

Censorship and Freedom of Expression

Policy Paper 63



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Introduction:

- 1.1 At the September 2002 Conference, a motion on the regulation of pornography was referred back to the Federal Policy Committee.
- 1.2 In November 2002, the Federal Policy Committee asked this Working Group to update the party's policies on censorship in a paper of not more than 8000 words to go to the Spring 2004 Conference.
- 1.3 The Working Group published a Consultation Paper (No. 66) in February 2003 identifying relevant questions and expressing some preliminary views.
- 1.4 The Working Group has considered the written responses to the Consultation Paper which were received from individuals and organisations. We have also been assisted by the comments made at the Consultation Session held at the Spring Conference in Torquay in March 2003 and the fringe meeting held at the Brighton Conference in September 2003. We are very grateful to all those who took the time and trouble to communicate their views, in writing or at the meetings.
- 1.5 The vast majority of consultees were broadly supportive of the conclusions set out below, including the conclusions on sexually explicit and violent material which attracted most of the interest of those who responded to the Consultation Paper.
- 1.6 The proposals which we make represent the strong consensus of those who served on the Working Group, although (of course) not every member would subscribe to each and every point.

Principles

- 2.1 Any assessment of the policy issues posed by censorship needs to begin by identifying the principles to be applied.
- 2.2 There are few (if any) principles more fundamental to liberalism than a belief in freedom of expression¹ as one of the core rights enjoyed by all human beings.
- 2.3 Party policy, as set out in Policy Paper 44 *Protecting Civil Liberties* (2001), states:
- Civil liberties are rooted in freedom of speech and expression.
 - Freedom of expression is an essential foundation stone of a democratic society.
 - Freedom of expression and information should be constitutionally guaranteed.
 - The media must be free to publish, and the public entitled to receive, information and opinions.
- 2.4 There are two main reasons for the primacy of freedom of expression:
- (1) First, because it is central to our autonomy and self-fulfilment that we are free to receive and impart information and ideas.²
 - (2) Second, because freedom of expression has beneficial effects for society. By promoting debate, freedom of expression is essential to an effective political democracy, facilitates the exposure of errors, and deters abuse of power.³

¹ We refer to freedom of expression rather than freedom of speech because the former more accurately conveys our intention to cover art and all other forms of expression that do not depend on the use of words.

² As John Stuart Mill observed in *On Liberty* (1859), chapter 1, “over himself, over his own body and mind, the individual is sovereign”.

³ John Stuart Mill explained in *On Liberty* (1859), chapter 2, that
the peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

As Mr Justice Holmes commented for the United States Supreme Court in *Abrams v United States* (1919) 250 US 616, 630, “the best test of truth is the power of the thought to get itself accepted in the competition of the market”.

- 2.5 But freedom of expression is not absolute. It may cause harm to others. So it needs to be balanced against a variety of other rights and interests, for example privacy, the protection of children and public order.
- 2.6 In deciding how to balance the competing interests, Liberal Democrats recognise that the issues which we discuss below are sensitive as well as important. As the responses to the Consultation Paper confirm, some people see sexually explicit and violent material as a symptom, or even a cause, of a degraded society, and suggest that such material contributes to physical attacks, broken relationships and other forms of harm, whether physical, emotional or cultural.
- 2.7 We understand and respect those concerns. In addressing those concerns, Liberal Democrats recognise that the importance of freedom of expression (for the reasons identified in paragraph 2.4 above) means that censorship should not be imposed (whether by way of restrictions or other types of regulation) by reference to the quality or content of the message (or lack of it) *unless* this is truly *necessary* to protect some other vital objective. Those who argue for censorship have the burden of showing that there is a pressing social need for a limitation on freedom of expression and that the restriction on freedom of expression is proportionate. It is central to liberalism that people should be left to make their own judgments about what they wish to say, read or see, free from State or other control, unless there will be real harm to others.
- 2.8 Some of the material protected by the right to freedom of expression will seem worthless or offensive to many people. But the principle of freedom of expression nevertheless protects such material unless it is truly necessary to impose censorship to protect some other vital objective. As Lord Justice Hoffmann noted in a 1994 judgment in the Court of Appeal, subject to limited exceptions freedom of expression

means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible.⁴

- 2.9 Indeed, when we consider what limits to impose on freedom of expression, it is important to bear firmly in mind the effect of censorship which may, perhaps unintentionally, impede the communication of material which does have value. It is easy to identify absurd examples of the abuse of censorship powers in previous generations. Who would now regard as other than ridiculous the decision in 1922 of Sir Archibald Bodkin, the Director of Public Prosecutions. He read a copy of James Joyce’s *Ulysses* which had been seized by customs officials at Croydon Airport and decided that it contained “a great deal of unmitigated filth and obscenity”, in particular the thoughts of Molly Bloom, “a more or less illiterate vulgar woman”. Bodkin threatened to prosecute F.R. Leavis who wanted to refer to the work in lectures at Cambridge University.⁵ And who would now defend the decision, in 1953, of the Lord Chamberlain (then responsible for theatre censorship) to refuse to licence a play if it

⁴ *R v Central Independent Television plc* [1994] Fam 192, 203.

