THE LEGAL CONCEPT OF OBSCENITY IN WESTERN AUSTRALIA

In *Mackinlay v. Wiley* (1970)[1] the Supreme Court of Western Australia had to consider, apparently for the first time, the legal meaning of the term "obscene". The statutory provision in question was s. 2(1) of the Indecent Publications Act 1902-1967 (W.A.), which states:

> 2. Any person who—
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> (1) Prints, makes, sells, publishes, distributes, or exhibits any obscene book, paper, newspaper, writing, picture, photograph, lithograph, drawing, or representation; . . .
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> shall be liable to a penalty . . . .

The term "obscene" is not defined in this or any other West Australian statute, though it may be argued that the wording of s. 204(1) of the Criminal Code (W.A.), which also prohibits the publication and exhibition of obscene articles, implies that an article is obscene in law if it tends to corrupt morals, for this section states (writer's italics):

> 204. Any person who knowingly, and without lawful justification or excuse,—
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> (1) Publicly sells or exposes for sale any obscene book or other obscene printed or written matter, or any obscene picture, photograph, drawing, or model *or any other object tending to corrupt morals;* . . .
>
> is guilty of a misdemeanour . . . .

This point was not referred to by the West Australian Supreme Court, though the year previous in Queensland, Matthews J. had stated in *Herbert v. Guthrie, ex parte Guthrie*[2] that the term "obscene" in a Queensland statute which was designed to curb the dissemination of obscene publications was to be given the same meaning as that term has in s. 228 of the Criminal Code (Qld.)—which is identical with s. 204 of the Criminal Code (W.A.)—subject to any statutory qualifications; he then indicated that so far as he was concerned the words "tending to corrupt morals" in s. 228 implied that the legal concept

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1 [1971] W.A.R. 3.

2 [1970] Qd. R. 16 (F.C.); affirmed *sub nom. Guthrie v. Herbert* (1970) 122 C.L.R. 527 (H.C.)

of obscenity involved just such a tendency.[3] This point will be referred to again later. The only observation that needs to be made here is that it would appear reasonable to expect that the term "obscene" should be given the same legal meaning for all purposes within a single legal jurisdiction unless a statute either expressly or by clear implication indicates otherwise.[4]

The facts in *Mackinlay v. Wiley* were these. Mackinlay was a university student and editor of the paper published by the Guild of Undergraduates of the University of Western Australia known as *Pelican*. On 3 September, 1969, he published an issue of *Pelican* on the theme of censorship in general and film censorship in particular and as a result of this he was convicted by a Court of Petty Sessions on a charge of having published an obscene paper contrary to s. 2(1) of the Indecent Publications Act. He was fined $50 and ordered to pay $30.90 in costs. It is not known precisely what parts of *Pelican* led the Magistrate to conclude that the issue in question was obscene though two of the Supreme Court Judges held that parts which the Magistrate might reasonably have concluded were obscene included a quotation on p. 10 from a statement made by an "underground" film director, Albie Thoms, on what he thought about censorship and censors, with special reference to members of the Commonwealth Film Censorship Board, the reproduction (also on p. 10) of a letter written by the chief censor ordering the deletion of a stated passage of dialogue—which included the word "fuckin"—from the film *Hey Mama*, the reproduction on p. 12 of a still photograph showing an act of lesbianism from the film *Flesh*, and an article on the final page (p. 20) by one Wellington Rundle entitled "Roth's Portnoy—Pullitzer Prize-Winner?" which included a number of passages from that

3 at p. 33. And see n. 33, *infra*.

4 *Quaere*, should the term "obscene" when used with reference to oral words have the same legal meaning as it does when used with reference to objects and publications? In *Bradbury v. Staines, ex parte Staines* [1970] Qd. R. 76, a case concerning the use of obscene language under s. 7(c) of the Vagrants, Gaming and Other Offences Act, 1931-1967 (Qld.), the Full Supreme Court of Queensland clearly thought that it should, though in England in *Myers v. Garrett* [1972] CRIM. L.R. 232, a case which concerned an almost identical provision in s. 54(12) of the Metropolitan Police Act, 1839 (U.K.), the Queen's Bench Divisional Court would appear to have thought otherwise. In Western Australia, magistrates would appear to follow the attitude of the Queen's Bench Divisional Court in this respect (there is no officially reported case to support this assertion, but see, e.g., the newspaper article headed "'Kill Pigs' Call to Crowd" in the *West Australian* dated 18 January, 1972); the relevant Western Australian provision is in s. 59 of the Police Act, 1892-1972.

book.[5] This issue of *Pelican* also contained a reproduction of Beardsley's print of "Lysistrata and the Three Ladies", which had been held to be obscene in Queensland,[6] and a reproduction of a banned poster for the Patch Theatre's production of *Othello,* which showed a naked blackamoor lying on top of a naked white lady on a bed.

