

# CRIMINAL JUSTICE AND IMMIGRATION ACT 2008

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## EXPLANATORY NOTES

### THE ACT

#### *Commentary on Sections*

#### **Part 5: Criminal Law**

#### ***Section 63: Possession of extreme pornographic images***

454. This section creates a new offence of possession of extreme pornographic images. *Subsection (1)* provides that it is an offence to be in possession of an extreme pornographic image.
455. *Subsections (2) to (8)* set out the definition of “extreme pornographic image”. The definition of “pornographic” is set out in *subsection (3)*. In order to be considered pornographic, an image must be of such a nature that it must reasonably be assumed to have been produced solely or mainly for the purpose of sexual arousal. Whether this threshold has been met will be an issue for a jury to determine. *Subsection (4)* makes it clear that where an individual image as it is held in a person’s possession forms part of a larger series of images, the question of whether it is pornographic must be determined by reference both to the image itself and also the context in which it appears in the larger series of images.
456. *Subsection (5)* expands on subsection (4). It provides that where an image is integral to a narrative (for example a mainstream or documentary film) which taken as a whole could not reasonably be assumed to be pornographic, the image itself may be taken not to be pornographic even though if considered in isolation the contrary conclusion would have been reached.
457. *Subsection (6)* defines an “extreme image” for the purposes of the offence. An extreme image is one which is grossly offensive, disgusting or otherwise of an obscene character and which depicts one of a list of acts set out in subsection (7). These are explicit and realistic portrayals of:
- acts which threaten a person’s life; this could include depictions of hanging, suffocation, or sexual assault involving a threat with a weapon;
  - acts which result in, or are likely to result in, serious injury to a person’s anus, breasts or genitals; this could include the insertion of sharp objects or the mutilation of breasts or genitals;
  - acts which involve sexual interference with a human corpse; or
  - a person performing an act of intercourse or oral sex with an animal.
458. The people and the animals portrayed must appear to a reasonable person to be real.

459. *Subsection (8)* sets out the definition of an image. It states that for the purposes of this offence, “an image” means either still images, such as photographs, or moving images, such as those in a film. The term “image” also incorporates any type of data, including that stored electronically (as on a computer disk), which is capable of conversion into an image. This covers material available on computers, mobile phones or any other electronic device. The scope of the definition of image is also affected by the requirement referred to above that persons and animals portrayed in an image must appear to be real. That requirement has the effect of excluding animated characters, sketches, paintings and the like.
460. *Subsection (9)* states that references to parts of the body include body parts that have been surgically constructed.
461. *Subsection (10)* requires proceedings to be instituted by or with the consent of the Director of Public Prosecutions.

***Section 64: Exclusion of classified films etc.***

462. This section provides an exclusion from the scope of the offence under section 63 for classified films.
463. An “excluded image” is defined in *subsection (2)* as an image which forms part of a series of images contained in a recording of the whole or part of a classified work. A “recording” is defined in *subsection (7)* as any disc, tape or other device capable of storing data electronically and from which images may be produced. This therefore includes images held on a computer.
464. The effect of the exclusion is that a person who has a video recording of a film which has been classified by the British Board of Film Classification and which contains images that, notwithstanding their context, might be caught by the offence in section 63, could not be liable for prosecution. The fact that the images are held as part of a BBFC classified film takes them outside the scope of the offence.
465. However, the effect of *subsection (3)* is that the exclusion from the scope of the offence does not apply in respect of images contained within extracts from classified films which must reasonably be assumed to have been extracted solely or principally for the purpose of sexual arousal. Essentially the exemption for an image forming part of a classified work is lost where the image is extracted from that work for pornographic purposes. *Subsection (7)* defines “extract” to include a single image.
466. *Subsection (4)* provides that when an extracted image is one of a series of images, in establishing whether or not it is of such a nature that it must reasonably be assumed to have been extracted for the purpose of sexual arousal, regard is to be had to the image itself, and to the context in which it appears in the series of images. This is the same test as set out in *subsection (4)* of section 63. *Subsection (5)* of section 63 also applies in determining this question.
467. The effect of *subsection (5)* is that in determining whether a recording is a recording of a whole or part of a classified work, alterations due to technical reasons, such as a failure in the recording system, or due to inadvertence, such as setting the wrong time for a recording, or the inclusion of extraneous material such as advertisements, are to be disregarded.
468. *Subsection (6)* makes it clear that nothing in section 64 affects any duty of a designated authority to take into account the offence in section 63 when considering whether to issue a classification certificate in respect of a video work.
469. *Subsection (7)* sets out the definitions used in this section. *Subsection (8)* states that section 22(3) of the Video Recordings Act 1984 applies. The effect of section 22(3) is that where an alteration is made to a video work in respect of which a classification

