

# Five areas of law covered in this series of information packs

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Editors’ note

As with the other documents in this series, this booklet is intended as an introduction to the legal framework that underpins the qualified right of freedom of expression enjoyed by artists and arts organisations in the UK. We hope that it will be of some assistance to artists, artistic directors, curators, venue management and trustees and others who seek to protect and promote artistic freedom of expression, especially when planning to programme challenging and controversial works.

This pack is not a substitute for legal advice.

If you are unsure about your responsibilities under the law at any time, you must obtain independent specialist legal advice. Some of the lawyers at work in the sector at time of publication are listed on the website.

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Leda and the Swan: Michelangelo, 1530. Oil on canvas. © The National Gallery, London.



# Preface

Freedom of expression is essential to the arts. But the laws and practices that protect and nurture free expression are often poorly understood both by practitioners and by those enforcing the law. The law itself is often contradictory, and even the rights that underpin the laws are fraught with qualifications that can potentially undermine artistic free expression.

As indicated in these packs, and illustrated by the online case studies – available at [indexonensorship.org/artandoffence](http://indexonensorship.org/artandoffence) – there is scope to develop greater understanding of the ways in which artists and arts organisations can navigate the complexity of the law, and when and how to work with the police. We aim to put into context the constraints implicit in the European Convention on Human Rights and so address unnecessary censorship and self-censorship.

Censorship of the arts in the UK results from a wide range of competing interests – public safety and public order, religious sensibilities and corporate interests. All too often these constraints are imposed without clear guidance or legal basis.

These law packs are the result of an earlier study by Index: [Taking the Offensive](#), which showed how self-censorship manifests itself in arts organisations and institutions. The causes of self-censorship ranged from the fear of causing offence, losing financial support, hostile public reaction or media storm, police intervention, prejudice, managing diversity and the impact of risk aversion. Many participants in our study said that a lack of knowledge around legal limits contributed to self-censorship.

These packs are intended to tackle that lack of knowledge. We intend them as “living” documents, to be enhanced and developed in partnership with arts groups so that artistic freedom is nurtured and nourished.

**Jodie Ginsberg, chief executive, Index on Censorship**

# Foreword by Dominic Johnson

Censorship, obscenity and freedom of expression reflect the higher question of what, in a particular time and place, is sayable or unsayable. Not all artists are intent on pushing the boundaries of this problem, but when we do so, our work might appear to others as too intense, too ugly, too beautiful, too crazy, too painful, too long, too weird, too personal, too pleasurable.

By being *too much*, works of art or performance that reinvent the scope of the sayable will inevitably strain at the limits of aesthetic acceptability. The feeling of the work’s proximity might seem akin to being slapped in the face, held by the scruff or punched in the gut. Hence reactions they prompt – from individuals, communities, institutions, the media or the state – may themselves be profoundly physical, visceral and emotional, redoubling the perceived extremity of the initial provocation.

Beyond aesthetic extremity, a controversial work may also contravene other limits, be they cultural, social, political or legal. The effects of such transgressions attach themselves to artists, and may include financial burdens, stress from stigma or ridicule and institutional blacklisting. To avoid such effects, artists may clip their own wings, through anticipatory self-censorship, to inhibit the creative reach of one’s investigations as an artist.

Yet the conviction that an artist must be free to explore the limits of one’s personal and collective possibility can slip into cliché, or obscure the possibility that my freedom may sometimes impinge on the freedoms of others – curtailing, say, a viewer’s right to remain safe from personal discomfort, psychological upset, intolerance or hate, or the supposed dangers of moral turpitude.

As artists and audiences, each of us is intimately aware of one’s own limits. We may feel squeamish before representations of the spilling of blood, open wounds, sex or extremely intimate demonstrations. We might close our eyes or avert our gazes, fall fainting on the floor, intervene somehow, turn vandal or leave. A liberated state of making, showing and seeing art would welcome all our most sensitive, outraged and overwhelmed states: celebrating our sweaty palms, flushes and blushes, increased heartbeat, syncope, fight or flight. The extent to which such states can be provoked, without causing unwarranted harm or hurt or injury, is the test of how far we might go as artists and audiences, into the still-yet-uncharted territories of both the sayable and the unsayable.

*Dominic Johnson is Senior Lecturer in Drama at Queen Mary University of London.*

# Freedom of expression

Freedom of expression is a UK common law right, and a right enshrined and protected in UK law by the Human Rights Act<sup>1</sup>, which incorporates the European Convention on Human Rights into UK law.