Mackinlay appealed against his conviction to the Full Supreme Court on three main grounds: first, that the magistrate was wrong in fact and in law in holding that the paper in question was obscene within the meaning of the Indecent Publications Act; second, that in considering the matter of obscenity the magistrate had misdirected himself in certain respects; and third (a matter that will not be considered further in this article), that the magistrate was wrong both in fact and in law in holding that he had published the paper. The Court (Virtue S.P.J. and Lavan J.; Wickham J. dissenting) dismissed the appeal.

As *Mackinlay v. Wiley* is the first reported case in Western Australia to concern the meaning of the term "obscene", it may be helpful before considering this case further briefly to note the ways in which Australian Courts had previously defined the term "obscene" in other States.[7] The first reported Australian case dealing with obscenity was *Bremner v. Walker* (1885) (Full Supreme Court of N.S.W.).[8] In that case Martin C.J. said of the term "obscene" to be found in the Obscene Publications Prevention Act 1880 (N.S.W.):[9]

> A good definition of that term runs thus: "Obscene; offensive to chastity and delicacy; impure; expressing or presenting to the mind or view something which delicacy, purity and decency forbid to be exposed, as obscene language and obscene pictures". That is a very comprehensive and accurate definition of what is meant by this term "obscene".

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5 See p. 9 (Virtue, S.P.J.), and pp. 17-18 (Lavan, J.). N.b. Wickham J.'s comments on these sections of *Pelican,* at pp. 20-21.

6 A subsequent order nisi to review the magistrate's decision in this case was discharged by the Full Supreme Court of Queensland; see *Herbert v. Guthrie, ex parte Guthrie,* [1970] Qd. R. 16; affirmed *sub nom. Guthrie v. Herbert* (1970) 122 C.L.R. 527.

7 For a more detailed survey of the ways in which Australian Courts have defined the term "obscene", see Richard G. Fox, *The Concept of Obscenity* (1967), ch. 7. For surveys of the way English Courts have defined this term, see: *op. cit.,* ch. 3; Norman St. John-Stevas, *Obscenity and the Law* (1956); C. H. Rolph, *Books in the Dock* (1969); (Arts Council of Great Britain), *The Obscenity Laws* (1969); D. G. T. Williams, *"The Control of Obscenity"* [1965] CRIM. L.R. 471 & 522; and Alec Samuels, *"Obscenity and the Law",* (1969) 20 N. IRELAND L.Q. 231.

8 6 L.R. (N.S.W.) 276.

9 at p. 281.

This definition makes the test of obscenity essentially subjective for this test is dependent solely upon the attitude of whoever has to decide whether an article is obscene.

The two other judges in *Bremner v. Walker* did not state explicitly what they understood by the term "obscene", though Innes J. may be said to have implied in his judgment that he followed not a subjective test like Martin C.J. but the *prima facie* objective test that had been enunciated less than twenty years previous in England by Cockburn C.J., in the celebrated obscenity case of *R. v. Hicklin* (1868).[10] In that case the English Chief Justice had said:[11]

> . . . I think the test of obscenity is this, 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 *Bremner v. Walker,* Innes J. said of an obscene publication:[12]

> And who can doubt that such a publication must exercise a corrupting and depraving influence upon any but firm and stable minds—disgusting all whom it did not deprave—a direct corrupter of chastity in the vast majority of cases—a vile instrument of furthering the vilest purposes?

The implication that Innes J. was following Cockburn C.J.'s test, otherwise known as the *Hicklin* test, of obscenity lies in his reference to the "corrupting and depraving influence" of the publication in question.

From 1885, the year of *Bremner v. Walker,* to 1948, Australian judges would seem to have been uncertain whether to follow Martin C.J.'s subjective test of what is obscene (viz. whether the article in question is an affront to decency) or the apparently objective *Hicklin* test (*viz.* whether the article in question tends to deprave and corrupt those who are likely to come in contact with it).[13] Then in 1948 the Full Supreme Court of Victoria considered the meaning of the term "obscene" in the case of *R. v. Close.*[14] This concerned an appeal against

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10 L.R. 3 Q.B. 360. On the lack of objectivity that this test, and the later English statutory test based on the *Hicklin* test, in practice involves, see n. 24 and text, and n. 70, *infra.*

11 at p. 371.

