

# CONSULTATION ON OBSCENE PUBLICATIONS GUIDANCE

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## Introduction

1. This Legal Guidance identifies potential offences for prosecutors to consider when dealing with “obscene publications”, before focusing on the Obscene Publications Act 1959 itself. It provides guidance on the provisions in general and in particular how prosecutors should approach the question of “obscenity”.

## Possible offences

2. Prosecutors may consider the following offences when dealing with obscene publications:
  - Possession of an extreme pornographic image, contrary to section 63 Criminal Justice and Immigration Act 2008
  - Taking, making, distributing or publishing indecent images or pseudo-images of children, contrary to section 1 Protection of Children Act 1978; possession of an indecent image of a child, contrary to section 160 Criminal Justice Act 1988; possession of prohibited images of children, contrary to section 62 Coroners and Justice Act 2009
  - Disclosing private sexual images without consent, contrary to section 33 Criminal Justice and Courts Act 2015
  - Sending an article which is indecent, grossly offensive, conveys a threat or is false to cause distress or anxiety, contrary to section 1 of the Malicious Communications Act 1988
  - Sending by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character, or false for the purpose of causing annoyance, inconvenience or needless anxiety to another, contrary to section 127 Communications Act 2003
  - Pursuing a course of conduct which amounts to harassment, contrary to section 2 Protection from Harassment Act 1997
  - Outraging public decency, contrary to common law

- Importing obscene articles, contrary to section 42 Customs Consolidation Act 1876
- Sending injurious, indecent or obscene articles etc by post, contrary to section 85 Postal Services Act 2000
- Encouraging or assisting an offence, contrary to 44 to 46 Serious Crime Act 2007
- Children and Young Persons (Harmful Publications) Act 1955. This criminalises publishing etc. articles consisting of stories told in pictures (whether or not accompanied by text) portraying crimes, violence, cruelty or incidents of a repulsive or horrible nature having a tendency to corrupt children. The maximum penalty is four months imprisonment and/or a £1,000 fine. Attorney General's consent is needed to prosecute
- Video Recordings Act 1984 and 2010. This provides for a regime of video classification and criminalises non-compliance, maximum sentences ranging from six months to two years imprisonment
- Indecent Displays (Control) Act 1981. A person permitting or causing display of indecent matter visible from a public place shall be guilty of an offence, punishable by up to two years imprisonment
- Theatres Act 1968. A person presenting a play which is obscene so as to have a tendency to corrupt or deprave shall be guilty of an offence, punishable by up to three years imprisonment. Attorney General's consent is needed to prosecute

## **The Obscene Publications Act 1959**

3. The Obscene Publications Act 1959 ("the Act") criminalises the publication (whether or not for gain) of an obscene article. It also criminalises a person who has an obscene article for publication for gain (personal gain, or gain for another), to be interpreted in accordance with the provisions of the Obscene Publications Act 1964.
4. Section 1 of the Act provides definitions of "article", "publish" and "obscene". Section 4 provides for the defence of "public good".

- “Article”: “any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures”.
- “Publish”: an article is published if it is distributed, circulated, sold, let on hire, given, lent, offered for sale or for letting on hire, or is shown, played, projected or transmitted electronically where the matter is data stored electronically (i.e. the data must be shown to be stored electronically).
- “Obscene”: “an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.” “To deprave means to make morally bad, to pervert, to debase or to corrupt morally. To corrupt means to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin good quality, to debase, to defile”: *Penguin Books Ltd* [1961] Crim LR 176.
- The defence of “public good”: this requires the defence to prove that the publication of the article in question, if the prosecution have proved its tendency to deprave and corrupt, is nonetheless justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern (or in the case of a moving picture film or soundtrack, the interests of drama, opera, ballet or any other art, or of literature or learning). The Act also creates a defence for a person who proves that he or she has not examined the article, and had no reasonable cause to suspect that it was obscene: section 2(5).

## Evidential considerations

5. “Obscene” has a meaning provided for by the Act. This meaning is different to the ordinary meaning of obscene (“repulsive”, “filthy”, “loathsome” or “lewd”) and it will not suffice for the prosecution to prove that the articles concerned met the ordinary meaning of obscenity unless they also meet the higher threshold of tendency to moral depravity or corruption: *Anderson* [1972] 1 QB 304.

