



Criminal Law Branch

TIGHTENING THE LAW ON THE POSSESSION OF NON PHOTOGRAPHIC VISUAL DEPICTIONS OF CHILD SEXUAL ABUSE – A PUBLIC CONSULTATION

On April 2nd the Home Office launched a UK-wide public consultation to consider the issues raised by gaps in the law on the possession of cartoons, drawings, computer generated images and other visual material depicting the sexual abuse of children. This consultation is being run in conjunction with the Northern Ireland Office and the Scottish Executive. The consultation puts forward 3 possible options to address any difficulties: amending existing legislation; creating a new free standing offence and leaving the law as it stands.

A paper copy of the consultation document is available on request by contacting Criminal Law Branch 02890 527264, by email at CJPB.Public@nio.x.gsi.gov.uk or by textphone 02890 527668. Copies of the document can be made available in other formats on request. If there is an alternative format which would assist your participation please let us know and we will do our best to assist you.

Responses can be made in writing to Criminal Law Branch, Criminal Justice Policy Division, Massey House, Belfast BT4 3SX or by email to CJPB.Public@nio.x.gsi.gov.uk

The consultation period will extend until June 22nd 2007. Further information, including details of how to respond are contained within the consultation document.

The Northern Ireland Office is committed to publishing a list of those organisations that comment on these proposals and to making available, to anyone who asks for it, a copy of the comments and of our response to them. If you do not wish your comments to be published in this way, you must make this clear in any response you submit.

Respondents should also be aware that the NIO's obligations under the Freedom of Information Act may require that any responses, not subject to specific exemptions in the Act, may be disclosed to other parties on request.

As a public authority under Section 75 of the Northern Ireland Act 1998, the Northern Ireland Office, in carrying out all its functions, powers and duties in Northern Ireland, is required to have due regard to the need to promote equality of opportunity. The legislation requires public authorities to identify whether a policy has a differential impact upon the relevant groups; the nature and extent of that impact; and whether such impact is justifiable. This consultation is conducted in accordance with the requirements of the NIO's Equality Scheme.

If you have any questions about the consultation process you should contact the Northern Ireland Office's consultation coordinator whose contact details are:

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SCOTTISH EXECUTIVE



Home Office



Northern
Ireland
Office

CONSULTATION ON POSSESSION OF NON-PHOTOGRAPHIC VISUAL DEPICTIONS OF CHILD SEXUAL ABUSE

FOREWORD

By Vernon Coaker MP, Parliamentary Under Secretary of State at the Home Office; David Hanson MP, Minister of State at the Northern Ireland Office; and Cathy Jamieson MSP, Scottish Executive Minister for Justice

Developments in communications technologies in the last ten years have been rapid and exciting, resulting in enhanced opportunities for learning and social interactions. There are also more negative aspects to these developments which raise challenges for society. It is important, in this changing environment, that the law is responsive and remains fully equipped to protect the public, and, in particular, the most vulnerable members of society.

The ease with which images can be circulated on the Internet or between mobile phones, or can be enhanced, changed or created by means of computer software has increased concern about the availability of images of child sexual abuse. We have stringent laws to cover the making, distribution and possession of indecent photographs or pseudo-photographs of children under 18 but, as technology develops, a gap is emerging in respect of realistic fantasy images of child sexual abuse. Concerns have been expressed by the police and children's welfare organisations about the increasing availability of non-photographic images.

Technology has advanced to the point that photographs of real children being abused can be manipulated into cartoons or other depictions. Possession of these images is not caught under existing legislation because they do not appear to be photographs, nor can the police forfeit them and take them out of circulation. But nevertheless they are often graphic and explicit depictions of the sexual abuse of children. There is concern that such material reinforces inappropriate feelings towards children and that its circulation and possession should be prohibited. We support that view.

This consultation paper sets out options on how to respond to these developments and concerns, including the creation of a new offence of possession of non-photographic visual depictions of child sexual abuse. We would welcome your views on the proposals we have put forward and on any other aspects of the debate.



Vernon Coaker

Vernon Coaker MP



David Hanson

David Hanson MP



Cathy Jamieson

Cathy Jamieson MSP

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EXECUTIVE SUMMARY

This consultation paper seeks views on the issues in respect of cartoons, drawings, computer generated images and other non-photographic representations of child sexual abuse. The document also seeks views on options to make illegal the possession of these images.

