

Consultation on the CPS Guidance relating to the Obscene Publications Act 1959

Introduction

1. This is a summary of responses to the public consultation undertaken by the Crown Prosecution Service (CPS) on the revised Guidance on prosecuting cases under the Obscene Publications Act 1959 (“OPA 1959”) and a statement of the revisions proposed which will form the Guidance to be issued.
2. We launched a 12 week public consultation on the proposed revised Guidance on 25 July 2018. The purpose of the consultation was to provide interested persons with an opportunity to provide comments and to ensure the final version of the Guidance was informed by as wide a range of views as possible.

The Consultation

3. The consultation was published on the CPS website and asked 5 questions:

Question 1

Do consultees agree or disagree with the guidance that the showing or realistic depiction of sexual activity/pornography which constitutes acts or conduct contrary to the criminal law is (subject to the statutory defences) likely to be obscene?

Question 2

Do consultees agree or disagree with the guidance that prosecutors must exercise real caution when dealing with the moral nature of acts not criminalised by law, and that the showing or realistic depiction of sexual activity/pornography which does not constitute acts or conduct contrary to the criminal law is unlikely to be obscene?

Question 3

Do consultees agree or disagree with the guidance that prosecutors, when assessing obscenity, should consider:

- a. Whether the activity is consensual;
- b. Whether or not serious harm is caused;
- c. Whether or not it is inextricably linked with other criminality; and
- d. Whether the likely audience is not under 18 or otherwise vulnerable.

Question 4

Do consultees agree or disagree with the guidance that the showing or realistic depiction of other acts or conduct which are contrary to the criminal law is also capable of being obscene?

Question 5

Do consultees have any further suggestions for guidance to prosecutors in assessing “obscenity” when considering allegations falling under the Obscene Publications Act 1959?

Method of Analysis

4. We received 107 responses, all of which have been analysed. We have indicated the percentage of responses to each question which were in agreement, disagreement or neutral. Each response to each question has been analysed separately. This has informed the statement below on what broadly the nature of responses was (“general observations”) and what specific clarifications or amendments were proposed, and whether it is intended to adopt these or not (“summary of responses to specific questions”). Whilst this summary intends to address all responses received, whether their broad nature or specific suggestions, it is not possible to set out or address each and every point made by respondents.

General Observations

5. We received a number of responses both from those who considered the OPA 1959 should be repealed and that prosecutions should not follow under this legislation, and those who considered that the showing of sexual activity or pornography should be more widely criminalised and any proposal to revise the CPS guidance abandoned.
6. The CPS does not make or amend the law nor can it determine that it will not prosecute under legislation for which Parliament has provided. These responses however were of assistance in illuminating how the guidance could better explain the legal framework of the OPA 1959.
7. The wider legal position requires prosecutors to consider whether prosecutions are necessary and proportionate and to provide guidance so that citizens are able to understand what conduct is likely to be caught by the criminal law. We have considered and rejected, as set out below, guidance based on a test of “revulsion” or the prohibition on the showing of all sexual activity / pornography, but we have greatly benefited from consultation responses in improving how the guidance expresses what is likely to be

deemed “obscene” and what is not. We have taken particular care to consider constructive suggestions for improvement notwithstanding a respondent’s indicated agreement or disagreement with a question, and to analyse the reasons for disagreement and whether the guidance can nonetheless seek to address those.

8. We have accepted representations that the use of the word “depiction” may catch mere depiction and art and entertainment in general and have amended the guidance accordingly. We have sought to clarify further that prosecutors must apply the legal test in section 1(1) OPA 1959 and not personal morality or taste. We have provided more detailed guidance on how prosecutors should assess allegations that showing serious harm, non-consensual activity and the likelihood of an audience being under 18 years of age would amount to obscenity.
9. We note that broader consideration of the OPA 1959 and reform may be contemplated elsewhere. On 1 November 2017 the Law Commission published “Abuse and Offensive Online Communications: A Scoping Report” (HC 1682 Law Com No 381). Recommendation 2 of this scoping report provides, “as part of the reform of communications offences, the meaning of ‘obscene’ and indecent’ should be reviewed, and further consideration should be given to the meaning of the terms ‘publish’, ‘display’, ‘possession’ and ‘public place’ under the applicable offences”.