12 6 L.R. (N.S.W.) 276, at p. 286. The publication referred to would appear to be that which the English Court of Appeal considered in *In re Besant* (1879) 11 Ch. Div. 508.

13 See, e.g., the judgments in *Ex parte Collins* (1888) 9 L.R. (N.S.W.) 497 (F.C.); *Ex parte Chidley* (1914) 14 S.R. (N.S.W.) 97 (F.C.).

14 [1948] V.L.R. 445.

conviction by an author, Robert Close, who had been found guilty of having published obscene matter in a novel of his entitled *Love me Sailor*. All three judges in this case (Herring C.J., Gavan Duffy and Fullagar JJ.) considered the meaning of the term "obscene", here in the context of the common law offence of publishing an obscene libel. Gavan Duffy J. cited the *Hicklin* test with approval[15] and Herring C.J. also approved of this test though without himself repeating the actual words used by Cockburn C.J.[16] Fullagar J. too, expressly approved of the *Hicklin* test, though only as *part* of the test of obscenity.[17] He argued that from a consideration of the ordinary meaning of the term "obscene", that term was not an adjective which referred only to that which is likely to deprave and corrupt. "As soon as one reflects", he said, "that the term 'obscene', as an ordinary English word, has nothing to do with corrupting or depraving susceptible people, and that it is used to describe things which are offensive to current standards of decency and not things which may induce to sinful thoughts, it becomes plain, I think, that Cockburn C.J. in the passage quoted from *R. v. Hicklin* was not propounding a logical definition of the word 'obscene', but was merely explaining that peculiar characteristic which was necessary to bring an obscene publication within the law relating to obscene libel. The tendency to deprave is not the characteristic which makes a publication obscene but is the characteristic which makes an obscene publication criminal".[18] He then summed up his understanding of what constitutes an obscene libel thus: "There is no obscene libel unless what is published is *both* offensive according to current standards of decency *and* calculated or likely to have the effect described in *R. v. Hicklin*" (the judge's italics).[19]

This two-fold test of what is obscene for the purposes of the criminal law was also reflected in Herring C.J.'s judgment in *R. v. Close,* for at the beginning of his judgment he said:[20]

> The offence charged is commonly known as obscene libel and, as I understand the law, it consists in the publication of any indecent, lewd or filthy matter, which tends to corrupt the morals of society. . . . Not only must public decency be outraged by the publication but also public morality endangered.

15 at p. 453.
16 at pp. 446-47.
17 See pp. 461-63.
18 at p. 463.
19 *loc. cit.*
20 at p. 446.

In *R. v. Close,* then, the Supreme Court of Victoria turned the *Hicklin* test of obscenity into only one half of the legal test of obscenity, at least for the purposes of the law of Victoria. Twenty years later, the High Court developed the test of obscenity still further. The case in question was *Crowe v. Graham and Others* (1968).[21] Strictly that case concerned the meaning only of the term "indecent" and not of the term "obscene"; nonetheless, one of the judges, Windeyer J. considered the meaning of the term "obscene" at some length on the ground that the terms "indecent" and "obscene" were synonymous for the purposes of the statutory provision under consideration, namely s. 16(d) of the Obscene and Indecent Publications Act 1901-1955 (N.S.W.).[22] Windeyer J. cited with approval the first of Fullagar J.'s statements quoted above concerning what is obscene for the purposes of the criminal law, but he then continued: "Of this [statement] I would say only that the word 'obscene', as an ordinary English word, does, I think, still carry the meaning which Doctor Johnson gave as its primary sense: 'Immodest; not agreeable to chastity of mind; causing lewd ideas'; and, when used in the criminal law, it carries too the emphasis of the other sense, given by Doctor Johnson as 'offensive; disgusting'. Writings are obscene by reason of what they describe, express or bring to mind, and the way and the words by which they do it. It is assumed incontrovertibly by the common law that obscene writings do deprave and corrupt morals, by causing dirty-mindedness, by creating or pandering to a taste for the obscene."[23]

As is apparent from the last sentence quoted, Windeyer J.'s interpretation of Fullagar J.'s test of obscenity makes the requirement of

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21 41 A.L.J.R. 402.