The police and children's welfare organisations have raised concerns that the market for these fantasy images is growing and that the images themselves are at present legal to possess. Currently, making, taking, distributing and possessing indecent photographs or pseudo photographs of children is prohibited under the Protection of Children Act 1978, the Criminal Justice Act 1988, the Protection of Children (Northern Ireland) Order 1978, the Criminal Justice (Evidence, Etc)(Northern Ireland) Order 1988 and the Civic Government (Scotland) Act 1982. However, the simple possession of non-photographic images of child sexual abuse, for example, computer generated images, cartoons, drawings, etc, is not covered under current law.

We are unaware of any specific research into whether there is a link between accessing these fantasy images of child sexual abuse and the commission of offences against children, but it is felt by police and children's welfare organisations that the possession and circulation of these images serves to legitimize and reinforce highly inappropriate views about children.

This paper sets out options to address these concerns, including the creation of a new stand-alone offence of the possession of these images. The proposed new offence would cover pornographic images

depicting child sexual abuse. It is not our intention to capture genuine works of art. We would expect the threshold content of the images to include non-penetrative sexual activity between adults and children, penetrative sexual activity between children, penetrative sexual activity between children and adults, sadism or bestiality.

We also wish to ensure that items of genuine historical interest are not captured under any new offence and we are consulting on how best to ensure possession of these items is covered by legal defences.

It is likely that the number of prosecutions under the proposed possession offence would be low. The proposed changes would allow the images to be forfeited by the police, thus taking the images away from the offender and out of public circulation.

Unless individual respondents to this consultation specifically indicate that they wish their response to be treated in confidence, their name and the nature of their response may be included in any published summary of responses. Respondents should also be aware that obligations under the Freedom of Information Acts may require that any responses, not subject to specific exemptions in the Act, may be disclosed to other parties on request.

The following contact points refer to the three jurisdictions. You are invited to send your views by 22nd June 2007 to:

E-mail: CJPB.Public@nio.x.gsi.gov.uk
Tel: 028 90 527524
Text Phone: 028 90 527668

For England and Wales

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Non-Photographic Visual Depictions of
Child Sexual Abuse
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London SW1P 4DF

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For **additional hard** copies please contact us at the above address. Electronic copies of this document are also available at: <http://www.homeoffice.gov.uk/about-us/haveyoursay/current-consultations/>

You should also contact the Criminal Law Policy Unit should you require a copy of this consultation in any other format, e.g. Large Font or Audio.

A summary of the responses received will be published within 3 months of the closing date for this consultation, and will be made available on our website.

For Northern Ireland

Consultation On The Possession of
Non-Photographic Visual Depictions of
Child Sexual Abuse
Criminal Justice Law Branch
Northern Ireland Office
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For Scotland

The Scottish Parliament is able to legislate separately to create any new child sexual abuse images offences in Scotland because these are devolved issues. If you respond on behalf of a UK-wide organisation, a copy of your response will be sent to the Scottish Executive. If you live in Scotland or your organisation is based in Scotland, please send your views to:

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Photographic Visual Depictions of Child
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INTRODUCTION

The purpose of this consultation paper is to consider the issues raised by computer generated images (CGIs), animated images, cartoons, drawings, and other visual material depicting the sexual abuse of children not covered elsewhere by statute and to examine any shortcomings in the current criminal law and how they should be addressed. The consultation also seeks views on a proposal to create a new offence of possession of these images of child sexual abuse.

This paper seeks views in particular on the impact of such an offence on protection of children, and also on any impact on artistic freedom, and historical and research works.

We welcome responses to the questions in the consultation paper and any contributions or suggestions which you may have.

BACKGROUND

The Criminal Law Sub Group of the Home Secretary's Task Force on Child Protection on the Internet has been considering for some time the issues raised by computer generated images (CGIs), drawings and cartoons which show graphic depictions of sexual abuse of children or child-like characters. Representatives of children's welfare organisations, the police and others on this multi-agency Group have made a strong case for action to be taken. This document outlines options to address the issue of these images including

the creation of a new offence of the possession of cartoons, drawings, computer generated images and other material which depicts child sexual abuse.

In England and Wales, the Protection of Children Act 1978 ("POCA 1978") (as amended) covers the making, distribution or showing of indecent photographs (this includes video images) or pseudo-photographs of children: indecency is left to the courts to determine.

The law was extended by Section 160 of the Criminal Justice Act 1988 (the "1988 Act") to cover simple possession of an indecent photograph or pseudo-photograph of a child. The Criminal Justice and Public Order Act 1994 amended POCA 1978 and the 1988 Act to include pseudo-photographs within the definition of the unlawful material. The Sexual Offences Act 2003 raised the age of the child from under 16 to under 18.