⁵ *The Daily Telegraph* 16 May 1998.

included the noise of a flushing lavatory because he

objects in principle to the pulling of lavatory plugs and all that stands for.⁶

- 2.10 The rapid growth of communications technology, and in particular the Internet, has meant that censorship is increasingly difficult to implement as information may so easily cross national boundaries. As Sir Nicolas Browne-Wilkinson stated in the High Court in one of the *Spycatcher* cases in 1987,

The truth of the matter is that in the contemporary world of electronics and jumbo jets, news anywhere is news everywhere.⁷

Our proposals seek to take account of this reality.

- 2.11 The principles identified above are central to the application of Article 10 of the European Convention on Human Rights.⁸ Since the coming into force of the Human Rights Act 1998 on 2 October 2000, the Convention has been part of English law. But the principles were already well-established in our domestic law.⁹ The right to freedom of expression is also recognised by Article 19 of the Universal Declaration of Human Rights and Article 11 of the Charter of Fundamental Rights of the European Union.
- 2.12 “Censorship” is a broad subject. The Working Group has not sought to cover each and

⁶ Nicholas de Jongh *Politics, Prudery and Perversions: The Censoring of the English Stage 1901-1968* (2000), p.106.

⁷ *Attorney-General v Guardian Newspapers Ltd and others* [1987] 1 WLR 1248, 1269.

⁸ Article 10 states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights has repeatedly explained that the adjective “necessary” in Article 10(2) “implies the existence of a pressing social need”. Furthermore, any interference with freedom of expression must be proportionate to the legitimate aim pursued. See *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 275-278 (paragraphs 59-62).

⁹ *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 550-551 (Lord Keith of Kinkel for the Appellate Committee of the House of Lords).

every respect in which the law imposes or tolerates restrictions on freedom of expression. We have not made recommendations on, for example, the law of libel, the protection of privacy, control of the media, the scope of the Official Secrets Act, and the rules which restrict reporting of criminal trials (such as anonymity for complainants in rape cases), all of them important issues which deserve specific consideration. We have focused on issues of censorship posed by the regulation of sexually explicit and violent material, having regard to the genesis of this Working Group,¹⁰ and on some associated issues. The majority of the responses to the Consultation Paper were content with this approach. Indeed, by far the most interest in the Consultation Paper concerned the issues of sexually explicit and violent material. The Party may consider that separate consideration should be given to other issues.

¹⁰ See paragraphs 1.1-1.2 above.

Obscene and Indecent Publications

- 3.1 As Geoffrey Robertson QC and Andrew Nicol point out in *Media Law*, “the history of obscenity provides a rich and comic tapestry on the futility of legal attempts to control sexual imagination”.¹¹
- 3.2 The law applies two main concepts to censor expression: “obscenity” (that which tends to “deprave and corrupt”) and “indecenty”. These concepts are not objective, although Mr Justice Stewart of the United States Supreme Court confidently asserted, “I know it when I see it”.¹²
- 3.3 The main issue is whether the legal concepts of “obscene”, “indecent” and “deprave and corrupt” should be abandoned, and common law offences such as corrupting public morals and outraging public decency abolished, and a new approach adopted, as the Williams Committee on Obscenity and Film Censorship¹³ recommended in 1979, focusing on specific harms caused by particular material.
- 3.4 Liberal Democrats consider that those who argue for censorship must establish that the material to which they object will cause harm to others and that the restrictions are proportionate to the harm which would be caused. We do not accept that a “precautionary principle” (by which restrictions are adopted unless and until it is established that no harm will be caused) can be justified. That is because of:
- (1) The general importance of freedom of expression. See paragraph 2.4 above.
 - (2) The effect of censorship in impeding the communication of something of value. See paragraph 2.9 above.
 - (3) The fact that for many people access to sexually explicit material contributes to their sex life. “One man’s vulgarity is another man’s lyric”.¹⁴
 - (4) The reality that a ban would drive the market underground, where it would be less

¹¹ Geoffrey Robertson and Andrew Nicol *Media Law* (4th edition, 2002), p.155.

¹² *Jacobellis v Ohio* (1964) 378 US 184, 197.

¹³ Cmnd 7772 (Chairman, Bernard Williams).

¹⁴ *Cohen v California* 403 US 15, 25 (1971) (Harlan J for the United States Supreme Court). For this reason, we prefer to describe the subject-matter as ‘sexually explicit material’, a more neutral term than ‘pornography’.

effectively regulated.

