

PRIME MINISTER

Attached is the Home Office briefing for your meeting with Lord Nugent on Monday. We have invited the Home Secretary to come in at 1030 for half an hour to discuss the draft Bill which Lord Nugent has submitted. As you will see the Home Secretary has considerable reservations about the approach proposed by Lord Nugent. Given this he is anxious to spend some of the 30 minutes before Lord Nugent arrives discussing tactics. In particular he is worried about giving any impression to Lord Nugent and his team that you and he are in any way at odds on the issue. His concern is partly prompted by the press coverage of the Graham Bright Bill in which as you will recall the defeat of the amendment to prohibit the sale of videos classified 18(R) was presented as a personal defeat for you.

3 February 1984

BRIEF FOR PRIME MINISTER'S MEETING WITH LORD NUGENT TO
DISCUSS HIS DRAFT BILL TO REFORM THE OBSCENE PUBLICATIONS ACTS
ON MONDAY, 6 FEBRUARY AT 10.00 A.M.

1. Lord Nugent has for many years taken an active interest in attempts to tighten the existing law on obscenity. He has introduced various measures in the House of Lords (none of which has made progress) - most recently in 1982.

PARLIAMENTARY GROUP VIDEO ENQUIRY INTO VIDEO VIOLENCE AND CHILDREN

2. Lord Nugent chairs a Parliamentary Group, under the auspices of which a preliminary report on Video Violence and Children was published in November 1983. Further reports are expected to be published shortly.

3. In brief, the report claims that a large proportion of children (over 40% of six year olds) have seen at least one video nasty. There are certain doubts about the methodology and the accuracy of the figures (for example, responses to questionnaires by children, some of whom were as young as five or six, are almost inevitably of dubious accuracy), and it is understood that the research team itself was worried that the preliminary report was published too early. But the report does at least suggest that knowledge of the titles of video nasties is widespread even among young children.

VIDEO RECORDINGS BILL

4. Mr Mellor met Lord Nugent in November and, in the light of his experience in this field, suggested that he should consider piloting the Video Recordings Bill through the House of Lords. This was

on the understanding that the Bill was acceptable to him. Lord Nugent said that he would wish to reserve his position on this until he had assessed the shape of the Bill as it emerged from the House of Commons.

5. Lord Nugent said at the meeting that he accepted that the Bill could not be used as a vehicle for wider reform of the obscenity legislation. His main reservations concerned Restricted (18) material. Notwithstanding a strong Government lead, the vote in Standing Committee has gone against banning the supply of video material in this category for viewing in the home. The issues may come up again in Report, and it may be that the House as a whole will endorse this view. Lord Nugent has said that, in that event, he would wish to move on amendment in a contrary sense in the Lords. There is a need for caution, however, If such an amendment was rejected, on Commons consideration of those amendments, lack of Parliamentary time at the end of the session could endanger the Bill's prospects. Lord Nugent has been warned of this.

OBJECTIONS TO EXISTING LEGISLATION

6. The test of obscenity, as set out in section 1 of the Obscene Publications Act 1959, is whether the effect of the article in question is

"such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear it"

Section 2 of the Theatres Act 1968 contains a similar definition.

The "deprave and corrupt" test might seem a difficult test for the courts to apply but it is doubtful whether in practice they interpret it literally. The definition in the 1959 Act has the effect that an article would fail the statutory test if it was unlikely to deprave and corrupt the particular people who are likely to see, read or hear it.

7. Although the terms of the law are couched in general phrases and there have been inconsistent decisions by the courts, the number of persons convicted under the Obscene Publications Acts has increased from 162 in 1980, to 221 in 1981 and 234 in 1982 (figures for 1983 are not yet available). As to the problem of inconsistent decisions, this is almost inevitable whatever the wording of the relevant legislation given the differences of view within the community - which are reflected in the courts - about the acceptability of pornographic material. It is argued, however, that the uncertainty of the present law and the availability of special defences (such as that which enables a defendant to argue that the publication of an article would be in the public good) has weakened sanctions against pornographic material and encouraged its spread.

"VIDEO NASTIES"

8. Cases which have to be considered by the Crown Courts generally take several months to work through the system, but the impression is that in the case of video nasties (the area which has caused most concern of late) there has been a marked reduction in the number of such articles on supply in recent months as a result of the proceedings that have been brought under the Obscene Publications Acts and the attendant publicity.

