

## Response to the public consultation on Obscene Publications Guidance

Consultation Website: <https://www.cps.gov.uk/consultation/public-consultation-obscene-publications-prosecution-guidance>

Closing Date: **17 October 2018**

### Consultation Questions

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?

We disagree with the guidance, as it makes no sense. It is not the fact that the showing or realistic depiction of particular acts happen to be criminalised that renders them obscene, rather the other way round. The showing or realistic depiction of a wide range of sexual activity/pornography has been historically criminalised precisely because of the tendency for it to corrupt people and thus it is in the public interest to criminalise showing and depiction.

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?

The Crown Prosecution Service should explain why it is that it wants to force a split between the accepted meaning of obscenity found in the common law and intuitively understood by the public, and its claim that it is defined in the Act. In other words how does the Crown Prosecution Service think the public interest would be better served by its proposals than by leaving the law as it is.

We suspect that the motivation for forcing this split is to break the tie between moral revulsion that most people harbour towards certain unnatural acts as listed in Section 16 and the probability of a successful prosecution based on their showing or realistic depiction. There is no good reason to attempt to break this tie. In an era when many people have difficulty making coherent and objective moral judgments based on an absolute understanding of right and wrong, they may only have their feelings of revulsion towards certain acts to fall back on as a sign that a particular behaviour indeed is wrong. This is extremely dangerous for society and will have a very harmful effect on vulnerable adults. For example people who have been victims of domestic abuse have often not been encouraged to trust their own intuition and moral feelings when discerning whether relationships with particular persons are welcome or not. A healthy approach to decision-making in interpersonal relationships of all kinds has to include a balance of criteria including moral revulsion.

All of this is to say that the decision no longer to prosecute such material as listed in Section 16 would result long-term in more such material being produced and more people being recruited into pornography involving this kind of behaviour. It is well-known that women and girls in particular who end up in this world may not be truly consenting to what they are doing. Thus withholding the threat of prosecution from publishers would result in a culture whereby those who have been manipulated into this kind of behaviour would find it more difficult to escape the pornography 'industry'.

The stated aim of the Crown Prosecution Service according to the consultation document is to remove showing and realistic depiction of all the acts listed in Section 16 from liability for prosecution, provided that participants are consenting, no 'serious harm' is caused, it is not linked with other criminality, and the likely audience is not under 18 or otherwise vulnerable.

The question as to whether consultees agree that prosecutors 'should exercise real caution, etc.' is biased towards the already intended outcome of the CPS, to decriminalise acts covered by these provisions.

It is highly relevant that there is no public call for showing or realistic depiction of the acts listed in Section 16 to be decriminalised. As such it is obvious that there is a hidden agenda here to normalise the showing or realistic depiction of 'consensual' examples of these acts listed, and perhaps to stigmatise criticism and disapproval of them in wider society and within the criminal justice system.

Defining 'vulnerable persons' in law is extremely difficult and somewhat subjective. As such this provision is liable to be used in an arbitrary manner by lawyers to prevent prosecution where it would occur under the present legal guidance.

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.

Consent is irrelevant to whether or not the acts listed in Section 16 are obscene. They are obscene by their very nature.

'Serious harm' is a subjective concept, and as such liable to be interpreted too narrowly by lawyers trying to fend off prosecution for these acts. Their intrinsic obscenity and unnatural nature mean that they are seriously harmful to people on a fundamental moral level.

The problem with condition c. is that the criminal law changes (as in the case of the current proposals), thus requiring consideration of an inextricable link with other criminality does nothing to 'clarify' the definition of obscenity, as is claimed in the introduction to the consultation document. Rather it serves to relativize the definition so as to be unintelligible.

Working out who is a 'likely audience' is very difficult with online publications especially with the dark web. It is naïve and perhaps disingenuous to pretend that it would be possible to prove whether the 'likely audience is not under 18'.

Restricting prosecution of these acts will inevitably lead to them being normalised and thus being depicted and discussed in material published under the rubric of sexual health, which will then be available online to all ages.

