

# A HUMAN RIGHTS AUDIT OF THE INTERNET WATCH FOUNDATION

LORD MACDONALD OF RIVER GLAVEN QC



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KEN MACDONALD QC has practised at the Bar since 1978.

A founder member of Matrix Chambers, he was appointed a Recorder of the Crown Court in 2001 and elected Chairman of the Criminal Bar Association in 2003. Between 2003-2008, he was Director of Public Prosecutions for England and Wales.

As DPP, he established the Counter Terrorism Division, the Organised Crime Division, the Special Crime Division and the Fraud Prosecution Service. He was active across Whitehall in the development of criminal justice policy, especially in relation to international treaties and jurisdictional issues, mutual legal assistance, extradition, terrorism and grave cross border crime.

He became a Bencher of the Inner Temple in 2004, and he was knighted for services to the law in 2007.

He became a Deputy High Court Judge in 2010, and he was appointed to the House of Lords in the same year, where he has served as a member of the Constitution Committee.

In 2010, at the request of the Home Secretary, he oversaw a government Review of Counter Terrorism Legislation and Powers.

In 2011, as part of Turkey's accession negotiations, he led a European Commission mission to Ankara to assess Turkey's attachment to free expression and a free media.

He was a Visiting Professor of Law at the London School of Economics, 2009-2012, and he is a member of the Advisory Board of the Centre for Criminology at the University of Oxford.

He is Warden of Wadham College, Oxford.

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## Executive summary

- Restrictions on certain forms of extreme adult pornographic content and on all child sexual abuse content are lawful limitations upon privacy and free expression rights, necessary in a democratic society and permitted under Articles 8 and 10 of the European Convention on Human Rights ('the ECHR'). It is therefore legitimate and consistent with human rights law for content in these categories to be removed or blocked from the internet. Furthermore, removal or blocking of child sexual abuse content from the internet is required under the terms of the United Nations Convention on the Rights of the Child ('the Child Convention'), to which the United Kingdom is a signatory.
- Internet Watch Foundation (IWF) is a private, industry-funded body with charitable status, possessing significant powers in facilitating the removal of extreme adult pornographic and removal and blocking of child sexual abuse content from the internet. Presently acting as a hotline that takes action on reports sent in by the public, those powers include its role in issuing 'takedown notices' to all Internet Service Providers (ISPs) in the United Kingdom, including its members, from the UK internet industry. These notices result in the removal of designated content from the internet by those members, who are required by the terms of their membership of IWF's Funding Council to comply. IWF also facilitates blocking action to impede access to child sexual abuse content on the internet.
- There is concern in some quarters that powers which engage important privacy and free expression rights are wielded in this way by a private body in the absence of any prior judicial order or authorisation. However, it is highly likely that IWF's acts would be construed by the Courts as public acts, so that its policies and decision-making are in reality susceptible to judicial review, and may be overturned by the Courts were it ever to be found that IWF was exercising them in a manner incompatible with human rights law.
- IWF's policies are, broadly, compatible with human rights norms. Its remit results in proportionate and lawful restrictions on content that is proscribed by law, conducted in a manner that is consistent with Articles 8 and 10 of the ECHR, and respectful towards the Child Convention. Nevertheless, IWF should consider in future limiting its remit to child sexual abuse content, which in any event represents the vast majority of its work. In 2011/12, IWF did not take action in respect of any adult pornographic content. Furthermore, relatively complex legal reasoning is necessary correctly to identify those categories of adult pornography that are likely to be unlawful, whereas the correct identification of child sexual abuse content is usually straightforward. This means that misconceived and therefore unlawful interferences in privacy and free expression rights are much less likely in the case of child sexual abuse content.

- However, certain of IWF's practices do require attention in order further to ingrain good practice and respect for privacy and free expression rights, and therefore public confidence, in its work.
- In particular, IWF's appeals process, its inspection regime and its Board require some reform. IWF should appoint a retired judge as Chief Inspector to serve as the final point of appeal in any dispute arising from IWF's action against any internet content. Furthermore, inspections of IWF's work should take place at least every two years by an independent inspectorate, chaired by the Chief Inspector and including at least one expert in human rights issues, should take place at least every two years. Finally, IWF's Board should in future always contain at least one figure who is an acknowledged expert in human rights law.
- The proposal, supported both by the government and by the industry, that IWF's role should widen in April 2014, to take on proactive investigations to seek out content on the internet for removal, will bring substantial new risks to IWF's work that will require careful management. At present, IWF acts primarily as a hotline, taking action on reports of allegedly illegal content sent in by the public and by internet professionals. Proactive investigations will require IWF to employ more analysts, and for the training of those analysts to include extensive tutoring in investigative skills and relevant laws. Close liaison and coordination with the police will be essential, both in the design and conduct of this training, and in any resulting investigations.
- It is not desirable at present for IWF to go even further and to commence proactive investigations into Peer-to-Peer file sharing activities. This work is sensitive, requiring a close knowledge of all relevant legal instruments and it is likely to entail a degree of surveillance activity. It is best performed by properly trained law enforcement professionals, who are appropriately directed by senior officers and subject to contemporaneous legal supervision, including by prosecutors. It is, of course, important that the police give this work the appropriate priority, so that offending in this grave area is picked up and dealt with through the courts.
- Recent funding increases agreed between IWF and its internet industry members will be critical in enabling IWF to improve its appeals and inspection processes. They will also be essential in enabling IWF to take on the additional analysts, and the much more extensive training of those analysts, that will be required by any move into more proactive investigations.



## **Recommendations**

- **IWF should in future restrict its remit to child sexual abuse content;**
- **IWF should appoint an expert in human rights law to its Board;**
- **IWF should appoint a senior legal figure as its new Chief Inspector;**
- **IWF's appeals process should include, as a final stage, a determination by the Chief Inspector;**
- **Inspections of IWF's work should take place at least every two years. The Inspection team, headed by the new Chief Inspector, should include one expert in human rights law;**
- **If IWF moves into more proactive investigations, its analyst training should be updated to meet the further responsibilities inherent in an investigative role;**
- **In any proactive investigations, IWF should liaise closely with police;**
- **Proposed increases in IWF's industry funding should be maintained and expanded in order to make a move into more proactive work feasible in the longer term;**
- **IWF should not, at present, investigate Peer-to-Peer file sharing. Instead, in light of the fact that it has subsumed the Child Exploitation and Online Protection Centre (CEOP) with the apparent intention that investigations into online child sexual abuse content should be mainstreamed into the fight against serious crime, the National Crime Agency should now give these investigations high priority.**

## **1. Introduction**

1.1 This Report is prepared at the request of the Board of the Internet Watch Foundation ('IWF'). It examines the structure, policies and practices of the IWF and determines their compatibility with a range of broadly accepted human rights principles, including rights to privacy and free expression, and the rights of the child. The relevant legal instruments are the Universal Declaration on Human Rights ('the Universal Declaration'), the United Nations Convention on the Rights of the Child ('the Child Convention') and the UK Human Rights Act 1998 which incorporates the European Convention on Human Rights ('the ECHR') into UK domestic law.

