

## **All Party Parliamentary Group on Sexual Violence Inquiry into Pornography and Sexual Violence 2018**

### **Evidence Submission from [Professor Clare McGlynn](#), Durham Law School, Durham University**

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This submission examines the following issues:

- ❖ the problematic nature of obscenity laws which remain the foundation for the legal regulation of pornography;
- ❖ the impact and challenges of the extreme pornography law introduced in 2008 and amended to include rape pornography in 2015;
- ❖ the significance of Artificial Intelligence (AI) technology, 'photoshopping' and creation of 'FakePorn';
- ❖ the importance of recognising links between pornography and image-based sexual abuse;
- ❖ justifying pornography regulations on basis that they are human rights enhancing and tackle the cultural harm of many forms of pornography; and
- ❖ Recommended changes in law and policy.

### **Recommendations**

#### **1. Obscenity:**

- a. Undertake wholesale review of laws relating to obscenity and pornography to re-orientate focus to harms against women and modernise the law to cope with changing technology; and
- b. Revisit CPS and BBFC guidance on what constitutes 'obscenity' removing depiction of lawful acts such as urination, menstruation and fisting.

#### **2. Amend extreme pornography laws:**

- a. to remove obscenity threshold;
- b. to include 'context' when deciding if an image is extreme;
- c. to introduce a public good defence;
- d. to extend scope of the defence of participation in consensual acts; and
- e. to seek introduction of sentencing guidelines.

#### **3. Amend image-based sexual abuse laws:**

- a. Reframe image-based sexual abuse offences as sexual offences, thereby recognising connections to other forms of sexual violence and extending automatic anonymity to all complainants;
- b. Amend law to cover altered (photoshopped) images; and
- c. Strengthen law to cover all forms of non-consensual creation and distribution of intimate images, including 'upskirt' images and threats to create/distribute images.

#### **4. Expert sex and relationships education for all young people in all schools**

## 5. Clarify framing of obscenity, pornography and image-based sexual abuse as forms of violence against women

### 1. Problems with current laws on pornography

1.1 Despite empirical, technological and theoretical advances, the law regulating pornography remains steeped in outdated assumptions, concepts and regulations. It focuses on offence to the public and moral corruption of the viewer, with little regard to harm, particularly harms experienced by women.

### 2. Obscenity laws: 'depraving and corrupting' the porn viewer

2.1 Laws regulating pornography remain based on the Obscene Publications Act 1959. The key issues to note in relation to this provision include:

2.1.1 It provides for a criminal offence (up to 5 years imprisonment) to *distribute* obscene materials (possession is not covered unless possession for financial gain);

2.1.2 The definition of obscenity is based on 19<sup>th</sup> century case law and is defined as material that tends to 'deprave and corrupt' the consumer. There is no requirement to demonstrate harm, other than moral harm to the consumer;

2.1.3 Due to the opaque nature of the definition, exactly what constitutes 'obscene' materials is open to considerable debate and uncertainty. This is a major criticism of the law.

2.1.4 Some guidance has been provided by the Crown Prosecution Service (CPS) which states that the categories of material most commonly prosecuted include<sup>1</sup>:

2.1.4.1 realistic portrayals of rape

2.1.4.2 sadomasochistic material which goes beyond trifling and transient infliction of injury;

2.1.4.3 torture with instruments

2.1.4.4 bondage (especially where gags are used with no apparent means of withdrawing consent);

2.1.4.5 dismemberment or graphic mutilation;

2.1.4.6 activities involving perversion or degradation (such as drinking urine, urination or vomiting on to the body, or excretion or use of excreta); and

2.1.4.7 fisting.

2.1.5 This list includes material ranging from exceptionally violent and misogynistic pornography to that which depicts lawful activities (eg fisting or drinking urine).

2.2 The inclusion of lawful acts within the scope of obscenity laws invites the legitimate criticism that the laws are underpinned by views of 'appropriate' sexuality as it potentially covers depictions of acts that may not be common, but is not unlawful.