THE LIST APPROACH : GENERAL OBSERVATIONS

9. Many who want to see a reform of the Obscene Publications Acts in a more restrictive sense favour a list system setting out specific matters, such as violence and sexual activity or perversion, the depiction of which would be illegal. This is the approach of Lord Nugent's Bill. It appears, however, from discussion at a recent lunch between Mr Mellor and Mrs Whitehouse that Mrs Whitehouse herself may have moved away from this approach.

10. The main problem is that a list of specifically prohibited material is probably too blunt an instrument to deal with the subtleties of distinction between what is and what is not offensive. The circumstances may often be all important. For example, depictions or descriptions of forms of sexual activity which may normally be within the bounds of general acceptability to adults may be unacceptable if, say, children were involved or they were induced by drugs, threats, blackmail, etc. Similarly, certain forms of sexual activity may be acceptable on film or video if portrayed discreetly or shown briefly in long shot, but quite unacceptable if the purpose (for example) is to glamorise sex with violence or if it is shown for long periods in close-up. The danger is, therefore, that a list approach unqualified by any general requirement to prove that the material had an adverse effect or by any reference to context, would end up by catching a great deal of material which many sections of opinion might consider entirely legitimate, and vice versa.

11. A list system would probably be effective only if it comprised a long list setting out all those sexual and violent and other activities the portrayal or description of which are to be regarded as unacceptable, (and even then there must be considerable doubt about whether it would achieve its intended purposes). There would be considerable objections of principle to this approach on the grounds set out above. That aside, there would be considerable disagreement about where the line should be drawn and whether particular sexual activities, deviations and perversions should be included in the list (and indeed whether it should be extended into quite unrelated fields such as racial hatred).

12. A list approach thus tends both to catch material which would generally be regarded as acceptable and to risk failing to catch material which most people would consider objectionable. Lord Nugent's Bill illustrates this. As is pointed out below, his Bill might, for example, render obscene diagrams in sex educational material used in schools, or articles about the problem of child prostitution, while failing to catch some of the worst "video nasties".

13. Recent legislation has, in fact, strengthened the law in areas where Lord Nugent's proposed legislation might well apply less effectively. The Indecent Displays Act 1981, for example, makes illegal the public display of indecent material - this is probably a less severe test than Lord Nugent's formula. The Cinematograph (Amendment) Act 1982 extends the whole range of cinema licensing provisions to cinema clubs - which enables a more detailed and specific control to be applied than might be under more general legislation. Mr Bright's Bill is another example of legislation

which might be desirable even under a revised Obscene Publications Act since it relies on the prior censorship and classification of video recordings - which makes it very much easier for suppliers and the public to determine whether or not a video recording is objectionable and places restrictions on the video recordings which can be supplied to children: the difficulty with the present position is that while many "video nasties" are likely to come within the scope of the present Obscene Publications Act, uncertainty remains until the courts have taken a view about each title, and even then different courts can reach different decisions; the same difficulty would arise even if the Obscene Publications Acts were reformed along the lines proposed by Lord Nugent.

SUMMARY OF LORD NUGENT'S BILL

14. The Bill removes the definition of obscenity in the Obscene Publications Act 1959 and the Theatres Act 1968. It provides instead that, broadly, an article or performance of a play is obscene if it contains any pornographic or sadistic material.

Clause 1(2) defines "pornographic matters", without prejudice to its generality, as including any presentation, description or other representation by words, performance, pictures or sound of certain activities including bestiality, sodomy, child sex or group sex. It includes also any visual representation of certain other matters including "human sexual organs lewdly displayed" and "sexual intercourse".

Clause 1(3) defines "sadistic matter", again without prejudice to its generality, but does so in such a way as largely to duplicate the definition of "pornographic matter".

Clause 2 applies the Obscene Publications Acts to broadcast material.

Clauses 3 and 4 provide a narrower range of exemptions than at present.

Clause 5 increases the penalties, largely by increasing the maximum term of imprisonment on conviction on indictment from three years to five years.

Clause 6 seeks to remove the requirements for the Director of Public Prosecutions' consent in respect of (in effect) prosecution of films for exhibition in a cinema and of plays and for the application to a Justice for a warrant to search for and seize obscene articles.

CRITIQUE OF THE BILL

15. There are a number of points of detailed criticism which could be made on the Bill. This passage, however, deals only with the main proposals of the Bill.

