



Further information on the new offence of Possession of Extreme Pornographic Images

This note provides general information for members of public on the new offence of possession of extreme pornographic images in Part 5, Sections 63 to 67 of the Criminal Justice and Immigration Act 2008. These sections are due to come into force on 26th January 2009 in England, Wales and Northern Ireland.

As well as providing information about the offence, this document is intended to answer some of the more frequently asked questions about the offence. It should be read in conjunction with the published Explanatory Notes on the Act which are available at:

http://www.opsi.gov.uk/acts/acts2008/ukpga_20080004_en_1

The information in this note gives a basic explanation of the structure and content of the offence. As with any law, once Parliament has passed it, it is for the courts to interpret and apply it.

Understanding Sections 63 - 67 of the Criminal Justice and Immigration Act 2008

Introduction

The individual elements of the offence are explained below. It is important to note that it is not the intention of this offence to extend the law to cover additional material beyond what is illegal to publish under the Obscene Publications Act (OPA) 1959. Indeed, this offence covers a more limited range of material than the OPA. It creates a possession offence in respect of a sub-set of extreme pornographic material which is defined in Section 63.

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

1. 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.
2. 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 extreme acts:

- a. An act which threatens a person's life;
 - b. An act which results in or is likely to result in serious injury to a person's anus, breast or genitals;
 - c. An act involving sexual interference with a human corpse,
 - d. A person performing an act of intercourse or oral sex with an animal (whether dead or alive),
- and a reasonable person looking at the image would think that the people and animals portrayed were real.
3. 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.
 4. These three elements, when taken together, should ensure that the offence only covers material which it is an offence to publish under the OPA 1959.

Pornographic

5. 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.
6. 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.
7. 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. 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

8. 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 (OPA) 1959*, that definition being specifically geared to the concept of publication.

* *The publication etc of obscene articles – is a common law offence in Northern Ireland with a maximum penalty of life imprisonment.

9. 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 OPA 1959.

An Extreme Act

10. 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.
11. 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. It could include depictions of hanging, suffocation, or sexual assault involving a threat with a weapon.
12. 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. Serious injury could include the insertion of sharp objects or the mutilation of breasts or genitals.
13. As well as being a specified act, an extreme act must be **explicit** and **realistic**. Both those terms take their ordinary dictionary definition.
14. 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)

15. Section 64 of the Act provides an exclusion from the scope of the offence of possession of extreme pornographic images for classified films. The intention of this section 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 (BBFC), 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 (see paragraphs 1-14). The fact that the images are held as part of a BBFC classified film takes them outside the scope of the offence.
16. However the exclusion does not apply in respect of an image or 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.
17. 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.

18. 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. It will also have been decided that the image is an extreme image. The additional 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

19. 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.

20. What constitutes an unreasonable amount of time depends on all the circumstances of the case.

Deleting images

21. 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

22. 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 knowingly has control or custody and therefore possession of the image in question and does not keep it for an unreasonable length of time.

Section 66: Participation in consensual acts

23. 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).
24. 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.
25. 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

26. 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

27. The new offence of possession of extreme pornographic material is triable either way. This means that cases can be heard before magistrates in a Magistrates' Court or before a judge and jury in the Crown Court.
28. If a case is heard in a Magistrates' Court in England, Wales and Northern Ireland 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.
29. It is a matter for the courts to determine the level of penalty in each case, from a range of custodial and non-custodial options.

The “Sex Offenders’ Register”

30. There are very limited circumstances in which people convicted of the new offence would be made subject to notification requirements under part 2 of the Sexual Offences Act 2003. Offenders must be aged 18 or above and receive a sentence of two years’ imprisonment or more. This is the maximum sentence available in respect of possession of bestiality and necrophilia images and towards the top of the scale for the other categories of material. Judges would be aware that a certain sentence length would trigger notification requirements and a sentence of two years or more would reflect the concerns of the court about particular aspects of a case, such as the amount and severity of the material or the number of previous convictions.

DPP consent

31. 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.

Frequently Asked Questions

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 in the creation of the material, as well as those who publish it. Very few of these people are based here, 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 also 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.

Whom do I report material to?

Where material is found in hard copy or on a computer it should be reported to the police in the same way as any other criminal offence.

If you believe you have come across illegal pornographic material on a website then it should be reported to the Internet Watch Foundation www.iwf.org.uk to whom reports about potentially obscene material can already be sent. The IWF can determine whether or not that website is hosted in the UK, and whether or not it is potentially showing material in breach of UK legislation

What happens if I download material from the Internet and believe some of it to be illegal?

If you believe you have downloaded any potentially illegal material from the Internet then you should immediately delete it.

I have an erotic photography album/magazine which I bought last year in the UK will it contain illegal images?

If it was legal to publish or distribute this album or magazine here under the Obscene Publications Act 1959 it should not contain material which would come under the new offence.

I still find this law difficult to understand. What other sources of information are available which may help show what pornographic material is legal and what is illegal in the UK?

The Sections (63-67) in the Act give considerable detail about the material which is covered. In addition to specifying that the material must be 1) pornographic and 2) grossly offensive, disgusting or otherwise of an obscene character, there is a list of the extreme, explicit and realistic images which are caught. Information is also available at the Crown Prosecution Service website, www.cps.gov.uk, about material they will consider for prosecution under the Obscene Publications Act 1959 and information at the BBFC website, www.bbfc.org.uk about the sort of sexual material they refuse to classify.

Why is there not a simple list of material which is illegal?

There is a very wide range of pornographic material available and it is not possible to produce a comprehensive list in this way. The legislation itself is already very descriptive in outlining the type of material which will be illegal to possess.

I have heard that the new legislation is aimed at the Bondage, Domination and Sado Masochism (BDSM) community and will criminalise many millions of people. Is this true?

No. The new legislation is not directed at any particular group and will only catch a subset of material which is already illegal to publish or distribute under the Obscene Publications Act 1959 (OPA). BDSM material which is legally available under the OPA and used by the BDSM community should not be caught by the new offence.

How can I get rid of material if I think it is illegal?

If the material is on a computer, you should delete it. If it is in another form, such as paper, video or DVD, you should destroy it and dispose of it responsibly.