1.2 The Terms of Reference of this Report are:

- a. To give a view on whether the IWF is a public authority in relation to the Human Rights Act, 1998;
- b. To conduct an assessment of the governance, operational policies and operational practices of the IWF against the frameworks of the Universal Declaration, the Child Convention and the Human Rights Act 1998;
- c. To advise how compliant the IWF is with the above instruments;
- d. To advise how any policies or practices may be improved to better ensure compliance with the above instruments.

1.3 The IWF was established in 1996 by the internet industry, which was under significant government pressure to provide a United Kingdom internet hotline enabling both the public and IT professionals to report allegedly criminal online content in what was intended to be a secure and confidential way. This hotline service was to be used anonymously.

1.4 Very broadly, the IWF's expressed intention during its years of operation has been to work in partnership with the online industry, law enforcement, government and international partners to minimise the availability of allegedly criminal pornographic content, most particularly child sexual abuse content hosted anywhere in the world, but including allegedly criminally obscene adult sexual content hosted in the UK.

1.5 The IWF also works closely with the British Government to influence initiatives designed to combat online child sexual abuse. It works internationally with other national hotlines and relevant organisations to encourage what it sees as appropriate global responses to the problem of online child sexual abuse in particular, and to encourage the wider adoption

of what it considers good practice in combating child sexual abuse content on the internet around the world.

- 1.6 Specifically, the IWF assists UK ISPs and hosting companies to combat the abuse of their networks through a takedown notice service that alerts those organisations to content said to be within IWF's remit, so that they can remove it from their networks. Members of the IWF the online industry, are committed by the terms of their membership of its Funding Council to comply with such notices, which are copied to the relevant police agency.
- 1.7 In addition, the IWF maintains a blocking list of sites, hosted outside the United Kingdom, containing child sexual abuse content. The URLs or website addresses on this blocking list are distributed to UK and international ISPs and filtering companies for blocking, and this is governed by a strict licensing agreement. For very obvious reasons, this blocking list is not published more widely, although some critics complain, unreasonably in my view, that the process is thereby rendered unacceptably opaque.
- 1.8 If child sexual abuse content is hosted outside the UK, the IWF notifies INHOPE, the International Association of Internet Hotlines and local law enforcement for countries without a hotline. Until such time as the content is removed, it remains on the IWF URL blocking list.
- 1.9 In a recent development, the four major UK ISPs and three mobile operators have agreed on the text of a 'splash page' that will appear when anyone tries to access a site containing child sexual abuse content which is on the IWF list.
- 1.10 In 2012, IWF processed some 39,211 reports, of which 9,702 (25%) were assessed as containing potentially criminal content. According to IWF's figures, 56% of the UK hosted child sexual abuse content it identified was removed from the internet, or blocked, within 60 minutes or less of identification. 78% was removed in 120 minutes or less.<sup>1</sup>
- 1.11 This speed, which is a remarkable feature of IWF's work, is extremely important in circumstances where every re-viewing of an image amounts to the re-victimisation of the child portrayed. Furthermore, it is apparent that the absence of any requirement to seek prior judicial authorisation for a takedown notice, or the addition of any given URL to the blocking list, is a

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<sup>1</sup> See [www.iwf.org.uk/assets/media/annual-reports/FINAL%20web-friendly%20IWF%202012%20Annual%20and%20Charity%20Report.pdf](http://www.iwf.org.uk/assets/media/annual-reports/FINAL%20web-friendly%20IWF%202012%20Annual%20and%20Charity%20Report.pdf) (p12)

critical foundation of IWF's ability to act with such expedition. I discuss this aspect later in the Report.

- 1.12 It can be seen at once that, although the IWF is not a creature of statute nor any sort of governmental body, it has acquired considerable power to regulate content appearing on the otherwise open internet, and to do so in the absence of any prescribed governmental, police or judicial intervention. This has caused disquiet in some quarters.
- 1.13 Over the years, there have been a number of criticisms of the IWF, including in relation to its structure, its relationship with the online industry and, as the critics allege, its exercise of significant powers of online censorship in the absence of governmental, police or judicial imprimatur.
- 1.14 The implication of these criticisms is that the IWF, as presently constituted, fails to act, or is incapable because of its structure of so acting, in a manner that is consistent with respect for fundamental rights to privacy and free expression. At the very least, it should be subject to some form of governmental, police or judicial regulation - and it should certainly not be a mere creature of the industry it purports to regulate by what are essentially private acts of censorship.
- 1.15 I shall assess these and other criticisms in the body of the Report.

## 2. **The Problem**

2.1 I shall consider two issues separately:

- Adult pornographic content;
- Child sexual abuse content.

### 2.2 *Adult pornographic content*

2.2.1 Pornographic content is very widely available on the internet and easily accessed by the use of obvious and intuitive search terms. It varies from so-called soft-core pornography to hard-core content, featuring explicit sexual acts, including sado-masochistic sex acts, acts of sexual violence in a variety of forms, and bestiality.

2.2.2 Even the most extreme content in the categories alluded to above, which may be unlawful under the *Obscene Publications Act 1959* as possessing a tendency to deprave or corrupt anyone viewing it, or as amounting to 'extreme pornography' under *Section 63 of the Criminal Justice and Immigration Act 2008*, is easily available to anyone, including, of course, to any child, with normal literacy skills and access to a computer.

### 2.3 *Child sexual abuse content*

2.3.1 It is extremely difficult to estimate with any real accuracy the quantity of child sexual abuse content available on the internet and it is certainly beyond the competency of this Report to attempt to do so. I think it is safe to conclude, however, that content in this category is very readily available to those seeking it.<sup>2</sup>

2.3.2 In 2010, the latest year for which figures are available, there were 1,781 convictions and cautions for offences involving indecent images of children in

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<sup>2</sup> An IWF estimate that 3 million UK adults have seen a child sexual abuse image seems unreliable. It derives from a survey in which respondents were asked to indicate whether they had ever seen such content, in the absence of any control over the types of images respondents placed in that category.

England and Wales.<sup>3</sup> This implies a more than trivial level of consumption of such content.

