liberty-human-rights.org.uk](mailto:GarethC@liberty-human-rights.org.uk)

1. Liberty welcomes this opportunity to respond to the Home Office's consultation paper on the possession of extreme pornography ("the paper"). We accept the Government's premise that extreme and abhorrent pornography, depicting things such as violent rape and sexual torture, is now more readily available than ever before because of the Internet. Obviously, we would include child pornography within the category of extreme and abhorrent pornography. However, it is our understanding that the proposals in question are not specifically directed at child pornography, no doubt because there is already legislation to cover the production and possession of indecent photographs of persons under the age of 16<sup>1</sup>.

2. We also accept that the Government's proposal, to make the possession of extreme and abhorrent pornography a criminal offence, is reasonable. Although we may have some doubts about its ultimate effectiveness given the worldwide market for this kind of material, we accept that it is reasonable to attempt to disrupt the supply chain by targeting the collectors as well as the producers. Furthermore, we accept that some of the very extreme material mentioned in the paper may encourage or reinforce violent or aberrant behaviour which is to the detriment of society as a whole. Finally, we agree that, if such an offence is to be created, it should be a new and separate offence. It should not be tagged on to existing legislation in relation to obscene publications, which was created with different concerns in mind.

3. We do have concerns about the proposals, particularly in relation to the three following areas: the categories of proscribed material; the onus of proof; and the mental element of any offence (the mens rea).

4. First, we are concerned that the categories of material to be covered by the new offence are too broad. The Government has specifically said that "the material under consideration does not depict consensual sexual activity, nor even the milder forms of bondage and humiliation which are commonplace in pornography."<sup>2</sup> However, the proposed categories of material do not reflect that. The third and fourth

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<sup>1</sup> Cf. section 1 of the Protection of Children Act 1978 and section 160 of the Criminal Justice Act as amended by the Sex Offences Act 2003. The latter provision makes it an offence to possess indecent photographs of a child under the age of 18, although there are defences under section 160A where the child was 16 or 17. Of course, the acts depicted in such pornography would also be criminal because children under the age of 16 are not capable of giving consent.

<sup>2</sup> Page 6, § 11 of the paper

categories are “serious violence in a sexual context” and “serious sexual violence”. “Serious violence” and “serious sexual violence” are both defined as involving or appearing to involve “serious bodily harm”. This in turn is defined as “violence in respect of which a prosecution for grievous bodily harm could be brought”.

5. One problem with this is that consent to sado-masochistic activity is not a defence under the English criminal law<sup>3</sup>. As a result, the proposed categories would include images of consensual sado-masochism. Of course, we recognise that it will not always be possible to prove that the activity depicted in the image was non-consensual. Furthermore, we accept that there is a public interest in restricting the creation and distribution of pornography that depicts the infliction of permanent or dangerous injuries, even where it is not possible to demonstrate that the victim did not consent.

6. However, grievous bodily harm is not limited to permanent or dangerous injuries<sup>4</sup>. Indeed, it is often not distinguished from wounding<sup>5</sup>, which includes any breaking of the skin<sup>6</sup>. The result is that the proposed offence would (or at least could) cover the possession of some ‘common place’ forms of pornography, such as that depicting relatively mild and consensual bondage, beating and spanking for example, particularly if any skin is broken. This is contrary to the Government’s own stated intentions. It would mean the criminalisation of a relatively large number of people, the vast majority of whom do not pose any threat to society. Furthermore, it would not serve any important public interest: the arguments in favour of criminalising the possession of ‘violent’ pornography<sup>7</sup> have little or no force where the ‘victim’ depicted in the images has consented and the injuries caused to that ‘victim’ are neither permanent nor dangerous.

7. Hence, we believe that the third and fourth categories of proscribed material should be limited to the realistic and explicit depiction of permanent or dangerous injury being inflicted upon a person in a sexual context. This would limit the offence

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<sup>3</sup> *R v Brown, Laskey & Jaggard* [1994] AC 212

<sup>4</sup> cf. e.g. *R v Ashman* [1858] 1 F & F 88

<sup>5</sup> Wounding with intent and grievous bodily harm with intent are both offences under section 18 of the Offences Against the Person Act 1861.

<sup>6</sup> cf. *R v Wood* [1830] 1 Mood. 278

<sup>7</sup> Set out in paragraph 2 above.

to possession of the extreme kind of material about which the Government is concerned, as opposed to the more 'common place' material.

8. Liberty's second concern is in relation to the onus of proof. The Government says that it does not intend to penalise people who accidentally stumble across the material or who have it sent to them without their consent. However, their proposal is to mirror the current legislation in relation to indecent photographs. Under this legislation it is, on the face of it, an offence to have the proscribed material in one's possession<sup>8</sup>. Possession includes the downloading of a photograph from the internet.<sup>9</sup> The act of possession can even continue after the viewer has deleted the material, because all deleted material is stored in a hidden cache on the hard drive<sup>10</sup>. The onus of proof is then on the defendant to prove either (a) that they had a legitimate reason for having the material in his possession; or (b) they had not seen material and did not have any reason to suspect that it fell into the proscribed category; or (c) that the material was sent to them without prior request and they did not keep it for an unreasonable time.<sup>11</sup>

9. Putting the onus of proof on the defendant might have been appropriate in the days before the Internet, where the mere fact that a defendant had a picture in their possession would ordinarily indicate that they deliberately obtained that picture. However, this reverse onus of proof is no longer appropriate. Internet users are frequently sent attachments of which they do not know the contents and 'pop-ups' can appear on their screen without any prior request. Under the proposed legislation, the prosecution will only have to demonstrate that an image, produced on the defendant's computer screen, contained the proscribed material. It will then be for the defendant to establish one of the defences, for example, that they never saw these images and/or that the images appeared without any prior request. This may be very difficult to do. It is very unlikely, for example, that there will be any witnesses. The defendant's word is likely to be his only defence. Miscarriages of justice will inevitably result.

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<sup>8</sup> Section 160(1) of the Criminal Justice Act 1988

<sup>9</sup> *Atkins v DPP* [2000] 1 WLR 1427

<sup>10</sup> *Ibid.* Possession by virtue of this hidden cache will only be established where the defendant knew about the said cache.

<sup>11</sup> Section 160(2) of the Criminal Justice Act 1988

10. As a result, Liberty would suggest putting the onus of proof on the prosecution to prove that the defendant deliberately accessed the material, without a legitimate reason, knowing that it would contain proscribed material. This will not impose an excessive burden on the prosecutor as the facts of *Atkins v DPP*<sup>12</sup> demonstrate: there will often be a ‘trail’ of sites, including a small or ‘thumbnail’ version of the image in question, which is clicked on in order to produce the final image.

11. Liberty’s third concern is related to the second. We consider that, at present, the mental element (*mens rea*) necessary for the offence is not clear. It would be a defence for the defendant to prove that the material was sent to him without any prior request being made by him or on his behalf. However, it is not clear what the situation would be if, for example, the defendant had requested the material believing that it would be pornographic but not realising that it would fall into one of the proscribed categories. That is why we propose limiting the offence to situations where the defendant knew that the material would fall into one of the proscribed categories.

**Rory Dunlop**  
**39 Essex Street Chambers**

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<sup>12</sup> *Op. cit.*