**The CPS should not passively normalise sado-masochistic behaviour**

It is clear that some of the acts listed in Section 16 come under the category of sado-masochism. This is a matter of grave public concern and it is very much in the public interest that sado-masochism is not normalised by the criminal justice system as this will pave the way for its normalisation in society.

There are very good grounds for strongly resisting the normalisation of sado-masochism in the criminal justice system and society as follows:

- 1) Higher risk of suicide of BDSM practitioners, related to the indirect effect of perceived pain tolerance
- 2) BDSM participants are also more likely to be involved in other perversions
- 3) BDSM practitioners are often unable to engage in sexual activity unless it was also sadomasochistic, and had often not engaged in normal behaviour before getting involved in BDSM. Society has an interest in encouraging normal sexual behaviour and in discouraging abnormal, perverse and dangerous sexual behaviour in relation to well-being, public health, public order, public safety and public morals.
- 4) Declining to prosecute depiction or representation of sado-masochistic behaviour will facilitate its normalisation and thus place girls and women who have been sexually abused at a higher risk of engaging in this perversion, thus leaving themselves open to further abuse.
- 5) Given the ongoing controversy over the government's handling of grooming gangs targeting teenage girls and young women, and the fact that these gangs are on record as employing particularly sadistic behaviour against these victims, declining to prosecute depictions of sado-masochism is completely unacceptable, indeed it is unconscionable.

In one major study sexually abused female respondents were significantly more likely to engage in masochistic sexual behaviour than the non-abused female respondents. However, the abused male respondents did not engage in sadistic sexual behaviour more often than the non-abused male respondents. This finding supports the notion of abused women seeking out punitive relationships involving violence and domination (Messman & Long, 1996).

[https://www.researchgate.net/profile/Pekka\\_Santtila/publication/237259201\\_Demographics\\_sexual\\_behaviour\\_family\\_background\\_and\\_abuse\\_experiences\\_of\\_practitioners\\_of\\_sadomasochistic\\_sex\\_A\\_review\\_of\\_recent\\_research/links/0c96053bbd26fc74d5000000/Demographics-sexual-behaviour-family-background-and-abuse-experiences-of-practitioners-of-sadomasochistic-sex-A-review-of-recent-research.pdf](https://www.researchgate.net/profile/Pekka_Santtila/publication/237259201_Demographics_sexual_behaviour_family_background_and_abuse_experiences_of_practitioners_of_sadomasochistic_sex_A_review_of_recent_research/links/0c96053bbd26fc74d5000000/Demographics-sexual-behaviour-family-background-and-abuse-experiences-of-practitioners-of-sadomasochistic-sex-A-review-of-recent-research.pdf)

- 6) Sado-masochism may be a background factor in cases of accidental death, manslaughter or murder. In several such cases the victims have been sexual slaves of others involved. If the CPS refuses to prosecute cases of depiction or publication of sado-masochistic behaviour it will effectively collude with the creeping normalisation of this perversion that has come about in recent years due to the internet and mass media. The result will be more cases of accidental death, manslaughter, murder and sexual slavery due to sado-masochism and as such the CPS will stand accused of having paved the way for an increase in prosecution due to such crimes, at a time when prisons in England and Wales have serious problems with overcrowding and resourcing.
- 7) It is perhaps disingenuous to make a distinction between non-consent to sexual behaviour and relinquishing control as the consultation document tries to do. The kinds of criminal cases involving sado-masochism back up this suspicion.

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?

Hate crimes should not be considered obscene. The concept of hate crime is easily misinterpreted by being conflated with 'hate incidents' and 'hate speech', especially by publishers. Deeming hate crime to be obscenity would fundamentally alter the meaning of obscenity away from its primary and agreed sexual meaning to being about relations between people who consider themselves to belong to groups with certain protected characteristics. This would likely exacerbate social relationships by over-valuing the subjective feelings and perceptions involved in crime and perhaps accord more significance to some aspects of certain crimes than they deserve.

Also the proposal to deem hate crime obscene constitutes unnecessary duplication of statutory offences for the same thing.