The most important of the Convention's protections in this context is Article 10.

## ARTICLE 10, EUROPEAN CONVENTION ON HUMAN RIGHTS

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.

It is worth noting that freedom of expression, as outlined in Article 10, is a qualified right, meaning it must be balanced against other rights. Where an artistic work presents ideas that are controversial or shocking, the courts have made it clear that freedom of expression protections still apply.

As Sir Stephen Sedley, a former Court of Appeal judge, explained: "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having." (Redmond-Bate v Director of Public Prosecutions, 1999).

Thus to a certain extent, artists and galleries can rely on their right to freedom of expression under Article 10 of the European Convention on Human Rights: the right to receive and impart opinions, information and ideas, including those which shock, disturb and offend.

As is seen above, freedom of expression is not an absolute right and can be limited by other rights and considerations. While the Crown Prosecution Service (CPS) and police have a positive obligation to promote the right to freedom of expression, they also have a duty to protect other rights: to private and family life, the right to protection of health and morals and the protection of reputation.



A Fool for Love: Derrick Santini, 2012. Framed Lenticular, 33" x 47" © [www.derricksantini.com](http://www.derricksantini.com).

The Scream gallery in Mayfair exhibited the artwork for a month until a police officer spotted it from the window of a bus and alerted his colleagues. Two officers went to the gallery and pressed staff to take the image down. According to the Daily Telegraph, quoting a Metropolitan Police spokesman, "the incident had not been recorded as a crime".

<sup>1</sup> At the time of writing (August 2015), the government is considering abolishing the Human Rights Act and introducing a British Bill of Rights. Free expression rights remain protected by UK common law, but it is unclear to what extent more recent developments in the law based on Article 10 would still apply.



# Obscene publications offences explained

Obscene publications are governed by the Obscene Publications Act 1959 and the Obscene Publications Act 1964. The 1959 Act sets out the legal test for obscenity and creates certain offences and defences.

Section 1(1) of the Obscene Publications Act (OPA) 1959 describes an “obscene” item as one that has the effect of tending to deprave and corrupt persons likely to read, see or hear it. This statutory definition is largely based on the common law test of obscenity, as laid down in the case of *R. v Hicklin* (1868) L.R. 3 Q.B. 360, namely:

“whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”

In cases such as *Lady Chatterley’s Lover* [*R. v Penguin Books Ltd* (1961)] and the prosecution of the publishers of *Last Exit to Brooklyn* [*R. v Calder and Boyars Ltd* (1969)] the courts have defined “deprave” as meaning to make morally bad, to debase, to pervert, or corrupt morally, and “corrupt” as meaning to render morally unsound or rotten, to destroy moral purity or chastity, to pervert or ruin a good quality, and to debase or defile.

An item covered by the OPA is referred to as an “article”. Section 1(2) broadly defines an article to include works that can be read or looked at, including recordings, films and pictures (including negatives of pictures, under Section 2(1) of the OPA 1964).

The nature of material that can be held to be obscene is not limited to material of a sexual nature. In fact, it has been held by the courts that material glamourising, or inducing, potentially dangerous behaviour, such as drug taking, may amount to an “obscene” publication [*Calder (Publications) Ltd v Powell* [1965]].

The intended viewer or recipient can be a specific individual or a group.

The Theatres Act 1968 applies a similar definition of obscenity to plays and performances. Section 162(1) of the Broadcasting Act 1990 extends the concept of “publication” under the OPA 1959 to include live programme material.

Other offences may be relevant to this area. In *R. v Gibson* (Richard Norman) [1990], earrings made from human foetuses displayed in art gallery were found to be “obscene”. However, the court held that “obscene” had the limited meaning of corrupting public morals as defined in Section 1(1) of the OPA 1959. Therefore, a prosecution brought not under the OPA but under the common law offence of outraging public decency was not precluded, because the purpose of the common law offence was to protect the public from feelings of outrage by such exhibitions. Outraging public decency has two elements. First, there must be a lewd or disgusting or obscene act that outrages minimum standards of public decency as judged in a contemporary society. Second, the act must be in public view, accessible or within view of the public so it is capable of being seen by at least one person, and it must be in the presence of two or more people, regardless of whether they actually witness the act or are outraged by it.