2.3 There is no offence if material is justified as being for the 'public good' in 'interests of science, literature, art, learning or of other objects of general concern'.

### 3 Obscene Publications Act: prosecutions and convictions

3.1 The overall picture is of falling numbers of prosecutions and convictions under the Obscene Publications Act 1959:

3.2 *Prosecutions*: In 2016-2017, there were 36 prosecutions (representing a fall from 71 in 2010-2011).<sup>2</sup>

3.3 *Convictions*: In 2015, there were only 2 convictions, a drop from 42 in 2002.<sup>3</sup>

### 4 Continuing influence of obscenity laws

4.1 While the low number of prosecutions and convictions may suggest a law that has limited effect, this is not the case. The concept of 'obscenity' casts a shadow over this whole area of law, influencing the activities of police and other authorities, as well as individuals. In addition, it provides the foundation for a range of other criminal laws, including communications offences, extreme pornography, image-based sexual abuse and is included in the Digital Economy Act (sec 22). This means that how the obscenity provisions are conceptualized (offence/disgust) and interpreted – or assumed to be interpreted – dominates the ways in which those other laws are interpreted and prosecuted.

### 5 Extreme pornography including rape pornography

5.1 As it has become more and more difficult to prevent obscene materials being distributed due to the internet, the focus has switched to the possessor of porn.

5.2 In 2008, the new law criminalising the *possession* of what is labelled 'extreme pornography' was introduced. It was extended in 2015 to include 'rape pornography' within the definition of an 'extreme pornographic image'.<sup>4</sup>

5.3 It is a criminal offence to possess 'extreme pornography' (max 3 years imprisonment). An extreme image is one which is:

5.3.1 pornographic; and

5.3.2 grossly offensive, disgusting or otherwise of an obscene character; and

5.3.3 portrays in an explicit and realistic way (not cartoons);

5.3.3.1 bestiality;

5.3.3.2 necrophilia;

5.3.3.3 life-threatening injury;

5.3.3.4 serious injury to the anus, breasts or genitals;

5.3.3.5 non-consensual penetration; or

5.3.3.6 rape.

### 6 Prosecutions and convictions:

6.1 Overall, there have been an increasing number of prosecutions for possession of extreme pornography, the vast majority of which relate to bestiality images. There are only a small number of rape pornography prosecutions.

6.2 *Prosecutions*: In 2016-2017, there were just under 2000 prosecutions for extreme pornography, a steadily rising figure (from 1165 in 2010-2011).<sup>5</sup> There were 24 prosecutions of rape pornography in 2016-2017, a rise from 3 in 2015-2016.<sup>6</sup> New FOI statistics also show few charges for rape pornography.<sup>7</sup>

6.3 *Convictions*: Between 2009-2014, 405 defendants were found guilty of possessing extreme pornographic images.<sup>8</sup> The vast majority (85%) were for possessing bestiality images. In 2016, there was only 1 conviction for possessing rape pornography.<sup>9</sup>

## **7 Who are the Users of Extreme Pornography?**

7.1 We know from new FOI (see Bows and McGlynn submission) data that those who are charged with extreme pornography offences are almost exclusively men (97%), predominantly white (71%) and of all ages.

## **8 Prosecutions for similar offences**

8.1 For information and by way of comparison, the CPS statistics for 2016-2017 show the high volume of prosecutions in relation to child sexual abuse images and malicious/obscene communications, though lower numbers of image-based sexual abuse prosecutions.<sup>10</sup>

8.2 There was a fall in the prosecution of child sexual abuse images from 22,545 in 2015-16 to 20,803.

8.3 There was an increase in the number of prosecutions under the Malicious Communications Act 1988 (indecent or grossly offensive material) and the Communications Act 2003 (grossly offensive or indecent communications) to 4,861. But note that these prosecutions are for all manner of communications, not only pornographic/obscene messages.

8.4 There were 465 prosecutions commenced of the offence of disclosing private sexual images without consent (so-called 'revenge pornography') a rise from 206 in the previous year.