- 3.5 The first type of harm identified by opponents of sexually explicit material (who distinguish it from acceptable erotica) is that it may lead to more offences of violence. But the relationship between what we read or watch, and what we then do, is complex. As John Mortimer QC pointed out,

millions of unadventurous men on commuter trains read the James Bond stories without feeling licensed to kill or sleep with sultry mistresses on Caribbean islands; even more millions of law-abiding citizens read Agatha Christie without the slightest temptation to stab the heiress in the library.¹⁵

National Commissions in this country, Canada and in the United States have not found it possible to establish a direct causal link between sexually explicit material and violent behaviour.¹⁶ Such studies are similarly inconclusive on whether people with a propensity for violence or abuse are more likely so to act if they have access to sexually explicit material. This is not surprising: there are many problems in establishing adequate controls for such studies, it is difficult to assess the marginal effect which watching a particular film may have on a person with an existing propensity for violence, and trying to establish a direct causal link is a simplistic way of analysing the complex and diverse causes of attitudes and behaviour. In any event, society rightly does not adopt a principle that the sale of an item (such as a knife) should be banned because of the risk that it may be used improperly by a tiny minority of consumers. Even if there were evidence to establish that a few consumers of sexually explicit material are more likely to act in a violent or abusive manner, that may not necessarily justify restrictions on freedom of expression in relation to the vast majority of consumers who do not act violently or with abuse towards others.

- 3.6 Secondly, critics of sexually explicit material contend that (again by contrast with acceptable erotica) it degrades those involved and society at large. In relation to this second type of alleged harm, the Working Group received forceful submissions contending that a person's freedom to look at sexually explicit material cannot take priority over the dignity of those who are exploited by participating in such activities (who are said to be amongst the weakest and most vulnerable members of society). Those submissions argued that there can be no freedom to reduce women to body parts whose function is to provide pleasure to men, and that sexually explicit material damages women by suggesting to men (in particular to young men for whom such material may be a significant means of obtaining information about sex) that their wives, girlfriends and others welcome being used as sexual objects. In short, sexually explicit material is an aspect of male dominance which should be prohibited.
- 3.7 This alleged harm to the women who participate in the making of sexually explicit material,

¹⁵ John Mortimer *Murderers and Other Friends* (1994), p.111.

¹⁶ See the *Report of the Commission on Obscenity and Pornography* (1970, USA), the *Report of the Williams Committee on Obscenity and Film Censorship* (Cmd 7772, 1979), and the *Report of the Special Committee on Pornography and Prostitution* (1985, Canada).

to society and to women in general raises difficult issues. The Working Group's response is as follows¹⁷:

- (1) We do not condone the contents of sexually explicit material: our task is not to act as film critics. We consider that it is central to liberalism that it is not for the State generally to regulate taste in a free society.
 - (2) If and to the extent that women (or men) are being compelled to participate in acts against their will (whether to produce a film or as a consequence of a film being watched by others), the criminal law already contains adequate remedies.
 - (3) It is not the role of the law relating to freedom of expression to remedy economic exploitation of those who are paid to perform in sexually explicit films. And there are some people for whom involvement in sexually explicit films is a voluntary choice.
 - (4) Nor is it the function of the law to impose restrictions on freedom of expression because sexually explicit material may misinform men about women's sexual desires. These are matters appropriately addressed by competing speech, and by the content of the consensual relationships between men and women.
- 3.8 There is undoubtedly a legitimate public interest in some controls over sexually explicit material.
- 3.9 Liberal Democrats accept that it is legitimate to prevent the public display of unreasonably offensive material. (See the Indecent Displays (Control) Act 1981). People have the right not to be confronted by such material without their consent.
- 3.10 The second legitimate control is to prevent such material from being made available to young persons:
- (1) Liberal Democrat party policy states that 16 should be the age at which people attain full civil and political rights.¹⁸
 - (2) Some responses to our Consultation Paper argued that young people aged 16 and 17 should not be exposed to sexually explicit material and so the law should seek to protect those under the age of 18. The British Board of Film Classification (the

¹⁷ Many of these issues were addressed by the United States Court of Appeals for the Seventh Circuit in *American Booksellers Association Inc v Hudnut* (1985) 771 F 2d 323. The Court struck down as an unconstitutional interference with freedom of speech an Indianapolis Ordinance which made the sale of sexually explicit material unlawful if it included material which presented women as "sexual objects for domination, conquest, violation, exploitation, possession or use through postures or positions of servility or submission or display". The Court explained that the principles of freedom of expression do not allow the State to impose such an approved view of cultural and social matters.

¹⁸ Conference Motion *Giving Youth a Voice*, March 1999.