There are also specific but separate offences relating to extreme pornography and the protection of children. Please refer to the pack regarding child protection law for more information.

Under Section 2(1) of the OPA 1959 there are two kinds of offences relating to publishing obscene material. The first deals with showing and distribution, the second with possession of an obscene article with the intention of showing or distributing it.

Section 2(1) of the OPA states that a person commits an offence if they publish an obscene article, whether or not they do so for gain. “Publish” is widely defined in Section 1(3) of the OPA and includes distributing, circulating, selling, hiring,

giving, lending, showing, playing, projecting and electronic transmission.

A person also commits an offence if they are in possession of an obscene article intended for publication for gain. This is intended to catch situations where an item is in a person’s possession but not yet on display. “Gain” is broadly defined. Section 1(5) of the OPA 1964 defines it as to “accrue by way of consideration for the publication or in any other way.” “Consideration” will cover financial advantage. However, “any other way” is not defined further so the exact parameters of this form of offence are unclear.

This means an artist or presenter could be convicted if it is proved that a work in their possession but not yet on show is obscene, if there was a proven intent to share the work with others, and if they expected to gain financially as a result. It could also cover situations where the intention is to display the work free, for publicity or to deliberately promote a reputation for notoriety.

Works that fall outside of the scope of the OPA may come under the Theatres Act or the common law offence of outraging public decency, while possession of extreme pornographic images could fall under the Criminal Justice and Immigration Act 2008.

As mentioned above, material of a sexual nature can be deemed to be obscene, but the definition can also cover other items such as material advocating drug taking or violence. Work that may engender revulsion, disgust or outrage may be covered by the offence of outraging public decency. The purpose or intention of the artist or gallery, however noble or otherwise, will be immaterial to whether something is deemed to be obscene or to outrage.

Unfortunately, the concept of what is indecent or obscene is not clearly or succinctly defined in UK law and many of the applicable laws are couched in oblique terms and leave scope for subjectivity, especially as behaviour will be judged against prevailing standards. There is a risk that lack of clarity and certainty can lead to inconsistency in the approach the police and the CPS take toward

works of art, and freedom of expression may be compromised because of over caution or sensitivity.

The UK laws applicable in this case include:

- Common law offence of outraging public decency
- The Obscene Publications Act (OPA) 1959
- The Obscene Publications Act (OPA) 1964
- The Theatres Act 1968
- Protection of Children Act 1978
- Indecent Displays (Control) Act 1981
- Video Recordings Act 1984
- Criminal Justice Act 1988
- The Broadcasting Act 1990
- Postal Services Act 2000
- Criminal Justice and Immigration Act 2008 (covering the definition of “extreme pornography”)

Prosecuting and investigating authorities will have to balance the right protected by Article 10 of the European Convention on Human Rights against the rights and freedoms of others, including any people involved or a young audience. The offence itself under the OPA 1959 has been found to be compatible with the ECHR [*R. v Perrin* (Stephane Laurent) [2002]].

# The powers of the police and prosecuting authorities

If the works or performance can be construed to be of an extreme sexual nature or to advocate the use of weapons, drugs or violence, or likely to cause public outrage then the artist's right to freedom of expression may carry less weight [R. v Hicklin; R. v Saunders; R. v Gibson]. It is useful to remember that the people who reach a view on this may hold more conservative views than your own. For that reason, it is important to be aware of the risks and to mitigate them by careful preparation.

Galleries (and their staff, officers or directors) may be committing a criminal offence, if, for example, they sell, show or distribute work that is considered to be obscene or which causes public outrage. You should review and document your professional approach to work that includes extreme sexual images or could be seen as advocating activities harmful to the public such as the use of weapons, drugs or violence. This will help you prepare a stronger case for arguing that prosecution would not be in the public interest if police investigation or charges are possible. Take legal advice. The investigation alone may leave a record that may be disclosed by the police, if, for example, you seek to work with children or vulnerable people in the future.

There are very limited defences to offences under the OPA 1959 that apply if a court decides that an item is obscene. The accused may assert that they had not seen the works or had no reason to believe that the works were obscene. Alternatively, the accused may assert that their actions were for the public good, as defined by Section 4 OPA 1959. Under Section 4 there will be no conviction and works may not be confiscated if it is proved that the work in question is presented in the interests of science, literature, art or learning, or other reasons of general public concern, including ethical merits. "Learning" is to take its normal meaning of "being the product of scholarship, something with inherent excellence gained by the work of a scholar" [DPP v. Jordan (1977) A.C. 699]. To succeed with this defence, the court or jury must be satisfied on the balance of probabilities that the publication was made for the public good.

