

# Submission to the Bright Blue Commission on Conservatism and Human Rights

by

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The **Centre for Gender Equal Media (GEM)** at Durham University is a newly established think-tank generating evidence and policy ideas to work towards a gender equal media. Founded by a partnership between leading researchers and policy experts in the field, GEM's aim is for a democratic media, open and accessible to all. We make the connections across forms of media including print media, online spaces and social media, film, gaming and music videos, and seek to inform consistent evidence based policy-making across these areas. <http://genderequalmedia.org.uk/>

**Clare McGlynn and Erika Rackley** are experts in the legal regulation of pornography, rape law and gender equality. Their research has shaped political and public debates and worked closely with government on the introduction of laws criminalising extreme pornography and 'revenge pornography'. Their work has been cited in Parliament and they are regular commentators in the broadcast and print media. Most recently, their call for a new law on 'image-based sexual abuse' was supported in Parliamentary by Mrs Maria Miller MP (see, HC Deb 7 July 2016, vol 612, col 1064).

## 1.0 Introduction

- 1.1 We welcome the opportunity to contribute to Bright Blue's Commission on Conservatism and Human Rights. Our submission addresses the following three questions:
- What are the causes, nature and solutions for violence and abuse against women in modern Britain?
  - Where does sexism exist in modern Britain and how can it be addressed?
  - Assuming that a British Bill of Rights will replace the Human Rights Act, what should this new bill contain?

We do so using the example of the recent criminalisation of possession of so-called 'extreme pornography', particularly pornographic images of rape and ongoing debates about the regulation of image-based sexual abuse (including 'revenge pornography').

- 1.2 Sexual violence, harassment and abuse online and via social media is now commonplace. Women's freedom of expression, privacy, dignity and autonomy are being compromised by the practice of creating and disseminating abusive material online. These real harms are facilitated by an absence of effective regulation of the (presumed) virtual world of the Internet. However, as the criminalisation of the possession of pornographic images of rape by the Coalition Government in 2015 demonstrates, focused and measured restrictions in this field can protect and *enhance* the human rights of victims of sexual violence and abuse both online and off-line.
- 1.3 A new Bill of Rights provides an opportunity to engage in debates which challenge the cultural harm of misogynistic online and off-line harassment and abuse as well as the essential underpinning framework for future regulation which protects and enhances the human rights of all.

### 1.4 We make the following recommendations:

- 1.4.1 That the protection of women and girls from all forms of violence must be a central aim of any new Bill of Rights in line with the Home Office-led Violence Against Women and Girls strategy.
- 1.4.2 That mechanisms are included to ensure the human rights of all parties are effectively protected and enriched both online and off-line.
- 1.4.3. That the Commission recognise that appropriate restrictions or limits on A's rights can be *human rights enhancing* insofar as they protect or enhance B's rights or freedoms that would otherwise be negatively affected by the unrestricted operation of A's rights.

## 2.0 Violence and abuse against women

- 2.1 The Internet and social media has brought new opportunities for personal expression, but it has also created and facilitated new forms of abuse.<sup>1</sup> Women and girls in particular face sexual abuse online and through new technologies. Pornographic images of rape and image-based sexual

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<sup>1</sup> McGlynn, C. and Rackley, E., 'Why Criminal the Possession of Rape Pornography' *Research Briefing*. Available at: <https://www.dur.ac.uk/resources/law/research/RapePrnFeb14.pdf>

abuse (including but not limited to so-called revenge pornography) are just two examples of the sorts of harmful material in circulation online.

- 2.2 Such material not only causes specific harms to the individuals subjected to this abuse but also operates as a form of 'cultural harm', contributing to and reinforcing a culture in which sexual violence is minimised and glamorised.
- 2.3 The ubiquity of this harmful material contributes to a climate in which sexual violence is condoned and the equality and dignity of persons is not protected.<sup>2</sup> It impacts on women's participation in online activities, restricting their autonomy and freedom of choice. It has a negative impact on their ability to exercise their freedom of expression and their right to private life.