16. The Bill is based essentially on the "list approach", in that it sets out a list of activities, the descriptions or depictions (in various forms) of which are deemed to be obscene. Activities listed in clause 1(2)(ii) (including sexual intercourse) are deemed to be obscene only if depicted visually. Those listed in

Those listed in clause 1(2)(1) (including bestiality, sodomy, child sex) cover the written word also.

17. There are two main exemptions from this definition of obscenity. One is in respect of material published before 1960, provided it would not have been obscene under the Obscene Publications Act 1959 at the time of commencement of Lord Nugent's Bill. However this exemption seems virtually unworkable since, under the Obscene Publications Act 1959, a court has to consider whether an article is obscene taking account of who is likely to see, read or hear it; but Lord Nugent seems to envisage that the deprave and corrupt test in the 1959 Act could be applied in vacuo.

18. The other main exemption is for material in scientific text books or designed for medical training. But this does not extend to material which could legitimately be used for the purposes of treatment, advice or therapy. There is also an exemption for material in certain museums etc. (but not for pictures or descriptions of such works).

19. The overall effect is that (subject to the exemptions) no representation or description of any of the activities listed in clause 1(2)(1) would be possible, quite regardless of the context or the way in which it was presented. Under Lord Nugent's approach, it would, for example, seem impossible to publish straightforward general information on, say, what is involved in homosexuality, for example of the sort that might commonly be found in the advice columns of women's magazines - or serious articles on the problem of child prostitution.

20. Furthermore, the Bill would make obscene any depiction of matters listed in clause 1(2)(ii). This would cover, for example, depictions of sexual intercourse in sex educational material used in schools or issued for marriage guidance purposes. And depictions of "human sexual organs lewdly displayed" would seem to cover a good deal of recognised art.

21. Aside from the considerations of policy, questions would arise in relation to the United Kingdom's international obligations. There must be considerable doubt whether material, which might be caught by Lord Nugent's Bill, could be banned consistently with the European Convention on Human Rights and the United Kingdom's other similar obligations.

22. The draft Bill is also notable for what it does not cover. For example, one of the main causes for concern with "video nasties" is the depiction of violence for its own sake (e.g. "Driller Killer") not necessarily associated with sexual activity. It is far from clear that this would be caught by the Bill. The Bill would also fail to cover material inciting experimentation with drugs, some of which has been subject to successful proceedings under the Obscene Publications Acts.

23. The main virtue claimed for the list approach (its specificity and certainty) is seriously undermined by the stipulation that the definitions of pornographic matter and sadistic matter are "without prejudice to their generality". But without a stipulation along these lines, the Bill would clearly fail to catch a good deal of material which ought to come within its scope; but its inclusion does not much improve matters. The courts are left with no guidance on how "pornographic or sadistic matters" should be interpreted outside the context of the matters listed.

REPEAL OF EXEMPTION FOR BROADCAST MATERIAL

24. Hitherto it has been thought right, in view of the responsibilities placed on the broadcasting authorities as publicly appointed bodies, that broadcast material should be exempted from the Obscene Publications Acts. But this could be looked at again in the context of any overall reform of obscenity legislation. The law on obscenity will, however, be applied to cable programmes by the Cable and Broadcasting Bill on the basis that such programmes will not be provided by publicly accountable authorities.

INCREASE OF PENALTIES

25. While it is important that the penalty of imprisonment is also available to deal with the worst cases falling under the Obscene Publications Acts, for an offence of this kind a relatively short term is likely to prove a sufficient deterrent if coupled with appropriate fines. Certainly the courts take this view - of the 61 offenders imprisoned for obscenity offences in 1982, only four were sentenced to more than one year, only one to over 18 months and none to over two years. There does not seem any need, therefore, to increase the current maximum of three years.

26. The maximum summary fines under the Obscene Publication Act and the Theatres Act are already the "prescribed sum", as the Bill proposes (by virtue of the Criminal Law Act 1977).

DRAFT BILL

Draft of a Bill to amend the Obscene Publications Acts 1959 and 1964 and related provisions of the Theatres Act 1968; and for purposes connected therewith.

Be it enacted, etc.

