

Obscene Publications Act 1959: 60th Anniversary

Introduction

On 29 July 2019, 60 years will have passed since the Obscene Publications Act 1959 received royal assent. This House of Lords Library Briefing provides information on the Act.¹ It also covers developments in the law that were relevant to the then Government's attempt to ban the publication of D H Lawrence's *Lady Chatterley's Lover* (*R v Penguin Books Ltd* 1960). This includes the previous case of *R v Hicklin* (1858).

What Does the Act Do?

Whilst the Obscene Publications Act 1959 has subsequently been amended, it still makes it a punishable offence to distribute, circulate, sell, hire, lend or give away obscene material.² It defines obscene material as that which is likely to “deprave and corrupt” the intended audience when taken as a whole.³ This includes not only sexually explicit material, but also that relating to violence and drug taking. It has been argued that material which simply shocks or disgusts, however, will not tend to fall under this definition.⁴ As a result, prosecutors have tended not to take action against the written word, but rather focus almost entirely on sexually explicit pictorial material, including: photographs; magazines; films; or websites.⁵ Although the Act applies to material broadcast on televisions, stricter tests relating to harms and offence are available under the Communications Act 2003 and the Ofcom broadcasting code.⁶

The Act also includes sections relating to search and seizure and available defences. It creates a power where, in accordance with a warrant, police can seize obscene materials.⁷ The Act also offers the defence of ‘public good’.⁸ This means that a court would not convict a person if they can justify the publication of the material as being for the public good. For example, that it has scientific, literary or artistic merit. In relation to any film or soundtrack, the individual must justify the material on the grounds that it is in the interests of drama, opera, ballet or any other art, literature or learning. Consequently, prosecutions tend to focus on material which can have little claim to artistic or other merit, where an individual has produced material explicitly to excite the viewer.⁹

History of Obscene Publications Legislation

Obscene Publications Act 1857

The Obscene Publications Act 1857 (also known as Lord Campbell's Act) prohibited the sale of obscene books, pictures and prints for the first time.¹⁰ The Act, which did not provide a definition of obscenity, faced strong opposition.¹¹ However, it passed after the Lord Chief Justice—head of the judiciary in England and Wales—guaranteed that it would prosecute individuals for works:

Written for the single purpose of corrupting the morals of youth and of a nature calculated to shock the common feelings of decency.¹²

The Act also empowered police to search premises on which publishers kept obscene publications for sale or distribution.¹³ It also authorised post office and customs authorities to:

- seize mailings shipments containing obscene materials;
- prosecute senders; and
- destroy obscene publications.

Hicklin Test

The Obscene Publications Act 1857 had not contained a definition of obscenity. This led to criticisms that judges had:¹⁴

- permitted prosecutions on the basis of isolated passages;
- refused to permit evidence of the author's intent, purpose or literary reputation; and
- refused to hear the testimony of recognised literary critics.

In 1868, *R v Hicklin*¹⁵ established a legal definition of obscenity. In the case, the court adopted a test whereby it asked whether material was marked by a 'tendency to deprave and corrupt'.¹⁶ The test could be applied to an isolated passage of a work or to the whole work. It also meant that the work should be judged not on its intended readership, but on how it might influence anyone in society, including women and children.¹⁷ In relation to this, the judge posed the question of whether a father could read the material aloud in his own home.¹⁸

Following this case, there were many successful prosecutions for "outright pornography", with the law also used against works of "literary merit and works with a social or moral purpose".¹⁹ However, these ideas later formed the basis of anti-obscenity laws in legal systems influenced by British law.

Post-war Governments

Alan Travis, author of *Bound and Gagged: A Secret History of Obscenity in Britain* (2000), argues that the advent of the 1945 Labour Government saw a more liberal attitude towards obscene publications.²⁰ For example, the Attorney General made a landmark decision and refused to ban Norman Mailer's *The Naked and the Dead*, despite popular pressure.

However, this attitude did not last. In 1951, under Winston Churchill's Conservative Government, "there was an explosion in the number of destruction orders issued by magistrates", whereby publications deemed obscene were destroyed by the authorities.²¹ In 1954, the number of volumes destroyed peaked at 167,000. Alan Travis argues sentences also got "heavier", increasing from an average of six weeks and twelve months to three to eighteen months. For example, in the summer of 1953 shopkeepers in various coastal towns found themselves branded criminals for selling postcards with vulgar jokes and puns on them. In addition, chief constables received a copy of a secret *Blue Book* in the early 1950s which contained the titles of 4,000 books and magazine. This list effectively put a blanket ban on the titles mentioned. However, its existence was not widely known about, with civil servants keeping it a secret from MPs and the public.