22 See pp. 407-8 for Windeyer J.'s reasons for treating both of these terms as synonymous. The present writer, on the other hand, is far from convinced, either from the point of view of statutory interpretation or on the basis of the judicial authorities cited by Windeyer J. that this should be the case. However, in New South Wales, Helsham J. has subsequently also held (without referring to Windeyer J.'s observations on this matter) that the terms "indecent" and "obscene" were synonymous for the purposes of reg.4A (1) (*a*) of the Customs (Prohibited Imports) Regulations (see *Chance International Pty. Ltd. v. Forbes* [1968] 3 N.S.W.R. 487, at p. 489), and Windeyer J.'s interpretation of the terms "indecent" and "obscene" was approved by Lavan J. in Western Australia in *Mackinlay v. Wiley* (see [1971] W.A.R. 3, at p. 13). Lavan J. also observed (*loc. cit.*) that the terms "indecent" and "obscene" denoted the same concepts under ss. 2 (2) - (7) of the Indecent Publications Act 1902-1967 (W.A.).

23 at p. 409.

a tendency to deprave and corrupt—i.e. the requirement under the *Hicklin* test—a mere fiction, or to be more precise, an assumption based upon the indecent nature of the matter under consideration. Windeyer J. did not hide the fact that so far as he was concerned the *Hicklin* test had no practical significance; indeed, he asserted that this had in fact long been the case. He said:[24]

> Despite the obvious unsuitability of [the *Hicklin* test] as a legal definition of obscenity, it, taken from its context, has had a great vogue. It has fostered much misunderstanding. But it has been too often repeated to be now discarded. . . . Yet it has only survived really because, although constantly mentioned, it and its implications have been ignored.

He then went on, stating what he considered actually happened in obscenity cases:

> Courts have not in fact asked first whether the tendency of a publication is to deprave and corrupt. They have asked simply whether it transgresses the bounds of decency and is properly called obscene. If so, its evil tendency and intent is taken to be apparent.

Windeyer J. approved of this subjective test of obscenity for the purposes of the criminal law. In a later part of his judgment he set out this test of obscenity more simply thus: "Does the publication, by reason of the extent to which and the manner in which it deals with sexual matters, transgress the generally accepted bounds of decency?"[25] For Windeyer J. then, the legal test of obscenity was essentially a single, subjective test which concerns not simply whether an article is considered to be obscene in the general sense of the word, but whether it is considered to be so obscene that it transgresses the community's generally accepted bounds of decency.

It may be argued that this test propounded by Windeyer J. is objective in that it concerns "the generally accepted bounds of decency", that is, the bounds of decency that are currently accepted by the Australian community.[26] However, this is not in fact so, for the question of what are the generally accepted bounds of decency is in practice dependent solely upon the opinion of the judicial arbtier of fact and

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24 *loc. cit.*

25 at p. 410.

26 See pp. 411-12. Cf. Wickham J.'s statement in *Mackinlay v. Wiley* that "The community . . . probably means the particular civilisation area in which the relevant law applies" ([1971] W.A.R. 3, at p. 25).

not on any objective test.[27] Indeed, Windeyer J. never contemplated that his test of obscenity should be objective, for after stating the test quoted above, he continued: "That [test] is a question of fact to be decided by the tribunal of fact. It is to be answered by reading the publication. *Common sense and a sense of decency must supply the answer*" (writer's italics).[28]

By the time that *Mackinlay v. Wiley* came up for trial the judicial definition of the term "obscene" had in effect turned a full circle in Australia, from the single, subjective definition stated by Martin C.J. in *Bremner v. Walker* of 1885, through the subsequent adoption by some Australian judges of Cockburn C.J.'s *prima facie* objective definition in *R. v. Hicklin,* on to the twofold, part-subjective, part-objective, definition enunciated by Fullagar J. in *R. v. Close* of 1948, and finally back to the single, subjective test laid down by Windeyer J. in *Crowe v. Graham and Others* in 1968. The Magistrate who heard the trial proceedings in *Mackinlay v. Wiley* applied the latest test of obscenity namely that laid down by Windeyer J. in *Crowe v. Graham and Others* two years previous. As a result of the application of that test Mackinlay was convicted of having published an obscene paper contrary to s. 2(1) of the Indecent Publications Act 1902-1967 (W.A.). On appeal, it was argued for Mackinlay that that magistrate had applied the wrong test; it was argued that the magistrate ought not merely to have asked himself whether the matter complained of transgressed the generally accepted bounds of decency in the community but that he ought also to have asked himself whether the publication had a tendency to deprave or corrupt the class of persons to whom it was published. Perhaps not unexpectedly, the West Australian Supreme Court decided by a majority (Virtue S.P.J. and Lavan J.) to follow Windeyer J.'s single, subjective test of obscenity and they therefore dismissed the appeal on this point.[29] Virtue S.P.J. set out the current test of obscenity thus:

> Whether the writing comes within the [ordinary] meaning of obscenity . . . and goes so far beyond accepted standards as to shock the tribunal of fact.[30]

Upon reviewing the evidence to see whether the magistrate could reasonably have concluded as a matter of fact that the offending issue

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27 n.b. the comments made on this matter by Hart J., in *Herbert v. Guthrie, ex parte Guthrie* [1970] Qd. R. 16, at pp. 25-26, and by Zelling J. in *Romeyko v. Samuels* (1972) 2 S.A.S.R. 529, at pp. 543-44.