BBFC) informed us that in the course of its public consultation (October 1999 to May 2000), there was no support for lowering the relevant age from 18 to 16 (and there was evidence that the introduction of a '21' rating, particularly for sex works, would be welcomed by some people). Other consultees argued forcefully that many young people under the age of 18 lack the maturity to deal with sexually explicit material and that lowering the age-limit to 16 would encourage the distribution of such material in schools.

- (3) The Working Group does not accept that people should have access to sexually explicit material only from the age of 18:
 - (a) The law treats persons aged 16 as adults for the purpose of identifying the age at which a person may lawfully choose to have sex and therefore the age at which a woman may choose to have a baby, and also the age at which a person may lawfully marry.
 - (b) The Working Group can see no sensible justification for the law to treat those over 16 as still requiring special protection in relation to watching sex acts on a film or video, or in relation to the purchase of a sex aid. It makes no sense to say that a person is mature enough to choose to have sex at 16 (and to have a baby), but not mature enough to watch such an act on a video and deal responsibly with sexually explicit materials.
 - (c) In addressing this issue, the Working Group does not accept that to lower the relevant age to 16 will mean that young persons will be exposed to sexually explicit material which would otherwise be entirely hidden from persons aged 16 or 17 who wish to see it. Such material is readily available on the Internet.
 - (d) For all these reasons, the Working Group does not consider that it would be right to confer a discretion on local authorities to adopt a minimum age limit of 17 or 18 as appropriate for the purchase of sexually explicit material, any more than it would be appropriate for a local authority to have such power in relation to the age at which young persons may lawfully have sexual intercourse.
- (4) Liberal Democrats therefore recommend that it should be an offence to publish, sell, electronically transmit or display to those under the age of 16 images which, by reason of their sexual or violent content, should not be seen by persons under that age. It should be a defence to any such charge that the material consists of a film or video for which the BBFC has granted a classification certificate approving the showing of the film and video to persons under the age of 16. Because of the importance of seeking to prevent inappropriate material from being seen by those under the age of 16, there should be tighter controls on sales and other distribution to persons under the age of 16.
- (5) Legitimate concern about protecting access by persons under the age of 16 cannot

justify restrictions on material for adults. To say that there is a risk that material for adults may come into the hands of children, and therefore access for adults must be restricted, would be “to burn the house to roast the pig”.¹⁹ Adults should be responsible for ensuring that their children (or children in their care or control) do not have access to inappropriate material, just as they should be responsible for ensuring that children do not have access to other items unsuitable for use by them, such as cigarettes and alcohol.

3.11 As to material for viewing by adults in private, the Working Group has reached the following conclusions:

- (1) In general, adults should be allowed to look in private at whatever material they wish, and it should not be an offence to produce, sell or supply such material.
- (2) But there must be exceptions, even for adults in private. For example (to take the most extreme circumstances) material which exploits for sexual purposes a rape or murder.
- (3) The difficulty is to formulate a test for censorship of sexually explicit material for adults. The Working Group recommends that it should be an offence to publish, sell, electronically transmit or display material which exploits for sexual purposes unlawful acts involving (or appearing to involve) persons under the age of 16, non-consenting adults (or adults consenting to very serious harm) or animals. So child pornography, snuff movies and films showing bestiality would continue to be banned. By ‘unlawful acts’ involving (or appearing to involve) persons under the age of 16, we have in mind the tough existing laws on indecent photographs of children, which we believe should be maintained and enforced. But adults would (if they wished) be able to watch in private films and videos depicting consensual acts (apart from those causing very serious harm) between adults. Because the prohibition would apply only to those categories where the material was being exploited for sexual purposes (that is, not where the material was being used to make a documentary or feature film), a public good defence would not be appropriate or necessary.²⁰ However, it would be appropriate to recognise a very limited defence for those who can establish that they are downloading such material for bona fide research purposes. If the film depicts consensual acts between adults, but in truth a person was being forced to

¹⁹ *Butler v Michigan* (1957) 352 US 380, 383; Mr Justice Frankfurter for the United States Supreme Court finding unconstitutional a provision in the Michigan Penal Code which made it a criminal offence to sell to an adult any book containing obscene language “tending to the corruption of the morals of youth”. Cf the speech by the Home Secretary, Sir William Joynson-Hicks, in 1928 on the censorship of books: “That freedom, in my view, must be determined by the question as to whether what is written or spoken makes one of the least of these little ones offended”: Alan Travis *Bound and Gagged: A Secret History of Obscenity in Britain* (2000), p.62.

²⁰ Section 4(1) of the Obscene Publications Act 1959 currently contains a public good defence to the offence of obscenity.

participate, the remedy is not just to ban the film but for those responsible for the making of the film to be prosecuted for assault or any other relevant criminal offence. Because of the importance of protecting young people, we welcome the tougher sentences now being imposed by the courts in relation to paedophile activity, including the exploitation of children for sexual purposes in film.