However, a succession of five separate prosecutions involving “respectable publishers” led to a movement calling for reform of obscenity law.²² Although the court only found two of the five publishers guilty, Alan Travis argues that the sight of publishers sitting in the dock of the Old Bailey alarmed the literary world. However, Mr Justice Stable’s summing up of the case of *The Philander*²³ proved to be significant in the development of the law. He argued that although the book may be unsuitable for adolescents, it did not mean that publishers were guilty of a criminal offence for selling it to the general public. He also found the Hicklin test was no longer appropriate and asked the jury to read the book as a whole, rather than focusing on specific sections. The jury found the publishers not guilty.

Sensing rising support for reform the Home Office tried to head off any calls for change.²⁴ This became particularly important following a Swindon magistrate’s decision to order the destruction of Boccaccio’s *Decameron*. Public backlash against the decision led the Home office to carry out an internal review. The review saw the Home Office deciding not to ban books that were more than 100 years old and recognised as classics.²⁵ A further attempt to prevent reform was a new secret ‘white list’ which would contain recognised classics with instructions to only seize in exceptional circumstances. However, Alan Travis argues that the Home Office never circulated the list due to a lack of trust between parts of the criminal justice system.

Society of Authors Private Member’s Bill

At Christmas 1955, the Society of Authors, led by Sir Alan Herbert, presented a draft of the Obscene Publications Bill to the Home Secretary.²⁶ The bill proposed scrapping the test of obscenity decided in *R v Hicklin* and instead asked the court to:

- consider the dominant effect of the book;
- listen to expert evidence on artistic and literary merit; and
- extend the definition of obscenity to include violence, horror and cruelty, not just sexual conduct.

It also set out that there would be no prosecutions without the consent of the Attorney General.

Roy Jenkins (Labour MP for Birmingham Stechford) first introduced the bill to the House of Commons under the ten-minute rule in 1955. Although it had little chance of becoming law, several figures in the Conservative Government got together to discuss it. They decided it was too controversial an issue. Therefore, they saw no justification for government legislation and no need for an immediate amendment to the law. However, the bill—along with newspaper protests—did have some impact. The Children and Young Persons (Harmful Publications) Act 1955 banned comics that children were likely to read that contained acts of violence or cruelty, the commission of crimes, or incidents of repulsive or horrible nature. However, in seven years, the Home Office only received twelve complaints against comics, five of which the Attorney General refused to act on.²⁷

Calls for reform continued in the following years.²⁸ The bill was reintroduced by Lord Lambton (Conservative MP for Berwick-upon-Tweed) but it failed to get the government backing it required. However, Roy Jenkins succeeded in getting it referred to a select committee, whose evidence strengthened the case of the reformers. The committee made it past the end of the 1956–57 parliamentary session by, what Alan Travis describes as, the “cunning device of making a formal report to Parliament”.²⁹ As a result, the committee continued at the beginning of the 1957–58 session with MPs

taking evidence. It finished its work in the summer of 1958. However, when the Government did not include a bill to reform the law on obscene publications in the Queen's Speech, campaigners were surprised. This led Roy Jenkins to reintroduce the private member's bill, but it failed to receive a second reading.

Following this, Sir Alan Herbert decided it was time to "take matters into his own hands".³⁰ A popular figure, he threatened to run in the next election against a Conservative candidate as an independent. Alan Travis argues that it was a "potent threat" which finally led the Government to act. Although the text of the bill "became a battleground between reformers and the Attorney General", the Obscene Publications Act 1959 reached the statute book on 29 July 1959. It included a new test, which replaced that in the Hicklin judgment. The test set out that an article was deemed obscene if its effect, taken as a whole, tended to deprave or corrupt persons who were likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied it in. This reflected the finding of Mr Justice Stable's ruling in *The Philanderer* case five years earlier.

Famous Prosecutions: *Lady Chatterley's Lover*

In *R v Penguin Books Ltd*, the Attorney General brought a prosecution against Penguin Books under the Act for its publication of *Lady Chatterley's Lover*.³¹ Published privately in 1920s Italy, the book was written by D H Lawrence. It described an affair between Lady Chatterley and her working-class gamekeeper.³² In the novel, Lawrence depicts sexual scenes in detail and uses strong language. The British establishment considered the novel shocking.

A key factor in the decision to prosecute Penguin was its proposal to sell the book at a price which would put it in easy reach of women and the working classes. Writing in the *Guardian* in 2010, Geoffrey Robinson QC states that this was something "the upper-middle class male lawyers and politicians of the time refused to tolerate".³³ However, Mr Robinson also claims that it was a poor test case. He argues that the prosecution failed to comprehend that the 1959 Act meant that the books must be taken as a whole.