- 2.3.3 Furthermore, child sexual abuse content is increasingly available on a more 'private' basis through the mechanisms of so-called Peer-to-Peer file sharing. CEOP has estimated that as many as 60,000 individuals in the UK are sharing child sex abuse content in this way.<sup>4</sup> It is not clear which law enforcement authority, if any, is presently taking responsibility for dealing with these individuals. The risk is that this seriously criminal behaviour is not meeting with an appropriate law enforcement response. A failure in this area would likely represent a clear breach of the UK's international obligations under the Child Convention.
- 2.3.4 There is also anecdotal evidence that it may be possible, accidentally, to 'stumble' upon this category of content on the internet. It is apparently not uncommon for IWF to receive reports to its hotline from users of pornographic websites who have unwittingly, or so they claim, found themselves downloading child sexual abuse images in the course of surfing an ostensibly adult pornographic site. It is obviously possible that at least some of these individuals are routine consumers of child sexual abuse content who are making reports in bad faith to provide themselves with a defence in the event of detection.
- 2.3.5 Yet, in circumstances where there is little doubt that determined consumers of child sexual abuse content who possess even a moderate degree of technological knowledge can easily bypass blocking mechanisms to visit their desired sites, protecting people from *accidentally* stumbling upon such content becomes a central part of IWF's mission.
- 2.3.6 It seems to me that the extensive existence on the internet (which is beyond argument), and the ready accessibility of both adult pornographic content likely to contravene the *Obscene Publications Act 1959* and *Section 63* of the *Criminal Justice and Immigration Act* and child sexual abuse content are matters of legitimate public and law enforcement concern. Beyond the fact that the publication and/or possession of such content is likely to amount to serious criminal offences, it is certain that, in the case of child sexual abuse content, the creation of the content will also necessitate the commission of

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<sup>3</sup> See <http://johnc1912.wordpress.com/2012/03/19/child-abuse-images-record-levels-of-convictions-and-cautions>

<sup>4</sup> See <http://johnc1912.wordpress.com/2012/03/19/child-abuse-images-record-levels-of-convictions-and-cautions> and [www.publications.parliament.uk/pa/cm201314/cmselect/cmcumeds/uc729-i/uc72901.htm](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmcumeds/uc729-i/uc72901.htm)

grave criminal offences against vulnerable children, who are then subjected to repeated re-victimisation as the content is circulated and repeatedly viewed.

- 2.3.7 This analysis informs any sensible response to the question as to whether the censoring of such content is necessary in a democratic society for a permitted purpose.

### 3. **Proportionality under the ECHR and the role of IWF**

3.1 *Article 8 of the European Convention on Human Rights reads:*

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

3.2 *Article 10 of the European Convention on Human Rights reads:*

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

3.3 It will readily be seen that under the ECHR, neither privacy rights nor free expression rights are absolute and each may appropriately be restricted in certain circumstances, so long as any such restrictions are prescribed by law, and necessary in a democratic society for a permitted purpose. So the question is: does the content falling within IWF's remit, and which is therefore subject to IWF takedown notices or blacklisting action, fall within categories that properly trigger the restrictions upon privacy and free expression permitted by the ECHR?

3.4 As I have already indicated, at present IWF's remit includes issuing takedown notices in relation to two distinct categories of content, restrictions in respect of which are self-evidently 'prescribed by law':



1. Adult pornographic content (hosted in the UK only) which may be construed as unlawful under the terms of the *Obscene Publications Act 1959*, or *Section 63 of the Criminal Justice and Immigration Act 2008*; and
  2. Child sexual abuse content which is construed as unlawful under *Section 1 of the Protection of Children Act 1978*.
- 3.5 In addition, IWF places the web addresses for child sexual abuse content on its block list for blocking in the UK and potential action by foreign authorities abroad. As I have already indicated, determined consumers of child sexual abuse content can circumvent blocking mechanisms with relative ease, although the blocking will tend to protect individuals from accidentally accessing such content.
- 3.6 I think it unlikely, in the case of adult pornographic content, that there is necessarily a broad consensus as to whether restrictions relating to the *entire* category are necessary in a democratic society. Certainly, views relating to adult pornography have shifted in very pronounced ways in recent years. Content that only fifteen years ago would likely have attracted prosecution (images of apparently consensual sex between adults, for example) is now readily available and free from any risk of a law enforcement response. A factor in the liberalisation of interpretations of the law may have been the increasing unwillingness of juries to convict in prosecutions of allegedly obscene adult content.
- 3.7 Further, the question as to whether any given content falls foul of the *Obscene Publications Act 1959* is not necessarily a straightforward one. The extent to which apparently obscene content possesses the ability to ‘deprave or corrupt’ its consumer has been a notoriously awkward issue for police and prosecutors to resolve over the years. The legal judgments necessary in this area are subtle and finely drawn and prosecutions appear to be extremely rare.
- 3.8 Equally, it appears that, setting aside cases involving images of bestiality, prosecutions under *Section 63 of the Criminal Justice and Immigration Act 2008* have been relatively rare,<sup>5</sup> although there does appear to be stronger public support for restrictions in limited categories of extreme adult pornographic content. Images of violent pornography, including so-called rape pornography, and images of sexual activity between adult humans and animals remain a focus of concern. Nevertheless, and again setting bestiality

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<sup>5</sup> Ministry of Justice figures show a total of 78 convictions in 2012, of which no less than 71 were for possession of content depicting bestiality.

aside, the legal judgments in these areas are also far from straightforward. It is not always easy to determine precisely at what point otherwise common or garden adult pornography (which must be regarded as lawful) tips over the edge and becomes potentially illegal ‘extreme pornography’ under the 2008 legislation.

- 3.9 In these circumstances, special difficulties appear to exist in the case of a private, industry-funded body, with no in-house legal expertise, exercising judgments in areas that are very likely to engage ECHR privacy and free expression rights, and which require complex legal reasoning to resolve satisfactorily. It seems to me that interventions by a body like IWF into these sensitive areas may present a real risk that the finely drawn balance between our criminal legislation on the one hand, and the UK’s international responsibilities under the ECHR and the Universal Declaration on the other, may be upset.
- 3.10 In any case, it is apparent that adult pornography forms only a very small part of IWF’s work in the real world. In 2012, of 3,320 adult pornographic images examined by IWF (only 10% of the total web pages reported to IWF), none was assessed as potentially criminal and no action was taken in respect of any of it.<sup>6</sup>
- 3.11 It seems to me that the substantial risks, in human rights compatibility terms, of having a private body make these fine legal judgments in the absence of any professional legal input into individual cases, combined with the dearth of actioned reports in any event, leads to a clear conclusion that IWF should seriously consider restricting its remit in future to child sexual abuse content alone.
- 3.12 None of this is to suggest that extreme adult pornography of the sort that I have identified above should not necessarily be policed. It is simply to question whether, in the face of the rights risks that regulating this category of content may present, IWF is the appropriate body to do the policing.
- 3.13 In contrast to adult pornographic content,, there appears to be a very strong consensus that child sexual abuse content is appropriately subject to firm legal restriction and prosecution. The creation of the content requires the sexual subjugation and exploitation of minors, which includes the imposition of violence, some of it extreme, and much of it routinely filmed. The content

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<sup>6</sup> See [www.iwf.org.uk/assets/media/annual-reports/FINAL%20web-friendly%20IWF%202012%20Annual%20and%20Charity%20Report.pdf](http://www.iwf.org.uk/assets/media/annual-reports/FINAL%20web-friendly%20IWF%202012%20Annual%20and%20Charity%20Report.pdf) (p10)

can include images of oral sex, vaginal and anal penetration and scenes of sexual torture, including against infants and babies.