Under Section 4 of the OPA, the court would need to consider, on the one hand, the number of people they believe would be depraved or corrupted by the work, the strength of the work's tendency to deprave and corrupt, and the nature of the depravity and corruption depicted. On the other hand, the court must consider the work's artistic merit. The accused would need to prove that publication or other public presentation was justifiably in the public good, having weighed all these factors.

There is a slightly different "public good" defence for performances, films and soundtracks. Here it applies if publication of the film or soundtrack is justified as being for the public good because it is in the interests of drama, opera, ballet or any other form of art, literature or learning.

The public good defence applies only to offences under the OPA and Theatres Act and not to any other offences such as outraging public decency or possession of extreme pornographic material.

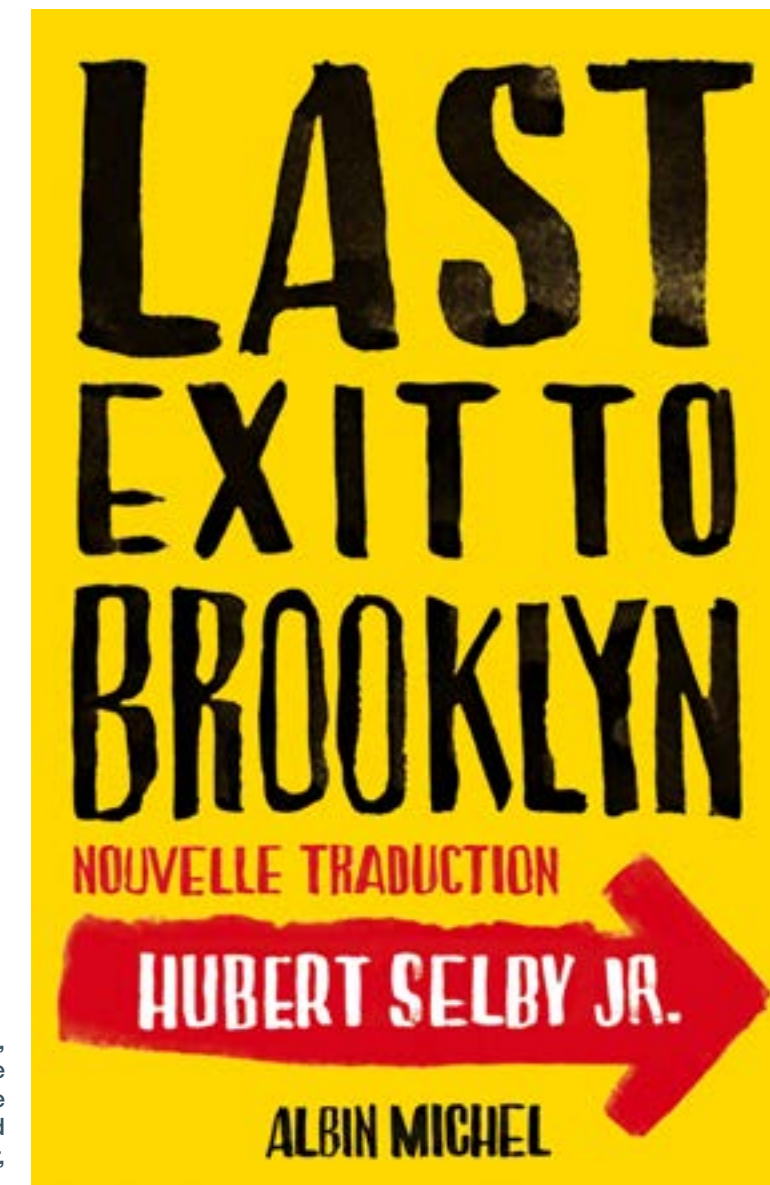
A person charged with an offence under the OPA has a right to ask to be tried by a jury. It will be up to the jury to decide if an article meets the test for obscenity set out in Section 1(1) of the OPA. The jury will need to consider the nature of the article, what the accused was doing with it, where it was shown, the likely audience and prevailing social and cultural standards.

The CPS, the police and the courts have positive obligations to promote freedom of expression, but are also required to protect rights to private and family life, and, in the context of freedom of expression rights, the protection of health and morals, and the reputation or rights of others. The CPS must reasonably consider that bringing a prosecution is in the public interest and must make that decision after balancing these competing rights.