A pseudo-photograph is defined as an image, whether made by computer graphics or otherwise, which appears to be a photograph. So, under current law, if an indecent image of a child created by CGI, or for that matter a drawing or cartoon, looks realistic enough to appear to be a photograph, despite not actually depicting a real child or a real event, possession could still be covered by Section 160 of the 1988 Act.

In Scotland, similar offences are contained in sections 52 and 52A of the 1982 Act. The Criminal Justice and Public Order Act 1994 also amended this Act to include pseudo-photographs within the definition of the unlawful material, and the

Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 raised the age of the child from under 16 to under 18.

By and large the legislation in England and Wales extends to Northern Ireland; the Protection of Children (Northern Ireland) Order 1978 and the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988 are equivalent to POCA 1978 and the 1988 Act.

Alongside the 1988 Act, and POCA 1978, publication, distribution or supply of some of the cartoons, CGIs, or drawings that we are considering may be an offence under the Obscene Publications Acts (the “OPA”) or section 51 of 1982 Act. Possession for gain is covered by the Obscene Publications Act 1964 but the simple act of possession is not covered. The Scottish offence includes the having or keeping of material, but only with a view to its eventual sale or distribution.

Annex B sets out the current legislation in more detail, including the defences available for each offence.

It is the simple possession of images that fall outside the categories or definitions within Section 160 of the 1988 Act, POCA 1978, and the 1982 Act that cannot be captured under current law.

From discussions with the police, it has become clear that cartoons, CGIs, or drawings which graphically depict children in a sexually abusive way are generally found alongside indecent photographs of children, possession of which is an offence and can result in a prosecution. However, we are aware of a case where the police

were unable to prosecute because the suspect was only found in possession of drawings and cartoons: no illegal photographs or pseudo-photographs were discovered. As it is currently legal to possess this material, the police must return it to the person in possession of it regardless of what it portrays. So it was not possible for the police either to prosecute this person under current law or to seize and forfeit the images.

Moreover, there is increasing concern among child welfare experts and the police that the problem will increase as technology becomes more sophisticated. There is already an indication that websites featuring animated images depicting child sexual abuse are on the increase. These are often hosted abroad, beyond our jurisdiction. As technology advances a gap in the law is starting to emerge. The Government feels this should be addressed.

Concern about the material

It is the case that cartoons, drawings and material created entirely by manipulation of computer software do not harm real children in the same way as taking indecent photographs of children, which are currently covered by legislation. The creation of a simple possession offence in respect of fantasy material is a serious step. Nevertheless this material is causing increasing concern both within the UK and internationally (see below).

The police, children’s charities and others represented on the Criminal Law Sub Group of the Home Secretary’s Task Force on Child Protection on the Internet are

concerned that the fantasy images themselves fuel abuse of real children by reinforcing potential abusers' inappropriate feelings towards children.

In addition, these images can be used to help groom¹ victims. Whilst the use of these images for grooming purposes may result in a prosecution under the Sexual Offences Act 2003, making their possession an offence would enable these images to be taken out of circulation and make them unavailable for use as a grooming tool.

The material causing concern depicts serious child sexual abuse, going beyond the indecency threshold for photographs which is appropriate where real children are, or appear to be, involved. The kind of threshold under consideration for fantasy material is discussed further below.

Manipulation of “real” images

Technological advances mean that current software can allow a user to photograph an image (or download one onto a computer) and manipulate it to look like a drawing, a tracing, a painting or cartoon. It is possible to manipulate a real photograph (or video recording) of real child abuse into a cartoon or drawing format, be it still or animated. In that scenario the image/s would appear to be merely a fantasy cartoon or drawing, etc, but would in fact be a distinct record of an actual abusive and illegal act. Yet under current legislation, while possession of the original images of child sexual abuse would be illegal, it would not be illegal to make and possess these cartoon or “fantasy style” images, and they

would not be subject to forfeiture by the police.

It may, in some circumstances, be possible for the police to re-engineer the resultant “fantasy style” image to discover the original indecent photograph. In this case a prosecution under POCA 1978 could follow. However, if the process was unavailable and the original indecent photograph, or convertible data, remained undiscovered, i.e. if the “fantasy style” image had been forwarded on or simply printed as a hard copy, then it would not be possible to prosecute. In addition, the images would not be subject to forfeiture and would remain in circulation.