3.14 *Article 34 of the UN Convention on the Rights of the Child states:*

*States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*

*(a) The inducement or coercion of a child to engage in any unlawful sexual activity;*

*(b) The exploitative use of children in prostitution or other unlawful sexual practices;*

*(c) The exploitative use of children in pornographic performances and materials.*

3.15 It seems to me to be beyond argument that restrictions upon this category of content may appropriately be put in place, consistent with both domestic and international human rights norms. Such restrictions amount to a proportionate interference in privacy and free expression, allowable under the ECHR as necessary in a democratic society to protect vulnerable children from exploitation and grave abuse. They are similarly wholly consistent with the terms of the Universal Declaration, and in my view they are mandated under the terms of the Child Convention. Any contrary argument is, in my view, quite unsustainable. Moreover my view as to the mandatory nature of the obligation is further underpinned in respect of the UK by *Article 25 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.*

3.16 Furthermore, the identification of content within the child sexual abuse category is far more straightforward than the identification of potentially criminal adult pornography. This means that the risk of mis-identification, so that lawful content is removed from the internet in subversion of privacy and free expression rights, is minimised, even where prior judicial authorisation is not sought.

3.17 So, taking as read that the policing of this category of content on the internet is prima facie a lawful act, the question that arises is: to what extent is IWF an appropriate body to engage in this policing, bearing in mind the UK's international human rights obligations?

#### 4. **How the IWF works**

4.1 IWF describes its role as using its expertise to work with partners to:

1. Disrupt the availability of child sexual abuse content anywhere in the world;
2. Protect children who are victims of sexual abuse from repeat victimisation and public identification;
3. Prevent internet users from accidentally stumbling across child sexual abuse content;
4. Delete criminally obscene adult and non-photographic child sexual abuse content hosted in the UK.<sup>7</sup>

Such work appears to fall squarely within the terms of the mandated protections set out in *Article 34* (above), albeit that it is carried out, in this case, by a non-governmental organisation.

4.2 IWF presently consists of some 21 employees, led by a Chief Executive. Sir Richard Tilt, a distinguished former civil servant, chairs its Board which contains both representatives of the industry and 6 independent members, whose expertise spans policing, prosecuting, childcare, media and communications.<sup>8</sup> The Board does not, however, appear to include anyone who has particular expertise in human rights issues or, particularly, in questions of privacy, free expression or in open internet debates from a free expression perspective. This, I think, is a weakness in the present, otherwise distinguished, membership of the IWF Board and it should be addressed without delay.

4.3 At the core of the IWF are its analysts who actually view the reported content and make judgments as to whether the content should be taken down and removed from the internet, in the case of UK hosted content or, in the case of child sexual abuse content hosted abroad notified to INHOPE for further action and placed on a blocking list. These presently consist of 4.5 men and women of various backgrounds and ethnic origins. They are selected by lengthy and rigorous procedure that can take many months. This procedure is carried out in line with Safer Recruiting principles, including application forms, a personal interview, formal interview, medical and Disclosure and Barring Service (DBS) checks.<sup>9</sup>

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<sup>7</sup> See [www.iwf.org.uk/about-iwf/remit-vision-and-mission](http://www.iwf.org.uk/about-iwf/remit-vision-and-mission)

<sup>8</sup> See [www.iwf.org.uk/accountability/governance/board-biographies](http://www.iwf.org.uk/accountability/governance/board-biographies)

<sup>9</sup> Outlined in the IWF Recruitment and Welfare policy

- 4.4 Once in post, the analysts undergo specialist training. This includes in-house mentoring, INHOPE-sponsored tracing training, CEOP and police reciprocal training to encourage correct assessments under UK law, and technical training on internet technologies. As they take up work and begin examining suspect content on the internet, it is a requirement that all analysts undergo regular sessions with a trained counsellor.
- 4.5 I have a high degree of confidence that IWF selects, trains and counsels its analysts in a satisfactory manner, *for the purposes of its present remit*. I think it highly likely that these analysts are empowered to approach the tasks they are *presently* set professionally and dispassionately. This means that, by and large, I would expect them to make the right judgment calls when they are examining suspect images. This appears also to be the conclusion reached in an Inspection of IWF's work carried out in July 2013 by an external team brought in for the purpose.<sup>10</sup>
- 4.6 Were the remit of IWF to develop substantially, as some politicians, experts and campaigners have called for, so that it became more proactive in its work, or became involved in surveilling file-sharers, this would plainly represent substantially greater risks for the organisation, necessitating more intensive training to inculcate in its analysts in particular a deep awareness of the laws relating to surveillance and the related rights issues arising from the exercise of those laws. I shall discuss the desirability of developments in IWF's remit later in my Report.
- 4.7 That IWF's analysts may be well-trained for their present purposes does not, of course, of itself answer the question as to whether an essentially private organisation like IWF, rather than the government or police and prosecutors, should be performing this role in the first place. It is a necessary but not a sufficient precondition.
- 4.8 It also does not absolve IWF from regularly checking the quality of its analysts' decision-making, both through routine internal processes and by regular and competent external review, as well as through the existence of a robust and fair appeals procedure. So how does IWF presently measure up against these critical requirements?