The police have the right to enter and search premises and to seize artworks in certain defined circumstances. Under Section 3 of the Obscene Publications Act 1959, a magistrate may issue a warrant to search premises for obscene materials and seize articles for forfeiture. More generally, under Section 19 of the Police and Criminal Evidence Act 1984 (PACE), the police may seize anything on the premises if the officer has reasonable grounds to believing that it has been obtained as a result of an offence or evidence of one. The officer must be on the premises lawfully, such as being on public property, carrying a warrant or have been invited in. Section 8 of PACE allows a magistrate to issue a warrant to search a premises if a serious offence has been committed. Section 18 refers to the power to enter and search premises occupied or controlled by a person who has been arrested.

If items are seized, the police may apply to the court for forfeiture, and permanently confiscate the work. They may additionally investigate whether anyone has committed a criminal offence. As part of the investigation they may arrest the artist and gallery staff, and conduct interviews under caution.

In all cases the CPS will consider whether there is sufficient evidence for a realistic prospect of conviction, including whether the alleged offence comes within statutory or common law, the definition of the offence and whether any defence is likely to succeed. If the CPS decide that there is enough evidence for a realistic prospect of conviction, they will then need to consider if it is in the public interest to prosecute, taking into consideration the right to freedom of expression and the competing rights of all involved.



First published by John Calder in Britain in 1966, Hubert Selby's novel *Last Exit to Brooklyn* came to the attention of Tory MP Sir Cyril Black, who brought a private prosecution for obscenity against it. The eminent lawyer and creator of *Rumpole of The Bailey*, writer John Mortimer, led a successful appeal.



# Practical guidance for artists and arts organisations

This guidance applies if you are considering displaying, performing and screening any works where obscenity issues might arise, whether of an extreme sexual nature, involving extreme violence, drug taking or actions that cause public outrage. The guidance also applies where artworks are interdisciplinary and/or site-specific, acknowledging that performance art, an area of artistic practice where these boundaries are tested, tends not to conform to any single form, media or mode of presentation.

Consider the following preparatory steps:

- Make your motivation and reasons for making or displaying the work clear and why you consider the work to have artistic merit.
- Provide the context for the work, what the artist is seeking to achieve, their previous work, the role of controversy in their work.
- Consider the public interest in this work and how it contributes to a wider debate in society.
- Keep a clear written record of your reasons and your decision making process. (See Appendix 1 for an example of a written record).
- Remember that the right to freedom of expression includes the right to express ideas and opinions that shock, offend and disturb.
- Consider factors to be balanced against the right to freedom of expression – including the level of offence or harm that might be caused, the type and number of people likely to be affected and steps you have taken to mitigate any potential offence.
- Consider advising the audience on content or restricting access to over 16/18. This should be factual advice not evaluative – so say that it is “sexually explicit” rather than “may be offensive”.
- Demonstrate an awareness of previous similar displays that have been successfully exhibited or presented.
- Review (media and other) reactions to recent artworks with an awareness that the work will be judged against current recognised standards of propriety and decency, which is a fluid test.
- If the work may be viewed by children, refer to local authority child protection policies.

As a matter of good practice you might want to prepare a commitment to artistic and intellectual freedom of expression. (See box for a sample statement based on a template by the National Coalition Against Censorship in New York.)

## STATEMENT OF COMMITMENT TO FREEDOM OF EXPRESSION

We uphold the right of all to experience diverse visions and challenging views that may, at times, offend. We recognise the privilege of living in a country where creating, exhibiting and experiencing such work is protected by fundamental human rights enshrined in UK law. Should controversies arise as a result, we welcome public discussion and debate. We believe such discussion is integral to the experience of the art. But consistent with our fundamental commitment to freedom of expression, we do not censor exhibitions in response to political or ideological pressure.

This could be accompanied by a policy that sets out the way you will handle controversial exhibitions or performances. This should include clear creative and managerial curatorial procedures, arrangements to deal with individual complaints and how the press will be handled. There is useful information on this on <http://ncac.org/resource/museum-best-practices-for-managing-controversy/>. Such a policy can be drafted with the help of a lawyer or other arts organisations with experience of exhibiting controversial works. Consider contacting the appropriate police officer responsible for community relations in your area. A good understanding of the nature of the work presented in your venue could be invaluable if the police receive complaints about your work. This is particularly important where controversial works are to be presented in small, rural or conservative communities where there is a greater risk of causing offence or where police officers are unused to the concept of freedom of expression in art.