certificate has been issued the classification certificate does not apply to the altered work.

### ***Section 65: Defences: general***

470. This section sets out a series of defences to the offence of possession of extreme pornographic images. These defences are set out in *subsection (2)*. They are the same as for the possession of indecent images of children under section 160(2) of the Criminal Justice Act 1988. They are:
- that the person had a legitimate reason for being in possession of the image; this will cover those who can demonstrate that their legitimate business means that they have a reason for possessing the image;
  - that the person had not seen the image and therefore neither knew, nor had cause to suspect, that the images held were extreme pornographic images; this will cover those who are in possession of offending images but are unaware of the nature of the images; and
  - that the person had not asked for the image - it having been sent without request - and that he had not kept it for an unreasonable period of time; this will cover those who are sent unsolicited material and who act quickly to delete it or otherwise get rid of it.

### ***Section 66: Defence: participation in consensual acts***

471. An additional defence for those who participate in the creation of extreme pornographic images is provided for in this section. *Subsection (1)(b)* limits this defence, however, by excluding the images listed in section 63(7)(d) - those showing images of bestiality. Also excluded are necrophilia images which depict a real corpse.
472. *Subsection (2)* sets out the matters that a defendant must prove, on the balance of probabilities, in order to benefit from the defence. He must prove that he directly participated in the act or acts portrayed in the image and that the act(s) did not involve the infliction of non-consensual harm on any person. Where the image depicts necrophilia the defendant must also prove that the human corpse portrayed was not in fact a corpse.
473. *Subsection (3)* defines non-consensual harm as harm which is of such a nature that, in law, a person cannot consent to it being inflicted on him or herself, or harm to which a person can consent but did not in fact consent.

### ***Section 67: Penalties etc. for possession of extreme pornographic images***

474. The penalties that will apply to persons found guilty of an offence under section 63 are set out in this section.
475. On conviction on indictment, the maximum sentence is imprisonment for three years for possession of images covered by section 63(7)(a) or (b) (life threatening acts, or serious injury), and imprisonment for two years for possession of images covered by section 63(7)(c) or (d) (necrophilia or bestiality).
476. The combined effect of section 67 and the transitional provision in *paragraph 23* of Schedule 27 is that initially the maximum sentence on summary conviction of the offence in England and Wales will be 6 months' imprisonment. On the commencement of section 154(1) of the 2003 Act, the maximum sentence on summary conviction in England and Wales will rise to 12 months. The maximum custodial penalty in Northern Ireland is six months

***Section 68 and Schedule 14: Special rules relating to providers of information society services***

477. **Section 68** and Schedule 14 are intended to ensure that the provisions outlined above which make illegal the possession of extreme pornographic material are consistent with the UK's obligations under the EU E-Commerce Directive.
478. **Schedule 14** ensures that providers of information society services who are established in England, Wales and Northern Ireland are covered by the new offence even when they are operating in other European Economic Area states. **Paragraphs 3 to 5** of the Schedule provide exemptions for internet service providers from the offence of possession of extreme pornographic material in limited circumstances, such as where they are acting as mere conduits for such material or are storing it as caches or hosts.