The trial itself lasted six days.³⁴ The defence turned down the invitation to invoke a law which would have allowed an all-male jury in obscenity cases.³⁵ It believed that such a jury would be over-protective of women in their absence. It also thought that the prosecutions paternalism would alienate the female jurors. In addition, the defence called a selection of expert witnesses, including famous novelists, journalists, psychologists, and clerics. Following a three-hour deliberation, the jury found that the novel was not obscene. A month later, Penguin published the novel, with 200,000 copies bought in the first day.

The outcome of the trial significantly affected the publishing world, giving it more freedom to publish books containing explicit content.³⁶ Geoffrey Robertson QC argues that no other verdict "has had such profound social and political consequences".³⁷ He also believes that it was a "crucial step towards freedom of the written word, at least for works of literary merit".

Further Reading

- Alan Travis, *Bound and Gagged: A Secret History of Obscenity in Britain*, 2000
- H Montgomery Hyde, *The Lady Chatterley's Lover Trial*, 1990

¹ Whilst this briefing summarises provisions of the Obscene Publications Act 1959, it does not provide comprehensive coverage of the UK's obscene publications legislation.

² Obscene Publications Act 1959, section 1(3).

³ *ibid*, section 1(1).

⁴ Peter Cane and Joanne Conaghan, *The New Companion to Law*, 2009.

⁵ *ibid*.

⁶ Channel 4, '[Producers Handbook: The Obscene Publications Act 1959](#)', accessed 11 July 2019.

⁷ Obscene Publications Act 1959, section 3.

⁸ *ibid*, section 4.

⁹ Peter Cane and Joanne Conaghan, *The New Companion to Law*, 2009.

¹⁰ Obscene Publications Act 1857, section 1.

¹¹ Colin Manchester, '[Lord Campbell's Act: England's First Obscenity Statute](#)', *Journal of Legal History*, 1988.

¹² John Philip Jenkins, '[Obscenity: Developments in the 20th Century](#)', *Encyclopaedia Britannica*, last updated 11 April 2018.

¹³ Obscene Publications Act 1857, section 1.

¹⁴ *Encyclopaedia Britannica*, '[Obscene Publications Act](#)', last updated 17 April 2017.

¹⁵ *R v Hickling (1867-68)* L.R. 3 Q.B. 360.

¹⁶ Peter Cane and Joanne Conaghan, *The New Companion to Law*, 2009.

¹⁷ *ibid*.

¹⁸ *Encyclopaedia Britannica*, '[Obscene Publications Act](#)', last updated 17 April 2017.

¹⁹ *ibid*.

²⁰ Alan Travis, *Bound and Gagged: A Secret History of Obscenity in Britain*, 2000, p 92.

²¹ *ibid*, pp 94–5.

²² *ibid*, p 101.

²³ *R v Martin Secker & Warburg, Ltd. [and others]* [1954] 1 W.L.R. 1138.

²⁴ Alan Travis, *Bound and Gagged: A Secret History of Obscenity in Britain*, 2000, p 103.

²⁵ *ibid*.

²⁶ *ibid*, pp 107–8. Sir Alan Herbert was an author and playwright. He had been an MP between 1935 and 1950 (*Oxford Dictionary of National Biography*, '[Herbert, Sir Alan Patrick](#)', 26 May 2016).

²⁷ Alan Travis, *Bound and Gagged: A Secret History of Obscenity in Britain*, 2000, p 108.

²⁸ *ibid*, p 123.

²⁹ *ibid*.

³⁰ *ibid*, pp 124–5.

³¹ *R v Penguin Books Ltd* [1961] 1 WLUK 17.

³² British Library, '[Lady Chatterley Trial: 2 November 1960](#)', accessed 25 July 2019.

³³ Geoffrey Robinson QC, '[The Trial of Lady Chatterley's Lover](#)', *Guardian*, 22 October 2010.

³⁴ British Library, '[Lady Chatterley Trial: 2 November 1960](#)', accessed 25 July 2019.

³⁵ Geoffrey Robinson QC, '[The Trial of Lady Chatterley's Lover](#)', *Guardian*, 22 October 2010.

³⁶ British Library, '[Lady Chatterley Trial: 2 November 1960](#)', accessed 25 July 2019.

³⁷ Geoffrey Robinson QC, '[The Trial of Lady Chatterley's Lover](#)', *Guardian*, 22 October 2010.

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