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Evidence to the Committee on

OBSCENITY

and

FILM CENSORSHIP

by the

Defence of Literature

and the Arts Society

(DLAS)

April 1978 30p

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EVIDENCE

Introductory note on DLAS

1. DLAS grew out of the Free Art Legal Fund, established for the defence of the sociological novel Last Exit to Brooklyn. This was subject to trials for obscenity in 1966-1968. After a conviction was finally quashed by the Court of Appeal, the sponsors of the Fund felt there was need for a continuing organisation to assist publishers, writers and artists threatened by censorship. An executive committee was formed, and in May 1968 DLAS was set up. The Society has worked since then to oppose censorship, believing that the repression it involves outweighs any possible benefits. History shows there is no monopoly of truth, no permanent opinion. The ears of mankind must be open to every voice, for new truths come from unexpected quarters. The right of people to interfere with the freedom of others must, in a civilised society, be restricted to what is proved to be absolutely necessary.

2. DLAS has not aimed for mass membership, and has operated with very limited funds. It has set out to provide a forum in public life for those who believe it is necessary to present the case for the free expression of all views. A list of the Society's executive committee and sponsors is given in the Appendix.

The function of law in this field

3. We agree with the distinguished jurist Professor H.L.A. Hart when he refers to "the critical principle, central to all morality, that human misery and the restriction of freedom are evils", and goes on: "for that is why the legal enforcement of morality calls for justification" (Law, Liberty and Morality, page 82). We think he is right to say that the real solvent of social morality is not failure of the law to endorse that morality's restrictions with legal punishment, but "free critical discussion". As he says: "It is this — or the self-criticism which it engenders — that forces apart mere instinctive disgust from moral condemnation" (Ibid, p.68). We adopt Professor Hart's whole argument in this book, which we commend to the Committee. We feel, in particular, that those responsible for formulating and administering the laws in our ethically pluralist and multi-racial society need to be careful not to use them to enforce the dogmas of a particular religion or denomination. It is no longer true that Christianity is part of the law of England; the two are distinct, and should be kept so.

4. If morality is invoked, with or without religion, we think it is important to acknowledge that the preservation of maximum freedom of expression is itself a matter of the highest morality. However many voices are raised against what are currently seen as obscenities it is still true, we believe, that the vast majority of the population would not knowingly condone the erosion of our basic freedom as the price to be paid for curtailing them. Public opinion as to what is objectionable in art, literature and other forms of communication has never shown any reliable consistency, and society will still be best served, we believe, by continuing to defend the permanent values inherent in freedom of expression as our first moral priority. The merit of any work can only be fairly assessed through the collective open mind of a generation (or sometimes several generations). Mo individual or chosen few should be trusted to detect

merit (or greatness) when it appears and decide whether or not it should have a chance to survive.

5. A distinction that needs to be made in this discussion is that between the way obscene material comes into existence and what is subsequently done with it. One may, for example, urge that adults should be free to see material they wish to see while condemning the use of children as models for pornographic photographs. A particular article, however subjectively "obscene", is, in an objective sense, neutral. What concerns the law is how the article came into existence ("creation") and what is done with it ("dissemination"). In our evidence we deal separately with these aspects.

6. A further relevant distinction is that between pre-censorship and post-censorship. We define pre-censorship as any rule whereby material must be submitted to and approved by a censor before it is allowed to be published. Post-censorship we define as any rule whereby the publisher of material may be punished if it turns out to offend criteria laid down by law. DLAS is totally opposed to pre-censorship, even where it is only semi-official (as in the case of the British Board of Film Censors) — or even where it is entirely unofficial but enforced by monopoly power or compelling economic sanctions (as with the body recently set up by some magazine publishers). As will appear, we accept that in some cases post-censorship may be justified. We consider however that it should be confined within the narrowest possible limits.

7. What form should post-censorship take, where unavoidable? Here we conclude that the traditional use of criminal penalties continues to be the best practical method. Because the question whether material is obscene by current standards is necessarily subjective, we consider the public interest requires that it should invariably be decided by juries or lay justices rather than by career judges or stipendiary magistrates. Preferably, there should always be a right to jury trial. Furthermore, since complex psychological and emotional factors are involved, we suggest that it would be beneficial for assessors with training in psychology or psychiatry to be appointed to assist in weighing expert evidence and formulating directions to juries.