Advance preparation should bear in mind the principal legal standard of “reasonableness”. The factors relevant to meeting that standard may include:

- The artistic purposes of an organisation.
- Engagement with the authorities; making early contact will make it easier for them to protect your right to freedom of expression.
- Engagement with the press and individual complaints.
- A willingness to make contingency preparations to manage the risk of any disorder, and subject to the imperative of ensuring that the artistic work is not unduly constrained.

If you think the work may be borderline or cross over the line (remember at this stage you need to apply the probably conservative standards of members of the local community, or local police officers, not your own standards), it would be best to take legal advice so that you can be advised on the risks.

We recommend that you document the decision making process carefully (see Appendix 1). Such a record will be helpful in preparing a response to any police enquiries, and will be useful in responding to protesters and critics, even if no legal action is proposed.

In the case of doubt consider contacting a lawyer with relevant expertise. If you are contacted by the police with regard to a particular work, project or programme, contact a lawyer. If the police seek to remove or prevent the presentation of a work, seek legal advice urgently.

Photographer Rupri Kaur's images of a woman wearing menstrual blood stained jogging pants were twice removed – but eventually restored - by the photo sharing social media site Instagram for allegedly failing to follow their community guidelines. © Rupri Kaur/Instagram





# Questions and answers

## Q. What is the difference between Article 10 of the European Convention on Human Rights and Article 19 of the UN Declaration on Human Rights?

A. Freedom of expression, as outlined in Article 10, is a qualified right, meaning considerations regarding its protection must be balanced against other rights and interests. Article 19 of the UN Declaration on Human Rights, which also addresses freedom of expression, is less qualified: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Nevertheless, even within the UN Declaration there are provisions that contemplate some qualification of the freedom expressed in Article 19. It is the European Convention on Human Rights that is currently relevant to UK law.

## Q. Can I challenge a decision by a local authority or police body?

A. Yes. The usual way of doing so would be via judicial review. You should seek specialist legal advice before bringing your claim. Be aware that you must bring your claim as soon as possible and in any event no later than three months after the decision you are challenging. Judicial review is not ordinarily an effective means of quickly overturning decisions. Claims may take many months to be heard. However, it is possible to apply for a claim to be heard quickly if there are good grounds to do so. Even if you succeed you will not usually recover damages: they are awarded at the court’s discretion. The court might quash the decision under challenge, and/or require the public authority to adopt a different procedure in its decision-making.

## Q. What are the costs to the organisation calling for review? If the review finds in favour of the arts organisation – is compensation payable and are expenses reimbursed?

A. There would be court fees for filing the review, as well as the need to pay legal costs to their own lawyers (unless acting pro bono) and the risk of being required to pay legal costs for the opposing party if they succeed. If the arts

organisation succeeds, it may be entitled to reimbursement of expenses (usually around 60-70%) and it may be entitled in some cases to an award of money by the court.

## Q. Does it make a difference if a contested display is outside the venue?

A. No, the location of a display will not make any difference to prosecutions under obscenity laws. Outside displays could also expose an artist or gallery to liability under the Indecent Displays (Control) Act 1981 (IDCA). The IDCA does not apply to displays in an art gallery or museum and visible only from within the gallery or museum. However, a display projected onto the outside wall of a gallery would not be covered by this exception. Outside performances and presentations may escape indecency or obscenity charges but still fall foul of the common law of public nuisance if the effect of the act is to endanger “the comfort of the public,” and may cover offensive or potentially dangerous behaviour in public.

## Q. How do the CPS and the courts decide if an image is obscene?

A. The OPA 1959 states that an image or item is obscene if its effect is such as to tend to deprave and corrupt persons likely to read see or hear it. The courts have considered the definitions of “deprave” and “corrupt” in cases such as *R v Penguin Books Ltd* (1961) and *R v Calder and Boyars Ltd* (1969). (See the section on the OPA above regarding definitions of “deprave” and “corrupt”.) The CPS will apply this definition when considering whether to prosecute.