### **3.0 Addressing Sexual Violence**

- 3.1 The 'cultural harm' of such material provides a justification for regulatory and legislative intervention.
- 3.2 Our liberal democracy champions the values of equality and dignity, which are directly challenged by material such as extreme pornography. The law has a precautionary role; to anticipate, preclude and counter the risk of harm to society and to individuals.<sup>3</sup>

### **4.0 Freedom of Expression: Human Rights Enhancing Measures**

- 4.1 One of the criticisms of legislating against forms of pornography is that it restricts the rights to private life and the rights to freedom of expression of those creating and distributing the material. On the contrary, we argue that legislating against abusive behaviour enhances freedom of expression as it facilitates the participation of all.
- 4.2 In a society that condones violence against women, and undermines the value of consent, the freedom of expression of women may be circumscribed.<sup>4</sup> Their ability to participate freely in online discussions and activities is negatively affected by the threat or fear of harm. Whilst their rights are protected in law, societal practices and harms mean that they are unable to fully enjoy those rights and freedoms. Legislating against harmful material thus facilitates the enjoyment by women of their rights.
- 4.3 A person's freedom of expression is not absolute; it is balanced against the rights of others. Proportionate limitations can be placed on the freedom of expression to ensure the protection of the human rights of others. In this context, it is vital to remember that freedom of expression is a qualified right, as set out in Article 10 of the European Convention on Human Rights.

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<sup>2</sup> McGlynn, C. and Rackley, E., 'Why Criminalise the Possession of Extreme Pornography' *New Statesman*, 12 February 2014. Available at: <http://www.newstatesman.com/politics/2014/02/why-criminalise-possession-rape-pornography>; Rackley, E and McGlynn C, 'The Cultural Harm of Rape Pornography' *Free Speech Debate*, 22 May 2015. Available at:

<http://freespeechdebate.com/en/discuss/the-cultural-harm-of-rape-pornography/>

<sup>3</sup> See McGlynn, C. and Ward, I., 'Would John Stuart Mill have Regulated Pornography?' (2014) 41(4) *Journal of Law and Society* 500-522

<sup>4</sup> McGlynn, C. and Rackley, E., 'Criminalising Extreme Pornography: A Lost Opportunity' (2009) *Criminal Law Review*, 245-260, 258. Available at: <http://dro.dur.ac.uk/8111/1/8111.pdf?DDC117+DDC72+DDC71+DDD19+dla4jap+dl>

- 4.4 The Joint Committee on Human Rights agreed with a submission by us that the regulation of harmful material, such as extreme pornography, is a proportionate limitation of the freedom of expression and “a human rights enhancing measure”.<sup>5</sup> They stated:

*“We welcome, as a **human rights enhancing measure**, the provision in the Bill to extend the current offence of possession of extreme pornography to include possession of pornographic images depicting rape and other non-consensual sexual penetration. We consider that the cultural harm of extreme pornography, as set out in the evidence provided to us by the Government and others, provides a strong justification for legislative action, and for the proportionate restriction of individual rights to private life (Article 8 ECHR) and freely to receive and impart information (Article 10 ECHR)”.*

- 4.5 Therefore, regulation of online abuse and harassment can enhance the protection of human rights by enabling an online culture in which all can participate freely and without fear of harassment and abuse. Arguing that these interventions undermine human rights ignores the human rights enhancing effect of placing limitations on the freedom of expression to mitigate the ‘cultural harm’.
- 4.6 If there is to be a new British Bill of Rights then it is vital that the freedom of expression is included. We would also argue that it is crucial to the protection of human rights that appropriate limitations are placed on the freedom of expression to ensure the participation of all.

## 5.0 Further References

- 5.1 Rackley, E. and McGlynn, C., ‘Prosecuting the Possession of Extreme Pornography: A Misunderstood and Misused Law’ (2013) *Criminal Law Review* 400-405.
- 5.2 McGlynn, C. and Rackley, E., ‘Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography’ (2007) *Criminal Law Review* 677-690.
- 5.3 McGlynn, C. and Ward, I., ‘[Would John Stuart Mill have Regulated Pornography?](#)’ (2014) 41(4) *Journal of Law and Society* 500-522
- 5.5 McGlynn, C. and Rackley, E., ‘[The Cultural Harm of Rape Pornography](#)’ *Free Speech Debate*. Available at: <http://freespeechdebate.com/en/discuss/the-cultural-harm-of-rape-pornography/>
- 5.6 McGlynn, C. and Rackley, E., ‘The New Law Against ‘Revenge Porn’ is welcome, but no guarantee of success’ *The Conversation* 16 February 2015. Available at: <https://theconversation.com/the-new-law-against-revenge-porn-is-welcome-but-no-guarantee-of-success-37598>

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<sup>5</sup> House of Lords and House of Commons, Joint Committee on Human Rights ‘Legislative Scrutiny (1) Criminal Justice and Courts Bill and (2) Deregulation Bill’ Fourteenth Report of Session 2013-2014, 14 May 2014 (para. 1.50)