International Concerns

Against this background, there is evidence that international concern about these images is growing. Ireland, for example, has outlawed such images portraying child abuse. We understand that Norway has outlawed all depictions of child abuse. In November 2006, the Virtual Global Taskforce² (VGT) canvassed its members to find out how each jurisdiction covered non - photographic images and to identify any emerging difficulties. Canada, the USA and Australia all have legislation covering non - photographic images. The existence of Japanese websites containing fantasy child sexual abuse was identified as a concern and subject to reports to law enforcement in countries where it is illegal. The VGT is continuing to monitor developments across its partners in this area of the law and to work with the Home Secretary's Task Force on Child Protection on the Internet on this.

¹This is a term used to describe the process of preparing children for sexual abuse.

² The VGT consists of the Child Exploitation and Online Child Protection Centre in the UK, the Australian High Tech Crime Centre, the Royal Canadian Mounted Police and the US Department of Homeland Security and Interpol.

Why Act ?

We are not aware of any specific research carried out to ascertain whether there is a direct link between possession of these images and an increased risk of sexual offending against children. However, in discussion with the police and others involved in the protection of children, there is concern that these images fuel the abuse of real children by reinforcing potential abusers' inappropriate feelings towards children. Against this background, the interest in websites featuring animated images of child sexual abuse appears to be growing. These images, particularly as some are in a cartoon format, could easily be obtained for use to help groom victims.

Failure to act would allow these images to remain in circulation where they could continue to be used to groom children and to perpetuate inappropriate feelings towards society's most vulnerable members.

Q: In the absence of research into the effects of these images on offenders and the general public, do you think the proposal to make it illegal to possess the material described in this consultation is nevertheless justified? Please feel free to explain the reasons behind your decision here.

Options

The options are:

Option one - Extend the definitions in the Protection of Children Act 1978, Protection of Children (NI) Order 1978

and the Civic Government (Scotland) Act 1982 which refer to indecent photographs and pseudo photographs of a child under 18 to include for example "any visual representation", in order to cover cartoons, drawings, CGIs, etc.

Option two - Create new free-standing offences of possession of any non-photographic visual depiction/representation of child sexual abuse.

Option three - Do nothing.

We have considered all three options.

Option one would broaden the definitions in POCA 1978 (which also applies to the 1988 Act), the 1978 NI Order and the 1982 Act which refer to indecent photographs and pseudo photographs of a child under 18, to include for example "any visual representation". The advantage would be that we would avoid a multiplicity of offences. However, criminalisation of the possession of cartoons, drawings and computer generated images (CGI) of child sexual abuse would mark a significant departure from the current approach to indecent photographs of children, as set out in POCA 1978, the 1978 NI Order and the 1982 Act, where photographs are evidence of the actual abuse of a real child. A change to the definitions offered at option one would be a significant shift in the thinking behind the existing legislation which was designed to protect real children from real abuse. There is a low content threshold of "indecent" which has been interpreted by the courts to mean sexual posing. Arguably this is too low a threshold for drawings or cartoons and including them within POCA 1978, the 1978 NI

Order and the 1982 Act, which is well known and understood by the prosecuting authorities, could diminish the effectiveness of the current offences. Such a significant change could also cause confusion, for example, for those in the Internet industry who come across indecent photographs of children in the course of their work. In addition, the penalties available under the existing legislation would arguably be too severe for possession of the material in question (see section on penalties below).

Option two (our preferred option) would create new stand-alone offences for England and Wales, Northern Ireland and Scotland of possession of any non-photographic visual representation/depiction of child sexual abuse. There would be a higher threshold than indecency. A new offence would equip the criminal law to deal with these images and would address the concerns expressed by the police and children's charities. We expect that this proposed offence would not be used often on its own: collectors of material of this kind almost always also have indecent photographs of children. Criminalising possession would allow the police to forfeit³ the images and thereby take them out of circulation.

Option three would not address the concerns which have been raised about this material. The images, if discovered, would not be subject to forfeiture provisions and would have to be returned to the owner. As discussed above, the availability of, and interest in, these images appears to be growing and a failure to act now may lead to an increased market for such images in the future.

Q: Which of the options do you prefer?

Q: Why do you think this option is the best?

Q: Do you have another suggestion that you would like to submit ?

Defences

We consider that the defences to any new possession offence should mirror those in respect of possession of indecent photographs of children that is, it will be a defence for the defendant to show that they had a legitimate reason for possession of the material, or that they had not seen it, did not know or have cause to suspect that it was proscribed material, or that it was sent to them unsolicited. For example, those involved in genuine research work or in holding collections for national historical archives, would be covered by this legitimate reason defence. Records of abuse taken in the medical care and treatment of children or in the collection of forensic medical evidence would also be covered by the defence, as would access to images by clinicians treating adult patients who have committed or are at risk of committing child abuse. We intend that those in the Internet industry who necessarily come into contact with this material in the course of their work would also be covered by this defence.

