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Home Office Consultation: On possession of non-photographic visual depictions of child sex abuse

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 non-photographic visual depictions of child sex abuse is a cause for real concern. The BBFC's classification guidelines do not allow on film or video/DVD, even at the specially restricted 'R18' category, 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 non-photographic visual depictions of child sex abuse in circumstances which are not currently the subject of effective regulation or caught by existing legislation.

The proposals in detail

2. 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; and the defences available in cases of accidental or legitimate possession. Paragraphs 3 - 14 below consider the definitional issues. Paragraphs 15 - 16 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 17 – 21 propose some ways in which these difficulties might be addressed. Paragraph 22 deals with the need to ensure that the BBFC's own practice does not fall foul of the proposed offence.

Definitions

3. 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.

4. *"We intend any new offence to apply only to material that is pornographic"* [p 8]

No definition of 'pornographic' is offered at this stage and much will depend on how this test is worded. Many years of experience of regulating material containing sexual images has made the BBFC acutely aware of the difficulties involved in defining the difference between the pornographic and the non-pornographic in terms which do not allow for very wide interpretation. Difficulties arise whether the focus of the definition is on intent or on effect .

5. If the test relies on the purpose of the image (ie on an intention to arouse), the intent of the producer of the image will have to be deduced from the image itself. This will not always be clear. How would enforcement agencies and courts judge whether the purpose was pornographic? 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. On the other hand, if the test depends upon effect (ie on a tendency to arouse), the judgement becomes no more straightforward, especially as images of child sex abuse are only likely to be arousing to those disturbed individuals with a predilection for such images. Moreover, such individuals may find arousing images which would not be considered 'pornographic' by the public in general. The Chapman brothers' mannequins of children with genitalia in place of facial features provide a useful real world illustration of how difficult it may be to define the offence in terms which exclude art.

7. This issue may raise particular problems in relation to historic artefacts, including drawings, sculptures, and pottery from Ancient Rome or Greece, which contain non-photographic images of characters who appear to be children engaged in various forms of sexual activity. In many cases the original intent of the creator of the image may have been pornographic and, seen through certain eyes, so might be the effect . Clearly it is not the intent of the proposal to catch such items if they are regarded as being in the public good, but it is not clear that the 'pornography' threshold test would succeed in excluding them.

8. The same problem arises in respect of film and video works submitted to the BBFC. Such a work might quite reasonably include shots showing artefacts such as those described in the preceding paragraph, for a variety of reasons relating to the theme, the narrative or character

development. Would the test of 'pornography' apply to the work as a whole or just to the shots containing the relevant images? If intent is key to the definition would this relate to the intention of the film maker or to the intention of the original creator of the artefact?

9. 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. Animated works such as those in the Japanese 'manga' and 'hentai' traditions, have sometimes used the visual imagery of hardcore pornography in order to explore issues around sex and/or relationships and/or violence, prompting debate over whether the resulting works are pornographic or not.

10. *"... the threshold of indecency currently used in respect of photographs of real children for the offences in POCA 1978, the 1978 NI Act and the 1982 Act would be too low."* [p 8]

It is not clear why this should be the case. Through the inclusion of 'pseudo-photographs' within its scope, POCA already outlaws images which did not involve actual abuse in their creation (eg an image in which the head of a child is 'photo-shopped' onto the body of an adult engaged in sexual activity). POCA does this in recognition of the fact that viewing such images is likely to be harmful even if the creation of them did not involve a child engaging in anything untoward. It is not clear why an indecent non-photographic depiction of a child should be considered of less concern than an indecent pseudo-photograph of a child. Furthermore, with the development of CGI and other image manipulation technologies, distinguishing a pseudo-photograph from a non-photographic image may prove to be increasingly problematic.

11. *"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"* [p 8]

Given that the age of a child is under 18 in POCA, it seems likely that the same definition would apply to the current proposal. Even if a different age was chosen, a very difficult problem arises: how can one establish the age of a person who does not exist? Under POCA, no conviction is possible if the person in question can be shown to be 18, even if they look much younger. Clearly it is not possible to produce a birth certificate or a passport for a drawing or a CGI image and so the matter will inevitably rest on a subjective judgement as to whether the character appears to be under 18. This is a hard enough judgment to make with real people, even in the flesh, but with a non-photographic image the difficulty is multiplied many times. Animated representations are often highly stylised, deliberately avoiding the sort of details that give clues to age in real life. For example, the standard Disney characterisation (hugely influential throughout the world, and a model for much Japanese animation) involves huge 'child like' eyes and smooth skin even if the

representation is of a young man rather than a boy. In other words, how old exactly is Aladdin in the 1992 Disney film of the same name?

12. The definitional difficulties extend beyond those associated with establishing age and include the definitions of the activities covered by the proposal . Although the threshold is based on the Sentencing Guidelines used in POCA cases, the lack of the threshold test of ‘indecent’ in this proposal may have unintended consequences which could work in opposite directions.

13. The term ‘non-penetrative sexual activity’ is particularly open to interpretation and might conceivably catch images which would not necessarily be considered indecent under POCA, especially if the participants were both over the age of consent. On the other hand, the list of activities covered appears to exclude non-penetrative sex between children. This would result in the legislation failing to catch non-photographic images of children engaged in such activities as cunnilingus, anilingus, urolagnia and coprophagia.

14. It is not clear from the proposal whether distinctions would be drawn based on the detail of the image – for instance whether it would be necessary to see genital detail in order to conclude that the image was of penetrative sex. Requiring such detail sets the bar very high (and much higher than the test under POCA) but not requiring it raises the issue discussed in the previous paragraph: A live action scene of a 16 or 17 year old simulating sexual intercourse with an adult is not necessary indecent under POCA provided the images are sufficiently discreet (see the critically acclaimed films ‘The Name of the Rose’ or ‘Notes on a Scandal’) but an animated version of the same scenes might be considered a depiction of penetrative sex between an adult and a child.

Interpretation

15. Of course, judgements as to whether an image is pornographic, and as to whether a non-photographic image is of a child, 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.

16. Current enforcement activity , for example with regard to offences under the Obscene Publications Act (OPA) is understood to reveal significant disparities between courts in different areas. It is quite conceivable that courts in different parts of the country might take opposing views on whether classified works containing non-photographic images were, or were not, pornographic, and on whether the images were, or were not, of children. 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.

Possible remedies to the problems relating to definitions and interpretation

17. As noted earlier, the BBFC shares the Home Office view that the issue of non-photographic visual depictions of child sex abuse 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.

18. Firstly, works which have been classified by the BBFC should be specifically excluded. We regard this as essential. 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.

19. 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. 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. Failure to make such an exclusion could place us in the position of having to reconcile in our classification practice conflicting decisions from courts in different parts of the country.

20. Secondly, in addition to the proposed defences of 'legitimate reason', 'not seen' and 'sent unsolicited', the legislation could include a specific 'public good' defence, along the lines of that available to defendants under the OPA. Many representations of children 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 or are otherwise unsuitable for submission 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.

21. Thirdly, the legislation, or associated guidance, 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

22. 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.

Other areas of concern

23. The consultation paper clearly identifies a particular area of concern (possession of a particular type of indecent 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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