

Title: Extension to the Extreme Pornography Possession offence at Section 63 Criminal Justice & Immigration Act 2008 IA No: MOJ229 Lead department or agency: Ministry of Justice Other departments or agencies:	Impact Assessment (IA)	
	Date: 11/02/2015	
	Stage: Enactment	
	Source of intervention: Domestic	
	Type of measure: Primary legislation	
Contact for enquiries:		
Summary: Intervention and Options		RPC Opinion: RPC Opinion Status

Cost of Preferred (or more likely) Option

Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out?	Measure qualifies as
£m	£m	£m	Yes/No	In/Out/zero net cost

What is the problem under consideration? Why is government intervention necessary?

Rape Crisis South London wrote an open letter to the Prime Minister on 7th June 2013 highlighting what they believed to be a loophole in the extreme pornography offence at section 63 of the Criminal Justice and Immigration Act 2008 (the “2008 Act”). Campaigners suggest that the existing offence criminalising the possession of extreme pornography should be extended to cover depictions of rape, including both actual and simulated “non-consensual” sexual acts involving penetration. They suggest these images promote sexual abuse of women and girls. The Prime Minister accepts these concerns and has announced that the law will now be extended to cover images depicting non-consensual penetration.

What are the policy objectives and the intended effects?

The aim is to criminalise the possession of extreme pornographic images depicting rape and/or non-consensual sexual intercourse through an extension to the criminal offence at section 63 of the 2008 Act. This prohibited conduct will be subject to a 3 year maximum prison sentence. This intention is that this will send out a message that possessing extreme pornographic depictions of non-consensual sexual penetration is unacceptable. (Producing/distributing these images is already a criminal offence.)

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0 – Do nothing The current section 63 extreme pornography offence currently covers several types of extreme pornographic images, but does not include depictions of rape and non-consensual penetrative sexual conduct.

Option 1 – Extend the Extreme Pornography offence to cover depictions of rape and non-consensual penetrative sexual conduct.

Option 1 is the preferred option. It will target images at the extreme end of the scale, and bring our law into line more closely with the equivalent offence in Scotland. The reform fulfils the Government’s public commitment to extend the offence.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 12/2020

Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro	< 20	Small	Medium	Large
	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible

Andrew Selous

..... Andrew Selous Date: 02.07.2015

Summary: Analysis & Evidence

Policy Option 1

Description:

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional		Optional	Optional
High	Optional		Optional	Optional
Best Estimate				

Description and scale of key monetised costs by 'main affected groups'

Estimated cost per case is up to around £9,000 in 2013/14 prices. Each additional case is estimated to cost the Crown Prosecution Service approximately between £800 and £2,300 and Her Majesty's Courts and Tribunal Service £900. Costs to the Legal Aid Agency, Prisons and Probation Service have been estimated at approximately £2,700, £1,400 and £1,700 per case respectively.

Other key non-monetised costs by 'main affected groups'

There could be some one-off familiarisation costs to the police, Crown Prosecution Service and judiciary.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional		Optional	Optional
High	Optional		Optional	Optional
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the benefits.

Other key non-monetised benefits by 'main affected groups'

The extension of the offence would bring it in line with what already happens in Scotland. The amendment reflects the Government's commitment to reducing violence against women. The extension aims to help address the concern that these images promote the sexual abuse of women. It will send out a clear message that extreme pornographic depictions of non-consensual sexual penetration are unacceptable and that the Government is committed to protecting women from violence.

Key assumptions/sensitivities/risks

Discount rate (%)

Likely to be well received across Parliament. Estimates for the proportions of cases tried and for the average custodial sentence length (ACSL) given are based on the bestiality arm of the offence. There is a risk that proportions and ACSL for the new offence are different and therefore the cost per case may be lower/higher. No estimate for the expected volume of cases as this is highly uncertain.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO? Yes/No	Measure qualifies as IN/OUT/Zero net cost
Costs:	Benefits:	Net:		

Evidence Base (for summary sheets)