The basic principle: free dissemination

8. Subject to what is said below (paras. 44-47) about necessary restraints on the creation of obscene materials, DLAS believes that the basic principle governing this subject is that dissemination should be unrestricted. We realise that public opinion may insist on limits to the operation of this principle, but we ask the Committee to begin by accepting the principle and then to scrutinise with great care any proffered exceptions to it before advocating their adoption. The onus of proof, we contend, is always on those who seek to restrict freedom of speech and communication.

9. In examining the concept of free dissemination, it is helpful to break it down into its basic elements. First, there is the distinction between the right of those who wish to disseminate material and the right of those who wish to receive it. The motives are essentially different. The disseminator's motive may be to influence opinion or simply to make money. (The latter motive is commonly held to be despicable, but we believe this to be a fallacy: most human wants are supplied by people who make

money out of what they do.) The receiver's motive may be to open his mind or please his senses: he may seek instruction or titillation.

10. Secondly there are differences in the nature of the material disseminated. These can be expressed in different ways, but we find it most useful to subdivide the material which some people find offensive as follows:—

> **fact** (e.g. medical descriptions of the human anatomy);
>
> **opinion** (e.g. that sexual experience is valuable);
>
> **factual scene** (e.g. a photograph of a couple copulating);
>
> **imaginative realism** (e.g. a sexual novel or drawing not far removed
>
> from real life);
>
> **fantasy** (e.g. extravagant essays in pornography or cruelty which few could mistake for truth).

11. In considering what encroachments on free dissemination are necessary we consider it helpful to bear these distinctions in mind. It is very much harder to justify preventing the dissemination of true facts and factual scenes than it is to justify preventing the dissemination of, for example, wantonly cruel essays in fantasy. Again, the censoring of opinion raises different issues from the censoring of fact.

The consent principle

12. In advancing free dissemination as the basic principle, DLAS does not assert that it extends to requiring people to see or hear any material against their will. Freedom after all has two sides: my right to do what I want and your right not to have me do to you what you do not want. The concern of DLAS is for recipients who consent to what they experience; and more particularly for those who positively desire to experience it. Subject to the possible need for restrictions on the creation of material (dealt with in paras. 44-47) we consider that adults at least should have unfettered access to any obscene material they wish. With children the position is complicated by their immaturity. The consent principle can never be satisfied where the recipient is too young to give effective consent. Here we accept that the material must pass the scrutiny of parents, teachers and other responsible adults. For those below the age at which consent can be recognised as real, some form of censorship is inevitable.

Obscene displays

13. We recognise that the removal of all restrictions on the public display of obscene material would contravene the consent principle just mentioned. To be suddenly confronted with obscenity on a street hoarding or in a newsagent's shop is to experience it whether or not one consents to do so. It is wrong to assume that everyone likely to see the display would agree to see it; indeed that is contrary to the plain fact. Public displays of obscenity should therefore be penalised. The question is how far the admittedly necessary restrictions should go.

14. The last Conservative government introduced in 1973 a Cinematograph and Indecent Displays Bill, which failed to pass before the general election of February 1974. The Bill's main provision about displays was clause 6. which made it an offence for any 'indecent matter' to be 'publicly

displayed'. There was an exception for television broadcasts and material in publicly-owned art galleries and museums. Subsection (2) said that any matter —

> "(a) shall be deemed to be publicly displayed if it is in, or is visible from, any place to which, at the time it is displayed, the public have or are permitted to have access, whether on payment or otherwise; but
>
> (b) shall be deemed not to be publicly displayed if it is visible only from a place to which the public are not permitted to have access except on payment which is or includes payment for the display."

15. We submit that this restriction is wider than is necessary to comply with the consent principle, and therefore unacceptable. The definition of 'publicly displayed' suffers from the following defects. First, it uses the concept of what is 'visible' without limiting this to what is visibly offensive. (An open-air cinema screen may be 'visible' from a public highway without it being possible to distinguish the images). Second, the concept of 'payment for the display' raises problems. It may be difficult to determine whether or not the payment charged includes the display in question. (Does the cover-charge in a restaurant include the mural decorations?) More important, the fact that a payment undoubtedly does include a particular display is no guarantee that members of the public who make the payment have consented to see that display. If an art dealer mounted an exhibition of modern paintings and without warning included some outrageously offensive canvasses this would escape the restriction but would undoubtedly contravene the consent principle. A consent is only valid if it is an informed consent.