Similarly, there is no intention to criminalise those who accidentally stumble across this material or who have the material sent to them without their knowledge or consent.

³In the Police & Justice Act 2006, the Government strengthened the laws on forfeiture of indecent photographs and pseudo-photographs of children in England and Wales, and Northern Ireland allowing the police to forfeit all such images following any lawful seizure.

Q: Do you think the defences will adequately cover all those instances that need to be excluded from criminalisation, for example: for the visual reconstruction of an offence for risk assessment purposes, legitimate research, etc ?

Material

We intend any new offence to encompass non –photographic visual representations of child sexual abuse, other than those already covered by law, i.e. indecent photographs and pseudo-photographs of children. The law should cover CGIs, cartoons and drawings. This wide category could also cover sculptures and other objects but the threshold levels proposed below should help to ensure that works of art and other material which might be regarded as being in the public good are not caught.

Q: Do you think that it is appropriate that a new offence should cover the sort of material described ?

Q: Do you feel there is any other material that needs to be captured ?

Pornography (First threshold)

We intend any new offence to apply only to material that is pornographic. As set out earlier (see defences) it is not the Government's intention to criminalise legitimate works of art, literature or science. Neither is it the intention to capture historically important articles or images used for legitimate scientific reasons or assessment: for example, images used in the visual depiction or recreation of an

offence against a child to be used in assessing an offender's level of risk. Nor is it the intention to criminalise the records of abuse necessary to provide medical care and treatment of children, or in the treatment of adult abusers, or the collection of forensic medical evidence.

Content (Second threshold)

After the first pornography threshold, we would expect the images that could fall within any new offence to depict the sexual abuse of children. We believe that for fantasy or unreal images, such as cartoons, drawings or CGIs, the threshold of indecency currently used in respect of photographs of real children for the offences in POCA 1978, the 1978 NI Order and the 1982 Act would be too low.

We would therefore expect the threshold appropriate to content of these images to cover non-penetrative sexual activity between adults and children, penetrative sexual activity involving a child or children, or between children and adults, sadism or bestiality involving a child. The threshold is based largely on the scale of seriousness in the Court of Appeal Guidelines (*R v Oliver and others* [2003] 2 Cr.App.R.(S) 15) published by the Sentencing Guidelines Council (see Annex F) which is currently under review.

Q: Do you feel that the thresholds we have suggested are workable and will capture images at the right level of seriousness?

Penalties

There is a need to provide an appropriate maximum sentence that balances the nature of the content of the images against the fact that they do not depict actual abuse of a real victim. Currently simple possession of indecent photographs or pseudo-photographs of children under Section 160 of the Criminal Justice Act 1988 carries a five year maximum prison sentence. Making, taking, distributing or showing indecent photographs or pseudo-photographs of children is prohibited under POCA 1978 and carries a ten year maximum sentence.

It is proposed that a person convicted of the new possession offence will be liable to a maximum of three years imprisonment, or to an unlimited fine, or both. The offence will be an either way offence and if convicted on summary conviction the maximum penalty will be six months, or a fine up to the statutory maximum (currently £5,000), or both.

Three years will place the offence in the sentencing framework below the offence of possession of indecent photograph of a child (section 160 of the 1988 Act) which has a maximum penalty of five years' imprisonment or a fine or both.

We expect prosecutions for simple possession of these images alone to be extremely low, since, as stated above, the police generally find these images alongside indecent photographs or pseudo-photographs of children. Most prosecutions would run alongside prosecutions for other offences relating to child pornography. One of the benefits of

the creation of a new possession offence would be to give investigators the power to forfeit these images.

Q: Do you believe the maximum penalty of 3 years imprisonment for possession is appropriate?

Human Rights Consideration

The proposal to create a new offence outlined in this paper will have some impact on an individual's freedom to create or possess certain images. However, the content of the images targeted in this consultation covers depictions of child sexual abuse only. Additionally, the images must be pornographic. It is not the intention to criminalise the possession of works of art, historical artefacts or in any respect to hamper or limit police investigations or medical research, for example, the legitimate visual recreations of offences for investigative or risk evaluation purposes, or the medical care and treatment of children, or the collection of medical forensic evidence, or in the treatment of adult abusers. Our proposals for a defence of legitimate reason for possession of these images are intended to ensure that possession in these areas is protected.

We have carefully considered our obligations under the European Convention on Human Rights and our view is that our proposals are compatible with Article 10 (freedom of expression) and Article 8 (private life).