## Q. What are the legal issues affecting the relationship between artist and arts organisation?

A. If an investigation begins before the work is shown, those involved in its proposed presentation may face charges such as conspiracy to outrage public decency, possession of extreme pornographic images or being in possession of an obscene article for publication for gain. If the gallery has not seen the work and has no reason to suspect its nature, it might have a defence on those grounds. Since this defence may well be

contested by the artist or others involved, all should have a clear understanding of the work and its intent, its intended audience and how it will be presented.

Once the work is on display, both the artist and the arts organisation may face charges such as publishing an obscene article, outraging public decency or possession of extreme pornographic images. It is important that both the arts organisation and artist have a clear understanding of the issues involved and the artistic merit of the work, why it is thought appropriate for the work to be shown to the public and any steps taken to protect any vulnerable groups.

## Q. Does “artistic merit” impact the extent to which an artist’s freedom of expression will be protected?

A. It is more likely that a gallery or artist will be permitted to display controversial works if they are well known and if it is generally considered that the work has artistic merit. This is something that may not be obvious to some non-specialist police officers, though reference to the Metropolitan Police Arts & Antiquities unit or officers dealing with conventional pornography, may be of assistance when contextualising and explaining the work’s importance.

## Q. What defences does the gallery/theatre potentially have?

A. The gallery could seek to argue that the work is not obscene and will not “deprave” or “corrupt” those likely to see it. In some limited cases, it may be argued that it was unaware of the true nature of the work. The gallery may also be able to argue that the work was “for the public good” in cases investigated under the OPA. The gallery could also seek to argue that prosecution/conviction would breach rights to freedom of expression. All of these defences have their limitations and will be dependent on the views that others take of the work.

If a gallery has taken the steps recommended in this guidance and considered the likely reasonable response of the public properly and in advance, there are reasonable prospects of heading off a prosecution or convincing a jury that the work was not obscene or that a defence should apply. However, you will need specialist legal advice tailored to your own circumstances.

Theatres may be able to argue that the work is not obscene or rely on the “public good” defence applicable to theatres.

## Q. What decisions are the police able to take and how can they implement these decisions?

A. The police can seize work under search warrants or as evidence for future prosecution. They can also seize work under a warrant for forfeiture issued by the magistrates court under Section 3 of the Obscene Publications Act 1959. The police can arrest and/or interview under caution people they believe to have committed criminal offences. Where there is a hate crime element police will refer the case to the CPS. Where the case is suitable for disposal in the magistrates court, the police may charge it without reference to the CPS. There will be an opportunity to influence police investigations by preparing well for interviews and ensuring that the police have access to all the relevant evidence that may assist. Decisions of the CPS can be influenced by making written representations about the evidence, any defences such as “public good” and the lack of public interest in prosecuting, which may include reliance on Article 10 of the European Convention on Human Rights.



A commuter reads a copy of *Lady Chatterley’s Lover* by DH Lawrence on November 3, 1960 - the day the book went on sale to the general public. © Hulton-Deutsch Collection/CORBIS



**Q. Do I have to give the script of a play or images I intend to exhibit to the police or local authority prior to the show opening if requested?**

A. You only have to provide a copy of a script (or any document or property) if the police or local authority has a legal power to view and seize that material. Under Section 10 of the Theatres Act 1968, a senior police officer can make an order requiring the production of a script of a play if s/he has reasonable grounds to suspect an obscenity offence has been or will be committed, or the play involved or is likely to involve the use of threatening abusive or insulting words or behaviour performed with the intention of provoking a breach of the peace, or if the performance created or is likely to create a breach of the peace. An order under that section empowers any police officer to require the person named in the order to produce a script of the play and to allow the officer to make a copy of it.

If a local authority or the police ask to see particular artistic material you should ask them to clarify whether they are demanding that you hand over the material, or whether they are simply asking for your voluntary co-operation. If they are demanding that you provide the material, ask them to identify the legal power that gives them the right to do this and ask to see a copy of any order made under the Theatres Act 1968.

You should make a contemporaneous note of their answers. If the police are simply seeking your voluntary co-operation then you do not have to give them anything. If in doubt about the scope of their powers, consult a lawyer.

**Q. What potential measures can arts organisations' directors take if the police try to seize artworks?**

A. Gallery directors could seek to explain the artistic merit in the work and argue that they are showing work for public good. They could consider agreeing to take the work down voluntarily pending a discussion about the merits of the work. If you have documented the reasons for exhibiting the work and established good

relations with the police, you will be in a stronger position to ensure that the exhibition can go ahead. Be careful about resisting physically or engaging in a heated debate with officers who could then arrest you for obstruction.

