

Evidential considerations – OPA 1959 offence

This legislation seeks to criminalise those who make material, which has a tendency to deprave or corrupt its audience, available to others.

A childlike sex doll is capable of being an article embodying matter to be looked at, and thus an article within the meaning of the Act. In *Conegate Ltd. v H.M. Customs and Excise* [1987] 2 W.L.R. 39 a concession was made that adult sex dolls were not obscene articles. This concession does not prevent prosecutors from contending that childlike sex dolls are obscene articles.

A person who distributes or sells a childlike sex doll, or has it for distributing or selling for gain, is capable of publishing it within the meaning of the Act. While section 1(3)(b) provides an alternative way in which an article embodying matter to be looked at may be published, it is upon the alternative provision in section 1(3)(a) that a person may be said (using the wide terms of the OPA 1959) to have published an article. Publication may need only be to one person and may include paedophilic fantasy: *R v Gavin Smith* [2012] EWCA Crim 398.

As with “article” and “publish”, prosecutors must apply the definition provided for by the legislation when assessing the question of “obscene”. This is distinct from other legislation, including the CCA 1876, which does not define this word and whose ordinary meaning applies.

In this context, prosecutors must consider the evidence that the likely recipient of the childlike sex doll may be depraved or corrupted. Regard may be had at this stage to the other evidence in the case, whether the doll was to be used to satisfy a sexual interest in children and the likelihood that it would be limited to the doll or to child sexual offences. A defence based on an argument that the likely audience is already depraved or corrupt is unlikely to succeed. The Act is not merely concerned with the once and for all corruption of the wholly innocent; it equally seeks to protect the less innocent from further corruption, the addict from feeding or increasing his addiction: *Whyte* [1972] 3 All ER 12. Prosecutors should note, and go on to consider if appropriate, the statutory defence provided for by section 2(5) OPA 1959:

“A person shall not be convicted of an offence against this section if he proves that he had not examined the article in respect of which he is charged and had no reasonable cause to suspect that it was such that his publication of it would make him liable to be convicted of an offence against this section.”

Public interest considerations

In addition to considering the public interest factors tending in favour of, and against, a prosecution in the Code for Crown Prosecutors, prosecutors will also have regard to the following.

The seriousness of this offending is its potential link to sexual offending against children. However, as set out above, it cannot be assumed that this will follow nor is there conclusive evidence that this is the case. Further, as the court in *Dobson* [2017] EWCA Crim 2435 observed: "whilst there is a clear public policy in deterring those who sustain the market in [indecent images of children]the position may be different whose activities are restricted to using dolls for their own private sexual pleasure".

Notwithstanding that prosecutors are entitled to reach a conclusion that childlike sex dolls may have a *tendency* to deprave or corrupt, on the particular facts of the case they are dealing with, they should not base their decisions at either the evidential or the public interest stage on a general and more serious ground that possession of a doll *will* lead to more serious offending.

Where there is other evidence that the suspect was furthering a sexual interest in children, such as relevant communications or indecent images of children, that will be a further factor tending in favour of a prosecution. The absence of any other evidence or offending demonstrating a sexual interest in children and/or that the doll was not likely to come into contact with any other person will be a factor or factors tending against a prosecution. The age of the doll may also be relevant: the younger its apparent age, the greater the public interest in prosecuting.