Evidence Base

Introduction

1. Possession of certain images of extreme pornography, that is, images that can reasonably be assumed to have been “produced solely or principally for the purpose of sexual arousal”, which are grossly offensive, disgusting or otherwise obscene and which depict certain types of images is a criminal offence under Section 63 of the Criminal Justice and Immigration Act 2008 (the “2008 Act”). There are four different arms to the offence, each depicting different types of images. The types of images currently included in the offence are (1) extreme pornographic images depicting an act which threatens a person’s life; (2) extreme pornographic images depicting an act which results or is likely to result in serious injury to a persons anus, breasts or genitals; (3) extreme pornographic images depicting an act which involves sexual interference with a human corpse (necrophilia); (4) extreme pornographic images depicting a person performing an act of intercourse or oral sex with an animal (whether dead or alive) (bestiality). However, images of real or simulated non-consensual penetrative sexual activity are not currently explicitly covered by the existing extreme pornography offence in England and Wales.
2. Rape Crisis South London (the “RASASC”) wrote an open letter to the Prime Minister on 7th June 2013¹ highlighting what they believed to be a loophole in the extreme pornography offence at section 63 of the Criminal Justice and Immigration Act 2008 (the “2008 Act”)². Campaigners called for the offence to be extended to cover depictions of rape, along the lines of the recently created Scottish offence which expressly covers such material. The campaign for change gained considerable support from women’s rights groups, Parliamentarians and the Press.

Problem under consideration

3. Although the section 63 extreme pornography offence currently covers a range of extreme pornographic images (as detailed at paragraph 1), it does not explicitly include depictions of non-consensual penetration.
4. Campaigners for reform believe that websites depicting real or staged rapes glorify sexual violence against women. Not to extend the offence they suggest shows a failure to take such violence seriously, and undermines the work the Government has done in seeking to end violence against women. The Government accepts campaigners’ views and the Prime Minister has undertaken to change the law to cover images of real or simulated rape.

Policy objective

5. The Government is concerned that viewing these images may have an effect on young peoples’ attitudes to sexual and violent behaviour, and that some men may exhibit heightened aggression towards women after exposure to violent pornography. The findings from the Ministry of Justice’s rapid evidence assessment into the effects of exposure to extreme pornography (September 2007)³ supported the existence of some harmful effects from extreme pornography on some who access it, including increased risk of developing pro-rape attitudes, beliefs and behaviours, and committing sexual offences. Similarly, the report “Basically ...porn is everywhere”, by the Children’s Commissioner⁴ echoed concerns about how exposure to sexualised or violent imagery could affect children and young people.

¹ http://www.endviolenceagainstwomen.org.uk/data/files/Letter_to_PM_to_ban_rape_porn_7th_June_2013_original_to_PM.pdf

² <http://www.legislation.gov.uk/ukpga/2008/4/contents>

³ The report can be found at:

<http://webarchive.nationalarchives.gov.uk/20100612014700/http://www.justice.gov.uk/publications/docs/280907.pdf>

⁴ http://www.childrenscommissioner.gov.uk/content/publications/content_667

6. Further, the Government believes most people would regard these images as disgusting and deeply disturbing.
7. The policy objective is to ensure that the possession of extreme pornographic images depicting non-consensual sexual penetration is criminalised. In order to achieve this we will extend the criminal offence at Section 63 of the 2008 Act to capture this material. The prohibited conduct caught by the extended offence will be subject to a 3 year maximum prison sentence (as is the case for the other existing arms of the offence). It is hoped that this will send out a message that explicit pornographic depictions of rape and serious sexual assault are unacceptable.
8. Scotland's extreme pornography offence (Section 43 of the Criminal Justice and Licensing (Scotland) Act 2010) already captures such material and this amendment will bring the law in England and Wales more closely in line with that equivalent offence.
9. The extension of the Section 63 extreme pornography offence will not impact on possession of extreme pornographic images concerning children. This is because these are dealt with in separate legislation, for example the Protection of Children Act 1978, and also Section 160 of the Criminal Justice Act 1988, and section 62 of the Coroners and Justice Act 2009.

Rationale for intervention

10. The conventional economic approach to government intervention is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way the market operated ("market failures") or if there are strong enough failures in existing intervention ("institutional failures"). In both cases the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and distributional reasons.
11. In this case, the Government is intervening to ensure that extreme images of rape and non-consensual penetrative sexual intercourse will be treated on a par with other extreme pornographic images in England and Wales.⁵ This ensures that what is arguably a loophole in the current legislation is closed. In addition, it also ensures greater consistency with the equivalent offence applicable in Scotland.

Proposed reforms

12. It is currently an offence to possess an extreme pornographic image (see paragraph 1 on the meaning of that expression). The extension of the offence to include a further category of images depicting non-consensual sexual penetration will involve a relatively minor amendment, and would still result in a tightly drawn and targeted offence.