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<sup>10</sup> Due to be published later in 2013

## 5. Internal reassurance

### 5.1 *Borderline cases*

- 5.1.1 The manner in which a regulator tackles borderline cases is a good marker of the robustness of its decision-making in general. IWF's structure is markedly hierarchical. I do not intend this as a criticism, since an important part of internal reassurance is the existence of a system for escalating decision-making in borderline cases further up that hierarchy. Escalation of this sort does appear to take place at IWF.<sup>11</sup>
- 5.1.2 Child sexual abuse images are graded in levels 1-5 with escalating gravity. So an analyst is presented with no great difficulty where he or she is presented with the more serious images, for example a level 4 image, depicting an apparently three-year-old infant suffering anal rape. This image is beyond any dispute unlawful and may appropriately be subject to a takedown notice, or blocking since its removal or blocking is a plainly proportionate response necessary in a democratic society to disrupt the market in content whose creation typically involves the abuse and exploitation of infants, and whose publication amounts to the re-victimisation of those infants. Such action is therefore wholly consistent with privacy and free expression rights.
- 5.1.3 A more difficult case arises when the image depicts a young person, who *appears* to be around fourteen or fifteen, performing oral sex on another young person of around fourteen or fifteen. In this situation, a number of questions arise and a high degree of internal testing is required before a takedown notice is issued: above all, if the individuals concerned are eighteen or over, it is probable that no offence is being committed and the production or possession of the image itself is unlikely to amount to a crime. In these circumstances, a takedown notice would be inappropriate since it would be beyond IWF's remit. It would probably amount to a disproportionate interference inconsistent with privacy and free expression rights.
- 5.1.4 In borderline cases, the process is set out in the IWF Hotline Manual. Essentially, there are a number of steps that are followed by IWF where Level 1 images are suspected, or where the ages of the young people depicted in the suspected child sexual abuse content appear to be close to sixteen, such that it cannot be said with certainty that they are under eighteen.<sup>12</sup>

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<sup>11</sup> Outlined in the IWF Hotline Manual

<sup>12</sup> Outlined in the IWF Hotline Manual

- 5.1.5 Where it is uncertain whether a person depicted in content is under eighteen, IWF's policy is not to issue a takedown notice in the absence of clear evidence pertaining to actual age being supplied by the police or the NSPCC. In this sense, its analysts may be erring on the side of caution, and such a policy might, in reality, result in images that actually amount to child sexual abuse content remaining on the internet.
- 5.1.6 On the other hand, such a policy makes it less likely that IWF will act in a manner that is inconsistent with privacy and free expression rights, because it becomes less likely that a takedown notice will be issued in respect of content that does not, in fact, feature persons who are under eighteen, and therefore is probably not actionable in law.
- 5.1.7 In the case of Level 1 images that clearly show persons under the age of eighteen, IWF policy also applies a higher test to merit inclusion within that band than that required by the police and other law agencies to categorise content as constituting Level 1 content. In the case of the police an image that consists of 'erotic posing' is sufficient.<sup>13</sup> For the IWF to action a takedown request in relation to Level 1 content, the image must at least show 'legs apart focusing on the genitals'.<sup>14</sup>
- 5.1.8 Secondly, in the case of Level 1 images, IWF policy requires confirmation of the categorisation by a more senior analyst before a takedown notice or blocking may be actioned.<sup>15</sup>
- 5.1.9 Again, this approach on the part of IWF is likely to mean that some content considered by the police to fall squarely within Level 1 will not be actioned by IWF, because it fails to meet IWF's more stringent requirements. This means that although IWF is alerted to this content, it will, unless it comes to the attention of the police and they take action, remain on the internet for future viewing. This implies potential further re-victimisation of the children depicted in the images.
- 5.1.10 I understand the rationale for IWF's policy in this regard to be a desire to avoid its analysts mis-categorising content as Level 1 when, on a true examination, the image fails the test of criminality altogether. IWF appears to prefer a cautious approach at the margins of criminality in order to avoid mistakes at the cost of incompatibility with *Article 8* and *Article 10* of the ECHR. In that sense, IWF appears to demonstrate a strong culture of desired

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<sup>13</sup> See [www.cps.gov.uk/legal/h to k/indecent photographs of children/#a03](http://www.cps.gov.uk/legal/h%20to%20k/indecent%20photographs%20of%20children/#a03)

<sup>14</sup> Outlined in the IWF Hotline Manual

<sup>15</sup> Outlined in the IWF Hotline Manual

compliance with the ECHR, though this may come at the cost of some additional risk of re-victimisation in the case of children depicted in this content.

- 5.1.11 On one view this cost may be an inevitable consequence of tasking a non-police body with something very close to a policing function in respect of an otherwise open internet. It is, of course, the Government's responsibility to ensure that the UK's response to the problem of child sexual abuse content on the internet is compliant with the Child Convention. In circumstances where the relevant IWF policies understandably call for a cautious approach in borderline cases, it is essential that the police are in a position to make their own law enforcement judgments in the interests of protecting sexually abused children. This aspect is acknowledged in IWF's service level agreement with CEOP.<sup>16</sup>
- 5.1.12 In my view, the IWF policies to which I have alluded demonstrate a highly appropriate appreciation of the sensitivities involved in decisions to issue notices requiring the removal of content from the internet in circumstances where those notices are very likely to be complied with, so that a degree of internet censorship is inevitably imposed.
- 5.1.13 I consider that the risk these same policies may result in some actionable images remaining on the internet to be one of the prices of a system in which a form of internet censorship is effectively being processed by an industry body independent of traditional law enforcement. In those circumstances, IWF's desire to exercise more caution over the images it polices than the police themselves might choose to exercise in a strictly judicially controlled context is understandable, and a proportionate response to wider concerns about IWF's structure.
- 5.1.14 It is, of course, always open to the Government to bring this work entirely in-house to the police service, should it wish to provide the funding that would enable such a transfer to take place. But it is important to note that the inevitable corollary, were the police to take over this work so that it became 'professionalised' to law enforcement, would be that some form of judicial process *in advance* of the police issuing a takedown notice would need to take place.

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<sup>16</sup> See [www.iwf.org.uk/assets/media/hotline/SLA%20ACPO%20IWF%20FINAL%20OCT%202010.pdf](http://www.iwf.org.uk/assets/media/hotline/SLA%20ACPO%20IWF%20FINAL%20OCT%202010.pdf) 5 (xi) and 6 (ii)



5.1.15 This is because where IWF can rely, as an industry body, on the convention that membership effectively mandates compliance (and membership is voluntary), the police could rely on no such convention. I consider that there would be great reluctance simply to empower the police to issue notices in circumstances where the law required those notices be strictly complied with on pain of penal sanction *in the absence of judicial endorsement of any sort*, and I strongly doubt that the police would seek such a controversial power in relation to internet censorship.

5.1.16 This means, as I argue below, that the likely price of moving to a system exclusively of police action strictly predicated upon prior judicial authorisation would be significantly to slow down the removal of child sexual abuse content from the internet, thereby prolonging repeated acts of re-victimisation of sexually abused children.

## 5.2 IWF's appeals process

5.2.1 A critical aspect of the legitimacy of any regulatory function is the robustness of the appeals process by which those subject to the regulation may challenge a decision adverse to their interests. The IWF's Content Assessment Appeal Process ('the Appeal Process') can be found on their website.<sup>17</sup>

5.2.2 Broadly, any relevant party, as defined in the Appeal Process, who believes that they are being prevented from accessing legal content by an act of IWF may appeal against the accuracy of the assessment that led to a takedown notice or the blocking of the site in question.