16. A more serious objection to clause 6 is that it is based on the concept of 'indecency', which it does not define. This means that judicial precedent would be relied on for its meaning, and it would therefore be given a very wide interpretation. Lord Parker CJ defined indecency in R v Stanley (1965) 1 All ER 1035 as "Something that offends the ordinary modesty of the average man". In the Oz trial the judge defined indecent as "unbecoming" or "immodest". We do not consider that the weight of the criminal law should be used to protect the public from material that is nothing more than immodest. In a mature democracy, it is not unreasonable to look for a certain robustness from adult citizens.

17. The report in 1976 of the Working Party on Vagrancy and Street Offences used the concept of causing "offence or distress" in proposing a new offence of indecent exposure (para.53). We think this is nearer the mark, though still too wide. The Law Commission's concept of causing serious offence' (Law Com. Mo. 76, Para. 3.109) is better. We consider however that a public display should not meet with the severity of a criminal sanction unless it is likely to give rise to a sense of outrage in persons who may be expected to see it. This is akin to the concept of being liable to cause a breach of the peace, and is in line with the longstanding concern of the law with preservation of public order. By being related to those likely to see the material it allows consideration of the siting of the display and other relevant circumstances. In considering who is likely to see it there should be excluded any adult who consents to see it (whether on payment or not), provided the consent is given with

knowledge of the type of material it is. Similar considerations should apply to audible material. The question of displays visible to children is dealt with in our discussion of the special problems connected with obscenity and children (paras. 36 to 47).

The meaning of obscenity

18. A difference between the indecency test and the outrage test as just outlined is that unless limited the latter may include material which is not in any way 'indecent'. The material may cause outrage for quite different reasons, e.g. because it inflames political passions or offends against religious susceptibilities. This brings us to the question of the class of material to be covered by the new legislation, as opposed to its degree of offensiveness within that class. Terms like 'indecent' and 'obscene' are notoriously vague, and vagueness is to be deprecated in the criminal law. The width of the outrage test must be limited in some way, but we do not consider this would be satisfactorily done by tying it to terms of uncertain meaning. Obscenity is usually taken to include violence and cruelty (though it is significant that the terms of reference of the Committee use the phrase 'obscenity, indecency and violence', a striking confirmation of the imprecise meaning of the constituent terms). The public has also been held to require protection against the exhibition of gruesome material (e.g. pictures of anatomical dissection) or material likely to arouse disgust (e.g. the beggar's sores).

19. We do not believe that there is any future place for the 'deprave and corrupt' definition of obscenity laid down by the Obscene Publications Act 1959. In theory (though perhaps less so in practice) this is quite different from the concept of causing offence or outrage. Outrage involves anger and annoyance; no one suggests that it has any lasting effect. The 'deprave and corrupt' concept on the other hand presupposes that obscene material can cause lasting psychological damage to those encountering it.

20. If it were proved that obscene material could cause lasting harm we should of course wish to see its distribution made an exception to the basic principle of free dissemination. It has not been so proved, and the 'deprave and corrupt' test is now largely discredited. We do not believe that even hard-core pornography causes lasting harm to adults, and we think its availability can be defended. Accordingly we believe that for adults the law's interference with publication of obscene material should be based solely on the outrage test.

21. We offer the following as a definition of obscenity on this basis —

> **An item is obscene if, on the ground that matter contained or embodied in it -**
>
> **(a) is concerned with human or animal sexuality, or**
>
> **(b) depicts violence or cruelty, or**
>
> **(c) is gruesome or disgusting,**
>
> **the item, taken as a whole, may be expected to outrage the majority of persons who are likely, having regard to all relevant circumstances, to read, see or hear it.**

22. In the rest of our Evidence we use 'obscene' in this sense.

The duty to give warning

23. It follows from what we have said so far that for adults there should in this field be no departure from the basic principle of free dissemination, but that the consent principle should be fully respected. In other words there should be unfettered distribution of obscene material to those adults who want it. Indeed if all who read, see or hear the material have previously consented then for them it cannot be obscene. A person cannot be heard to say he is outraged by what he has agreed to experience and could, if he would, have avoided experiencing. As we have said, this requires that consent be given with awareness of the obscene nature of the material.