Main Affected Groups

13. The following groups would be affected by this policy:
 - Police
 - Crown Prosecution Service (CPS)
 - Her Majesty's Courts and Tribunals (HMCTS)
 - National Offender Management Services (NOMS)

⁵ The other types of extreme pornographic images are: (1) extreme pornographic images depicting an act which threatens a person's life; (2) extreme pornographic images depicting an act which results or is likely result in serious injury to a persons anus, breasts or genitals; (3) extreme pornographic images depicting an act which involves sexual interference with a human corpse (necrophillia); (4) extreme pornographic images depicting a person performing an act of intercourse or oral sex with an animal (whether dead or alive) (bestiality). Possession of extreme pornographic images concerning children are dealt with in separate legislation, for example the Protection of Children Act 1978, and also Section 160 of the Criminal Justice Act 1988)

- Legal Aid Agency (LAA)
- Lawyers
- Victims and potential victims
- Charity and women's groups

Costs and Benefits

14. This Impact Assessment identifies both monetised and non-monetised impacts from society's perspective, with the aim of understanding what the net social impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact Assessments place a strong emphasis on the monetisation of costs and benefits. However there are important aspects that cannot sensibly be monetised. These might be distributional impacts on certain groups of society or changes in equity or fairness, either positive or negative.

Option 0 – Do nothing

15. This equates to not changing the current offence. Under this option the existing Section 63 offence, implemented in January 2009 following a full public consultation, would remain the same. The creation of the offence followed a full public consultation. Currently the offence criminalises possession of pornographic images - images which can reasonably be assumed to have been "produced solely or principally for the purpose of sexual arousal" – which are grossly offensive, disgusting or otherwise obscene and which explicitly and realistically depict necrophilia, bestiality or violence that is life threatening or likely to result in serious injury to the anus, breasts or genitals.

16. Pursuing the option to do nothing could have an unquantifiable cost for individuals and society, as it may signal to the public that images depicting women and men being sexually abused are a legitimate form of pornography, and that such abuse is acceptable.

17. Because the do-nothing option is compared against itself its costs and benefits and necessarily zero, as is its Net Present Value (NPV).

Option 1 – Extend the Extreme Pornography offence to cover depictions of rape and non-consensual penetrative sexual intercourse.

Costs

18. It is difficult to estimate the number of proceedings and convictions arising from an extension of the existing offence. We believe that offenders guilty of committing this limb of the offence are likely also to be guilty of other limbs of the offence or possibly of other more serious offences. Possession of extreme pornographic images can be uncovered as part of the investigation into more serious offences. It is difficult to estimate how many offenders would be guilty of just this extension of the offence.

19. Although the Extreme Pornography offence in Scotland, at Section 43 of the Criminal Justice and Licensing (Scotland) Act 2010⁶ already covers "rape and non-consensual penetrative sexual intercourse", data on prosecutions and convictions for the offence is not broken down into the different arms of the offence (unlike in England & Wales). However, anecdote suggests that in Scotland there has only been one prosecution for possession of an image depicting rape, and that was found in a collection of other images which it is illegal to possess under their Extreme Pornography offence (bestiality), and which also would be illegal to possess under the current offence in England and Wales.

20. Given the uncertainties, we have not attempted to estimate volumes of proceedings or convictions likely to result from the extension of the offence. We have estimated a cost per

⁶ <http://www.legislation.gov.uk/asp/2010/13/section/42/enacted>

additional case by using the bestiality limb of the existing offence in England and Wales. We used this limb of the offence as the numbers of offenders proceeded against are the largest compared with the other arms of the offence (63 for the period 2010-2012, compared with 2 for the life threatening arm, 10 for the serious injury arm, and none for the necrophilia arm of the offence). We have assumed that the case progression through the courts (i.e. whether a defendant is tried in the Magistrates' or the Crown Courts, and whether they are convicted), the disposals (i.e., whether a defendant is sentenced to immediate custody, a community order, a suspended sentence order, a fine, etc), including average custodial sentence length (ACSL) where applicable, of the bestiality offence is a suitable proxy for the extension of the offence. All costs per case are on the basis that approximately half of cases are tried in the Magistrates' and half are tried in the Crown Courts and that the weighted ACSL across both courts is 7.2 months, with the ACSL served being 3.6 months. Further details can be found in the Assumptions and Risks section.