Summary of Responses to Specific Questions

Question 1: Do consultees agree or disagree with the guidance that the showing or realistic depiction of sexual activity / pornography which constitutes acts or conduct contrary to the criminal law is (subject to the statutory defences) likely to be obscene?

10. 104 responses were received to this question. 2 were neutral, 66 disagreed and 36 agreed.

11. Of the 66 who disagreed:

- a. 10 expressed disagreement but provided no further observations;
- b. 14 indicated disagreement with the proposition that the mere depiction of a criminal act should be deemed to have a tendency to deprave or corrupt. They considered there were many examples in art and entertainment of realistic depictions which are part of the mainstream media, would not be considered criminal and could not be said to have a tendency to deprave or corrupt;

- c. A quantity of the remaining 42 did not appear to disagree with the proposition that showing a criminal act should be deemed obscene, but indicated that it should go wider. In some cases this foreshadowed a response to question 2 and a view that the criminal law was not an exhaustive expression of what was obscene. In this respect it was difficult to see that the disagreement expressed was in fact a disagreement with the rationale underlying this question, that the showing sexual activity / pornography which constitutes acts or conduct contrary to the criminal law is likely to be obscene: the response indicated that the respondent did not feel that this was an exhaustive definition of obscenity. Some respondents indicated a view that the question should be turned on its head: that obscene acts were criminalised precisely because they are obscene. Insofar as that was an explanation for why the law criminalises such acts, it would again not amount to a disagreement with the rationale underlying this question, that the showing sexual activity / pornography which constitutes acts or conduct contrary to the criminal law is likely to be obscene.

Specific changes as a result of feedback

12. The words “realistic depiction” will be removed as without more they require more guidance to make clear they do not extend to mainstream art and entertainment. A further qualification has been added concerning whether the material may encourage its emulation.

Question 2: Do consultees agree or disagree with the guidance that prosecutors must exercise real caution when dealing with the moral nature of acts not criminalised by law, and that the showing or realistic depiction of sexual activity / pornography which does not constitute acts or conduct contrary to the criminal law is unlikely to be obscene?

13. 103 responses were received to this question. 6 were neutral, 43 disagreed and 54 agreed.

Specific changes as a result of feedback

14. Respondents who both agreed and disagreed with this question emphasised that the concept of ‘morals’ was extremely subjective and demonstrated concern that there was a risk that prosecutors would exercise their own moral judgement when considering cases under this Act . “....Assessing the moral nature of acts....” has therefore been changed to “...Assessing the tendency

of acts to deprave or corrupt...” to emphasise the legal test that must be applied.

15. Respondents noted, in addition to considerations of consent, harm and link to other criminality, that the likely audience was important to this paragraph too. “Provided the likely audience is not under 18 or otherwise vulnerable” has therefore been added to follow “subject to the criminal law....”.

Specific changes not made

16. It was proposed that the CPS exercise an assessment of tendency to deprave or corrupt based on revulsion, or similar concepts. We consider that this would risk blurring the line between the ordinary meaning of “obscene” (which still applies in statutes which do not define “obscene”) and the meaning given by the section 1(1) OPA 1959.
17. It was proposed that the CPS exercise an assessment of tendency to deprave or corrupt based on public norms and a view that the showing of sexual acts not caught by the criminal law has a tendency to deprave or corrupt. We consider that it is important to ensure there is legal certainty in the application of this test and that the criminal law is a clear and important indicator.
18. Respondents expressed a concern about the impact of this revision, in terms of prosecutions undertaken, on society in general. Whilst this Guidance is intended to assist future charging decisions of all forms, in assessing the extent to which these revisions represent a departure from current charging of this offence, a review of recent prosecutions has been conducted. This indicates that there were 32 prosecutions, each involving one defendant, who had a first hearing from 1 January 2017 to 3 July 2018. These cases involved prosecutions for other related sexual offences, or the distribution of extreme pornography, or conduct which would now be caught by section 15A Sexual Offences Act 2003 (sexual communication with a child). The guidance has sought to address the interrelationship between the OPA 1959 and these allegations to ensure that culpable conduct is reflected by the appropriate charge(s).