28 41 A.L.J.R. 402, at p. 410.

29 [1971] W.A.R. 3, at pp. 8 (Virtue S.P.J.), 13 (Lavan J.).

30 at p. 8.

of *Pelican* was obscene for the purposes of the criminal law, both Virtue S.P.J. and Lavan J. held that the magistrate's decision in this respect was reasonable and consequently refused to overturn his finding of fact.[31]

The adoption by the Supreme Court of Western Australia of Windeyer J.'s legal definition of the term "obscene" is consistent with the judicial trends in other Australian States in respect of the common law definition of this term.[32] However, by adopting this definition the Supreme Court of Western Australia has created a problem with regard to the definition of the term "obscene" in s. 204 of the Criminal Code for, as has already been noted, the wording of that section would seem to indicate that the concept of obscenity involves—at least for the purposes of the Criminal Code—a tendency to corrupt morals. Such a tendency is clearly akin to the *prima facie* objective *Hicklin* test of obscenity which Windeyer J. declared in *Crowe v. Graham and Others* to have no practical significance. As a result of the decision in *Mackinlay v. Wiley,* either the term "obscene" in s. 204 of the Criminal Code must be given the same, subjective meaning that it now has in the Indecent Publications Act, in which case the expression "tending to corrupt morals" in s. 204 either has no special connection with the concept of obscenity or must be given a strictly subjective meaning too, or the term "obscene" in s. 204 must be given either the meaning stated by Cockburn C.J. in *R. v. Hicklin* or that stated by Fullagar J. in *R. v. Close;* if the latter course is adopted the term "obscene" in s. 204 will imply a tendency to deprave and corrupt, and thus all parts of s. 204(1) will concern the same mischief, though the term "obscene" in s. 204 will not have the same meaning as it now has in the Indecent Publications Act after *Mackinlay v. Wiley.*[33]

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31 at pp. 9 (Virtue S.P.J.), 15-18 (Lavan J.).

32 See, e.g., *Chance International Pty. Ltd. v. Forbes* [1968] 3 N.S.W.R. 487, and *Altman v. Forbes* (1970) 91 W.N. (N.S.W.) 84 (N.S.W.); *Bradbury v. Staines, ex parte Staines* [1970] Qd. R. 76 (but cf. *Herbert v. Guthrie, ex parte Guthrie* [1970] Qd. R. 16. referred to in the footnote following) (Qld.); *Romeyko v. Samuels* (1972) 2 S.A.S.R. 529 (S.A.). In *Browne v. Venning* (1972) 2 S.A.S.R. 473 the judge referred to Windeyer J.'s judgment in *Crowe v. Graham and Others* with approval, but on another point. There has been no Victorian obscenity case reported since 1968.

33 This sentence contains purely formal considerations only and presupposes that it is possible to determine by means of some objective test whether an article tends to deprave or corrupt; such an objective test does not, however, exist (see n. 67, *infra*). *Quaere,* to what extent will the legal definition of the term "obscene" laid down in *Mackinlay v. Wiley* in fact affect the meaning of the same term in s. 204 of the Criminal Code?

The argument in *Mackinlay v. Wiley* that the magistrate had applied the wrong test of obscenity by simply asking himself whether the matter complained of transgressed the generally accepted bounds of decency in the community had allied to it the secondary argument that as the publication involved in the case was an internal publication for the students of one particular University, the magistrate ought not to have judged its contents according to the generally accepted standards of decency of the community as a whole, for it was asserted that the educational background of University students, their standard of intelligence, and the nature of their work at University rendered them less subject to the corrupting influences of pornography than would be the case in respect of other members of the community of the same age group. The legal argument involved here raises two interrelated questions, namely, are the standards of decency which determine the matter of obscenity always those of the community as a whole or can they be the standards of decency of that section of the community which alone has, or which alone was or is likely to, come into contact with the publication under consideration, and second, does the fact that only a limited section of the community has, or was (or is) likely to, come into contact with a certain publication affect the determination of whether that publication is obscene?