Revised test of obscenity

1. - (1) For the purposes of the Obscene Publications Acts 1959 and 1964 and of Section 2 of the Theatres Act 1968, an article or a performance of a play is obscene if it contains, embodies or records any pornographic or sadistic matter, or if it stores information for the electronic reproduction of such matter.
- (2) Without prejudice to its generality, the expression "pornographic matter" for the purposes of this Act, includes -
 - (i) any presentation, description or other representation, whether by words, performance, pictures, or sounds, of an activity (whether actual or wholly or partly imagined or simulated) of any of the following types:
 - (a) sexual intercourse or other gross indecency between a person and an animal;
 - (b) sodomy or other gross indecency between persons;
 - (c) sexual intercourse with, or masturbation of or by, a child;
 - (d) acts of masturbation or other genital stimulation, by any physical means, involving two or more persons;
 - (e) group sexual intercourse or sexual orgy;
 - (ii) any presentation, picture or other visual representation of -
 - (a) human sexual organs lewdly displayed;
 - (b) the male sexual organ sexually aroused;
 - (c) masturbation by any person;
 - (d) sexual intercourse between persons.
- (3) Without prejudice to its generality, the expression "sadistic matter" for the purposes of this Act, includes any presentation, description or other representation, whether by words, performance pictures, or sounds, of any sexual activity (whether actual or wholly or partly imagined or simulated) of a type referred to in subsection (2) (i) or (ii) where that activity involves or is represented as involving or accompanying the deliberate infliction of pain.

Repeal of exceptions for broadcasts

2. The proviso to subsection (3) of Section 1 of the Obscene Publications Act 1959 (exceptions for showings in the course of television or sound broadcasting) shall cease to have effect.

Exception for certain matter

3. A person shall not be convicted of an offence against Section 2 of the Obscene Publications Act, and an order for forfeiture shall not be made under Section 3 of that Act, -
 - (i) in respect of any article containing or embodying pornographic or sadistic written matter if it is proved that that matter was in the United Kingdom first published before 1960, and is matter the publication of which immediately before the commencement of this Act would not have been an offence under the Obscene Publications Act 1959 as in force immediately before the said commencement;

- 12
- (ii) in respect of any article if it is proved that that article was published, or prepared or kept for publication, for the purpose only of proceedings in Parliament or of legal proceedings or otherwise in the interests of the administration of justice.

Repeal of defence of public good

4. - (1) Section 4 of the Obscene Publications Act 1959 (and Section 3 of the Theatres Act 1968) (defence of public good) shall cease to have effect.
- (2) Where an article is published in or on a museum, art gallery, monument or ancient work (being a museum, art gallery, monument or ancient work to which the public are ordinarily admitted and which is maintained wholly or in part from funds appropriated by Parliament for museums, art galleries, monuments, ancient works or other like purposes), or is kept in or on any such public museum, art gallery, monument or ancient work with a view to such publication, that publication or keeping shall not be an offence against Section two of the Act of 1959, and an order for forfeiture shall not be made under Section three of that Act in respect of any article while it is so published or kept.
- (3) Notwithstanding anything in the aforesaid Act of 1959 as amended by this Act, matter of a type referred to in items (b) to (d) of subsection (2)(ii) of Section 1 of this Act shall not be deemed to be pornographic where it is published, or prepared or kept for publication, in a bona fide scientific textbook or in a medical textbook published or kept for publication for the use of medical practitioners of persons training to become medical practitioners.

Increase of penalties

5. - (1) Subsection (1) of Section 2 of the Obscene Publications Act 1959 shall be replaced by the following subsection:
- "(1) Subject as hereinafter provided, any person who, whether for gain or not, publishes an obscene article shall be liable:
- (a) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the prescribed sum for the purposes of Section 28 of the Criminal Law Act 1977 (punishment on summary conviction of offences triable either way: £1,000 or other sum substituted by order under the Act), or to both;
- (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding five years, or both."
- (2) Subsection (2) of Section 2 of the Theatres Act 1968 shall be replaced by the following subsection:
- "Subject to section 7 of this Act, if an obscene performance of a play is given, whether in public or in private, any person who (whether for gain or not) presented or directed that performance shall be liable:
- (a) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the prescribed sum for the purposes of Section 28 of the Criminal Law Act 1977 (punishment on summary conviction of offences triable either way: £1,000 or other sum substituted by order under the Act), or to both;
- (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding five years, or to both."

Abolition of restriction on institution of proceedings

6. The following provisions (requiring the consent of the Attorney General or the Director of Public Prosecutions, as the case may be for proceedings for an offence under the Obscene Publications Acts 1959 and 1964) shall cease to have effect: -
- Subsection (3A) of Section 2 of the Obscene Publications Act 1959;
 - Subsection (3A) of Section 3 of the Obscene Publication Act 1959;
 - Section 25 of the Criminal Justice Act 1967;
 - Section 8 of the Theatres Act 1968.

