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C.(58) 250COPY NO. 5215th December, 1958

CABINET

OBSCENE PUBLICATIONS BILLMemorandum by the Lord Chancellor

A Sub-Committee was appointed by the Home Affairs Committee on 21st November with the following composition and terms of reference:-

Composition

Lord Chancellor (In the Chair)
 Lord President
 Chancellor of the Duchy of Lancaster
 Attorney-General
 Lord Advocate
 Financial Secretary, Treasury
 Joint Parliamentary Under-Secretary of State,
 Home Office.

Terms of Reference

"To consider (i) to what extent legislative effect should be given to the recommendations of the Select Committee on Obscene Publications; (ii) whether, having regard both to technical and Parliamentary considerations, the recently introduced Obscene Publications Bill (Annex A) might be modified for this purpose; or (iii) what alternative course should be followed; and to report."

2. I now report on behalf of the Sub-Committee. The subject is a difficult one, full of controversial issues, and I will not conceal the fact that on several of them the Sub-Committee was deeply divided: the recommendations which follow therefore represent, on each point, the majority opinion among us.

Case for Legislation

3. It is by no means certain that there is any real case for legislation at all. The present agitation for statutory provision in replacement of the common law has arisen from prosecutions of novels instituted by the Director of Public Prosecutions in 1954; but the circumstances in which these prosecutions were undertaken were exceptional, and both for this reason and because the outcome showed that juries were liable to adopt a liberal attitude towards such works, it is unlikely that similar prosecutions will be undertaken in the future. Some of us feel, however, that there would nevertheless be advantage in trying to devise a rather

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more satisfactory definition of obscenity and in putting the law on obscene publications on a statutory basis. Of one thing we are satisfied: that the political pressures which have developed make it necessary to adopt a constructive attitude towards Mr. Roy Jenkins' Bill.

4. But this presents something of a dilemma. We are ourselves in no doubt that, in certain respects referred to in later paragraphs, the Bill, which is based closely on the Select Committee's recommendations, will not do as it stands. We believe that the modifications we regard as necessary could be effected without technical difficulty and we have been informed that Mr. Jenkins has expressed his willingness to co-operate in securing enactment of his Bill in a modified form - in effect, to accept any amendments for which we ask. There are, however, certain difficulties which the following programme might meet:-

- (a) There is a strong body of opinion which considers that a Bill on this subject should not go to a Standing Committee without a Second Reading debate. As the Bill has been introduced under the Ten Minute Rule it is not easy to guarantee such debate.
- (b) The Chief Whip might be asked whether there is a chance of sufficient time for debate on a Friday soon after the Christmas recess.
 - (i) in order to allow a reasonable deployment of general arguments;
 - (ii) to indicate the amendments which the Government desire to introduce.
- (c) If the Cabinet agree with the line suggested by this Sub-Committee, and the Leader of the House and the Chief Whip think that the time can be found, the Lord Privy Seal could inform the House that the Government would adopt the programme which I suggest.

If some such course is impracticable we have reached the conclusion that it would be better to let the Bill go into Committee without debate than to do nothing.

Recommendations of the Select Committee

5. These are set out in full in Annex B. The first three are concerned, in effect, with a statutory definition of obscene matter and we regard them as broadly acceptable. The Attorney-General dissents, however, from the view that we should accept the third recommendation - "that the effect of a work as a whole should be considered" or, as we should prefer to express it, "the effect of the matter in its context". It is arguable that this could open the way to pornography by enabling obscene passages or pictures to be included in works otherwise unobjectionable, but we believe nevertheless that the principle of the recommendation is essentially sound and practical. We therefore propose

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that (in place of the first five lines of clause 1 of Mr. Jenkins' Bill) the statutory definition of obscenity should run as follows:-

"For the purposes of this Act any matter shall be deemed to be obscene if its effect in its context is such as to tend to deprave or corrupt or further to deprave or corrupt those persons who are likely to read, hear or see it.

"In determining what persons are likely to read, hear or see it, regard shall be had to the circumstances in which the matter was found and to the manner in which it was proposed to be or was published."

6. We have found more difficulty over the recommendation that a defence of literary or artistic merit should be afforded than over any other. We are all agreed that a defence in these terms is unacceptable: an essentially obscene book is not less obscene because of its literary merit. Some of us indeed think it neither necessary nor desirable to afford any form of special defence: it is unlikely that reputable works would be prosecuted and the provision of any special defence might make it more difficult to secure the successful prosecution of "high class" pornography. Those of us who favour a special defence are divided on whether it should be one of good faith, or of the public good or public interest. It may be argued that the first would automatically bring in the question of literary or artistic merit and that the second is too vague to be workable. On the other hand, there are strong political grounds for adopting some form of special defence. The Society of Authors set much store by it and might well reject as wholly unsatisfactory any proposal which did not include some provision of this kind and so open the door to the admission of expert evidence. This would lose us much of the advantage of legislation.