The established answer to the first question is that the standards of decency which determine the question of obscenity in a criminal case are always those of the community as a whole, regardless of whether the article in question is, or is likely, to be published to only a specific section of the community. Windeyer J. made this clear in *Crowe v. Graham and Others* when he said: "The question [of obscenity] is to be related to contemporary standards, community standards. . . . Contemporary standards are those currently accepted by

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Cf. the Queensland case of *Herbert v. Guthrie, ex parte Guthrie* [1970] Qd. R. 16, where the Full Supreme Court had to consider the meaning of the term "obscene" in the Vagrants, Gaming and Other Offences Act 1931-1967 (Qld.). Hanger J. held (at pp. 20-21) that for the purposes of the Act in question, the term "obscene" should be given its ordinary meaning. Matthews J., however, ascribed to that term (at p. 33) the same meaning as it has in s. 228 of the Criminal Code (Qld.) (which section is identical with s. 204 of the Criminal Code (W.A.)), subject to the statutory extension to the meaning of that term; he then went on and held (*loc. cit.*) that the words "tending to corrupt morals" in s. 228 (1) indicated that the term "obscene" in the Criminal Code should be given the meaning stated by Cockburn J. in *R. v. Hicklin,* subject to the qualifications propounded by Fullagar J. in *R. v. Close.* Hart J. was equivocal as to what he considered to be the meaning of the term "obscene" in the Act in question (see esp. pp. 24-25).

the Australian community. . . . And community standards are those which ordinary decent-minded people accept".[34] All three judges in *Mackinlay v. Wiley* accepted these standards as the bases upon which to determine the issue of obscenity in Western Australia.[35]

However, the fact that the question of obscenity is determined by the standards of decency of the community as a whole does not mean that no consideration at all can be given to the matter of the class of persons which has, or which will, come into contact with the publication under consideration. On the contrary, this matter may be of crucial importance to the verdict, for the fact that a *prima facie* obscene article was, or is to be, published only to a certain class of people may lead a Court to hold that though that article is obscene in the ordinary sense of the word its publication solely to that group can nonetheless be tolerated by the general community and so it is not obscene for the purposes of the criminal law.[36] According to Windeyer J. this matter of the class of persons which has, or which will, come into contact with the publication under consideration is a factor to be taken into account by the Court when deciding whether that publication is so obscene that it transgresses the standards of decency of the community as a whole, and is therefore obscene not only in the ordinary sense of the word but also in the strict, legal sense; the judge said (writer's italics):[37]

> The question [of the common law meaning of the term "obscene"] still is—Does the publication, by reason of the extent to which and the manner in which it deals with sexual matters, transgress the generally accepted bounds of decency? This is a question of fact to be decided by the tribunal of fact. It is to be answered by reading the publication. . . . *The court has to determine whether the publication before it is obscene having regard to the persons, classes of persons and age groups to whom or amongst whom the matter was published.*

In *Mackinlay v. Wiley*, Lavan J. would appear to have treated the matter of the class of the population to whom publication of the

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34 41 A.L.J.R. 402, at pp. 411-12.

35 See [1971] W.A.R. 3, at pp. 8 (Virtue S.P.J.), 12-14 (Lavan J.), and 25-26 (Wickham J. with reservations). These standards had also been recognised as the bases upon which to determine the issue of legal obscenity the year previous in the Queensland case of *Bradbury v. Staines, ex parte Staines* [1970] Qd. R. 76 (F.C. & H.C.); see esp. at pp. 82-83 (Stable J.) and p. 90 (Barwick C.J.).

36 See *R. v. Close* [1948] V.L.R. 445, at pp. 464-65, *per* Fullagar J. Cf. Richard G. Fox, *op. cit.*, pp. 157-164.

37 41 A.L.J.R. 402, at p. 410.

offending issue of *Pelican* was made in the way prescribed by Windeyer J.[38] Virtue S.P.J., perhaps more logically, turned this matter into a secondary test concerning the question of obscenity; having set out what he considered to be the basic legal test of obscenity[39] he then said that if the tribunal of fact decided that the writing under consideration does go so far beyond accepted standards as to shock that tribunal, it should then ask itself:[40]

> whether . . . the inference of law of tendency to deprave or corrupt which is to be drawn from such a conclusion should be rebutted by reason of the fact that publication is restricted to a certain class of the community in respect of whom the tendency to deprave or corrupt would not exist to the same extent as in other sections of the community.