Interpretation

7. - (1) The following subsections apply for the interpretation of this Act and of the Acts amended by this Act.
- (2) "child" means a person under the age of 16;
 - "film" includes any form of video-recording;
 - "record" includes any article or device for transmitting sound or a picture or pictures or both.

Short title, commencement, extent and repeals

8. - (1) This Act may be cited as the Obscenity Act 1982.
- (2) This Act comes into force at the expiration of the period of one month beginning with the day on which it is passed, and so far as it amends or repeals provisions of the Obscene Publications Act 1959 (or the Theatres Act 1968) applies only to proceedings for or in relation to offences committed after that period.
 - (3) This Act does not extend to Scotland or Northern Ireland.
 - (4) The enactments referred to in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

SCHEDULE

Enactments Repealed

<u>Chapter</u>	<u>Short Title</u>	<u>Extent of Repeal</u>
7 & 8 Eliz.2 c.66	The Obscene Publications Act 1959	In Section 1, subsection (1) and the proviso to subsection (3). In Section 2, subsections (1), (3A) and (6). In Section 3, subsections (3A) and (7). Section 3(7) Section 4.
1964 c.74	The Obscene Publications Act 1964	Section 1(3) (b)
1968 c.54	The Theatres Act 1968	Section 2(1). Section 3 Section 8
1967 c.80	The Criminal Justice Act 1967	Section 25.

CONFIDENTIAL

DRAFT OF A BILL
TO AMEND THE
OBSCENE PUBLICATIONS ACTS
with an explanatory memorandum

LONDON 1983

Explanatory Memorandum

The purpose of the Bill is to amend the Obscene Publications Acts 1959 and 1964 and related provisions of the Theatres Act 1968.

Revised test of obscenityClause 1

This clause provides for a revised test of obscenity. The existing statutory test "tendency to deprave and corrupt" has been found to be unworkable. This is the first and most important respect in which the current law has "misfired".

The revised test of obscenity embodies two concepts

- a) that there should be a general test of liability "pornographic and sadistic".
- b) that in relation to certain activities there should be an absolute prohibition.

Repeal of exception for broadcastsClause 2

Broadcasting is the most persuasive and influential of all mass media. There is no ground for its exclusion from the Obscene Publications Acts. The repeal by this clause of the proviso to subsection (3) of Section 1 of the Obscene Publications Act 1959 removes this exemption.

Exception for certain matterClause 3

This clause provides for exemption from liability under the Obscene Publications Act 1959 as it is to be amended.

- a) in respect of articles first published before 1960 in the United Kingdom, provided that any publication before the passing of the current Act would not have been an offence under the Obscene Publications Act 1959.
- b) in respect of publication for proper purposes in relation to parliamentary or legal proceedings or generally in the interests of the administration of justice.

Repeal of defence of public good

Clause 4

The Obscene Publications Act 1959 (with a related provision in the Theatres Act 1968) provides for exemption from liability under the Act if it is proved that publication is justified as being for the public good on the grounds that it is in the interests of science, literature, art or learning, or of other objects of general concern. The opinion of experts may be admitted in any proceedings to establish or to negative this ground.

This defence of the public good has also been a major factor in the breakdown of the law and by sub clause (1) of this clause it is taken away.

Sub clauses (2) and (3) provide for exemption from liability in the limited circumstances set out in the sub clauses, i.e. publicly funded and controlled exhibitions and the training of doctors respectively.

Increase of penalties

Clause 5

Penalties under the Obscene Publications Act 1959 are

- a) on summary conviction a fine not exceeding £100 or imprisonment for a term not exceeding six months.

- b) on conviction on indictment a fine or imprisonment not exceeding three years or both.

and under the Theatres Act 1968

- a) on summary conviction a fine not exceeding £400 or imprisonment for a term not exceeding six months.
- b) on conviction on indictment a fine or imprisonment for a term not exceeding three years or both.

These fines are inadequate and by Clause 5 are increased.

Abolition of restriction on institution of proceedings.

Clause 6

The restriction on the right of private persons to lay information and bring prosecutions cannot be justified.

This clause removes existing restrictions in the statutes referred to in the clause.

The draft Bill contains miscellaneous and supplementary provisions appropriate to the subject matter of the Bill. The Act will not extend to Scotland or Northern Ireland.