7. We do not agree with the Select Committee's view that, in order to secure uniformity in the administration of the law, the consent of the Director of Public Prosecutions should be required for the initiation of proceedings. Uniformity is already achieved in practice by informal consultation between the police and the Director, but if some more formal arrangement were adopted the Director could not avoid having regard, on each occasion, to the results of previous cases and every unsuccessful prosecution would therefore lead to a progressive lowering of standards.

8. The remaining recommendations of the Select Committee are of a minor or relatively uncontroversial nature and our views on these are contained in Annex B.

Conclusion

9. We invite the Cabinet -

- (i) to agree that, if satisfactory assurances can be obtained from Mr. Roy Jenkins that he will move or support in Committee the amendments desired by the Government in the Obscene Publications Bill, an attempt

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should be made to secure the procedure set out in paragraphs 4(b) and (c) above or if that is unobtainable, the Bill should no longer be blocked on Second Reading; and if this is agreed,

- (ii) to agree that the amendments to be proposed to Mr. Jenkins should be those required to give effect to the recommendations in this report and Annex B, and to decide whether we should also propose a provision for some form of special defence (paragraph 5).

K.

Lord Chancellor's Department, S.W.1.

15th December, 1950.

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Obscene Publications Bill

ARRANGEMENT OF CLAUSES

Clause

1. Definition of obscenity.
2. Penalties.
3. Power to search for and seize publications.
4. Rights of authors.
5. Ignorance a defence.
6. Initiation of proceedings.
7. Obscene libel.
8. Savings.
9. Citation and extent.

A
B I L L

T O

Amend the law relating to the publication of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography. A.D. 1958

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

- 5 **1.** For the purposes of this Act, any publication shall be deemed to be obscene if its effect as a whole is such as to tend to deprave and corrupt persons to or among whom it was likely to be distributed, circulated, sold, offered for sale, or let on hire: Definition of obscenity.
- 10 **Provided** that in deciding whether or not a publication is obscene the court shall take into consideration any evidence proffered, whether by the defence or by the prosecution, as to the literary, artistic, scientific or other merits of the said publication.
- 15 **2.** Subject as hereinafter provided, if any person shall distribute, circulate, sell, offer for sale, or let on hire any obscene publication, that person shall be guilty of an offence and liable— Penalties.
- 20 (i) on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding four months;
- (ii) on conviction on indictment to a fine not exceeding two thousand pounds or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment,
- 25 and the court is hereby empowered to order that all copies of the said obscene publication in the custody, possession, or control of the convicted person or persons shall be seized and destroyed.

[Bill 34]

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A.D. 1958

Power to
search for
and seize
publications.

3.—(1) Subject as hereinafter provided in this section, it shall be lawful for any metropolitan or stipendiary magistrate or any two justices of the peace, upon complaint made to him or them, upon oath by any person that there are reasonable grounds for believing that any obscene publication is kept in or upon any shop, house, warehouse, stall, barrow, or other place or vehicle within the jurisdiction of such magistrate or justices, for the purposes of gain by way of distribution, circulation, sale, offering for sale, or letting on hire, whether by wholesale or retail, to issue a warrant to any police officer to search such place or vehicle, and to seize any obscene publication so found, together with any documents relating to the business there carried on.

(2) Any such magistrate or justices, having examined the articles so seized and concluded that they, or any of them, are *prima facie* obscene within the meaning of this Act, may thereupon issue a summons calling upon the occupier or user of the said place or vehicle to appear within fourteen days before them and show cause why the articles so seized, or any of them, should not be destroyed; and if the person so summoned shall not then appear, or shall fail to satisfy the court either that the article is not obscene, or that it was not being kept by him for purposes of gain, the court shall order that the article or articles be destroyed.

Provided that the order for destruction shall not be executed before the expiration of the fourteen days within which the said person, or the author of the publication, may by virtue of section eighty-four of the Magistrates' Courts Act, 1952, give notice of his intention to appeal to quarter sessions against such order.

(3) No warrant or summons under this section shall be issued unless either—

- (a) there is evidence that the said obscene publication was so kept for the purposes of gain by way of distribution, circulation, sale, offering for sale, or letting on hire, whether by wholesale or retail; or
- (b) with a view to preventing frivolous and vexatious complaints, the person making the complaint is first required to give an indemnity in respect of the costs incurred in executing a search warrant and in bringing, and defending, proceedings before the court.

Rights of
authors.

4. In any proceedings under sections two or three of this Act the author of any publication alleged to be obscene shall have the right to be heard in its defence, whether or not he has already been made a party to the proceedings.

Retailers'
defence.

