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Home Office Consultation: On the possession of extreme pornographic material.

The response of the British Board of Film Classification

1. The British Board of Film Classification (BBFC) shares the Home Office view that the easy availability of extreme pornographic material which features a lack of consent or serious violence (or both) is a cause for real concern. As the consultation paper notes, the BBFC's classification guidelines do not allow on film or video/DVD, even at the specially restricted 'R18' category, the type of material the proposed new offence would be designed to catch. The BBFC's refusal to pass such material is in part in recognition of the fact that it is likely to fall foul of the Obscene Publications Acts 1959 & 1964 (OPA); and in part founded on a judgement that it may cause harm to potential viewers or, through their behaviour, to society, a factor to which BBFC is required to have special regard under the Video Recordings Act 1984 (VRA). The BBFC is therefore keen to offer support and cooperation in the moves to address the availability and use of extreme pornographic material in circumstances which are not currently the subject of effective regulation or caught by existing legislation.

2. We are grateful for the consultation paper's acknowledgment of the BBFC's role, and also for the attempts to ensure that the proposals do not cut across our classification practice.

The proposals in detail

3. Although the BBFC fully supports the intent behind the proposals, this is an area where it is not straightforward to formulate and operationalise the necessary definitions. There is a danger that the precise proposals as outlined may have significant unintended consequences, including in relation to works classified by the BBFC. Issues arise in relation to the definitions, and their interpretation; the defences available in cases of accidental or legitimate possession; and the possible 'knock on' effects with regard to the BBFC's own strict line on sexual violence.

Paragraphs 4 – 15 below consider the definitional issues. Paragraphs 16 -19 note the significance of the fact that interpretation would not be for a single regulatory body, but instead would be subject to geographical variation. Paragraphs 20 – 24 propose some ways in which these

difficulties might be addressed. Paragraph 25 deals with the need to ensure that the BBFC's own practice does not fall foul of the proposed offence. Finally, this response touches on some wider issues.

Definitions

4. The consultation paper attempts to define the material which is of concern in a manner which on the one hand offers clarity but on the other acknowledges that context is vitally important. Although this line is negotiated with care, the whole business of crafting definitions in this area is fraught with difficulty. It is worth noting that the Protection of Children Act 1978, which is cited as a precedent for the legislation, does not attempt to define what constitutes an 'indecent image of a child' but rather leaves that up to the court to decide. A few of the difficulties relating to framing the definitions are discussed below:

5. *"The intention is that any new offence would apply only to pornographic material. In other words, material that has been solely or primarily produced for the purpose of sexual arousal."* [p11 para 37]

However this test is framed, it will require a judgement to be made regarding the intent of the person(s) responsible for producing the image(s) rather than a judgement on the likely effect of the image(s). What would be the status of material produced for a purpose other than sexual arousal but which lends itself to such a purpose when placed in a different context (eg a collection of stills or clips taken from rape scenes from a number of classified video works)? How would enforcement agencies and courts judge whether the primary purpose was sexual arousal? Would not such a judgment, at least in some conceivable cases, require a sophisticated and informed artistic or critical opinion (in the past, new ways of representing the human condition have been widely dismissed as 'porn' before being recognised some time later as 'art')?

6. This key issue of separating the 'pornographic' from the 'non-pornographic' is becoming more rather than less difficult as film makers from either side of the divide borrow styles, images and themes from each other. Films such as *Baise-Moi* and *9 Songs*, both classified '18' by the BBFC, have used the visual imagery of hardcore pornography in order to explore issues around sex and/or relationships and/or violence, and even professional film critics are divided over whether the resulting films are pornographic or not. The "porn" / "non-porn" distinction is challenged by works as various as Japanese cartoons, documentaries about photographers such as Robert Mapplethorpe, the soft-focus films of David Hamilton, and a wide range of "sexploitation" and horror films.

7. *“The intention is also only to cover actual images or realistic depictions of the activities listed (but not, for example, text or cartoons). By realistic depictions we intend to capture those scenes which appear to be real and are convincing, but which may well be acted”* [p11 para 38]

The need to avoid placing upon the prosecution the burden of proving that the activity actually took place is clear. It is also logical: one of the public policy rationales is concerned with the effect that the material may have on the viewer, and this will no doubt depend less on whether the activity actually took place than on whether the viewer perceives it to be real. However, such perceptions will vary widely from viewer to viewer. A more experienced viewer, especially of horror films, may detect clear evidence of use of models, prosthetics, and CGI effects where a less experienced viewer will see none.