21. An extension of the offence will have an impact on the CPS, HMCTS, Legal Aid Agency, prison services and probation services. The estimated cost per additional offender prosecuted is approximately up to £9,000 in 2013/2014 prices.
22. Each additional case is estimated to cost the Crown Prosecution Service approximately between £800 and £2,300 and Her Majesty's Courts and Tribunal Service £900. Costs to the Legal Aid Agency, Prisons and Probation Service have been estimated at approximately £2,700, £1400 and £1,700 per case respectively. All costs are in 2013/14 prices. Further information can be found in the Assumptions and Risks section.⁷
23. There could also be some one-off familiarisation costs to the police, CPS and judiciary.
24. There may be some opposition from members of the Bondage, Domination and Sado-Masochism community and some aligned anti-censorship groups. Some of these groups have campaigned against the creation of the extreme pornography offence and have called for repeal: they may be unhappy with this latest proposed change. There may be some negative press articles or campaigns supporting their concerns.
25. In terms of the legitimate adult entertainment industry, we do not foresee any adverse impact. The material targeted by the extended offence would already be illegal to publish/distribute under the Obscene Publications Act 1959.

Benefits

26. The extended offence should capture extreme pornographic images depicting rape/non-consensual penetrative sexual intercourse. These images are already illegal to possess in Scotland under their equivalent criminal offence, and also illegal to publish or distribute in the UK (under the Obscene Publications Act 1959). This extension in England and Wales would bring the offence more closely in line with the equivalent offence in Scotland.
27. It is hoped that the amendment would result in taking these images out of circulation. It should send out a message that violence against women will not be tolerated and extreme pornographic images depicting such acts are unacceptable. In addition, the benefits from the proposals may not be immediately obvious, or indeed measurable, as they may well have a positive impact on the way individuals and society perceive violence against women and in some circumstances men.
28. The extension aims to help address the concern that these images glorify or promote the sexual abuse of women. It will send out a clear message that extreme pornographic visual depictions of

⁷ As the costs for the different agencies may not be based on the same assumptions or methodologies, comparisons of costs across agencies are not robust and should not be made.

rape are unacceptable and that the Government is committed to protecting women from violence. The high profile campaign for change attracted much support from women's groups, Parliamentarians and the failure to honour our commitment would be perceived very negatively by these groups.

Assumptions/Risks

29. There are minor risks that anti-censorship groups could see this step as an infringement on private consensual sexual activities, for example staging consensual acted rape scenarios. However, we intend to provide a limited defence to address some of these concerns. Alongside this the measure is likely to be well received across Parliament and a range of women's rights groups in particular.

30. We also intend to make available for the purposes of the images covered in the extended offence, the existing defence for participants possessing images of themselves, provided that no harm was caused to any participant, or if harm were caused, it was harm which was and could be lawfully consented to.

31. For the analysis of the impact to the criminal justice system, a number of assumptions were made, which come with associated risks.

Assumption	Risk
<p>Progression of a case through the CJS (eg, proportion proceeded in the Magistrates v. Crown courts, proportion sentenced to immediate custody):</p> <ul style="list-style-type: none"> • We use data on the <i>bestiality arm</i> of the offence to estimate proportions for the new offence. Although data is available for all arms of the offence, except possession of images containing necrophilia, as there were no proceedings, the numbers are too small to use for the purposes of our costings. • We assume that the proportion of offenders proceeded against for the bestiality arm of the offence that get a custodial sentence will be the same as for the extension to depictions of non-consensual sex. We also assume that the proportions of people tried in the Magistrates and Crown Court will be the same as for the bestiality arm of the offence. • The raw data is averaged across the period 2010-2012 to give estimates for likely numbers proceeded against, those found guilty and sentenced. 2009 is excluded from the averages as it is the year the possession of extreme pornography offence was introduced and it is likely that the policy took some time to take effect. <p>Source: MoJ internal analysis, 2013.</p>	<ul style="list-style-type: none"> • There is a risk that more/fewer offenders may be tried in the magistrates' courts or the Crown Courts and that more/fewer offenders may be sentenced to custody.
<p>We assume that the Average Custodial Sentence Length (ACSL) given for the bestiality arm of the offence will be the same for the extension to depictions of non-consensual sex.</p>	<ul style="list-style-type: none"> • There is a risk that the ACSL given will be longer or shorter.
<p>CPS costs:</p> <p>The estimated CPS costs consist of two broad categories, advocacy costs and Activity Based Costings (ABC). The primary purpose of the ABC model is resource</p>	<ul style="list-style-type: none"> • The key limitation of the ABC model is that it is built purely on staff time and excludes accommodation and other ancillary costs (e.g. those associated with complex cases and