5.2.3 An appeal triggers an automatic re-assessment by what is described in the Appeal Process as 'a suitably trained IWF manager not involved in the original assessment decision'.

5.2.4 If the original decision is reversed, and the appeal is upheld, the appellant is informed and the takedown notice is repealed or the site is removed from the blocking list.

5.2.5 If the original decision is not reversed and the appellant wishes to persist with the appeal, the content is referred to the relevant lead police agency for assessment. The police assessment is treated as final.

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<sup>17</sup> See [www.iwf.org.uk/accountability/complaints/content-assessment-appeal-process](http://www.iwf.org.uk/accountability/complaints/content-assessment-appeal-process)

- 5.2.6 As it stands, I consider this appeals process to be insufficiently robust, for a number of reasons, which I set out below.
- 5.2.7 Firstly, the work of IWF is extremely sensitive, amounting as it does to a form of regulation of the internet by a private, industry-funded body. In effect, IWF is involved in a species of internet censoring without the obligation of obtaining any prior judicial or even police approval before taking the steps that enable it to have removed from the internet content it judges to fall within its remit. In this sense, it is a body with significant powers.
- 5.2.8 Secondly, it is plain that IWF's power to have content removed from the internet represents, on its face, a serious potential interference in the rights of others, in this case the owners or the consumers of the content directed to be removed. It is no answer to say that the content in question is criminally pornographic, since this begs the question as to whether IWF's judgment that the content falls within its remit is correct.
- 5.2.9 Thirdly, it is equally plain that IWF's power to have content removed from the internet represents, on its face, a serious potential interference with the rights of the community as a whole, since such action, unless it can be justified in law, abrogates important privacy and free expression rights, potentially to the broader public detriment.
- 5.2.10 In my judgment these implications of IWF's work mandate an appeal process that is particularly rigorous. In order to achieve this, I recommend that in circumstances where an appellant has pursued an appeal to the extent that an assessment is sought from the relevant lead police agency, that police assessment should no longer be treated as final. Rather, it should be subject to final approval by a new legal figure, who would most suitably be a retired judge.
- 5.2.11 Appeals against IWF assessments have been exceedingly rare, perhaps for obvious reasons. This means that if any given appeal were to be pursued by an appellant right to the end of the Appeal Process, the chances become stronger that the appeal may amount to an appropriate reaction to genuinely questionable assessments on IWF's and the police's part. The involvement of a judicial figure, making the final decision in the light of all the facts, including the terms of IWF's own reassessment and the views of the lead police agency, would clearly bring a higher degree of reassurance that the right and just conclusion had been reached.
- 5.2.12 It seems clear this reform would represent a considerable improvement on the present system, in which the final stage of the Appeal Process grants the

police the power, in effect, to insist on the removal of internet content, and adversely to determine an appeal against this order with no judicial input. Such a change would lessen the risks of any inappropriate interference on the part of IWF in privacy and free expression rights and would strengthen IWF's compliance with the provisions of the ECHR.

### 5.3 *IWF's inspection process*

- 5.3.1 The robustness of a regulator's inspection process is fundamental to public confidence in its ability to carry out its regulatory function appropriately and lawfully, in this case in accordance with privacy and free expression rights and consistent with the rights of the child. It is critical, therefore, that IWF's inspection process should be transparent and properly designed. It should be capable of identifying both good and bad practice and it should represent a tool for continuing improvements in the way that IWF operates its mandate.
- 5.3.2 Because of the importance and sensitivity of its work, inspections of IWF should be regular, taking place at least every two years. They should be the responsibility of a new IWF Inspectorate, headed by a new legal figure, who should be a retired judge. Apart from this figure, the membership of the team could vary from inspection to inspection. But any given team should always contain one individual who is expert in privacy and free expression issues. Doubtless other members will have expertise in child protection, in law enforcement and so on. The Inspectorate's Reports should be published.
- 5.3.3 It seems clear that the involvement of a judicial figure, supervising inspections and taking responsibility for their robustness and the quality and accuracy of their conclusions, would provide substantially stronger reassurance that IWF, as a private body with an important and intrusive role in internet regulation, is acting at all times within its mandate and in a manner consistent with the UK's obligations under the Universal Declaration, the ECHR and the Child Convention. Equally importantly, it would provide significant reassurance that were it ever not to be the case, errors of process or in decision-making would be uncovered and swiftly corrected, with lessons learned.
- 5.3.4 There appears to be no reason in principle why the same legal figure should not hold both the new appeals post as well as the new inspection post and be known as the Chief Inspector. This would appear to make good sense in circumstances where appeals against IWF's determinations are extremely rare.

## 6. **IWF and judicial pre-authorisation**

- 6.1 A key question that has been raised by those who doubt the appropriateness of a private body having a role to play in the regulation of the internet, is the extent to which an alleged lack of judicial oversight in IWF's processes impacts upon the lawfulness of those activities in terms of their compliance with the provisions of the Human Rights Act 1998. That is to say, to what extent can apparent restrictions on privacy and free expression rights, imposed by a private industry-funded body in the complete absence of any judicial authorisation, come within those limitations to privacy and free expression permitted under *Article 8* and *Article 10* of the ECHR?
- 6.2 I have already recommended that judicial figures should be appointed to make final decisions in the Appeal Process and to supervise regular inspections of IWF's work, but I consider it important to consider the broader issue within a practical context. If the removal of child sexual abuse content from the internet is a necessary and proportionate response, both to protect the victims of this exceptionally grave crime, but also to prevent people accidentally stumbling across this content on the internet, it is obviously necessary that the processes of takedown and blocking should be efficient as well as effective.
- 6.3 Presently, IWF receives around 3300 (2012 figures) reports a month to its hotline. These result in some 800 instances of illegal content being identified every month.<sup>18</sup> Of course it might be possible to design a process that permitted some judicial scrutiny prior to takedown notices being issued, even in the context of these numbers. It is unlikely, however, that this scrutiny could take place at an elevated level of the judiciary, simply because the quantity of work would be too high to be satisfactorily discharged at the currently very overworked High Court or circuit bench levels. On the other hand, were it to be pushed down to the magistracy, there would, I think, be a very high risk of inconsistent decision making which would be entirely undesirable in an area touching upon privacy and free expression rights.
- 6.4 A related problem is the question of speed. As I have already made clear, it is important to recognise that child sexual abuse content represents a continuing offence. So long as the images remain online, the possibility of re-victimisation remains. It is obviously critical that once the content is identified, it should be removed with a minimum of delay. It is difficult to see

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<sup>18</sup> See [www.iwf.org.uk/assets/media/annual-reports/FINAL%20web-friendly%20IWF%202012%20Annual%20and%20Charity%20Report.pdf](http://www.iwf.org.uk/assets/media/annual-reports/FINAL%20web-friendly%20IWF%202012%20Annual%20and%20Charity%20Report.pdf) (p10)

this imperative, and IWF's current impressively fast response times, surviving the intrusion into the current system of a mandated process of prior judicial scrutiny.