6. This legal definition of obscenity applies to prosecutions under the Act. Where other offences require proof of obscenity (for instance, those contrary to the Communications Act 2003, the Customs Consolidation Act 1876 or the Postal Services Act 2000), but do not provide a definition of obscenity, the ordinary meaning will apply.
7. A defence based on an argument that the likely audience is already depraved or corrupt is unlikely to succeed. The Act is not merely concerned with the once and for all corruption of the wholly innocent; it equally seeks to protect the less innocent from further corruption, the addict from feeding or increasing his addiction: *Whyte* [1972] 3 All ER 12.
8. A jury should determine the question of obscenity without expert evidence: *Calder and Boyars Ltd* [1969] 1 QB 151. However, such evidence may be admissible in relation to tendency to deprave (a person or group's susceptibility to material) or the defence of public good (as provided for by section 4(2) of the Act).
9. When assessing the evidence of obscenity, particular consideration should be given by prosecutors to the question of who is likely to read, see or hear the article, and the potential for it to deprave or corrupt them (whether or not they in fact read, saw or heard it). The clearest and most common question will be whether there exists a likelihood that children would access the material. Where material is published to a police officer or other person who is not themselves likely to be depraved or corrupted, prosecutors should consider the evidence that (i) there are other persons who would tend to be depraved or corrupted by the article who were likely to read, see or hear it (whether or not they in fact did so), or (ii) whether the evidence demonstrates that the suspect had material for publication and for gain.
10. When considering whether the content of an article is "obscene", prosecutors should distinguish between:
  - Content showing or realistically depicting criminal conduct (whether non-consensual activity, or consensual activity where serious harm is caused), which is likely to be obscene;
  - Content showing or realistically depicting other conduct which is lawful, which is unlikely to be obscene.
11. Non-consensual activity shown or realistically depicted may involve those who cannot consent to the activity. This includes children, animals and deceased persons. Children means persons under the age of 18: the Protection of Children Act 1978 section 2 provides for this definition and as a publication

showing sexual activity with such a person is also likely to be caught by the Protection of Children Act 1978, for consistency the same definition is adopted.

12. Non-consent for adults must be distinguished from consent to relinquish control. Previous guidance indicated that the presence of a “gag” indicated that consent could not apparently be withdrawn. This will not, without more, suffice to confirm that sexual activity was non-consensual.
13. Where a person consents to an activity, as a matter of law such consent will not amount to a defence to assault occasioning actual bodily harm or worse: *R v Brown and others* [1994] 1 AC 212. Assault occasioning actual bodily harm may be charged where more than transient and trifling harm is caused. As a matter of charging practice, this charge should be reserved for serious harm which cannot be met by an allegation of battery. Accordingly, publications which show or depict the infliction of serious harm may be considered to be obscene publications because they show criminal assault notwithstanding the consent of the victim. This includes dismemberment and graphic mutilation. It includes asphyxiation causing unconsciousness, which is more than transient and trifling, and given its danger is serious.
14. Each case must be considered on its own facts and merits. However, the showing or realistic depiction of sexual / pornographic activity which involves the commission of a crime is likely to be obscene. Its criminalisation indicates its moral nature; where publication may tend to normalise or glorify such activity, the statutory test of obscenity accordingly will likely be met.

#### **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?

15. Conversely, real caution must be exercised when assessing the moral nature of acts which Parliament has not provided should be subject to the criminal law. That is particularly so because whilst they may well be construed to be “repulsive”, “filthy”, “loathsome” or “lewd”, and so fall under ordinary language to be classified as obscene, that will not suffice for obscenity under the Act.

## 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 criminalized 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?

16. The following conduct (notwithstanding previous guidance indicating otherwise) will not likely fall to be prosecuted under the Act:

- Fisting
- Activity involving bodily substances (including urine, vomit, blood and faeces)
- Infliction of pain / torture
- Bondage / restraint
- Placing objects into the urethra
- Any other sexual activity not prohibited by law

provided that:

- It is consensual;
- No serious harm is caused;
- It is not otherwise inextricably linked with other criminality; and
- The likely audience is not under 18 or otherwise vulnerable.

## 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.

17. The definition of obscenity does not restrict it to sexual or pornographic material, although these form the bulk of cases and of the reported cases, and as such this guidance has focused on this category of obscenity. Prosecutors should exercise caution and have regard to the importance of legal certainty and fair warning when considering non-sexual / non-pornographic publications. An ill-defined concept of moral depravity or corruption does not



provide for legal demarcation of sufficient precision to enable a citizen to regulate his or her conduct. However, where conduct or an activity is itself criminalised, that may be a clear indication as to its moral nature. A publication showing or realistically depicting such conduct may tend to normalise or glorify it. Accordingly, a prosecution under the Act is possible for obscenity which is not sexual or pornographic in nature but which shows or realistically depicts criminal acts, for instance offences against the person or hate crimes.