<p>distribution, and has several limitations (see risks). The range of costs reflects the different ABC and advocacy costs for guilty plea and effective trials, as well as the assumption that half of the cases would be prosecuted in the Magistrates' and half in the Crown Courts. Source: MoJ internal analysis, 2013.</p>	<p>witness care). It also relies on several assumptions. This could mean there is a risk that costs are underestimated. For further information about how CPS ABC costs are calculated please see the following CPS guidance (CPS, 2012): http://www.cps.gov.uk/publications/finance/abc_guide.pdf.</p>
<p>HMCTS costs:</p> <p>Magistrates Courts Costs</p> <p>To generate the costs by offence categories, HMCTS timings data for each offence group were applied to court costs per sitting day. Magistrate's court costs are £1,220 per sitting day in 2013/14 prices. A sitting day is assumed to be 5 hours. The HMCTS costs are based on average judicial and staff costs, found at HMCTS Annual Report and Accounts 2012-13 and updated in line with the GDP deflator of 2% (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266322/GDP_Deflators_Autumn_Statement_December_2013_update_v2.xls). HMCTS timings data from the Activity based costing (ABC) model, the Timeliness Analysis Report (TAR) data set and the costing process.</p>	<p>Timings data for offence categories:</p> <ul style="list-style-type: none"> • The timings data are based on the time that a legal advisor is present in court. This is used as a proxy for court time. Please note that, there may be a difference in average hearing times as there is no timing available e.g. when a DJ(MC) sits. • Timings do not take into account associated admin time related with having a case in court. This could mean that costings are an underestimate. There is some information available on admin time, however we have excluded it for simplicity. • The timings are collection of data from February 2009. Any difference in these timings could influence costings. • The timings data also excludes any adjournments (although the HMCTS ABC model does include them), and is based on a case going through either one guilty plea trial (no trial) or one effective trial. However a combination of cracked, ineffective and effective trials could occur in the case route. As a result the costings could ultimately be underestimates. • Guilty plea proportions at the Initial hearing from Q2 in 2012 are used, based on the Time Analysis Report. As these can fluctuate, any changes in these proportions could influence court calculations (effective trials take longer in court than no trials (trials where there was a guilty plea at the initial hearing). <p>HMCTS average costs per sitting day:</p> <ul style="list-style-type: none"> • HMCTS court costs used may be an underestimate as they include only judicial and staff costs. Other key costs which inevitably impact on the cost of additional cases in the courts have not been considered; for example juror costs.

<p>HMCTS costs:</p> <p>Crown Courts Costs</p> <p>Timings data for types of case (eg, indictable only, triable either way) were applied to Crown court costs per sitting day. This was added to the cost of the initial hearing in the Magistrates, as all criminal cases start in the Magistrates courts. Crown Court cost is £1,640 per sitting day in 2013/14 prices, assuming a sitting day is 5 hours. The HMCTS costs are based on average judicial and staff costs, found at HMCTS Annual Report and Accounts 2012-13 and uprated in line with the GDP deflator of 2% (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266322/GDP_Deflators_Autumn_Statement_December_2013_update_v2.xls).</p>	<p>Timings data for types of cases:</p> <ul style="list-style-type: none"> • The average time figures which provide the information for the timings do not include any down time. This would lead to an underestimate in the court costing. • Timings do not take into account associated admin time related with listing a case for court hearings. This could mean that costings are an underestimate. • The data which informed the timings data excludes cases where a bench warrant was issued, no plea recorded, indictment to lie on file, found unfit to plead, and other results. • Committals for sentence exclude committals after breach, 'bring backs' and deferred sentences. <p>HMCTS average costs per sitting day:</p> <ul style="list-style-type: none"> • HMCTS court costs used may be an underestimate as they include only judicial and staff costs. Other key costs which inevitably impact on the cost of additional cases in the courts have not been considered; for example juror costs.
<p>Legal Aid costs:</p> <p>We assume an eligibility rate of 50% for cases in the magistrates' courts and 100% in the Crown Court. The average legal aid cost in the Magistrates assumed was around £500, and £5,000 in the Crown Court (based on Crime Lower Report and Crime Higher Report, Legal Aid Agency).</p>	<ul style="list-style-type: none"> • There is a risk that variance in the Legal Aid eligibility rate assumed for cases in the magistrates' courts would impact the costings. • Assuming 100% eligibility for Legal Aid in the Crown court carries several risks. Firstly, an individual may refuse legal aid. Secondly, an individual may contribute to legal aid costs. Lastly, the size of this contribution can vary. This could mean that the costings provided are a slight overestimate.
<p>Prison costs:</p> <p>We assume that 50% of a prison sentence over 12 months is served on probation and that there is no element of licence for a sentence under 12 months. The proportions of offenders who are sentenced to probation are determined by the proportion of those who receive an over 12 month sentence. We assume that half the given ACSL is served. The cost per prison place is £28,000 in 2013/14 prices (NOMS management accounts addendum (2011)).</p>	