8. Films in mainstream genres have routinely presented serious violence (often including sexual violence) in a highly sexually charged context, whether old Hammer Horror films starring Ingrid Pitt, mainstream Hollywood thrillers like *Basic Instinct*, tacky Hollywood dramas like *Showgirls* or more recent films such as *The Hillside Strangler*, a fictional account of the activities of real life US killers. What one viewer sees as realistic and pornographic, another may identify as obvious fakery in a routine horror/thriller context. The proposed new offence is not intended to catch such works but it is clearly difficult to frame the legislation in a way which will exclude the possibility of such material being caught in practice.

9. The BBFC notes the intention not to catch ‘cartoons’. But the gap between animated and live action material in terms of realism narrows year by year through advances in CGI technology and a ‘realistic depictions’ test may be difficult to frame in a manner which effectively separates the two in practice. Animated gross violence in video games is often sufficiently realistic to place the work outside the general exemption from classification for video games set out in the VRA. Of course, if animated material is rendered so as to appear real and convincing then capturing it would not necessarily be in conflict with one of the aims of the proposed legislation. In our own practice, we do not accord “cartoon allowance” to, for instance, pornographic Japanese animé works.

10. *“intercourse or oral sex with an animal”* [p11 para 39]

This definition of bestiality appears to be at odds with the definition in the Sexual Offences Act 2003 which only refers to penetration involving a penis and a vagina or anus. It might be curious to specifically criminalise possession of material which depicts an activity which is not itself illegal. The proposed definition would be likely to catch *The Good Old Naughty Days*, a film passed ‘R18’ without cuts in 2003. This film is a collection of short, explicit, sex films dating from the silent film era of the early twentieth century and has a certain value as a work of historical and cultural interest. One of the sequences features a dog licking the genitals of a woman and then a man.

Although the work may be viewed for its curiosity value in the 21st century, there is no doubt that it was primarily produced for the purposes of sexual arousal - the short films were typically originally shown in brothels.

11. *“sexual interference with a human corpse”* [p11 para 39]

Again, this definition would appear to be wider than the relevant definition in the Sexual Offences Act 2003, which only refers to acts of sexual penetration with a dead person. It raises the question, what would constitute ‘sexual interference’?

Classified video works such as Visitor Q, Kissed and Underground Comedy Movie all feature fictional depictions of necrophilia in contexts which focus on sex to a significant extent. The judgement of the BBFC at the time was that none of these works, classified ‘18’, was ‘pornographic’, still less obscene, but other agencies might take a different view, particularly in a changed legislative context.

12. ‘R18’ videos, which are, by their very nature, pornographic according to the definition proposed, often try to add variety through the use of scenarios featuring consensual, adult role play. A number feature scenes in which an apparently dead person is brought back to life through sex. Although the rapid and full revival of the ‘corpse’ ultimately makes a nonsense of the idea that necrophilia has been depicted, the early part of such scenes could be caught by a new offence, especially in circumstances where some effort has been made to present the dead body reasonably convincingly in the first instance.

13. *“... ‘serious violence’ will involve or will appear to involve serious bodily harm in a context or setting which is sexual – for example, images of suffocation or hanging with sexual references in the way the scenes are presented.”* [p 12, para 40]

Realistic depictions of serious violence are a very common feature of modern, mainstream films and videos, and many such depictions will have a sexual context. For instance, current films made within a broadly Hitchcockian tradition will often feature violence (including murder) with a sexual motive which may take place in a narrative which includes a number of consensual sex scenes whose purpose is primarily sexual arousal. Such ‘erotic thrillers’, which are routinely passed ‘18’ on video and regularly feature on late night terrestrial TV, are clearly not the target of the proposed legislation, but framing the offence in a manner which excludes them may be difficult.