ANNEX A

Consultation Questions

Why act ?

In the absence of research into the effects of these images on offenders and the general public, do you think the proposal to make it illegal to possess the material described in this consultation is nevertheless justified? Please feel free to explain the reasons behind your decision here.

Options

Which of the options do you prefer?

Why do you think this option is the best?

Do you have another suggestion that you would like to submit ?

Defences

Do you think the defences will adequately cover all those instances that need to be excluded from criminalisation, for example: for the visual reconstruction of an offence for risk assessment purposes, legitimate research, etc ?

Material

Do you think that it is appropriate that a new offence should cover the sort of material described?

Do you feel there is any other material that needs to be captured ?

Content

Do you feel that the thresholds we have suggested are workable and will capture images at the right level of seriousness?

Penalties

Do you believe the maximum penalty of three years' imprisonment for possession is appropriate?

ANNEX B

Current Legislation

The Law in England and Wales

The Protection of Children Act 1978 (“POCA 1978”)

It is an offence under the Protection of Children Act 1978 for a person

- a) to take, or permit to be taken, or to make any indecent photograph or pseudo-photograph of a child; or
- b) to distribute or show such indecent photographs or pseudo-photographs; or
- c) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others; or
- d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs, or intends to do so.

The offences carry a ten year maximum prison sentence.

Defences:

General

It is a defence under the Act if a person is charged with b) or c) if a he proves that he has a legitimate reason for showing or distributing the images or having them in his possession. It is also a defence if he proves he had not seen the images and did not know, nor had any cause to suspect them to be indecent.

Defences:

Marriage and other relationships.

There are additional defences to the offences contained within POCA 1978, covering images taken within marriage, a civil partnership or whilst having lived together in an enduring family relationship.

Defences:

Exceptions for criminal proceedings, investigations

There is also a separate defence to take, permit to be taken, or make (a) if it is proven that:

It was necessary for him to make the photograph or pseudo-photograph for the purposes of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings, in any part of the world.

At the time of the offence charged he was a member of the Security Service, and it was necessary for him to make the photograph or pseudo-photograph for the exercise of any functions of the Service, or

At the time of the offence charged he was a member of GCHQ, and it was necessary for him to make the photograph or pseudo-photograph for the exercise of any functions of GCHQ.

The Criminal Justice Act 1988 (as amended)

Section 160 of the Criminal Justice Act 1988 makes it an offence to possess an indecent photograph or pseudo-photograph of a child. The offence attracts a maximum prison term of five years.

Defences:

If a person is charged with possession of these images it is a defence if it is proved,

- a) that he had a legitimate reason for having the photograph or pseudo-photograph in his possession; or
- b) that he had not himself seen the photograph or pseudo-photograph and did not know, nor had any cause to suspect it to be indecent; or
- c) that the photograph or pseudo-photograph was sent to him without any prior request made by him or on his behalf and he did not keep it for an unreasonable time.

Marriage and other relationships.

There are additional defences to the offences contained within the 1988 Act, covering images taken within marriage, a civil partnership or whilst having lived together in an enduring family relationship.

Obscene Publications Acts 1959 and 1964

The Obscene Publications Act 1959 (the “1959 Act”), as amended, is the main control on published works, including material published on the Internet. The Act says that an article is deemed to be obscene if its effect, when taken as a whole, is such as to tend to deprave and corrupt persons who are likely to read, see or hear it.

Publication of an obscene article whether for gain or not, or having an obscene article for publication for gain attracts a maximum sentence of three years’ imprisonment

The Obscene Publications Act 1964 added the offence of possession for gain to the 1959 Act and attracted the same maximum sentence.

Defences:

There is a public good defence which is intended to ensure that genuine works of art, science, literature or learning are not penalised.

The Law in Northern Ireland

In NI the legislation is the same as England and Wales except for the following references:

The Protection of Children (NI) Order 1978 is equivalent to The Protection of Children Act 1978;

The Obscene Publications Act 1957 is equivalent to The Obscene Publications Act 1959 and 1964; and

The Criminal Justice (Evidence, Etc) (Northern Ireland) Order 1988 is equivalent to The Criminal Justice Act 1988

The Law in Scotland

Section 52 of the Civic Government (Scotland) Act 1982 makes it an offence to take, or permit to be taken, distribute or show, possess with a view to its being distributed or shown by himself or others an indecent photograph or pseudo-photograph of a child, or to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such an indecent photograph or pseudo-photograph, or intends to do so. The offence attracts a maximum ten years' imprisonment.