Both ways of treating the matter of the class of people to whom a *prima facie* obscene article has been published clearly imply that the legal concept of obscenity is not based upon an absolute standard but is always related to the audience involved, be that audience the public at large or only a section of the public. This point should be stressed for some judicial definitions of the term "obscene", for example that given by Martin C.J. in *Bremner v. Walker,* do not make this point at all clear.[41] As Richard G. Fox has put it in his work, *The Concept of Obscenity*:

> The idea of inherent obscenity has no place in the legal conception of the obscene. In law obscenity always ultimately depends upon the circumstances of the dissemination, so the same publication may be found obscene in the hands of one group of readers and innocuous in the hands of another.[42]

Neither Virtue S.P.J. nor Lavan J. were prepared in *Mackinlay v. Wiley* to accept the argument that the issue of *Pelican* involved in that case was not legally obscene taking into account the class of people for whom it was published. Both judges pointed out that though *Pelican* was published as an internal paper for the students of the University of Western Australia, the way in which it was distri-

38 See [1971] W.A.R. 3, esp. at pp. 13-14.

39 See n. 30 and text, *supra.*

40 [1971] W.A.R. 3, at p. 9.

41 n.b. the gloss on Martin C.J.'s definition of the term "obscene", which emphasises the point raised in the text, in *Ex parte Collins* (1888) 5 W.N. (N.S.W.) 85, at p. 87, *per* Windeyer J.

42 p. 30. This passage was cited with approval by Hart J., in *Herbert v. Guthrie, ex parte Guthrie* [1970] Qd. R. 16, at pp. 24-25. See also Richard G. Fox's remarks concerning this same matter in his casenote on *Crowe v. Graham and Others* in (1969) 3 ADELAIDE L. REV. 392, at pp. 398-99.

buted—by being placed in four open boxes on the University campus —meant that it was also available to people who were not students but who wished to obtain a copy of it. Moreover, evidence had clearly shown that it was contemplated that *Pelican* should be available to non-members of the University for the cover of the paper indicated an off-campus price of 10 cents, and it had been proven that non-members of the University had in fact come across the issue that had subsequently been found to be obscene. Thus, notwithstanding both the fact that *Pelican* was intended to be read principally by students at the University of Western Australia and the fact that it was read principally by such students, this publication was nonetheless readily available to the public at large. Lavan J. expressly followed (and Virtue S.P.J. may be said implicitly to have followed) Helsham J.'s statement on this matter in *Chance International Pty. Ltd. v. Forbes*;[43] the judge there had said that the class of the community that was likely to come into contact with a *prima facie* obscene article was a factor relevant to the question of legal obscenity only if the publication of that article were restricted to that class.[44] Both Virtue S.P.J. and Lavan J., however, added that even if the offending issue of *Pelican* had been restricted to those for whom it was primarily published, *viz.* University students, it could not be said as a matter of fact that those people were any less susceptible to the corrupting influences of pornography than were other members of their age group and no exception should therefore be made in their favour.[45]

The rule that only if the publication of a *prima facie* obscene article is made to a restricted audience will the nature of those who have, or who are likely to, come into contact with it be relevant to the question of legal obscenity raises the question of what is meant by the term "restricted". In *Chance International Pty. Ltd. v. Forbes,* the judge made it clear that by a restricted publication he meant a publication that would be made only to certain sections of the public and not to the public at large. He said (writer's italics):[46]

> [In determining the question of legal obscenity] The circumstances of a restricted publication or sale are relevant, that is to say the classes of person and the ages of groups to whom publication or sale *will* take place . . . but the fact that material is only intended for certain age groups or classes or is likely to be read

43 [1968] 3 N.S.W.R. 487; see [1971] W.A.R. 3, at pp. 9 (Virtue S.P.J.), 14-15 (Lavan J.).
44 at p. 490.
45 See [1971] W.A.R. 3, at pp. 9-10 (Virtue S.P.J.), 15 (Lavan J.).
46 [1968] 3 N.S.W.R. 487, at p. 490.

> by them, although publication is at large, is not a material consideration.

This passage was cited with approval by Lavan J. in *Mackinlay v. Wiley*.[47] It might, of course, happen that notwithstanding the intention of a publisher that a *prima facie* obscene paper be published to only a certain group of people, and despite his taking reasonable care to ensure that it be published only to those people, that paper will in fact fall into the hands of some other person or persons(because, for example, of a reasonable mistake on the part of the publisher, or subsequent publication of the paper by a proper recipient). In such a case it is very likely that the Courts will not take these other people into account when considering the nature of the class of people to whom the publication in question was, or was likely to be, made. Wickham J. would certainly make such allowances, for he said in his dissenting judgment in *Mackinlay v. Wiley*:[48]

> . . . if the writing is made for and to a restricted audience for a worthy purpose and, for that or other reasons, is not obscene it makes no difference that there is a leakage to the general public. This answers the "it might fall into wrong hands" type of argument, although, of course, the fact that it so has, might throw doubt on the sincerity of the publisher in the first place, particularly if the misdirection is on a significant scale.