14. The BBFC notes and appreciates that the intent of the proposal is to catch only material which goes some way beyond that currently classified ‘R18’. However, it may be difficult to define ‘sexual context’ in the legislation in a manner which does not risk accidentally including a significant number of titles passed ‘R18’ by the BBFC. A number of hardcore pornographic works use

narratives and generic styles which mimic 'mainstream' films and television programmes in order to link together the sex scenes which form the main sell of the work. In such videos, the scenes which drive the narrative may involve reasonably realistic depictions of serious violence (eg shootings) which are sufficiently separated from the sex to allow the BBFC to make the judgement that they are not likely to encourage an interest in violent or aberrant sexual activity. However such judgements inevitably depend on a whole range of factors which arise from the precise nature and details of the individual work, although in a pornographic work the wider context is clearly sexual.

15. *".....'serious sexual violence' will involve or will appear to involve serious bodily harm where the violence is sexual."*

Would the legislation catch pornographic scenes in which the threat of violence, rather than actual violence, is used to secure compliance?

Interpretation

16. Of course, judgements as to the primary purpose of work, the extent to which a context is sexual, the degree to which a depiction is realistic, and so on, are routinely – and we hope generally consistently and defensibly - made by the BBFC in the course of performing its regulatory duties. It is one thing to have a single, specialist and reasonably expert regulatory body taking such decisions, but it is quite another to create the potential for such decisions to be made simultaneously by a wide number and range of enforcement agencies and courts, in different parts of the country. There must be danger that the proposal would lead to the same sort of geographical anomalies that existed during the "video nasty" era of the early 1980s, with different courts returning "guilty" and "not guilty" obscenity verdicts in relation to the same material. It was precisely this variation and unpredictability that led to the VRA, with decisions on videos being made by one body.

17. Current enforcement activity with regard to existing OPA offences is understood to reveal significant disparities between courts in different areas as to what is, or is not, likely to deprave and corrupt. It is quite conceivable that courts in different parts of the country might take opposing views on whether classified works containing realistic depictions of serious or sexual violence such as *Salo*, *Baise-Moi*, *Hustler White* or *Visitor Q*, or any number of works by eg *Jess Franco* or *Russ Meyer*, were primarily produced for the purpose of sexual arousal. Conflicting case law with regard to the new offence would exacerbate the difficulties relating to consistency that exist under the OPA as it stands. At the BBFC, we could find ourselves pulled in different directions when striving to fulfil our obligation to seek to avoid classifying material which is itself in breach of the criminal law.

18. The difficulty in framing legislation in a way which will ensure consistency of interpretation would also have implications for private citizens. At present, law abiding citizens who own a video/DVD of one of the films cited in para 17 can regulate their behaviour with certainty, knowing that provided there is no intent to publish for gain, their actions remain within the law. Each of options 1, 2 and 3 would leave such citizens in a perpetual state of uncertainty over whether they were committing a serious criminal offence merely by possessing the film, even if the work had been classified by the BBFC under the VRA.

19. Similar difficulties may be faced by UK businesses, especially those involved with the production, distribution or exhibition of moving or still images. Many such businesses may be concerned that the Partial Regulatory Impact Assessment statement that *“no business sector in the UK should be adversely affected”* [p23, section 5] is rather optimistic. The difficulty in framing the legislation in a manner which will ensure clear and consistent interpretation across the UK risks creating a new state of uncertainty which may impact upon UK businesses in a variety of ways. There may be a reluctance to create legitimate works which seek to explore the nature and effect of the material outlawed for fear that the resulting works will themselves be caught by the way the legislation is interpreted in a particular court. Those who do seek to create legitimate works which seek to explore the nature and effect of the illegal material may be inhibited in researching the material by the fear that their reason for possessing it would not be accepted as legitimate by a particular court. Furthermore, the lack of a ‘public good’ defence for possession may mean that convictions result from the possession of material which it would not otherwise be an offence for a UK business to distribute.

Possible remedies to the problems relating to definitions and interpretation

20. As noted earlier, the BBFC shares the Home Office view that the issue of extreme pornographic material is a serious one, and is keen to offer support and cooperation in the moves to address its availability and use. The BBFC believes that the problems relating to definitions and interpretation discussed above might be adequately addressed in three ways.