***Section 69: Indecent photographs of children: England and Wales***

479. **Subsection (2)** of this section amends section 1B(1)(b) of the Protection of Children Act 1978 (the 1978 Act) to include members of the Secret Intelligence Service in the defence from prosecution for an offence under section 1(1)(a) of the 1978 Act, i.e. making an indecent photograph or pseudo-photograph of a child, if it was necessary for him or her to do so in the exercise of any of the functions of that Service.
480. **Subsection (3)** of this section amends section 7 of the 1978 Act to extend the definition of "photograph" to include derivatives of photographs, such as tracings or other forms of data. As a result, references to a photograph in the 1978 Act will include tracings or other images, whether made by electronic or other means, that are not in themselves photographs or pseudo-photographs (as defined in the 1978 Act) but which are derived from the whole or part of a photograph or pseudo-photograph, or a combination of either or both. This amendment will mean that an offence under section 1 (indecent photographs of children) of the 1978 Act, will cover derivatives of indecent photographs or pseudo-photographs, alongside indecent photographs and pseudo-photographs themselves. These derivatives include line-traced and computer traced images, for example, pencil traced images using tracing paper or computer traced images of photographs taken on a mobile phone.
481. The definition in section 7 of the 1978 Act also extends to the offence in section 160 of the 1988 Act relating to possession of indecent photographs or pseudo-photographs of a child.
482. **Subsection (4)** of this section amends a minor drafting error in section 7(9)(b) of the 1978 Act.

***Section 70: Indecent photographs of children: Northern Ireland***

483. This section amends the Protection of Children (Northern Ireland) Order 1978. The effect is to make the same changes to corresponding Northern Ireland legislation as section 69 does to the legislation in England and Wales.

***Section 71: Maximum penalty for publication etc. of obscene articles***

484. This section raises the maximum penalty on indictment for offences under the Obscene Publications Act 1959 from three years' imprisonment to five years' imprisonment. The new sentence will not apply to offences committed before the commencement of this section (see paragraph 24 of Schedule 27).

***Section 72: Offences committed outside the United Kingdom***

485. **Subsection (1)** substitutes a new section 72 into the Sexual Offences Act 2003 (which allows for the prosecution of British citizens or UK residents for sexual offences against children committed abroad).

486. New section 72(1) makes it an offence for a UK national to commit an act outside the UK which would constitute a relevant sexual offence if done in England and Wales or Northern Ireland. This has the effect of removing the requirement that the act committed must have been illegal in the country where it took place, in respect of the prosecution of UK nationals. However, this requirement remains for the prosecution of UK residents under new section 72(2) and those who become UK residents or nationals under new section 72(3) and (4). Where a person becomes a UK national or resident after having committed a relevant sex offence, in a country outside the UK, such a person must also be a national or resident at the time the proceedings are brought.
487. New section 72(9) provides definitions of “country”, “UK national” and “UK resident”.
488. New sections 72(5) to (8) replicate provisions in the current section 72. They provide rules relating to how the prosecution can prove that the offence was an offence in the country in which it was committed.
489. *Subsections (2), (3) and (4)* amend Schedule 2 to the Sexual Offences Act 2003. The effect of these amendments is that the new section 72 will apply to sexual offences committed against children under 18, rather than under 16, or in the case of Northern Ireland under 17.