- (4) These restrictions on material for adults in private are intended to apply only to visual images, and not to the use of language, whether written or oral. It is difficult - other than in wholly exceptional circumstances, for example, material which exploits for sexual purposes illegal practices such as paedophilia - to see how the use of words could constitute the mischief within (3) above. Indeed, there are particular reasons why restrictions should not be imposed on the use of words: language is the primary medium for communicating information and opinion; the risk of unjustifiable censorship decisions outweighs any damage which may be done by the absence of censorship of words; and images have a capacity to disturb which words (however eloquent) lack.²¹

3.12 The Working Group has considered whether the law should impose a wider prohibition, so as to ban adults from viewing some material because it glorifies violence, even outside the context of sexual explicit material. In 1979, the Williams Committee considered that there was a justification for censorship of films containing “highly explicit depictions of mutilation, savagery, menace and humiliation... for the entertainment of an audience in a way that appeared to emphasise the pleasures of sadism”.²² The Working Group’s view is that such a restriction on freedom of expression is not now justified. Provided that the material does not offend against the test set out in paragraph 3.11(3) above - that is, it does not exploit for sexual purposes unlawful acts involving (or appearing to involve) persons under the age of 16, non-consenting adults (or adults consenting to very serious harm) or animals - we do not consider that it is the role of the State to regulate the imagination of the adult viewer or the filmmaker any more than it would be in the context of a novel. Any broader test would impose a fetter on artistic expression; and (as the law relating to obscenity and indecency has demonstrated over the past 100 years) it is impossible to draw objective lines as to what is ‘acceptable’.

3.13 At present, a licence is needed for sex establishments, that is sex shops and sex cinemas. The licensing of such establishments is currently performed by local authorities under the Local Government (Miscellaneous Provisions) Act 1982. No such licence is required for establishments where sexually explicit material is produced. And newsagents and others who sell such material as a small part of their trade are not required to obtain a licence.

3.14 Liberal Democrats believe that such a scheme of regulation needs reform:

- (1) There is a proper role for the licensing of sex shops by local authorities. There should be power to refuse a licence (or a renewal of a licence) to persons wishing to

²¹ See the Williams Committee Report at paragraph 7.22.

²² Paragraph 12.10.

sell such products for specified, objective offences: for example, allowing persons under the age of 16 to enter the premises, selling unlawful goods, offensive window-displays, failing to provide clear notices to customers entering the premises concerning the nature of the establishment. The local authority should also have the power to refuse a licence because the applicant, or a person with whom he or she is associated, is unsuitable by reason of criminal convictions or the manner in which he or she has previously administered a licence.

- (2) But Liberal Democrats do not believe that local authorities should retain a power to refuse a licence for subjective, moral reasons relating to the nature of the goods on sale or the location of the premises (although general planning controls would, of course, remain applicable) save where there are wholly exceptional circumstances, for example, if the sex shop is to be located next to a school. The general nature of the locality should not provide a basis for refusing a licence, and nor should the number of such establishments in the locality be material. We recognise the concern of many communities that they should enjoy protection against the opening of such establishments (or 'too many' such establishments) in their locality. But the Working Group's conclusion is that (save for exceptional circumstances) a community has no greater right to protection against such shops and cinemas than it has against any other lawful business which provides a service which people want to use, especially when the system of licensing impedes competition which may improve standards, and especially when the items sold in sex shops can be sold without a licence by shops which predominantly sell other items. In our view, it is preferable to regulate what goods may be sold and to whom, rather than attempt to regulate where they may be sold. The latter approach has become increasingly anachronistic in a society where the top-shelf in newsagents contains a variety of sexually explicit publications, condoms are on sale on open shelves in Boots, and vibrators are sold in Selfridges.
- (3) The local authority should have a power to charge a fee for a licence calculated by reference to the costs of administration and enforcement, and not to be increased to act as a deterrent or as a windfall for the authority.
- (4) There should be a right of appeal to an independent tribunal.

3.15 Although sexually explicit films and videos depict fantasy, we should mention that in principle those working in the sex industry enjoy the same employment protection rights as other workers. However, there is concern that such rights are not always enjoyed in practice. There is an important role here for the Health and Safety Executive to ensure that appropriate steps are taken to protect employees in what can be a very dangerous industry for them. Indeed, we recommend tougher financial penalties for those who exploit workers in this context.

The Classification of Film and Video

4.1 The British Board of Film Classification (BBFC) performs two functions:

- (1) It classifies films on behalf of local authorities who licence cinemas under the Cinemas Act 1985. The BBFC acts in an advisory role, but almost all of its recommendations are followed by local authorities.
- (2) The BBFC has a statutory responsibility for classifying videos under the Video Recordings Act 1984.