## 7. **IWF and judicial review**

- 7.1 In any case, it seems to me that properly understood and appropriately restricted, IWF's remit does not require any such prior judicial approval for its activities to remain fully compliant with the ECHR and the Universal Declaration, as well as being robustly responsive to the Child Convention.
- 7.2 This is because I consider that there are two obvious answers to the alleged problem of lack of judicial scrutiny of IWF's work. The first is to acknowledge, as I am told IWF does, that its decisions are plainly subject to judicial review.<sup>19</sup> What is the position in law?
- 7.3 The leading case in the area of determining susceptibility to judicial review is *YL v Birmingham City Council*, a split decision of the United Kingdom Supreme Court.<sup>20</sup> In essence, the majority judgment makes plain that the answer to this matter is to be found in an analysis not of the structure of the body in question, or in an examination as to whether the body is a public or a private entity, but in considering what the body actually *does*. To what extent is its work of such a character that in reality it is carrying out a public function?
- 7.4 I think it likely that upon an analysis in these terms, IWF's policies and decision-making are susceptible to judicial review. It was set up at the very strong urging of the government to fulfill a role in policing the public internet, its central function being to facilitate the removal from public consumption of content likely to be seriously criminal in nature. It is quite clear that its activities have the intention and effect of enforcing aspects of the criminal law, governed by a Memorandum of Understanding entered into with the police and the Crown Prosecution Service, countersigned by the Director of Public Prosecutions.
- 7.5 IWF may by constitution be a private organisation, but it nonetheless receives funding from the European Union, in addition to its industry funding, precisely to enable it to carry out a function that plainly rubs up against privacy and free expression rights. It is settled law that the public acts, even of private bodies, are susceptible to judicial review.
- 7.6 The importance of IWF's susceptibility to judicial review is obvious. It has been a significant criticism of IWF in the past that any risk that resides in permitting an essentially private body to perform an important role in regulating content on the internet is strongly exacerbated if its decision-

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<sup>19</sup> See IWF Board Minutes 25/04/2001

<sup>20</sup> 2007 UKHL 27

making is not subject to any form of judicial supervision. In an area as sensitive as the policing of the internet, it becomes a law unto itself. But if IWF's processes and decision-making *are* subject to judicial review, the essence of that criticism falls away.

- 7.7 It is true that, by and large, judicial review takes place after the event. However, as I have already argued, it is difficult to see how contemporaneous judicial supervision could ever work in practice, and certainly not without seriously limiting IWF's operational effectiveness. I consider that judicial review provides an appropriate and sufficient mechanism for providing reassurance, where it is necessary, that IWF's work remains lawful - that is to say consistent with the requirements of the Human Rights Act and therefore the ECHR. Any challenge to the contrary may be determined by the Administrative Court and, in this way, IWF's policies and decision-making are appropriately subject to the supervision of the courts.
- 7.8 Finally, while this could never be determinative of a court's approach, IWF's Board has given an undertaking to me that IWF will never seek to defend judicial review proceedings on the basis that it is not susceptible to that jurisdiction.

## 8. **Proposed developments in IWF's role**

### 8.1 *Background*

The whole area of pornography on the internet has become the subject of intense political interest, engaging the participation of the Prime Minister himself.<sup>21</sup> Part of this interest has focused on the work of IWF, which has received significant political support in recent months from across the political parties. This support has manifested itself in calls for the industry to provide more funding for IWF's work and suggestions that IWF itself might take on a broader role in two particular areas. I deal with these below.

### 8.2 *A more proactive approach*

8.2.1 At present, IWF's work is almost entirely reactive. Conceived as a hotline, it receives complaints from members of the public over the internet. It considers those complaints, assesses the sites in question and either takes no action, or issues a takedown notice, or adds a URL to its block list and refers to INHOPE or law enforcement. In fact, over 76% of complaints made to IWF turn out to be misconceived and result in no action being taken.<sup>22</sup>

8.2.2 To the extent that analysts, in visiting suspect sites as a result of complaints from members of the public, are likely to pursue, to some extent, links from those reported sites to other potential child sexual abuse content, there plainly exists already a degree of proactivity in IWF's work. This level of onward investigation, leading from reported sites to others linked to those sites, seems an entirely appropriate development to the work of a hotline. It would be odd were links to patently criminal sites to be ignored by IWF analysts.

8.2.3 However, it is now proposed, with the active encouragement of senior politicians, experts and campaigners, that IWF should develop a more investigative role, so that its analysts begin actively to trawl the internet looking for child sexual abuse content, quite apart from those sites reported

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<sup>21</sup> See the Prime Minister's speech of 22<sup>nd</sup> July 2013 [www.gov.uk/government/speeches/the-internet-and-pornography-prime-minister-calls-for-action](http://www.gov.uk/government/speeches/the-internet-and-pornography-prime-minister-calls-for-action)

<sup>22</sup> See [www.iwf.org.uk/assets/media/annual-reports/FINAL%20web-friendly%20IWF%202012%20Annual%20and%20Charity%20Report.pdf](http://www.iwf.org.uk/assets/media/annual-reports/FINAL%20web-friendly%20IWF%202012%20Annual%20and%20Charity%20Report.pdf) (P10)



to it by the public.<sup>23</sup> It would no longer be necessary for IWF to await reports from the public and it would become much more than a hotline. This, of course, would amount to a significant expansion of the IWF role and it plainly raises a number of questions.