21. Firstly, works which have been classified by the BBFC could be specifically excluded. Such works have already been subject to effective regulation by an authority designated by the Secretary of State for the Department of Culture, Media and Sport, under the VRA. In making its determinations, the BBFC is required to:

“have special regard (among the other relevant factors) to any harm that may be caused to potential viewers or, through their behaviour, to society by the manner in which the work deals with:

(a) criminal behaviour;

- (b) *illegal drugs;*
- (c) *violent behaviour or incidents;*
- (d) *horrific behaviour or incidents; or*
- (e) *human sexual activity.*”

The BBFC is also required, under the terms of its designation, to seek to avoid passing material which is in breach of the law, including the OPA.

22. In performing its function the BBFC therefore ensures that the sort of material the proposed legislation is designed to deal with is not granted a classification certificate and the Board notes and welcomes the fact that the consultation paper makes clear that the intent is to criminalise possession of material which goes “*well beyond what is available for sale in licensed sex shops, classified R18 by the British Board of Classification*” [Executive summary, p1]. Making classification by the BBFC a defence would help to avoid the legislation catching material it is not designed to capture, would avoid increasing the risk of classified works attracted guilty verdicts in one court and not guilty verdicts in another, and would enable citizens to regulate their conduct with greater certainty.

23. Secondly, the legislation could include a ‘public good’ defence, along the lines of that available to defendants under the existing OPA. Many works which may be in the interest of art, literature or learning and which might be unintentionally caught by some interpretations of the proposed legislation, however it is drafted, are not commercially distributed and so are never submitted to the BBFC. Such a ‘public good’ defence would allow a court to ensure that the law only catches the type of material it is designed to catch.

24. Thirdly, the legislation could reduce the risk of confusion by committing the Crown Prosecution Service to take account of the views of relevant authorities, such as the BBFC, before authorising a prosecution.

Defences relating to accidental or legitimate possession

25. The BBFC notes and welcomes the proposal to include defences to “*protect those whose exposure to the material was accidental and those who had a legitimate reason for possessing it, such as prosecuting authorities*”. Although the BBFC does not classify, and has no intention of classifying, the material the legislation would be designed to deal with, the BBFC and its officers may well be in possession of such material for quite legitimate reasons. These reasons include unsolicited receipt of submissions from clients which include such material; receipt of videos seized by Trading Standards officers, submitted in order for the BBFC to determine whether the work is classified or not for the purposes of issuing a Certificate of Evidence; or for training

purposes. In order to avoid creating severe difficulties for the work of the BBFC, the defences would have to be framed in a manner which covers every aspect of our role. This is obviously a matter of very great concern to the BBFC and we would welcome an opportunity to contribute to the process of ensuring that our ability to perform our regulatory duties is not unintentionally compromised.

Consequences for the BBFC's strict line on sexual violence

26. The BBFC is concerned that an unintentional consequence of the proposed legislation may be to provide a rather narrow definition of what constitutes a potentially harmful depiction of sexual violence. The danger is that material which fails to meet the criteria set out in the legislation might eventually, by erosion, come to be considered to be not harmful. The judgement of the BBFC is that research and expert evidence in relation to depictions of sexual violence which may fall well short of the definitions found in the proposed legislation raise sufficient concerns over the potential for harm to suggest caution and warrant censorship even at the adult categories. Research into public attitudes suggests that the public support the BBFC's strict line in this area. It is, indeed, one of the cornerstones of our current policy and practice. We would therefore welcome public confirmation that the proposal should not be taken as a reason for the BBFC to liberalise its sexual violence policy.

Wider issues

Unintended consequences relating to other obscene material

27. The BBFC agrees that *Option one* presents difficulties as the test currently set out in the OPA relates to the effect of the material on its potential audience rather than on the individual in whose possession the material is found. A hardened consumer of extreme pornography might therefore be legally entitled to possess material which would lead to conviction in the hands of someone inexperienced or young.

28. *Option two* is also mismatched to the purpose of the OPA and, as the consultation paper points out, carries with it the additional risk that the ability of the OPA to deal with other obscene material will become eroded over time as enforcement agencies, court and juries come to regard the list of specially proscribed material as a definitive and exhaustive list of that which is obscene. The test of 'deprave and corrupt' does not lend itself easily to the idea of 'sub-sets' of obscenity, as these would inevitably appear to involve separating obscene material into that which depraves and corrupts a lot, and that which only depraves and corrupts a little bit.