Hate crime need to be proven to be crimes before they can be deemed 'hate' crimes. However social media offences including trolling and online harassment come under the Obscene Publications Act 1959.

The Crown Prosecution Service needs to explain why exactly it is proposing to the showing or realistic depiction of 'hate crimes' should also be prosecuted as obscenity. Would this not be pointless and redundant? Is the real aim to provide prosecutors with an opportunity to send a message to society about certain kinds of crime and certain classes of (self-defined) victims? What standards of evidence does the Crown Prosecution Service propose to enable objective evaluation of prosecutions of hate crimes brought under the proposed new guidelines? It seems that it would be extraordinarily difficult to draw up adequate standards given that the Crown Prosecution Service is proposing to erase the plain meaning of 'obscenity' as understood by the public and to replace it with the concept of hate crime which is often not well understood and indeed interpreted too broadly by many.

#### **Threat to freedom of expression (Article 10 ECHR)**

In order to minimise risk of litigation, Big Tech companies are likely to take it upon themselves to decide which publications count as 'hate speech' and therefore as 'obscenity'. Publishers of all kinds of text and video publications are likely to censor content. This will have a detrimental effect on smaller publishers.

#### **Risk of passively permitting operation of Islamic blasphemy law in England and Wales**

The proposal to prosecute hate crime as obscenity would play into the hands of Islamists operating in England and Wales, and thus make the work of the government in confronting this ideology more difficult. There is evidence that in officially Muslim countries which operate using Sharia Law that which is considered blasphemous to devout Muslims may also be considered 'obscene'. Such a situation should **never** be allowed to obtain in the United Kingdom at any time and for any reason. Religious freedom and freedom of expression must be upheld as basic to the law of the land.

#### **Examples of Islamic notions of blasphemy also interpreted Islamically as obscenity**

##### **Indonesia**

'Islamic fundamentalists in the district of Bekasi, 30 km east of Jakarta, have obtained the destruction of a statue of "Three young women," because it was deemed blasphemous. The bare chest and symbols related to the number "three" - the Trinity of Christian nature - make the work of art "obscene" and "desecrate" the religion of Mohammed.'

<http://www.asianews.it/news-en/Bekasi:-Islamic-extremists-destroy-an-immoral-and-blasphemous-sculpture-18745.html>

### **Pakistan**

In 2011 the Pakistan Telecommunications Authority banned 'obscene words' including 'Jesus Christ' from text messages.

<https://www.bbc.co.uk/news/world-asia-15772292>

### **Saudi Arabia**

Saudi Arabia deemed Iranian Shi'i Muslim film about the childhood of Mohammed 'obscene' because it depicted him. Note in this case that denoting a depiction as obscene and 'un-Islamic' highlighted and exacerbated long-standing differences between the two largest movements in the Islamic religion and between two countries.

<https://end-blasphemy-laws.org/2015/09/the-week-in-blasphemy-news-31/>

For the Crown Prosecution Service to allow prosecution of hate crimes as obscenity would encourage prosecutions on such grounds, as well as inevitably leading to the multiplication of reporting of 'hate incidents' as incidents of 'obscenity' on these and similar grounds. The result would be worsening relations between members and self-perceived members of groups in society, as well as a serious and drastic long-term diminution of religious freedom and freedom of speech.

### **Risk to ex-LGBT movement**

Precisely because of the fact that many publishers misinterpret hate crime law such that strong disagreement over issues of belief and lifestyle may be treated as 'hate incidents' (hate speech), there is a potential risk to freedom of expression of discussion on relinquishing LGBT sexual identities and lifestyles. The irony would be that publication of depictions of some of the more obscene and dangerous practices involved are listed in Section 16 of this consultation document as being no longer worthy of prosecution.

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

The Crown Prosecution Service should resist any and all attempts to extend the definition of 'obscene' beyond what is sexual, and especially resist any and all attempts to abandon the main sexual definition altogether. To do so would constitute an attempt to gain control over normal everyday moral language in a manner that would lower public trust in the criminal justice system as well as respect for the law.

The proposals in this consultation create crime problems for society rather than solving them. As such they should be shelved immediately.