#### **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?

## **Public interest considerations**

18. If (and only if) the evidential stage is met, prosecutors should go on to consider the public interest stage of the Code for Crown Prosecutors.

19. In addition:

- Prosecutors should address the following factors identified in a Parliamentary Written Answer provided by the Attorney General on 16 June 1997:

“in determining whether a prosecution would be in the public interest, the principal factors include:

- i. the degree and type of obscenity together with the form in which it is presented;
- ii. the type and scale of any commercial venture;
- iii. whether publication was made to a child or the possibility that such publication would be likely to take place.”

- Prosecutors should address why a prosecution is required in the public interest by reference to whether (and why / why not) seizure and forfeiture (see below) would be an acceptable disposal.

## Article 10

20. Article 10(1) provides that everyone has the right to freedom of expression. This will be engaged by publications alleged to be obscene. However, a prosecution is permissible for an offence prescribed by law and necessary and proportionate for the prevention of disorder or crime and the protection of health or morals: 10(2). In *Handyside v United Kingdom* (1976) 1 EHRR 737 the European Court of Human Rights acknowledged that prosecutions under the Act were permissible under the latter exception. Accordingly, provided the publication considered is plainly obscene in showing or realistically depicting conduct caught by the criminal law, and the public interest stage is carefully considered and addresses necessity and proportionality, having regard to the guidance in *Handyside*, a prosecution will be Article 10 compliant.

## Seizure and forfeiture

21. The Act provides an alternative to prosecution in section 3 which creates a power to seize and forfeit such articles. This requires the material to have been seized pursuant to a warrant issued under this section. Prosecutors will have conduct of such proceedings: see section 3(2)(d) Prosecution of Offences Act 1985. Such proceedings may run concurrently to a prosecution and be adjourned pending the conclusion of the prosecution. The court determining forfeiture must be informed if there has been an acquittal and on what basis.

22. The Law Officers have undertaken that where a publisher intervenes in forfeiture proceedings and indicates an intention to continue publishing, whatever the result of the forfeiture proceedings may be, then in the absence of special circumstances and there being sufficient evidence the Director will usually proceed against the publisher by way of prosecution rather than pursue the forfeiture proceedings. The undertaking does not apply to “pulp” magazines. These are magazines where there cannot be any claim of literary, artistic, scientific or any other merit. These are magazines considered by virtue of their nature and character not worthy of consideration by a judge and jury, where pulping them is the appropriate disposal.

## Jurisdiction

23. Time limit. An obscene publications prosecution may not be commenced more than two years after the commission of the offence: section 2(3) of the Act.
24. Geography. “Publish” means transmission of data, both uploading and downloading. Where a defendant uploads a material outside England or Wales, and a person then downloads the material in England or Wales, the courts will have jurisdiction to try the defendant: *Perrin* [2002] EWCA Crim 747. More generally, the courts in England and Wales will have jurisdiction where a substantial number of the activities constituting a crime take place within England and Wales, unless it can be argued, on a reasonable view, that the conduct ought to be dealt with by the courts of another country: *Smith (Wallace Duncan) (No.4)* [2004] EWCA Crim 631. For prosecutions under the Act it is submitted that this means a substantial number of the activities involved in publishing or a substantial amount of the audience likely to be depraved or corrupted.

## Handling of evidence / disclosure

25. A request by the defence to view the articles concerned should be acceded to. The items should not be copied because this will involve further publication contrary to the Act. Unlike the Protection of Children Act 1978 there is no equivalent in the Act for copying articles for the purposes of criminal proceedings. Instead the defendant’s solicitor or counsel should be permitted access at a suitable location including the opportunity for private and confidential discussions with legal advisers, unsupervised and unobserved by police officers or representatives of the CPS. Whenever possible, such access should take place either on police premises, or at the offices of either the defendant’s solicitors or the offices of the defence or prosecution expert. The accused should only be permitted access whilst in the company of their legal representative. Any dispute about access to the articles should be referred to the court to make directions which are in accordance with the Act and which permit the defence properly to defend their clients.

## Sentencing

26. Offences contrary to the obscene publications act can be tried summarily or on indictment. The maximum sentence is five years' imprisonment and/or an unlimited fine.