## **9 Problems with extreme pornography law**

9.1 There are a [number of concerns](#) with the substantive law on extreme pornography, as well as how it is being used in practice, including<sup>11</sup>:

9.2 prosecutions are almost exclusively focussed on bestiality images (likely due to their easier identification);

9.3 the majority of prosecutions are add-ons to other prosecutions or resulting from other investigations;

9.4 the definition of extreme image includes problematic concepts of 'grossly offensive, disgusting or otherwise obscene';

9.5 the definition of rape pornography is not straightforward and the absence of a provision similar to that in Scottish legislation which enables the 'context' of image to be considered in determining whether 'extreme'<sup>12</sup>;

9.6 the defence of participation in consensual acts is too narrow<sup>13</sup>;

9.7 there is no 'public good' defence which would clearly signal the aims of the legislation;

9.8 there is a lack of clarity over the meaning of 'possession' in view of technological advances (as with other pornography and child sexual abuse image laws);

- 9.9 there are no sentencing guidelines for extreme pornography offences; and
- 9.10 increasingly sophisticated technology means that computer-generated images have become more and more realistic and include [rape pornography](#) (though virtual porn is not included within the scope of the extreme pornography laws).<sup>14</sup>

## 10 Significance of Artificial Intelligence (AI) technology, 'photoshopping' and creation of 'FakePorn'

- 10.1 For many years, photoshopping technology has enabled users to alter images, often though in crude ways meaning that the resulting image or video is obviously changed. This is no longer the case. Technology means that it can be almost impossible to determine whether an image is altered or not.
- 10.2 Further, AI technology is now transforming the possibilities for creating porn videos with [new apps](#) being launched which enable users to super-impose images of real people into pornographic videos.<sup>15</sup>
- 10.3 This technology allows for the creation and distribution of intimate images/videos without consent, with the similarly devastating consequences resulting from other forms of image-based sexual abuse.<sup>16</sup>
- 10.4 Technology is also used to generate 'cartoon-style' porn which is not designed to look realistic, but nonetheless sexualizes unlawful material, such as child sexual abuse images and rape pornography. While the law on child sexual abuse images includes virtual images (where obscene), it does not cover 'adult' pornography.
- 10.5 The law is failing to keep pace with this changing technology. Specifically, English law on image-based sexual abuse does [not cover altered images](#), unlike the law in Scotland and many Australian states.<sup>17</sup>

## 11 Recognising connections with image-Based Sexual Abuse

- 11.1 It is important to recognise the connections between sexual violence, pornography and forms of [image-based sexual abuse](#) (including 'revenge porn' and 'upskirting').
- 11.2 Private sexual images are taken and shared for a variety of reasons, including their distribution on pornography websites. There are websites dedicated to 'revenge porn', as well as 'upskirting' and other forms of 'non-consensual pornography'.<sup>18</sup> While many of the porn websites claim to have banned such non-consensual material, it is easily and freely available online, normalising non-consensual sexual activity and images.
- 11.3 At present, image-based sexual abuse is [not recognised in law or by the Government](#) as a sexual offence meaning that the connections to other forms of sexual violence are not being recognised (as well as denying complainants the right to anonymity).
- 11.4 Advances in technology, particularly 'FakePorn' apps and other uses of AI, mean that it is going to be increasingly easy to create pornography without the consent of participants (ie photoshopping images of individuals into porn) and generate forms of 'extreme pornography' which fall outside the current threshold of 'realistic'.<sup>19</sup>

11.5 The current laws covering image-based sexual abuse are [inconsistent, piecemeal and only protect some victims](#). For example, where a perpetrator is motivated by financial gain, male bonding, sexual gratification or 'humour', the laws on 'revenge porn' do not apply; the laws on voyeurism only apply if the motive is sexual gratification; upskirting is not covered, nor are threats or photoshopped images.