24. This approach leads to the conclusion that what the criminal law should forbid is dissemination of obscene matter to persons without their consent. The consent which matters is not consent to receive the article as such, but consent to receive the obscene matter. A person who buys an obscene book consents to receive the book but he does not consent to receive the obscene matter contained in it unless he knows of its existence and buys just the same. Such consent is incapable of being given where the obscene matter is exposed in a place to which the public have a right of access, such as a public highway. One cannot obtain the consent of the public in general. Exposure in a place to which the public have access only by permission of the occupier, such as a shop or cinema, is different. Provided warning is given of the obscene nature of what is within, persons entering the premises can be taken to consent to receiving the obscene material. In general therefore what emerges is that there should be a duty to warn people what they are in for, rather than (as under the present law) a duty not to make the material available at all).

A new obscenity offence

25. In the light of these considerations DLAS proposes that there should be a single obscenity offence defined as follows —

> A person commits an offence, if, for payment or not, he knowingly exposes or delivers an obscene item to any person who has not (with awareness of its obscene nature) consented to receive it.

26. We contemplate that this would be accompanied by an explanation that ‘exposure’ includes all forms of communicating the obscene matter, e.g. display of pictures or drawings, playing of sound recordings, exhibition of films etc. A person would be taken to have awareness of the obscene nature of the item if adequate notice were given, for example a notice prominently displayed outside a cinema or on the cover of a book. We do not consider it necessary for the precise nature of the notice to be specified by law; it should be sufficient if the recipient is put on guard, and nevertheless consents. He could be put on guard by wording such as “This book contains explicit sexual material which might offend some readers”.

27. Although this statement of the proposed offence does not deal specifically with the public highway-type case (where consent cannot be given by the public at large) it in fact covers it, because clearly it would not be possible for the defendant to prove he had obtained the knowing consent of everyone who was likely to pass along the highway.

28. There is much complaint about the uncertainty of the present law.

We think some uncertainty in this field is inescapable, but it can be limited. As the statement of offence in paragraph 25 stands, it would often be difficult (and sometimes impossible) to determine in advance whether a jury would consider given material to be obscene. It would be entirely a question of whether or not the members of the jury thought the majority of people likely to encounter it would be outraged — a hypothetical question. We propose that to secure a conviction in "exposure" cases the prosecution should have to call at least two witnesses who had in fact been outraged by the material exposed. In "delivery" cases the person to whom the delivery was made should have to testify to being outraged before a conviction could be obtained. We feel strongly that the limitation on freedom imposed by an obscenity law cannot be justified if no member of the public is prepared to testify in court to having been outraged. Testimony by a police officer should not suffice for this purpose.

29. We have considered whether to require proof of actual outrage might in exposure cases lead to the prosecution and the defence competing to bring the most witnesses who would testify that they had been, or had not been, outraged. This we think could be dealt with adequately by limiting testimony to persons who witnessed the display in question before the prosecution commenced. The jury would still use its discretion in judging whether the witnesses called fairly reflected the likely response of the majority of those persons to whom (actually or potentially) the exposure was made.

Penalty for contravention

30. We do not consider that imprisonment is a suitable punishment for causing outrage through the medium of books, films etc. Accordingly we propose that the maximum penalty should be a fine of £500. If a pornographer regarded such fines merely as a 'business expense' and was repeatedly convicted, the Attorney General could obtain an injunction under the general law. Here imprisonment (for contempt of court) would be the ultimate sanction.

31. To ensure consistency we recommend that prosecutions for the new offence should require the consent of the Director of Public Prosecutions. Local authorities and others concerned with infringements would of course be free to submit evidence and representations to the DPP.

The public good defence

32. Section 4 of the Obscene Publications Act 1959 provides that even though an article is obscene within the definition in that Act its publication does not amount to an offence if the defence proves that publication "is 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". Similar provision is made by the Theatres Act 1968

33. We believe that in future legislation the public good defence ought to be expressed in completely general terms. It is illogical to allow a publication to escape because it is for the public good in the interests of say, art' but not if it is thought by the jury to be for the public good on some other ground not within the present formula. The public good is the public good, and juries should be trusted to use their common sense. On the other hand the defendant should still be required to specify in

advance the type of 'public good' on which he relies. Expert evidence should still be admissible, for example to prove or disprove literary merit where that is the ground relied on by the defendant.