**Q. Is there a right not to be offended?**

A. Under UK law there is no legal right not to be offended. The European Court of Human Rights has stated on numerous occasions that the right to freedom of expression includes the right to shock, disturb and offend.

**Q. In general is it a good idea to cooperate with the police?**

A. Yes, in general, it is, for both practical and legal reasons. For practical reasons, as a matter of common sense, the more cooperative and constructive an artistic body appears to be, the less likely it is that the police would move precipitously to shut down a work. For legal reasons, conveying information to the police about the purposes of a work, and a willingness to consider alternatives, will be relevant to the reasonableness test.

**Q. What happens if police advise you not to continue with something / take it off as they have unspecified concerns about public safety – but tell you it is your choice and they can only advise you?**

A. The artist would in principle be free to continue with the work. It would be advisable, however, to ensure that the reasons held by the police were understood and that the artist seeks legal advice. It will be useful to establish the reasons why the police are making such a recommendation, and important to understand what criteria the police will apply when deciding whether to take further action later.



The cover of an anthology of letters by schoolteacher Mary Whitehouse, founder in 1964 of the National Viewers' and Listeners' Association. It campaigned against what she called the "propaganda of disbelief, doubt and dirt" on the nation's radio and television sets.



# Appendix I: Documenting and explaining a decision

Please note: Appendices are only examples and should not be relied upon in individual cases. They are not a substitute for specialist legal advice tailored to your particular circumstances.

**Example: A gallery seeks to exhibit a video of dressed and semi-naked men instructing each other in the practice of extreme sexual acts, made by a well-known visual artist who has previously exhibited photographs documenting LGBTI communities. The gallery owner decides the work has value and should be exhibited. The decision might be documented as follows:**

## Reasons for the decision

1. The artist seeks to challenge the boundaries of photographic depictions of the LGBTI community.
2. The work is made in response to a debate of general public interest – society's approach to the portrayal of the LGBTI community.
3. The work has artistic merit and the artist has sold/exhibited numerous copies of previous works that have been positively reviewed (give examples) and has works in major art collections.
4. There is a public interest in freedom of artistic expression itself and we consider that this is work of value which should be seen exhibited and viewed so as to further an important debate.
5. We recognise that there is a risk the work may be misunderstood by some individuals and so cause undue offence or concern. Accordingly, we and the artist have taken steps to ensure children are adequately protected including:
  - a. We have confirmed that informed written consent was given by participants and the artist has confirmed this in writing.
  - b. We have considered whether or not our advertising material should contain warnings that the exhibition contains images which are sexually explicit.
  - c. We have considered whether or not we should issue advice or put a warning on the entrance to the gallery that the show is not suitable for children under 16/18.

**Example: A festival wishes to present a stage-based performance involving body piercing, bodily fluids and female nudity at a high profile publicly-funded theatre. The theatre decides the work is formally and conceptually compelling and should be presented. The decision might be documented as follows:**

1. The festival is well respected and recognised as supporting challenging and risk-taking work.
2. The theatre is known for working in partnership.
3. The artist seeks to confront/challenge/respond to questions of representations of the human body.
4. This work is made in response to a debate of general public interest – society's approach to the human body.
5. The artist is a young practitioner whose talent is championed by a number of distinguished scholars, writers, artists and producers.
6. There is a public interest in freedom of artistic expression itself and we consider that this is work of value which should be seen to further the debate.

7. We recognise that there is a risk the work may be misunderstood by some individuals and so cause undue offence or concern, and have taken measures to address this.
8. We have ensured that the promotional material contains appropriate advice about challenging images which may cause offence/not be suitable for children under 16/18.
9. Similar advice will be on the entrance to the theatre and in the event freesheet.
10. A post-show discussion has been organised to enable the artist, organisers and audience to debate the issues and confront controversial topics in a safe and supportive environment.
11. We recognise that the work contains actions and materials which may raise health and safety concerns.

12. We have conducted a risk assessment and put a number of protocols in place in collaboration with the artist and venue to ensure there are no health and safety breaches and that the artists, audience and venue staff are not at risk.
13. We have consulted with the trustees of both the festival and the venue.
14. We have briefed all front of house and other relevant staff on the nature of the work and possible causes for concern by the audience and informed/involved them in the above decision-making process.









# Art and the Law

A guide to the legal  
framework impacting  
on artistic freedom  
of expression