## 12 Justifications for Legal Regulation

12.1 The criminal regulation of pornography requires justification. The standard liberal response is to resist legislative action on the basis that there is no evidence of a direct causal connection between pornography and sexual violence. Drawing on research with Erika Rackley, it is argued here that on the contrary we need to move beyond a simplistic search for 'direct effects' and recognise the 'cultural harm' of many forms of pornography. Further, our fundamental liberal values - of autonomy, dignity and protection of human rights – also justify regulatory action.<sup>20</sup>

## 13 Criminal regulation can be 'human rights enhancing'

13.1 Legislative action restricting pornography can be justified on the basis that it protects human rights, particularly women's human rights. This has been recognized by Parliament's Joint Committee on Human Rights which welcomed the extension of the extreme pornography offence to include rape pornography '[as a human rights enhancing measure](#)'.<sup>21</sup> This view was justified on the basis that rights to equality and dignity are directly challenged by much violent, extreme pornography, particularly 'rape pornography'. The proliferation and easy availability of such material can impact broadly on many women's ability to exercise both freedom of expression and their right to private life, by restricting their autonomy and freedom of choice.

13.2 In relation to image-based sexual abuse, regulation is similarly human-rights enhancing, protecting rights to privacy, sexual expression and sexual autonomy. Prohibiting the distribution (eg onto pornography websites) of non-consensual material, and reducing the abuse and harassment that often follows, is also vital to ensuring the freedom of expression of women. The impact of abuse and harassment of image-based sexual abuse often results in women's self-censorship, removing themselves from social media and other online means of social and professional interaction.

13.3 Further, the State has a positive obligation to ensure that it takes appropriate action to protect human rights including, in this context, Articles 2 (right to life), 3 (right to protection from inhuman and degrading treatment) and 8 (right to respect for private life). Preventative and protective measures are required to ensure the free exercise of autonomy in sexual activity and expression, to challenge and change the societal context in which sexual violence is endemic and breaches the human rights of thousands of women and men.

## 14 Cultural harm of extreme pornography

14.1 Some forms of pornography, particularly violent and rape pornography, constitute a form of '[cultural harm](#)' which justifies legislative action.<sup>22</sup> The cultural harm argument rejects a simplistic

link between pornography and sexual violence, such that a person who watches rape pornography might then be triggered into committing rape. Rather the argument is that this sort of pornography plays its part in shaping a cultural context conducive to high levels of sexual coercion.

**14.2** Some pornography constitutes a form of cultural harm in that it contributes to a culture in which sexual violence is eroticized, normalized and minimized. This in turn leads to a society where sexual violence is less likely to be recognized as such (by the police, juries, the victims themselves), where it is therefore less likely to be investigated and where rape myths are harder to challenge.

## **15 Beyond 'direct harm' and 'causal links'**

15.1 Nonetheless, the common response to calls for regulation is that there is no proof of direct causation or links between pornography and sexual violence and therefore no basis for regulation.

15.2 However, we are unlikely to ever devise a research project that can establish (or disprove) that exposure to pornographic images leads to specific acts of sexual violence. Individual acts of sexual violence will rarely, if ever, be the exclusive product of one immediate stimulus. But the fact that we cannot test for this does not mean we ought to proceed on the basis that no such connection exists. The absence of evidence connecting exposure to rape pornography to real-world rapes is not evidence that there is no such connection. Rather, as in any situation where causation is unclear, we are left to make a determination on the balance of probabilities: is rape pornography, for example, more, or less, likely to contribute to a culture which is conducive to high levels of rape and sexual violence?

15.3 Unless we think that tendencies towards sexual violence are exclusively genetically predetermined, then these attitudes and actions must come from somewhere. If we accept that our cultural environment influences our attitudes and values, the question becomes what aspects of this environment contribute to particular attitudes. It would be surprising if pornography generally, and rape pornography in particular, was not one such contributing factor – among any number of other factors – that is likely to encourage and sustain a way of thinking where women's sexual autonomy is less likely to be valued. [It is on such a basis that violent and rape pornography is more likely to be culturally harmful than not.](#)

## **16. Recommendations**

### **16.1 Obscenity:**

16.2 Recommend wholesale review of laws relating to obscenity and pornography to re-orientate focus to harms against women and modernise the law to cope with changing technology;

16.3 Revisit CPS and BBFC guidance on what constitutes 'obscenity' removing depiction of lawful acts such as urination, menstruation and fisting.