34. If there is to be new legislation (whether on comparable lines to the present law or on different lines) we feel strongly that the advance made by the 1959 Act should be preserved and the public good defence retained. It has done much to liberalise the repressive treatment of erotic material, and we greatly value it. We also greatly value the right to call expert witnesses where a particular type of public good is sought to be established.

35. Is the public good defence appropriate in relation to an offence on the lines laid down in para. 25? We think it is, though its importance would be lessened. It might for example be in the public interest to display frank posters illustrating the dangers of venereal disease even though these might shock some people. It is a legitimate exception to the consent principle to publish material which is for the general benefit of society.

Obscenity and children

36. What we have said so far is limited to adults. We propose the following modifications in the case of young people under the age of 16. Since this is the age at which people can marry and give effective consent to sexual acts we consider it would be illogical and wrong not to make it also the age of consent in this field.

37. Definition of obscenity (para. 21) Clearly this needs modification for children under 16. Otherwise it would be possible for a pornographer to escape by limiting publication of a set of grossly obscene pictures to schoolboys, who are scarcely likely to be 'outraged' by them. We are not willing to say that children should have unrestricted access to obscene material just because they are more likely to experience curiosity (or titillation) than outrage when confronted by it.

38. We considered whether it would be right to amend the definition by referring the likelihood of outrage to the parents of children encountering the material. This would require some such addition as the following —

> where children under 16 are likely to read, see or hear matter contained or embodied in an article, the article is obscene if, on a ground mentioned in (the main definition), a significant proportion of those having parental rights and duties in respect of those children would be likely (if they read, saw or heard that matter themselves) to be outraged at the prospect of its being read, seen or heard by the children.

39. This has its attractions, but is not really satisfactory. Too many parents even today seem anxious to deny their children access to information about sexual matters which it is right for them to have. While we acknowledge the duty of parents to guide their children's upbringing, we do not think they should have a complete veto over what passes into their minds. Here it is helpful to refer back to the classification of material given in para 10 above. In general we consider it wrong to deny children access to any material so far as it contains true facts or factual scenes, but many parents would wish to do so. Our belief is that the basic principle of free dissemination should prevail here. On the other hand children may need protection in the field of opinion or fantasy, since they are too

immature to be relied on to form a balanced judgment.

39. In these circumstances we have been driven to look again for this limited purpose at the 'deprave and corrupt' test. If a jury can be persuaded that material shown to children is liable to corrupt them it is difficult to argue that there should not be a conviction. In relation to children, juries are easily swayed however. It would be safer (and more in line with modern medical thinking) to require proof by expert evidence that the material is liable to cause the child marked disturbance (whether lasting or temporary). Accordingly we offer the following test in addition to the outrage test —

> Without prejudice to (the main definition), where matter contained or embodied in an article is likely to be read, seen or heard by children under 16 the article is obscene if it is established by medical evidence that the matter might reasonably be expected to cause them pronounced psychological or emotional disorder.

41. Medical evidence would thus be admissible (indeed essential) in these cases, and as we have suggested above (para. 7) a person with psychological training should sit as an assessor. The question of whether children are likely to encounter the material should be decided in the light of a provision on the lines of section 2(6) of the Obscene Publications Act 1959. This requires the question whether an article is obscene to be determined without regard to any publication of it by a third party, unless that could reasonably have been expected by the person charged. If a person sells pornography only to consenting adults he is not to be held responsible if one of his customers leaves it lying around for his children to see. The customer himself should be held responsible, and would indeed be liable under our proposed new offence (para. 25).

42. Children and the new obscenity offence Here we think the problem is more straightforward. While many young people would hotly dispute that their consent to anything is unreal (and we would sympathise), we think the best solution is the obvious one. Just as consent is ineffective if given in ignorance of the obscene nature of the article, so it should be ineffective if given by a person under the age of 16.

43. Child models This problem is dealt with in the discussion of the creation of obscene material, which follows immediately.

Creation of obscene material

44. Concern is sometimes expressed about the risk of harm to persons employed as actors or models in pornographic productions. In the case of adult participants we consider this concern groundless. They should be free to earn money in this way if they wish, subject to the general legal restrictions on aiding and abetting the commission of a criminal act.