4.2 Film and video classification serves necessary functions:

- (1) It identifies which films may properly be seen by children and young persons, and at what age.
- (2) In respect of material for adults, film and video classification is appropriate to identify works which should not be shown.

4.3 In relation to film classification, the Working Group received submissions from the Film Distributors' Association (the FDA) (whose releases collectively account for 98% of all cinema tickets sold in the United Kingdom). The FDA's view is that the BBFC has much improved its level of service to the industry in recent years. Its speed of response is quicker, and it is willing to consult in detail before taking action. And it has a good relationship with local authorities so there is already, in most cases, uniformity across the United Kingdom. The Working Group agrees with this assessment.

4.4 The BBFC, in its submissions to the Working Group, stressed that it is independent both of the Government and of the film and video industry. The BBFC suggested to us that a statutory arrangement which removed this independence would make the classifying body more vulnerable to political and other pressures. Nevertheless, we consider that it would be appropriate for the BBFC to be given a statutory responsibility for film classification, so that its judgments would be subject to a right of appeal to an independent tribunal, which would then be subject to judicial review, and so that the discretion of local authorities (rarely exercised in practice) is removed. That is the current position in relation to video classification. We can see no justification for taking a different approach to film classification. We can see no reason why that should adversely affect the independence of the BBFC. It has not done so in relation to its statutory role for video classification. The current position in relation to film classification is an historical anomaly which should be reformed.

4.5 Liberal Democrats welcome the move by the BBFC towards a more advisory classification system for children and young persons:

- (1) In 2002, the BBFC introduced a new '12A' category (after a successful pilot project), which means that no one younger than 12 may see the film in a cinema unless accompanied by a responsible adult. This move towards a more advisory classification system is in line with practice in the USA, Canada, Australia and most of Europe, and (in our view) is to be welcomed.
- (2) The FDA wishes to see the '15' certificate also made advisory, again in line with many other countries. We agree. Such a reform would allow those under the age of 15 to see such a film in the cinema if accompanied by a responsible adult.
- 4.6 Following a decision by the Video Appeals Committee in 1999, upheld by Mr Justice Hooper in the High Court in May 2000,²³ in relation to a series of films,²⁴ the BBFC liberalised its criteria for R18 videos - that is material which may be supplied in licensed sex shops to adults aged 18 or over.
- 4.7 The BBFC guidelines (published in July 2000) reveal a very considerable reduction of censorship by the BBFC, which the Working Group welcomes. We consider that there is a need for a statutory statement of principle. As explained in paragraph 3.11 above, we see no justification for preventing adults from seeing a film or video in private unless it exploits for sexual purposes unlawful acts involving (or appearing to involve) persons under the age of 16, non-consenting adults (or adults consenting to very serious harm) or animals. Only such works should be refused a licence by the BBFC for adult viewing.
- 4.8 But we do consider that it is appropriate for the BBFC to maintain a category of works consisting of material which, by reason of its sexual content, should only be available for sale or viewing in establishments which do not admit persons under the age of 16, have no public displays of material visible from outside the shop which may reasonably cause offence, and have clear notices to customers entering the premises concerning the nature of the establishment. Such certificates should henceforth be known as R16 certificates.
- 4.9 The Working Group sees no reason why such R16 videos should not also be available for sale (or hire) to adults by mail order (a matter on which the current law is unclear in relation to R18 videos). This is particularly so when Customs and Excise have stated that they will no longer seize material depicting sexual activity between consenting adults which falls within the BBFC's published guidelines (see paragraph 4.6 above). Since this means that a video classified R18 by the BBFC may now lawfully be imported from abroad by mail-order, it would be perverse to prevent a customer from ordering the same video by mail-order from within the United Kingdom.
- 4.10 The BBFC Guidelines for works suitable only for those over the age of 18 state:

The BBFC respects the right of adults to choose their own entertainment, within the law. It will therefore expect to intervene only rarely in relation to '18' rated cinema

²³ *R v Video Appeals Committee of The British Board of Film Classification ex parte The British Board of Film Classification* [2000] EMLR 850 (Hooper J).

²⁴ The 'Horny Catbabe' and 'Nympho Nurse Nancy' decision.

films. In the case of videos, which are more accessible to younger viewers, intervention may be more frequent.

The view of the Working Group is that it is not appropriate for the BBFC to maintain stricter standards for video than for film classification on the ground that the former may be watched repeatedly at home, the viewer may focus on particular parts of the work, and a child may gain access to the work. We do not consider that it is right to regulate what adults may watch in private (with the limited exception of works which exploit for sexual purposes unlawful acts involving persons under the age of 16, non-consenting adults or adults consenting to very serious harm, or animals, as set out in 3.11(3)). Adults should be responsible for ensuring that their children (or children in their care or control) do not have access to adult material in their home, just as they should be responsible for ensuring that children do not have access to other items unsuitable for use by children, such as cigarettes and alcohol.