### ***Section 73 and Schedule 15: Grooming and adoption***

490. *Section 73* introduces Schedule 15. *Paragraph 1* of Schedule 15 amends section 15 (1) of the Sexual Offences Act 2003. It widens the offence of grooming so that an offence will be committed by an adult where a child under 16 travels to meet the adult or the adult arranges to meet the child, following two earlier communications, if the adult intends to commit a sexual offence against the child during or after the meeting.
491. *Paragraph 3* of Schedule 15 amends section 27(1)(b) of the Sexual Offences Act 2003 to include reference to the relevant section of the Adoption Act 1976, which governs the effect of adoptions made before 30 December 2005. The result is that the provision applies to adoptions made before 30 December 2005, as well as to adoptions made on or after that date (which are governed by the Adoption and Children Act 2002). *Paragraph 4* amends similarly the corresponding defence in section 29(1)(b) of the Sexual Offences Act 2003 so that the defence for sexual relationships which predate family relationships is not available where there is a prescribed category of relation irrespective of whether a person has been adopted and irrespective of the date of adoption.
492. *Paragraphs 5 and 6* amend sections 64 and 65 of the Sexual Offences Act 2003 so that the offences of sex with an adult relative are committed where an adoptive parent has consensual sex with their adopted child when he or she is aged 18 or over. The adopted person does not commit the offence unless he or she is aged 18 or over.
493. *Paragraph 7* amends section 47(1) of the Adoption Act 1976 so that section 39 of that Act (status conferred by adoption) does not have effect for the purposes of sections 64 and 65 of the Sexual Offences Act 2003. The result is that it is clear that pre-30 December 2005 adoptions are treated in the same way for the purposes of those sections of the Sexual Offences Act 2003 as subsequent adoptions.

### ***Section 74 and Schedule 16: Hatred on the grounds of sexual orientation***

494. *Section 74* gives effect to Schedule 16, which amends Part 3A of the Public Order Act 1986 (hatred against persons on religious grounds) to create offences involving stirring up hatred on the grounds of sexual orientation.
495. New section 29AB of the 1986 Act defines “hatred on the grounds of sexual orientation”. The definition covers hatred against a group of persons defined by reference to their sexual orientation, be they heterosexual, homosexual or bi-sexual.

*These notes refer to the Criminal Justice and Immigration Act 2008 (c.4) which received Royal Assent on 8 May 2008*

496. *Paragraphs 6 to 11* of Schedule 16 amend, in turn, sections 29B to 29G of the 1986 Act so as to extend the various religious hatred offences in those sections to cover hatred on the grounds of sexual orientation. These offences involve the use of words or behaviour or display of written material (section 29B), publishing or distributing written material (section 29C), the public performance of a play (section 29D), distributing, showing or playing a recording (section 29E), broadcasting or including a programme in a programme service (section 29F), and possession of inflammatory material (section 29G).
497. In relation to each extended offence the relevant act (namely words, behaviour, written material or recordings or programme) must be threatening, and intended to stir up hatred on the grounds of sexual orientation. In the case of the offence under section 29B, there is a specific defence where the words or behaviour are used or displayed inside a private dwelling and the accused had no reason to believe that they can be heard or seen by a person outside that or any other private dwelling.
498. The offences differ from the offences of stirring up racial hatred, in Part 3 of the 1986 Act, in two respects. First, the offences apply only to “threatening” words or behaviour, rather than “threatening, abusive or insulting” words or behaviour. Second, the offences apply only to words or behaviour if the accused “intends” to stir up hatred on grounds of sexual orientation, rather than if hatred is either intentional or “likely” to be stirred up.
499. *Paragraphs 6(3) and 12 to 13, 15 and 16* of Schedule 16 rectify technical defects in Part 3A of the 1986 Act as inserted into that Act by the Racial and Religious Hatred Act 2006.
500. *Paragraph 6(3)* of Schedule 16 omits section 29B(3) of the 1986 Act (which has not been commenced). This provides that a constable may arrest without warrant anyone he reasonably suspects is committing an offence under section 29B. This provision is unnecessary given the general power of arrest now in section 24 of the Police and Criminal Evidence Act 1984, as amended by the Serious Organised Crime and Police Act 2005.
501. The Racial and Religious Hatred Act extends to England and Wales. However, sections 29H(2) and 29I(2)(b) and (4) of the 1986 Act make provision in relation to Scotland only. As such, these sections are redundant and have not been commenced (see *Racial and Religious Hatred Act 2006 (Commencement No 1) Order 2007 (SI 2007/2490)*). *Paragraphs 12 and 13* of Schedule 16 repeal these redundant provisions and remove unnecessary references to England and Wales in sections 29H and 29I. *Paragraph 14* of Schedule 16 relates to freedom of expression and is inserted for the avoidance of doubt. It does not change the threshold of conduct required in order for the offence to be made out. *Paragraph 16(2)* of Schedule 16 removes unnecessary references to England and Wales in section 29L.
502. Section 29K of the 1986 Act makes it clear that the Act does not apply to fair and accurate reports of anything done in the United Kingdom or Scottish Parliaments or the fair and accurate contemporaneous reports of judicial proceedings. Paragraph 15 of Schedule 16 inserts a reference to the National Assembly for Wales.
503. *Paragraph 16(3) and (4)* of Schedule 16 amends section 29L(3)(b) of the 1986 Act, which sets out the maximum penalty for an offence under Part 3A on summary conviction, to take account of Custody Plus, as provided for in the 2003 Act (but not yet commenced). The maximum sentence on summary conviction is increased from 6 to 12 months and a transitional provision inserted for the period before section 154(1) of the 2003 Act comes into force, such that during that period the reference to 12 months’ imprisonment is read as a reference to a period of 6 months’ imprisonment.