45. With children the matter is different. The idea of exploiting the sexuality of children for the gratification of adults arouses widespread anger. Yet this emotive matter needs to be handled coolly and with care. Adolescents are certainly sexual creatures. They are at an age when the human body is often at its most beautiful. A walk through the National

Gallery will immediately satisfy any doubter of the frequency with which, throughout the history of art, painters and sculptors have seen fit to depict the naked bodies of youthful models. Many theatrical and cinema productions legitimately call for the use of nude actors of tender age (e.g. the highly successful and reputable play and film Equus, in which for lengthy periods an adolescent boy acts with great vigour totally naked).

46. Considerable protection is given to children by the general law, for example the law as to indecent assault, the law restricting other indecency with children, and the laws regulating employment of children. We are very doubtful whether any case has been made out for the further incursion of criminal law in this field. The most we would wish to see is some restriction on the use as models of children who are in an actual state of sexual arousal or are participating in actual sexual intercourse. Even here however we are not aware of any abuses for which the law offers no existing remedy. We earnestly request the Committee to obtain firm evidence of actual abuse within the United Kingdom before it recommends any further restrictions.

47. Paras. 45 and 46 ignore the Protection of Children Bill at present before Parliament as a private member's Bill, since its fate and (if enacted) final form are still unknown. Nothing relating to that Bill affects the views we have expressed however.

Treatment of obscene articles

48. Under the present law, obscene articles kept for publication for gain may be seized and forfeited. The transmission by post and importation of indecent matter is a criminal offence. These rules betoken a class of objects which are regarded as evil in themselves, and fit only for destruction. This we consider to be the wrong approach. As we suggested above (para. 5) the article in itself is neutral. What matters is what is done with it. We think that aspect is adequately covered by our proposal for a new obscenity offence, and we would leave it at that.

49. In the course of their duties customs officers are required to examine articles sought to be imported or exported. Similarly, postal workers may have to examine material sent through the post. Is this fact in itself a sufficient justification for penalising transmission of indecent material? We do not think so. Once the principle of free dissemination is adopted we feel that public officials should be sufficiently robust to accept this as part of their duties. Indeed they have to accept it already, since indecent material is frequently imported or posted illegally. Whether its consignment is legal or illegal, the workers concerned therefore take the risk of having to handle it. Accordingly we believe there should be no power to seize and destroy "obscene" material. Nor should there be any restriction on its importation or transmission by post.

Cinemas and theatres

If the new obscenity offence we propose were adopted, cinemas and theatres could exhibit anything they liked to persons over 16, provided notices were posted indicating that the exhibition contained material which might offend some people. Does this provide a sufficient safeguard for the public? We think it does, so far as the criminal law is concerned. Any further classification should be done on a voluntary basis. If it seems

to the film industry, for example, that the public find the present system of classifying films by the British Board of Film Censors useful there is no reason why they should not continue with it. However we are strongly of the opinion that the licensing powers of local authorities should revert to their original purpose, and be limited to securing public safety. As we have said, we are totally opposed to the blanket restriction of freedom involved in pre-censorship.

Dropping the term "obscene"

50. For convenience, we have framed our proposed single offence in terms of "obscenity". We conclude by saying however that we believe it would be wise for any future law to depart from this well-worn term. Our view is that the law's concept of obscenity should in future be given a limited meaning. New wine does not pour happily into old bottles. A legal term with such a diverse history has earned its retirement.

51. There is no reason why our proposed conglomerate offence should be expressed in terms of a definition. It would be perfectly possible to combine paragraphs 21, 25 and 42 above in an enactment on the following lines:—

> **(1) A person commits an offence if, for payment or not, he knowingly exposes or delivers to another person who has not consented to receive it any item which, on the ground that matter contained or embodied in it —**
>
> (a) is concerned with human or animal sexuality, or
>
> (b) depicts violence or cruelty, or
>
> (c) is gruesome or disgusting,
>
> **may, if taken as a whole, be expected to outrage the majority of persons who are likely, having regard to all relevant circumstances, to read, see or hear it.**
>
> **(2) Consent is ineffective for the purposes of subsection (1) if given—**
>
> (a) by a person who is not aware that, on a ground stated in that subsection, the item may cause outrage, or
>
> (b) by a person who has not attained the age of 16.

A corresponding adaptation would be needed of the offence laid down in para. 40.