- 4.11 Compliance with a film or video classification issued by the BBFC should be a defence to a charge of providing an inappropriate work to persons under the age of 16, or selling to adults a work which exploits for sexual purposes unlawful acts involving (or appearing to involve) persons under the age of 16, non-consenting adults (or adults consenting to very serious harm), or animals. A publisher concerned that a film or video work may be accused of such an offence should be able to seek a certification that the work does not fall within the prohibited category. The BBFC should be encouraged to introduce similar advisory certificates in relation to films released and distributed via the Internet.

Blasphemy

- 5.1 Those who are responsible for scurrilous insults to Christianity may be prosecuted for the offence of blasphemy. There has only been one successful prosecution since 1922, for the publication in *Gay News* of a poem which imagined sexual acts with Christ.²⁵
- 5.2 Despite the value and importance of religious beliefs (which the Working Group recognises), there is no justification for maintaining special criminal laws which protect religious feelings from being offended. Subject to the general laws of the land, religion should be subject to no greater protection from freedom of expression than any other important matter.
- 5.3 That would be so even were the law non-discriminatory. The objectionable nature of the law of blasphemy is exacerbated, however, by the fact that it protects only the religious feelings of adherents to the Christian faith.
- 5.4 The Working Group therefore proposes the abolition of the law of blasphemy.

²⁵ *R v Lemon* [1979] AC 617.

Incitement to Racial Hatred

- 6.1 The Public Order Act 1986 makes it an offence to use threatening, abusive or insulting words or behaviour, or to display threatening, abusive or insulting material, with the intention of stirring up racial hatred or in circumstances where racial hatred is likely to be stirred up.
- 6.2 Liberal Democrats conclude:
- (1) The law serves a necessary purpose. Its content properly balances competing interests.
 - (2) The Act defines ‘racial hatred’ to mean hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins. We do not recommend the expansion of the law to cover threats, abuse or insults to religion. There is too great a danger that such a law would unjustifiably inhibit freedom of expression, and would cause insuperable problems as to what constitutes a religion for these purposes. The Report of the House of Lords Select Committee on Religious Offences in England and Wales²⁶ concluded that although there should be a degree of protection of faith, there is no consensus on the form it should take.
- 6.3 Liberal Democrats support the draft Equality Bill which seeks to address the serious defects of current equality legislation by setting out a single framework for eliminating discrimination and promoting equality between different people, regardless of their racial or ethnic origin, religion or belief, sex, marital or family status, sexual orientation, gender reassignment, age or disability.

²⁶ HL Paper 95-I, April 2003, paragraph 133

Broadcasting

- 7.1 It is a basic principle of broadcasting law in this country²⁷ that offensive material should not be included in programmes. Of course, what is offensive must depend on the context (in particular, the nature of the programme, the time at which it is broadcast, and the content of any prior warning). But, in general, such restrictions - which are no longer thought appropriate in respect of publications, theatre or film - are based on the belief that people are entitled to greater protection from offence in relation to a uniquely powerful medium which enters the home of the viewer, and which may be watched without careful prior selection of items. In general, we consider that because of the unique nature of broadcasting, this approach should be maintained in relation to terrestrial channels and 'free-to-air' channels available via satellite or cable, where no subscription or decoding card is required to receive the broadcast.
- 7.2 Liberal Democrats appreciate that, of course, many children watch television long after 9 pm, or video programmes to watch at a later date. But many parents welcome the reassurance provided by a watershed standard for all freely accessible television broadcasting since it provides guidance about what they may consider to be inappropriate material for children to watch. Liberal Democrats therefore propose:
- (1) Broadcasting on terrestrial channels should retain the principle of the watershed of 9 pm (or 10 pm if considered more appropriate today), before which time broadcasters should assume that children may be watching programmes and after which time more adult material may be appropriate.
 - (2) For 'free-to-air' channels available via satellite or cable, where no subscription or decoding card is required to receive the broadcast, a similar watershed time of 9 pm should be adopted (rather than the currently different, and therefore confusing, time of 8 pm).
 - (3) Broadcasters whose programming is delivered to audiences via a satellite or cable subscription package and is aimed at a general audience (for example, packages containing Sky One) should state clearly and publicly what their voluntary watershed policy is, so consumers can decide whether to subscribe. OFCOM should have the responsibility of ensuring compliance with such a voluntary watershed policy.
- 7.3 Where a person chooses to subscribe to a package of television channels or an individual television channel, we consider that after the (voluntary) watershed, less intrusive standards than at present should apply, so long as an appropriate warning is broadcast.
- 7.4 The Working Group proposes that individuals should be free to access (whether by subscription or pay-per-view) channels showing sexually explicit material subject to no