Section 52A of the Act covers simple possession of indecent photographs or pseudo-photographs of children and attracts a maximum five years' imprisonment.

Section 52B provides a number of exceptions for photographs of 16 and 17 year olds where the accused and the child were married or civil partners, or partners in an established relationship, and where the child consented.

If a person is charged with these offences it is a defence if it is proved,

- d) that he had a legitimate reason for having, distributing or showing the photograph or pseudo-photograph in his possession; or
- e) that he had not himself seen the photograph or pseudo-photograph and did not know, nor had any cause to suspect, it to be indecent; or
- f) (for section 52A only) that the photograph or pseudo-photograph was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time.

⁴ The Government is proposing to increase the maximum penalty to five years' imprisonment in measures which it is bringing forward in the Criminal Justice Bill.

Section 51 of the Act deals with obscene material. Under the Act it is an offence to display obscene material in a public place or where it can be seen publicly, or to publish, sell or distribute, or with a view to its eventual sale, make, print have or keep any obscene material. The offence is subject to a three year maximum sentence.

It is a defence for the accused to prove that he had used all due diligence to avoid committing the offence.

ANNEX C

Partial Regulatory Impact Assessment for the Consultation: The Possession of Non-Photographic Visual Depictions of Child Sexual Abuse

Purpose and intended effect

A public consultation on a new offence of possession of non-photographic visual depictions of child sexual abuse.

Objective

To gauge the views of the public on these images and consider whether legislation is needed to criminalise their possession.

Background

Under current law, in England and Wales the Protection of Children Act 1978 (POCA 1978) (as amended) criminalises the making, distribution or showing of indecent photographs or pseudo-photographs of children (this includes video images): indecency is left to the courts to determine. The Sexual Offences Act 2003 raised the age of the child from under 16 to under 18.

The law was extended by Section 160 of the Criminal Justice Act 1988 (The “1988 Act”) to cover simple possession of an indecent photograph or pseudo-photograph of a child. The Criminal Justice and Public Order Act 1994 amended POCA 1978 and the 1988 Act to include pseudo-photographs within the definition of the unlawful material. A pseudo-photograph is defined as an image, whether made by computer graphics or otherwise which *appears* to be a photograph. So, under current law, if an indecent image of a child created as a computer generated image (“CGI”), or for that matter a drawing or cartoon, looks realistic enough to appear to be a photograph, despite not actually depicting a real child or a real event, possession would still be covered by Section 160.

Alongside the 1988 Act, and the POCA 1978, *publication* or *supply* of some of the cartoons, CGIs, or drawings that we are looking at in the consultation may be an offence under the Obscene Publications Act 1959. Possession for gain is covered by the Obscene Publications Act 1964 but the simple act of possession is not covered.

Similar provision for Scotland is contained in the Civic Government (Scotland) Act 1982.

The possession of images that fall outside the categories or definitions within POCA 1978 (which definition applies also to the 1988 Act) is not captured under current law. The consultation would ascertain the public’s view on these images and whether their possession should be an offence.

Rationale for Government Intervention

The Criminal Law Sub-Group of the Home Secretary's Task Force on Child Protection on the Internet has been considering the issues raised by CGIs, cartoons and drawings of child sexual abuse. Representatives of children's welfare organisations and the police have expressed concern that there is currently no action which can be taken in respect of simple possession of these images.

As possession of these images is not illegal, if they are discovered by police, either in isolation or alongside indecent photographs or pseudo-photographs of children, they cannot be forfeited.

The Government wishes to gauge public opinion on these issues generally, assess any concern over the present coverage in the law and address it as necessary.

Options

Option 1: Amend the Protection of Children Act 1978, the Criminal Justice Act 1988, and the Civic Government (Scotland) Act 1982

Option 2: Create new possession offences

Option 3: Do nothing

Costs and benefits

**Option 1 Amend the Protection of Children Act 1978, the Criminal Justice Act 1988
Civic Government (Scotland) Act 1982**

Amending the definition in POCA 1978 (which also applies to the offence under the 1988 Act) and the Scottish 1982 Act which refer to indecent photographs or pseudo-photographs of a child under the age of 18 to include for example "any visual representation" could cause difficulties in view of the low threshold of "indecent". This could be considered too low a threshold for CGIs, drawings, cartoons, etc, given that the existing offences were designed to protect real children from real abuse.

If this option were to be accepted we expect the number of prosecutions to be low, as the police are unlikely to find such images unless investigating more serious offences. However, the amount of material criminalised would be higher than option 2 and the link with real images may be less strong. So the impact of the change on prosecutions could be marginally higher than for option 2.