Abolition of existing offences

53. It follows from what we have said that all existing offences relating to obscenity should be abolished and replaced by the two offences we have proposed. Our recommendations for abolition include the common law offences of conspiracy to corrupt public morals, and conspiracy to outrage public decency. Conspiracy to do an act falling within the new offence would be a statutory conspiracy under the Criminal Law Act 1977.

Postscript

54. As a postscript we would mention that we have been under pressure from some of our members to put forward extreme libertarian views. They argue that we ought to counterbalance the opinions of the numerous reactionary groups by going to the other extreme. In that way they think we would secure better results. We have rejected these siren voices in favour of proposals we honestly think would be acceptable to the mass of people because firmly based on common sense and humanity.

Summary of views and recommendations

55. Our views and recommendations are briefly as follows:—

(1) The preservation of maximum freedom of expression is a matter of the highest morality (paras. 3-4).

(2) A distinction should be drawn between regulating the creation and the dissemination of obscene material (para. 5).

(3) A distinction should also be drawn between pre-censorship and post-censorship (para. 6).

(4) There should always be a right to trial by jury, with assistance from medical assessors (para. 7).

(5) The basic principle is that dissemination should be unrestricted. The onus of proof of need is always on those who seek to make exceptions to this principle (para. 8).

(6) It is necessary to distinguish between the motives of disseminators and of receivers of material, and to recognise basic differences in the nature of the material (paras. 9-11).

(7) To avoid infringing on the freedom not to receive obscene matter, the basic principle can be expressed in the form: adults should have unfettered access to any obscene material they wish (the "consent principle") (para. 12).

(8) Public displays of obscenity contravene the consent principle and should be prohibited (para. 13).

(9) A public display should not be prohibited unless it **outrages** those likely to see it (para. 17).

(10) In applying the "outrage" test adults who consent to see or hear the material (with awareness of its obscene nature) should be disregarded. The offence should cover unsolicited deliveries also. (para. 25).

(11) A conviction should not be obtainable unless witnesses testify that they were in fact outraged (paras. 28 and 29).

(12) The maximum penalty should be a fine of £500 (para. 30).

(13) Prosecutions should require the DPP's consent (para. 31).

(14) The public good defence should be retained and widened (paras. 32-35).

(15) Without prejudice to the main offence, set out in recommendation (20), where matter contained or embodied in an article is likely to be read, seen or heard by children under 16, the article is to be treated as obscene (and its exposure or delivery therefore penalised) if it is established by medical evidence that the matter might reasonably be expected to cause the children pronounced psychological or emotional disorder (para. 40).

(16) There should be no restriction on the willing participation of adults as actors or models in the production of obscene material (para. 44).

(17) It is doubtful whether there is need of more protection for child actors or models: further restrictions should be recommended only if there is evidence that they are necessary (para. 46).

(18) No material should be treated adversely by the law because of the

nature of the material (as opposed to the use made of it); accordingly powers to seize and destroy obscene material should be abolished, as should restrictions on its transmission by post or importation, (paras. 48-49).

(19) In relation to cinemas and theatres, the licensing powers of local authorities should be limited to securing public safety (para. 50).

(20) The term "obscene" should be dropped and the new offence worded as follows:—

(1) A person commits an offence if, for payment or not, he knowingly exposes or delivers to another person who has not consented to receive it any items which, on the ground that matter contained or embodied in it —

(a) is concerned with human or animal sexuality, or

(b) depicts violence or cruelty, or

(c) is gruesome or disgusting,

may, if taken as a whole, be expected to outrage the majority of persons who are likely, having regard to all relevant circumstances, to read, see or hear it.

(2) Consent is ineffective for the purposes of subsection (1) if given —

(a) by a person who is not aware that, on a ground stated in that subsection, the item may cause outrage, or

(b) by a person who has not attained the age of 16.

A corresponding adaptation would be needed of the offence specified in recommendation (15).

(21) Apart from the new offences specified in recommendations (15) and (20), there should be no obscenity offences and all existing offences should be abolished (para. 53).

(22) The overall result of our recommendations would be as follows:—

(a) **for persons of all ages** public exhibition, and private exposure without informed consent, of material likely to cause **outrage** would be prohibited;

(b) **for children under 16**, in addition, any exposure (whether public or private) of material likely to cause pronounced psychological or emotional disorder would be prohibited;

(c) there would be no other restrictions on obscene material.

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