### **16.4 Amend extreme pornography laws:**

16.5 to remove obscenity threshold;

16.6 to include 'context' when deciding if an image is extreme;

16.7 to introduce a public good defence;

16.8 to extend scope of participation in consensual acts; and

16.9 to seek introduction of sentencing guidelines for extreme pornography offences.

### **16.10 Amend image-based sexual abuse laws**

- 16.11 Reframe image-based sexual abuse offences as sexual offences, thereby recognising connections to other forms of sexual violence and extending automatic anonymity to all complainants;
- 16.12 Amend law to cover altered (photoshopped) images; and
- 16.13 Strengthen law to cover all forms of non-consensual creation and distribution of intimate images, including 'upskirt' images and threats to create/distribute images.

**16.14 Expert sex and relationships education for all young people in all schools:**

Recommendation that all young people undertake sex and relationships education which critically engages with the nature of pornography, its content, impacts and questions of consent.

**16.15 Clarify framing of obscenity, pornography and image-based sexual abuse as forms of violence against women:** There is a lack of clarity across Government and the criminal justice system about how to frame/conceptualise these harms. They should be viewed as part of the continuum of violence against women and included in policy, monitoring, action plans and strategies as appropriate.<sup>23</sup>

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**Expertise of [Clare McGlynn](#), Professor of Law, Durham University**

Clare McGlynn is an expert on laws relating to sexual violence, pornography and online abuse including image-based sexual abuse. She has worked closely with politicians, policy-makers and the voluntary sector to strengthen laws on violence against women, including the introduction of new criminal offences targeting rape pornography and [image-based sexual abuse](#) (including 'revenge porn'). She [gave evidence](#) before the Women & Equalities Select Committee in December 2017 on women's experiences of sexual harassment, and has given evidence before the Scottish and English Justice Committees on these issues.

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<sup>1</sup> CPS Guidance for Prosecutors, Obscene Publications: <https://www.cps.gov.uk/legal-guidance/obscene-publications>

<sup>2</sup> CPS, *Violence Against Women and Girls Report 10<sup>th</sup> edition 2016-2017*, p A42.

<sup>3</sup> Ministry of Justice, *Criminal Justice System Statistics Quarterly: December 2016*, discussed in J Rowbottom, 'The Transformation of Obscenity' (2017) *Information and Technology Communications Law*.

<sup>4</sup> Criminal Justice and Courts Act 2015, section 37: came into force on 13 April 2015.

<sup>5</sup> CPS, *Violence against Women and Girls Report 10<sup>th</sup> edition, 2016-2017*, November 2017, A42-43: [https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2017\\_0.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2017_0.pdf)

<sup>6</sup> CPS VAWG Report.

<sup>7</sup> See evidence submitted to this inquiry by Hannah Bows and Clare McGlynn, 'New FOI Data on Policing of Extreme Pornography', April 2018.

<sup>8</sup> A Antoniou and D Akrivos, *The Rise of Extreme Porn – legal and criminological perspectives on extreme pornography in England & Wales* (Palgrave, 2017), p 203.

<sup>9</sup> See Rowbottom, 'The Transformation of Obscenity' (2017) *Information and Technology Communications Law*.

<sup>10</sup> CPS VAWG Report.

<sup>11</sup> See further Clare McGlynn and Erika Rackley: (2009). [Criminalising Extreme Pornography: A Lost Opportunity](#). *Criminal Law Review* (4): 245-260 and 'Rape Should be Extreme enough for English Porn laws' *The Conversation*, 10 June 2013: <https://theconversation.com/rape-should-be-extreme-enough-for-english-porn-laws-15048>

<sup>12</sup> Scottish legislation explicitly allows reference to be made to 'how the image is or was described' to assist in determining whether it depicts non-consensual sexual activity: Civic Government (Scotland) Act 1982, sec 51A(7)(a).