Option 2 Create new possession offences

Option 2 would fill the gap in the law, making possession of these images illegal and subject to forfeiture procedures, without adversely affecting the current definition in POCA 1978 and the Scottish 1982 Act.

The number of additional stand-alone prosecutions for a new offence of possession of these images is likely to be very low. Such images are generally found alongside indecent photographs or pseudo photographs. It is difficult therefore to quantify new prosecutions at such a low level but, following initial discussions with the prosecuting authorities, we estimate new prosecutions to be negligible, possibly 0 – 1 a year. We will discuss estimates further, in the light of responses received during the consultation period.

Option 3 Do nothing

If we pursue this option and leave the law unchanged there would be no financial costs. However, to do nothing involves the risk of leaving a possible inadequacy in the law allowing the possession of drawings, cartoons, CGIs, etc, depicting child sexual abuse to continue. There is evidence to suggest that possession of these images could be an increasing problem, and any weakness in the law will be further exploited as technology develops.

Equality and fairness

The Government believes that the consultation and the proposed offences would not adversely impact on any section of society. This will be further tested in the consultation process.

Enforcement and sanctions

The proposals in Options 1 and 2 would be enforced by criminal prosecutions involving the police, the Crown Prosecution Service (the Crown Office and Procurator Fiscal Service in Scotland) and the courts. The maximum sentence at Option 1 would be 5 years imprisonment in line with the current maximum for possession of indecent photographs or pseudo-photographs of children. Our view is that the maximum penalty for the proposed new possession offence at Option 2 would be 3 years.

Race and Equality Impact Assessment

We do not believe that this consultation will have any adverse effect on race equality. This will be tested further during the consultation process to which this partial RIA relates.

Effect on Business

Most obscene cartoon and CGI sites are hosted in the US, Japan and South Korea. We do not predict any major impact on businesses in the UK other than a possible effect on internet service providers who will need to have regard to any new law. We will continue to look at this area throughout the consultation process.

Summary and Recommendation

This partial RIA accompanies a consultation on new offences of possession of non-photographic visual depictions of child sexual abuse. The consultation includes a proposal to create a new offence making it illegal to possess such images. The consultation is intended to gauge public opinion on these images and will be used to determine the best way forward to strengthen the law in relation to these images.

ANNEX D

Consultation Code of Practice

This consultation follows the Cabinet Office Code of Practice on Consultation - the criteria for which are set below.

The six consultation criteria

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The full code of practice is available at:
www.cabinet-office.gov.uk/regulation/Consultation

Consultation Coordinator

If you have any complaints or comments specifically about the consultation process only, you should contact the Home Office consultation co-ordinator Christopher Brain by email at:

Christopher.Brain2@homeoffice.gsi.gov.uk

Alternatively, you may wish to write to:

Christopher Brain
Consultation Co-ordinator
Performance and Delivery Unit
Home Office
3rd Floor Seacole
2 Marsham Street
London
SW1P 4DF

ANNEX E

Responses: Confidentiality & Disclaimer

The information you send us may be passed to colleagues within the Home Office, the UK Government, the Scottish Executive or related agencies.

Furthermore, information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Freedom of Information (Scotland) Act 2002 (FOISA), the Data Protection Act 1998 (DPA), the Environmental Information Regulations 2004 and the Environmental Information (Scotland) Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under FOIA and FOISA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Home Office, Northern Ireland Office or Scottish Executive.

Please ensure that your response is marked clearly if you wish your response and name to be kept confidential.

Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.

The Home Office, Northern Ireland Office and the Scottish Executive will process your personal data in accordance with the DPA - in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

ANNEX F

Extract from the Court of Appeal Guidelines issued by the Sentencing Guidelines Council *

Making and distributing indecent photographs of a child

Relating to the seriousness of materials.

R v Oliver and others [2003] 2 Cr.App.R.(S) 15

As part of the draft guideline being considered in relation to offences under the Sexual Offences Act 2003, it is possible that the definitions within each of the sentencing levels (below) will change.

The Court considered advice from the Sentencing Advisory Panel.

The guideline provides for the seriousness of materials to be analysed using five levels of activity:

1. Images depicting erotic posing with no sexual activity.
2. Sexual activity between children or solo masturbation by a child.
3. Non-penetrative sexual activity between adults and children.
4. Penetrative sexual activity between children and adults.
5. Sadism or bestiality.

Seriousness increases with the offender's proximity to and responsibility for the original abuse.

** The Sentencing Guidelines Council has issued draft guidelines on sexual offences. When the final version of the Council's guidelines is published the levels above may be subject to change.*

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