5. In any proceedings under section two of this Act against a bookseller or other retailer for distributing, circulating, selling, offering for sale, or letting on hire an obscene publication, it

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Obscene Publications

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shall be a defence for him to prove that he had not examined the contents of the work and had no reasonable cause to suspect that it was one to which this Act applies. A.D. 1958

6. No proceedings under any of the provisions of this Act shall be commenced except with the consent of the Director of Public Prosecutions. Initiation of proceedings.

7. It is hereby declared that obscene libel shall not be punishable at common law. Obscene libel.

8. Nothing in this Act shall affect the operation of the Judicial Proceedings (Regulation of Reports) Act, 1926, or the Law of Libel Amendment Act, 1888. Savings.

9.—(1) This Act may be cited as the Obscene Publications Act, 1958. Citation and extent.

(2) This Act shall not apply to Scotland or to Northern Ireland.

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Obscene Publications

A B I L L

To amend the law relating to the publication of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography.

Ordered to be brought in by

*Mr. Roy Jenkins, Viscount Lambton, Mr. Ede,
Mr. Maurice Macmillan, Mr. Kenneth Robinson,
Mr. Hugh Fraser and Sir Leslie Plummer*

*Ordered, by The House of Commons,
to be Printed, 18 November 1958*

LONDON
PRINTED AND PUBLISHED BY
HER MAJESTY'S STATIONERY OFFICE

Price 6d. net

[Bill 34]

(3844)

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ANNEX BRECOMMENDATIONS OF THE SELECT
COMMITTEE

- (i) That the test of obscenity to be applied in any statutory definition should begin with the words "whether the matter tends to deprave and corrupt".
- (ii) That the class of persons liable to be depraved and corrupted should be defined in accordance with the explanation of the law contained in R. v. Secker (Annex C).
- (iii) That the effect of a work as a whole should be considered.

With some modifications of detail we recommend that these be accepted (paragraph 5).

- (iv) That a defence of literary or artistic merit should be afforded.

We discuss this in paragraph 6.

- (v) That an author should have a right to be heard in criminal proceedings if he is not already a party; and that he should have a similar right, and a right of appeal in proceedings under the Obscene Publications Act, 1957.

We do not think that the first part of this recommendation should be accepted. The author will normally be joined as a co-defendant where he is known. Where he is not so joined, the case for the defence might be prejudiced by his intervention. We see no reason, however, why the author, and indeed the publisher as well, should not have a right to be heard in destruction proceedings under the Obscene Publications Act, 1957 and the right of appeal in such proceedings.

- (vi) That a defence should be afforded to publishers on the lines of the proviso to Section 2(i) of the Children and Young Persons (Harmful Publications) Act, 1955.

This proviso affords a defence to a person "selling or letting on hire" a work if he can prove that he had not examined the contents of a work and had no reasonable cause to suspect that it was one to which the Act applied. In our view this defence should be available not only to booksellers, but to circulating libraries as well, and we therefore think that Clause 5 of the Obscene Publications Bill should be extended to any person engaged in distributing.

- (vii) Penalties

The penalties recommended by the Select Committee are:-

"On summary conviction a fine not exceeding £100 or imprisonment for a term not exceeding four months; on conviction on indictment a fine not exceeding £2,000 or

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imprisonment for a term not exceeding three years or both such fine and imprisonment."

We think that there should be no limit to the amount of the fine which might be imposed on conviction on indictment; the penalty of imprisonment cannot be imposed on companies, nor are they likely to be deterred by the fines recommended by the Select Committee. On summary conviction we recommend that the maxima should be £500 and six months.

- (viii) That the consent of the Director of Public Prosecutions should be required for the initiation of proceedings.

We recommend that this be rejected (paragraph 7).

- (ix) That the trial court should be empowered to make the necessary destruction orders in the case of a successful prosecution.

A trial court could hardly be expected to examine material not exhibited in the prosecution proceedings. But Clause 2 of the Bill interprets the recommendation in the limited sense that the court should be empowered to order the forfeiture of any seized works identical with an exhibit. This is acceptable.

- (x) That the Obscene Publications Act, 1957 should be amended by omitting the requirement of proof of sale.
- (xi) That warrants under the Obscene Publications Act, 1957 should give power to seize documents relating to the business.
- (xii) That warrants under the Obscene Publications Act, 1957 should enable stalls and vehicles to be searched.
- (xiii) That the law relating to obscene publications should be consolidated incorporating the preceding recommendations.

We regard these as acceptable.

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ANNEX C

"Remember the charge is a charge that the tendency of the book is to corrupt and deprave. The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. Then you say: 'Well, corrupt or deprave whom?' and again the test: those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. What, exactly, does that mean? Are we to take our literary standards as being the level of something that is suitable for a fourteen-year-old schoolgirl? Or do we go even further back than that, and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: Of course not. A mass of literature, great literature, from many angles is wholly unsuitable for reading by the adolescent, but that does not mean that the publisher is guilty of a criminal offence for making those works available to the general public."

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