<sup>13</sup> Discussed in Erika Rackley and Clare McGlynn, '[Prosecuting Extreme Pornography](#): a misunderstood and misused law' (2013) *Criminal Law Review* 400.

<sup>14</sup> For further info on CGI rape pornography, see Vonny Leclerc <https://threadreaderapp.com/thread/966766553940283392.html>

<sup>15</sup> On FakePorn and failure of law to keep up, see Matt Burgess, "the law is nowhere near ready for the rise of AI-generated fake porn": <http://www.wired.co.uk/article/deepfake-app-ai-porn-fake-reddit>

<sup>16</sup> See Henry et al, 'AI can now create fake porn making revenge porn even more complicated': <https://theconversation.com/ai-can-now-create-fake-porn-making-revenge-porn-even-more-complicated-92267>

<sup>17</sup> See Clare McGlynn, 'The law must protect all victims of image-based sexual abuse, not just upskirting' *Huffington Post* 9 March 2013: [https://www.huffingtonpost.co.uk/entry/not-only-upskirting-law-must-protect-all-victims\\_uk\\_5aa105e8e4b0ef2aaff7048e](https://www.huffingtonpost.co.uk/entry/not-only-upskirting-law-must-protect-all-victims_uk_5aa105e8e4b0ef2aaff7048e)

<sup>18</sup> On prevalence of 'creepshots' on porn and social media sites, see: [https://motherboard.vice.com/en\\_us/article/paxevg/tumblr-creepshots](https://motherboard.vice.com/en_us/article/paxevg/tumblr-creepshots)

<sup>19</sup> On AI and 'FakePorn', see <http://www.wired.co.uk/article/deepfake-app-ai-porn-fake-reddit>

<sup>20</sup> Regulation of pornography is often rejected on the basis that it contravenes JS Mill's 'harm principle'. However, there are good grounds for suggesting Mill would have been far more inclined towards regulation than is often recognised. Further, he argued that: 'It is the business of the law to prevent wrongdoing, and not simply to patch up the consequences of it when it has been committed'. See Clare McGlynn and Ian Ward, 'Would John Stuart Mill have Regulated Pornography?' (2014) 41 *Journal of Law and Society* 500-522.

<sup>21</sup> Parliament's Joint Committee on Human Rights, '*Report: Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill*', 11 June 2014, para 1.41, 1.43, 1.50 <https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/189/18904.htm>

<sup>22</sup> This discussion of cultural harm draws on the following articles: Erika Rackley and Clare McGlynn, '[The cultural harm of rape pornography](#)', 22 May 2015, *Free Speech Debate*:

<http://freespeechdebate.com/en/discuss/the-cultural-harm-of-rape-pornography/>; Clare McGlynn and Erika Rackley, '[Criminalising Extreme Pornography: A Lost Opportunity](#)' (2009) *Criminal Law Review*, 245-260.

<sup>23</sup> For example, the Government VAWG strategy refers to 'revenge pornography' as new form of abuse affecting women, though the only reference to pornography is in the context of young people's problematic access to porn, and the Government has rejected calls to recognise 'revenge porn' as a sexual offence (HM Government, *Ending Violence Against Women and Girls Strategy 2016-2020*, March 2016). While the CPS Violence Against Women strategy includes 'pornography and obscenity' within its scope and therefore recognising these as crimes 'identified as being committed primarily but not exclusively by men against women', this is difficult to square with the current obscenity laws (which focus on moral corruption of porn viewers) and extreme pornography prosecutions being primarily of bestiality images (CPS, VAWG Report). Note that there are no actions relating to obscenity or pornography in the CPS Action Plan to deliver the strategy: CPS VAWG Strategy Actions Plans 2017-2018.