29. The BBFC does not challenge the principle of creating a new free standing offence, as in *Option three*, but notes that this carries with it the same problem of unintended ‘erosion’ of the OPA which is described in relation to *Option two*. It is difficult to see in the proposal relating to *Option three* a mechanism that would prevent the proscribed list from becoming the de facto definition of what is likely to deprave and corrupt.

Wider reform of the Obscene Publications Act

30. We note that the Home Office has not sought views on the wider reform of the OPA. But others may argue that the lack of clarity and consistency it currently provides means that there is a case for making the proposed change only in the context of a carefully considered reform of the obscenity laws generally. If such a case is made, and if the Home Office is persuaded to take it further, the BBFC would be grateful for an opportunity to share its considerable experience and expertise in this area. It is possible that the proposed new offence might work better as part of a reformed OPA.

Other extreme material

31. This response has already discussed at some length the difficulty of framing legislation in a manner which would avoid catching material (such as that currently classified by the BBFC) which it is not intended to catch. This also begs the question: would the four proposed categories (intercourse or oral sex with an animal; sexual interference with a human corpse; serious violence in a sexual context; serious sexual violence) exclude material which might be of equivalent or even greater concern?

32. The BBFC is aware of an increasingly popular category of ‘extreme reality’ material which has many of the characteristics of extreme pornography but which does not appear to have been produced for the purpose of sexual arousal. It is not clear that the lack of a sexual element renders the material any less harmful than the extreme pornographic material defined in the proposal. Two video works rejected by the BBFC illustrate the nature of the content.

33. *Bumfights: A Cause for Concern* is a US video/DVD work in which the film makers persuade real homeless people who are often incapacitated through drink or drugs to fight or take part in dangerous stunts. Some of the incidents result in significant injuries, for instance one man pulls his own tooth out with pliers and another sustains a broken ankle during a fight. Part of the work is given over to a spoof wildlife programme in which the film makers approach homeless men who are asleep in public areas and treat them as if they are wild animals. This typically involves startling, forcibly subduing and then binding their arms, legs and mouths with duct tape. Their physical attributes are then discussed as if they are not human. There is considerable doubt as to

whether the homeless men in these sequences are consenting and they appear bewildered, frightened and angry. The film makers were convicted in the USA for soliciting an assault during filming. The video is reported to have sold over three hundred thousand copies. Two sequels have been made.

34. *Terrorists, Killers and Other Wackos Volume 1 [aka Terrorists, Killers & Middle East Wackos]* also appears to have been produced in the USA but features real, documentary material from around the world. The work edits together over 50 minutes of footage of people being killed or seriously injured. The incidents are not put into any recognisable documentary or news context and appear to have been selected for shock value alone, and edited together almost at random. Upbeat music and 'jokey' captions (including an onscreen graphic which keeps a running score of the number of 'mullet' haircuts seen onscreen) suggest that the primary purpose of the work is to entertain or even amuse but there is little doubt as to the veracity of the footage. Sequences include live kangaroos having their limbs sliced off, a man having his arm hacked off, a man being shot in the face but remaining alive for a while with his face half destroyed, people on fire in the Bradford City FC disaster, a dead man being scalped and many similarly horrific sequences. Even experienced BBFC examiners have found such a work distressing to watch. But we would not be surprised to encounter still worse examples.

35. Neither work would be caught by the proposal as currently drafted. Furthermore, any attempt to include such material would inevitably raise still further issues relating to definitions and interpretation, not least because the images that feature in such works often have a quite legitimate place in different contexts such as news programmes or documentaries.

Other areas of concern

36. The consultation paper clearly identifies a particular area of concern (possession of a particular type of obscene material) which is not currently addressed by legislation. Responses to the paper may point out that technological changes are not only allowing easy access to such material but are also creating a range of unregulated means of viewing material which if distributed on film or video/DVD would require classification by the BBFC. A number of major hotel chains already offer access to explicit, hardcore pornography via the TV set in guests' bedrooms; 3G phone operators already offer video clips and may soon offer explicit, hardcore pornography for viewing on mobile phones; and, of course, the internet offers many different ways of accessing, often without warning, a vast range of material which is, at best, unsuitable for children. The BBFC has over 90 years experience of regulating the moving image and is well equipped to assist in the development of initiatives designed to address the new media world that technology is creating. Should the responses to the consultation prompt further discussion of these issues, the BBFC would be very interested in being involved.

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