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## Response template for public consultation on Obscene Publications Legal Guidance

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1: Do consultees agree or disagree with the guidance that the showing or realistic depiction of sexual activity / pornography which constitutes acts or conduct contrary to the criminal law is (subject to the statutory defences) likely to be obscene?

In an ideal world every child, i.e. a person below the age of 18, when online, in a cinema or public place would only ever be able to view or access material which was appropriate to them as individuals, attuned to their own unique competencies, levels of maturity, understanding and vulnerabilities.

Such a possibility is a long way off and may never materialise. Thus, for the foreseeable future the only practical approach is to work with age groups or bands, recognising that these may not always work entirely satisfactorily, most likely for children around the edges of the delineated groups or bands.

In relation to sexual content the BBFC's bandings seem to us to be reasonable in terms of matching different types of material to age groups or bands.

Thus, sexual content which the BBFC currently classifies or would be likely to classify as 18 or R 18, and sexual content which the BBFC refuses to classify or would be likely to refuse to classify, should not ordinarily be viewable or accessible by persons below 18 whether online or offline.

Those engaged in publishing, distributing, or selling such material should be required by law to do so in ways which conform with such an approach. This rule should be applied irrespective of the medium or point of sale.

All online publishers or providers of services should be under a positive obligation to ensure that illegal content is not accessible via any site or service for which they are responsible. However, where it is likely that the site or service will be accessed by children, the obligation should be heavier. This could be achieved, for example, by requiring sites or services used by children, inter alia, to ensure they avail themselves of an appropriate set of technical tools which can screen for illegal content.

2: Do consultees agree or disagree with the guidance that prosecutors must exercise real caution when dealing with the moral nature of acts not criminalized by law, and that the showing or realistic depiction of sexual activity / pornography which does not constitute acts or conduct contrary to the criminal law is unlikely to be obscene?

Subject to the proceeding comments we would like to stress the importance of the law and its contingent regulations being easily defended on the basis of consistency and age appropriateness. The latter must be linked to the idea of the risk of harm.

It should not be possible to portray the law or regulations as being based on anything other than a widely shared set of values which put the protection of children at their core. Any suggestion that laws or regulations in this area are the product of a particular view of morality, perhaps informed by religious, political or other beliefs, will undermine the legitimacy of such laws and this, in turn, will undermine their authority and acceptability both in the short and longer term.

3: Do consultees agree or disagree with the guidance that prosecutors, when assessing obscenity, should consider:

- a. Whether the activity is consensual;
- b. Whether or not serious harm is caused;
- c. Whether or not it is inextricably linked with other criminality; and
- d. Whether the likely audience is not under 18 or otherwise vulnerable.

The last point, d., is particularly important. Using examples, the guidelines should make clear the sorts of circumstances where it is considered likely children will be present or would be likely to be able to gain access.

The fact that it may be legal for an adult to possess, purchase or consume a particular type of image or video should always be kept separate from the basis or terms on which such images or videos may be made accessible or viewable by others in public places i.e. places where it is reasonable to assume children are likely to be present on a regular basis.

4: Do consultees agree or disagree with the guidance that the showing or realistic depiction of other acts or conduct which are contrary to the criminal law is also capable of being obscene?

“Obscenity” is generally understood as being connected with depictions of sexual acts or material intended primarily for the purpose of sexual arousal or stimulation.

However, there can be no doubt that there is an at least equal or similar level of public revulsion around harms likely to be caused to children by them being able to view or access extremely violent images.

The fact that extremely violent images are not treated in an analogous or similar way to pornography undermines the legitimacy of the limitations placed on sexual material. It suggests an irrational, inconsistent and therefore ultimately untenable preoccupation with sexual matters. This, in turn, raises a suspicion that the attention given to sexual materials is likely to be motivated by hidden or unstated concerns not connected to the risks of harm to children.

5: Do consultees have any further suggestions for guidance to prosecutors in assessing “obscenity” when considering allegations falling under the Obscene Publications Act 1959?

At various points in the debate on the Digital Economy Bill, 2017, speakers alluded to tensions and inconsistencies between the then existing CPS guidelines and different legislative instruments which sought to describe a range of sexual materials whose publication, distribution, sale or possession are or ought to be illegal or restricted in some way. The review of the obscenity guidelines currently being undertaken by the CPS falls some way short of that but, at some point, it will be necessary for the Government to initiate such a review. Perhaps this would be best linked to an examination of the progress made in implementing those clauses of the Digital Economy Act, 2017, which address online access to commercial pornography sites.

We have five concluding observations:

1. In relation to Manga and other types of non-photographic images or videos which depict distinctly childlike characters in sexually abusive settings, the CPS guidelines should strive to make clear what the law is, irrespective of whether or not a prosecutor would be likely to bring charges. In recent (September 2018) correspondence with the IWF the following was stated:

“There has never been any dispute about the law since it was passed in 2009. However, the reason for the delay in the IWF being able to act is because the nature of our work requires us to act before the court process, there is a need for legal precedent to be set in case law so that our assessment of what we deem to be illegal is not open to a large number of challenges. The reason that we took a while to implement the policy was because up until a couple of years ago there was an absence of case law in that area”

One might criticise the IWF for being too timid or risk averse but had there been clearer guidance from the CPS it is probable the IWF would have acted sooner to limit access to this kind of material.

2. In our view the law should say that if a non-photographic image or video of a child would qualify as an indecent image of a child, contrary to POCA, 1978, had it been a real or pseudo image, then it should nevertheless still be regarded and treated in like manner. This will have the effect of requiring the Internet Watch Foundation to beef up their approach to non-photographic images.
3. The possession of any virtual or real artefacts which are intended or are likely to facilitate or simulate sexual interactions with or between a child or children should be declared to be illegal. This would catch and include child sex dolls and sexual behaviour controlled or conducted via a childlike character in a virtual environment. Sexualised virtual contact between an adult and a real child in a virtual environment, for example through sensory feedback devices, are likely to be caught by the existing grooming laws so there may be no need to call for any adjustment to the legal framework in that regard although it may still be useful for the CPS guidelines to clarify this. There is also likely to be a need to clarify how evidence in such cases should be collected and presented in court.
4. Many organizations concerned with child welfare advise parents to engage with, support and supervise their children’s internet usage. They also advise parents to make use of available filtering tools to protect children from exposure to age inappropriate materials. A clearer exposition of what the law expects or requires of parents in relation to matters of this kind might help reinforce or underpin the advice many child welfare organizations offer.

5. It is implicit in the notion of responsible parenting that, at all times, including when a child is at home, parents and carers must take reasonable steps to protect their children from exposure to age inappropriate material likely to cause harm. This suggests there might be circumstances where intentional or negligent failure to do so could constitute a criminal offence or otherwise attract other forms of child protection interventions. That being the case it would be helpful if the CPS and other authorities could issue advice making that clear.

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