²⁷ See section 319(2)(f) of the Communications Act 2003 and see the BBC's Licence and Agreement.

greater restrictions on content than are applicable to adult videos: that is a prohibition only on material which exploits for sexual purposes unlawful acts involving (or appearing to involve) persons under the age of 16, non-consenting adults or animals (see paragraph 3.11(3) above). Such channels should be subject to no greater restrictions than films and videos in relation to violent material which is not sexually explicit. As we explain in paragraph 3.12 above, we do not think there should be additional controls on violent material which is not designed to exploit for sexual purposes unlawful acts involving (or appearing to involve) persons under the age of 16, non-consenting adults or animals.

- 7.5 The Working Group's proposals in relation to channels available only by subscription or pay-per-view are based on our opinion that adults should be responsible for ensuring that their children (or children in their care or control) do not have access to inappropriate material, just as they should ensure that children do not have access to other items unsuitable for use by them, such as cigarettes and alcohol.

Advertising

- 8.1 The regulation of non-broadcast advertising (including press, poster, direct mail, sales promotions, cinema advertising and non-broadcast electronic advertising) is currently performed by the Advertising Standards Authority (the ASA), a non-statutory body. Its Code of Practice makes plain that the context is of central importance in assessing the acceptability of an advertisement.
- 8.2 As a public law body²⁸, the ASA already has a duty to comply with the principles of freedom of expression.²⁹
- 8.3 In relation to complaints about offensive advertisements, the ASA Code of Practice adequately addresses the relevant issues.

²⁸ See *R v Advertising Standards Authority ex parte The Insurance Service plc* (1989) 2 Administrative Law Reports 77 (Divisional Court).

²⁹ See paragraph 2.11 above.

The Internet and Other New Technologies

- 9.1 The Internet is a powerful international medium of communication. It is an effective means of educating and informing millions of people efficiently and inexpensively. But it also has the potential for abuse which is very difficult to control and which understandably causes widespread parental concern. No policy proposals in the field of censorship can ignore the reality that the Internet provides easy and free access for millions of people to sexually explicit material.
- 9.2 We agree with Policy Paper 54, *Making IT Work*, that the proper means of addressing standards for material sent over the Internet is to support the self-regulatory and co-regulatory approaches currently being adopted. We propose that the Government should encourage and support industry bodies which are seeking to raise standards by promoting codes of practice and rating systems. We propose that local government should encourage the provision of education and training for children and parents about the benefits and the dangers of the Internet.
- 9.3 If persons within the jurisdiction are acting unlawfully, for example in relation to child pornography, they can be prosecuted. If they are outside the UK's jurisdiction, then we propose that co-operation between the UK and the home authority should be encouraged.
- 9.4 The Working Group has proposed in paragraphs 3.10(4) and 3.11(3) above that:
- (1) It should be an offence electronically to transmit to those under the age of 16 images which, by reason of their sexual or violent content, should not be seen by persons under that age. Urgent consideration should be given to whether there are technical means by which persons within the jurisdiction can identify the age of the person to whose computer they are transmitting images which, by reason of their sexual or violent content, should not be seen by persons under the age of 16.
 - (2) It should be an offence electronically to transmit to anyone material which exploits for sexual purposes unlawful acts involving (or appearing to involve) persons under the age of 16, non-consenting adults (or adults consenting to very serious harm) or animals.
- 9.5 Unsolicited e-mails (known as spam), particularly those of an offensive nature, cause annoyance and sometimes distress to many people. The Privacy and Electronic Communications (EU Directive) Regulations 2003³⁰ were introduced with effect from 11 December 2003. They prohibit people from sending unsolicited marketing messages by electronic mail to individual subscribers unless the recipient has given prior consent. This opt-in rule is relaxed if three criteria are met:

³⁰ 2003 SI No. 2426.

- (1) The recipient's e-mail address was obtained 'in the course of a sale or negotiations for a sale'.
- (2) The sender only transmits promotional messages relating to their 'similar products and services'.
- (3) And when the address was obtained, the recipient was given the opportunity to opt-out. (That opportunity must be given with each subsequent message).

These Regulations should reduce the flow of unsolicited e-mails. But they ought to apply also to protect individuals at company e-mail addresses. And the problem will remain of regulating rogue companies operating from outside the jurisdiction. The only effective way forward is by international treaties under which all States agree to enforce common codes.

- 9.6 It is inevitable that new technologies (such as digital media) will be developed. Although we cannot predict what forms they will take, and what specific regulation will be appropriate and possible, we propose that the same principles as are set out generally above should apply.