***Section 75 and Schedule 17: Offences relating to the physical protection of nuclear material and nuclear facilities***

504. The provisions of section 75 and Schedule 17 are needed in order to facilitate UK ratification of amendments made in 2005 to the CPPNM. The original CPPNM was concluded under the auspices of the International Atomic Energy Agency in 1980. It entered into force in 1987, and there are currently 130 Parties. The UK is a Party, having signed the Convention in 1980 and ratified it in 1991.
505. Article 7(1) of the existing CPPNM lists a number of descriptions of conduct relating to nuclear material and requires State Parties to make each type of conduct “*a punishable offence...under its national law*”. Article 7(2) requires the offences to be “*punishable by appropriate penalties which take into account their grave nature*”. The conduct listed in existing Article 7(1) includes (for example):
- “an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property*
- and
- “a theft or robbery of nuclear material*
506. Article 8 of the CPPNM requires each State Party to establish jurisdiction over these offences not only when they are committed in its territory but also when they are committed on board a ship or aircraft registered in that State, by a national of that State or by a person who is presented in its territory and whom the State does not extradite. Therefore, among other things, the CPPNM requires State Parties to create extraterritorial offences.
507. The offences required by the existing CPPNM are implemented in UK law through a mixture of generally applicable criminal offences (for example murder, criminal damage and theft offences) and by the provisions of the 1983 Act. The 1983 Act was passed to implement the CPPNM. It was brought into force in 1991 to coincide with UK ratification. The 1983 Act created offences to fill particular gaps in UK law and also created extraterritorial offences as required by the CPPNM. Thus section 1 of the Act in effect created extraterritorial versions of a number of existing UK offences; and section 2 created new offences constituted either by conduct in the UK or conduct outside the UK. All the offences are capable of being committed by a person of any nationality.
508. Amendments to the CPPNM were agreed on 8 July 2005. Among other things, new descriptions of conduct were added to Article 7. In order to facilitate UK ratification of the amended Convention, it is necessary to create a number of new criminal offences – including extraterritorial offences. These new offences relate principally to acts directed at a nuclear facility, the misuse of nuclear material with intent to cause damage to the environment (or recklessly as to whether environmental damage is caused), and involvement outside the UK in the unlawful importing, exporting or shipping of nuclear material. It is also necessary to increase the penalty for existing UK offences relating to the import, export and shipment of nuclear material.
509. **Section 75** and Schedule 17 amend the 1983 Act to create the necessary new offences and to make related amendments to that Act. They also make related amendments to the penalties for various offences under the Customs and Excise Management Act 1979.