- 8.2.4 The first is the issue of funding. I do not consider that the present levels of industry funding for IWF would be adequate to allow it safely to move into proactive work. Any major expansion in role unaccompanied by a substantial increase in funding would represent a risk. Put simply, stressed and overburdened staff would be more likely to make misjudgments abusive of privacy and free expression rights. Similarly, an organisation operating at the limits of its capacity is likely to conduct appeals less competently and respond to inspection issues less comprehensively.
- 8.2.5 In this context, there would be real danger in government outsourcing an important law enforcement function to an industry body in circumstances where the internet industry was not prepared properly to finance that function. Of course the government would save public money in such a situation, but perhaps at the cost of a weaker than appropriate response to serious criminal activity in which the victims are primarily vulnerable children.
- 8.2.6 The government is firmly of the view that the industry should make a contribution to 'keeping its own house in order', much as the banking industry does through funding the Financial Conduct Authority, and as football clubs do by paying for match day policing. There also seems to be a general view that the industry should respond positively and adequately to this expectation even if it is difficult to see how any contribution, even at a significantly higher level than is currently provided, will ever be more than one, comparatively small, component in a much larger law enforcement and child protection battle engaged in by the State and involving police, prosecutors and the courts.
- 8.2.7 As it is, I think it very unlikely that IWF could embark on a meaningful investigative role without at least doubling its number of investigators. In the face of this challenge, Google has agreed a donation of £1 million to fund an additional five analysts over four years and the rest of the industry has

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<sup>23</sup> See [www.gov.uk/government/news/tackling-illegal-images-new-proactive-approach-to-look-out-child-sexual-abuse-content](http://www.gov.uk/government/news/tackling-illegal-images-new-proactive-approach-to-look-out-child-sexual-abuse-content)

indicated its willingness to fund an additional two analysts without limit of time.<sup>24</sup>

- 8.2.8 Furthermore, I am told that agreement has been reached with the industry that IWF will commence systematic proactive work from April 2014. To provide funding in addition to the Google donation, the IWF Board has set new bands for membership fees. This combination of new resources is expected to fund seven more analysts and a move to larger premises. It is also important that it is sufficient to fund the additional training required to turn analysts into investigators. These funding increases may need to be expanded in future years.
- 8.2.9 There is no doubt that some useful results could be obtained by a better-funded IWF tackling properly designed proactive activities that are perfectly consistent with free expression and privacy rights. But, as I have indicated, this would depend on more than just funding increases.
- 8.2.10 Investigations, particularly into serious criminal activity, are a science. There are many boundaries and many pitfalls. As one example, *Article 8* and *Article 10* rights may very well be more fiercely engaged through a process of internet trawling by investigators, than through a process of simple reaction to complaints from the public in relation to specific sites.
- 8.2.11 It seems clear, therefore, that if IWF analysts are to undertake proactive investigations, the design, scope and progress of this work will have to be very carefully monitored within the organisation by senior staff members suitably qualified to carry out such planning and monitoring. Close liaison with the police will be critical - both in planning and in putting into effect proactive work streams. Developing mechanisms to avoid at all costs the IWF finding itself inadvertently trapped in evidence chains would be essential.
- 8.2.12 So before they began proactive investigative work, analysts would require specialist training in the law and in investigative techniques, as well as in the relevance and applicability of privacy and free expression rights to their work. Such training would be beyond what is currently provided to IWF analysts, but as I have argued above, its absence would represent a significant risk.

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<sup>24</sup> See [www.iwf.org.uk/about-iwf/news/post/370-child-sexual-abuse-charity-doubles-hotline-team](http://www.iwf.org.uk/about-iwf/news/post/370-child-sexual-abuse-charity-doubles-hotline-team)

### 8.3 *Peer-to-Peer file sharing*

- 8.3.1 It is increasingly the case that consumers of child sexual abuse content share images with one another through Peer-to-Peer file sharing. They doubtless believe that this is a safer and more secure way to exchange illegal content. Perhaps because this has become such a common medium through which consumers of child sexual abuse content operate, there have been calls for IWF to commence investigations through the surveillance of Peer-to-Peer file sharing networks, presumably in order to discover evidence for onward report to the police.<sup>25</sup>
- 8.3.2 I observe at the outset that were it to move into this area, IWF would be undergoing a major escalation in its role, far beyond that implied by its merely becoming more proactive in its trawling of the 'open' internet. From a role that involves examining, in response to specific complaints, named sites on the internet, it would move explicitly into carrying out surveillance of individuals' behaviour. This would require IWF's involvement in sensitive decisions about whom to target for surveillance, for what purpose, and by what means. IWF's staff would increasingly be called upon to make judgments virtually indistinguishable from those the police are called upon to make in serious criminal investigations.
- 8.3.3 A move into this work would demand a complete overhaul of IWF's recruitment and training policies, since the organisation would require analysts with highly developed investigative skills and a professional understanding of domestic laws governing surveillance as well as a strong awareness of a number of international human rights instruments.
- 8.3.4 It would also require IWF to work much more closely with the police. Investigations would have to be carefully planned and executed, great care would have to be taken not to intrude into or inadvertently to disrupt existing police operations, and strategies would have to be devised to avoid IWF analysts accidentally inserting themselves into evidence chains and thereby gravely compromising important police work.
- 8.3.5 For all these reasons, I take the view that such a development in IWF's work would represent a very considerable risk at this time - both to IWF itself in terms of its readiness for a role whose implications are so sensitive, but also to the public, since such a move would bear serious implications for the State's accurate casting of the appropriate balance to be drawn in this area

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<sup>25</sup> See <http://johnc1912.wordpress.com/2013/06/11/tackling-online-child-sex-abuse-images>

between the various strongly competing rights in play. Arguably, it is for a properly constituted police force, properly trained and supervised, and fully cognisant of the law, to make the many difficult judgments inherent in such investigations, particularly since the means by which they are progressed are by their nature undercover and intrusive.

- 8.3.6 For the avoidance of doubt, it is critical that responsibility is somewhere taken for investigating child sexual abuse content by Peer-to-Peer file sharers, so that offenders are brought to justice. I conclude that since it has subsumed CEOP with the apparent intention that these important investigations should be mainstreamed into the fight against serious crime, the National Crime Agency should now target those criminals who are file sharing child sexual abuse content as a matter of high priority.
- 8.3.7 Obviously, intrusion can be justified in serious criminal investigations and, in the context of investigations into child sexual abuse content, profound intrusion can easily be compatible with privacy and free expression rights - so long as it is prescribed by law and necessary in a democratic society to protect vulnerable children. The point is, however, that in the case of Peer-to-Peer file sharing investigations these are likely to be particularly sensitive judgments more appropriately the preserve of trained investigators of properly constituted law enforcement organisations, subject to strict rules of internal authorisation and external professional legal supervision, including by experienced prosecutors.
- 8.3.8 On the other hand, it is possible to imagine a role for IWF in which it received reports from the public relating to suspect Peer-to-Peer exchanges for onward transmission to the police. But it should, I consider, avoid conducting its own investigations in this area.
- 8.3.9 I understand that IWF is presently consulting on the question of its moving into Peer-to-Peer investigations. My conclusions in this area may need to be re-visited once the results of that consultation become clear.



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I am extremely grateful to everyone for their time and assistance. The contents and conclusions of the Report are my responsibility alone.

Matrix Chambers  
Gray's Inn  
London WC1R 5LN  
November 2013