Question 3: Do consultees agree or disagree with the guidance that prosecutors, when assessing obscenity, should consider:

- a. Whether the activity is consensual;
- b. Whether or not serious harm is caused;
- c. Whether or not it is inextricably linked with other criminality; and
- d. Whether the likely audience is not under 18 or otherwise vulnerable.

19. 104 responses were received to this question. 2 were neutral, 46 disagreed and 56 agreed.

Specific changes as a result of feedback

20. Consultees suggested the following improvements to the guidance on these four criteria, added in parentheses:

- a. Whether the activity is consensual (particularly where there is full and freely exercised consent, and also where the provision of consent is made clear where consent may not be easy to determine from the material itself);
- b. Whether or not serious harm is caused (whether physical or other, applying contemporary social standards, focusing on the effect on and circumstances of the victim and not considering whether treatment was required, whether the harm was permanent or dangerous to be conclusive);
- c. Whether or not it is inextricably linked with other criminality (so as to encourage dangerous emulation or fuelling interest or normalisation of it);
- d. Whether the likely audience is not under 18 (having particularly regard to where measures have been taken to ensure that the audience is not under 18) or otherwise vulnerable (as a result of their physical or mental health, the circumstances in which they may come to view the material, the circumstances which may cause the subject matter to have a particular impact or resonance or any other relevant circumstance).

21. Suggested changes that we have not made include:

- a. Providing that consent is irrelevant to an assessment of obscenity. The guidance does not indicate that this is a conclusive factor but we maintain it is relevant, where activity is non-consensual, to the assessment of whether it is obscene.
- b. Providing for a likely audience to be under 16. Whilst persons are permitted to do a number of adult things when they reach the age of 16, the Protection of Children Act 1978 and other legislation continues to recognise that persons under the age of 18 merit particular protection.

- c. Providing that the “target” audience is under 18, or that the “possible” audience is under 18. We consider that requiring proof that the publication was targeted at those under 18 is too stringent a requirement if nonetheless there is a plain likelihood that this category will come to view the publication; but that the test of “possibility” is too lax and does not reflect an assessment about the risk that these persons will come to view the publication. We consider “likelihood” is fact-specific and whilst it would be difficult to provide examples of this, that it is the appropriate balance to be struck.
- d. Considering acts to be caught by other criminal provisions. Whilst we acknowledge the role of conspiracy or encouragement/assistance in prosecuting those who publish obscene articles, we consider that the broader gravamen of normalising or glorifying criminality is caught by this legislation and there remains a role for it in addition to existing provisions.
- e. Deeming serious harm not to be obscene, or providing that consensual sado-masochism not involving serious harm is obscene. We consider that we must apply the law as set out in *R v Brown and others* [1994] 1 AC 212: consensual sado-masochism not involving serious harm is not criminal and so, without more, it is difficult to see why showing it ought to be; by contrast, sado-masochism involving serious harm is criminal and therefore there is a clearer foundation for consequently criminalising its portrayal.
- f. Not tolerating the portrayal of any sexual or wicked behaviour. Where the representations are to the effect that the law should be amended, we consider they are better addressed to Parliament and others. The CPS must apply the law and the test of obscenity in section 1(1) OPA 1959 and in doing so have due regard to whether a prosecution is necessary and proportionate and how it can publicly state its approach to prosecutions so as to provide for legal certainty.

Question 4: Do consultees agree or disagree with the guidance that the showing or realistic depiction of other acts or conduct which are contrary to the criminal law is also capable of being obscene?

22. 103 responses were received to this question. 11 were neutral, 47 disagreed and 44 agreed.

23. Of the 47 who disagreed:

- a. 2 provided no further reasoning;

- b. 5 objected on the basis to the reference to “realistic depiction”;
- c. 11 raised a specific concern about the reference to hate crime and the potential for this to extend OPA 1959 prosecutions to blasphemy.

Specific changes as a result of feedback

24. “Realistic depiction” captures too wide a range of current art and entertainment and so will be deleted.

25. Some respondents questioned the legal basis for this statement. We do not accept that the definition of “obscene” cannot extend to non-sexual conduct. Accordingly the introductory sentence will read:

“Although the bulk of cases and reported cases relate to sexual or pornographic material, and as such this guidance has focused on this category of obscenity, the definition of obscenity is not restricted to these categories: *John Calder (Publications) Ltd v. Powell* [1965] 1 Q.B. 509.”

26. Some respondents challenged the inclusion of “hate crime” and it is correct that this is an expression which must be understood to attach to existing criminality. Those respondents expressed concern that this would become a way of introducing blasphemy offences. We consider the point being made is addressed by the reference to offences against the person which of course would include hate crime involving offences against the person, without reference to this as a free-standing category. We consider respondents’ reference to blasphemy to be a helpful indicator of the parameter of this provision:

“Accordingly, a prosecution under the Act is possible for obscenity which is not sexual or pornographic in nature but which shows criminal acts, for instance offences against the person. By contrast, behaviour which does not amount to an offence in criminal law, such as blasphemy, would not be caught by a definition of obscenity which references the existing criminal law.”

Question 5: Do consultees have any further suggestions for guidance to prosecutors in assessing “obscenity” when considering allegations falling under the Obscene Publications Act 1959?

Specific changes as a result of feedback

27. We agree it is appropriate, if the guidance is to emphasise the link between obscenity and criminality as the starting point for assessing the former, to invite prosecutors to consider if an existing criminal offence has been committed before turning to the OPA 1959, for instance allegations that a criminal offence is being encouraged as provided for by sections 44 to 46 of the Serious Crime Act 2007.
28. We agree that section 63 of the Criminal Justice and Immigration Act 2008, having identified categories of images which it is unlawful to possess, provides an indication of what may be obscene if published, such that the distribution of such images would be caught by the OPA 1959.
29. We agree that paedophilic discussion, encouragement and fantasy may on its facts be caught by the OPA, even if involving only one person publishing to another, given the judgment in *R v Gavin Smith* [2012] EWCA Crim 398. We acknowledge that this decision is not uncontroversial but as it involves judicial consideration of the OPA 1959 it should be included in the guidance.
30. Suggested changes that we have not made include:
- a. We have indicated that we consider the question of “likelihood” relating to the risk of children accessing the material to be the correct test but one for which it is difficult to provide further guidance or examples.
 - b. One respondent suggested that non-criminal non-sexual conduct could meet the OPA 1959 test, for instance where people took sexual pleasure in viewing death or intruding on grief. We consider this to be an example where caution must be exercised in construing the showing of non-criminal matter to be obscene but where such material might nonetheless be construed to be obscene. We have however not included this as an example as we have not identified this as a category of material which has fallen to be prosecuted nor one on which we consulted.
 - c. We have indicated that we cannot alter the legislative provisions of the OPA 1959 nor the decided cases which provide for the law.
 - d. We consider that it is appropriate to update this guidance to reflect a clear rationale for the use of this Act when sexual and non-sexual allegations are considered.

Next Steps

31. The new CPS Guidance on the OPA 1959 will come into force in the week commencing 28 January 2019.

Conclusion

32. We are very grateful to everyone who responded to the consultation. We are content that the responses and analysis have led us to make changes that have resulted in clearer, improved Guidance.