It would thus seem clear from both *Chance International Pty. Ltd. v. Forbes* and the majority judgments in *Mackinlay v. Wiley* that when considering the actual or potential audience of a publication in order to determine whether it is obscene in law, the Courts will consider only those people who were intended to constitute the audience. This will include, however, not only those who were primarily intended to constitute the audience, but also those whom the publishers could reasonably foresee, or ought reasonably to have foreseen, would be likely to form part of the audience and whom they did not take reasonable precautions to prevent constituting part of the audience.

From the majority judgments in *Mackinlay v. Wiley,* and in particular drawing on Virtue S.P.J.'s two tests of obscenity, a legal realist might put the current Western Australian test of whether an article is obscene in law (at least for the purposes of the Indecent Publications Act) thus:

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47 [1971] W.A.R. 3, at p. 14.
48 at p. 23.

First, does the tribunal of fact (or is the tribunal of fact likely to) hold that the article in question is clearly indecent[49] taking into account what it believes to be the current standards of the community as a whole?

If the answer to this question is in the affirmative, the article under consideration may be regarded as obscene in the general sense of the term.

Second, does the tribunal of fact (or is the tribunal of fact likely to) hold that the article in question is so indecent that it either—

(i) ought not to have been published to those who were both intended to come, and who in fact came, into contact with it; or

(ii) ought not to be published to those who are both intended, and who will be able, to come into contact with it?

The answer to this second question will depend to a large extent on the kind of people who constitute the audience involved. As Wickham J. said in his dissenting judgment in *Mackinlay v. Wiley*: "A paper made for the purpose of distribution to soldiers in an army camp will not necessarily be evaluated in the same way as one made for distribution to nuns in a convent".[50] However, the audience is not the only

[49] *Quaere,* in what sense indecent? In Australia all reported obscenity cases have concerned sexual indecency and doubtless as a result of this judicial discussions of the scope of the common law term "obscene" have often been confined to a consideration of sexual indecency only. Australian Courts would, however, probably also hold indecency in respect of excremental functions to be obscene at law if they ever had to decide such a matter. Fullagar J. was quite prepared in *R. v. Close* to hold as obscene whatever offends against good taste or decency (see [1948] V.L.R. 445, at p. 463); Windeyer J. in *Crowe v. Graham and Others,* on the other hand, considered the test of obscenity solely with reference to sexual obscenity and refused to decide whether a publication could be said to be indecent if it had no sexual implications (see 41 A.L.J.R. 402, esp. p. 410). The Supreme Court of Western Australia would appear to have left the scope of obscenity open in *Mackinlay v. Wiley.* In England, where the statutory test of obscenity is simply whether an article will tend to deprave and corrupt those who are likely to come into contact with it (see n. 70, *infra*), judges have been prepared to consider as obscene not only publications which have involved sexual matters but also publications which have involved drug-taking and violence; see *John Calder (Publication) Ltd. v. Powell* [1965] 1 All E.R. 159, *D.P.P. v. A. & B.C. Chewing Gum Ltd.* [1967] 2 All E.R. 504, and *R. v. Calder and Boyars Ltd.* [1968] 3 All E.R. 644. Some Australian States have extended the scope of the term "obscene" (usually to include the emphasising of matters of sex, crimes of violence, horror or cruelty) for the purposes of specific statutes; see, e.g., the Police Offences Act 1958 (Vic.), s. 164 (1), the Obscene and Indecent Publications Act 1901-1955 (N.S.W.), s. 3 (2), and the Vagrants, Gaming and Other Offences Act 1931-1967 (Qld.), s. 2.

[50] [1971] W.A.R. 3, at p. 23.

factor to be considered here; the actual words used, the style of the publication involved, the possible and probable effects of the article in question, and all other factors that may reasonably be considered relevant may be taken into account in order to answer this question. If this second question is answered in the affirmative, the article concerned may be regarded as obscene in law—again, at least for the purposes of the Indecent Publications Act—and its publication, distribution, sale, &c., will constitute an offence according to the provisions of the appropriate section.[51]

In his dissenting judgment in *Mackinlay v. Wiley*, Wickham J. adopted a less technical approach to the legal concept of obscenity than did the two majority judges. Although he referred briefly to the judgments in *R. v. Close* and *Crowe v. Graham and Others*, he did not expressly adopt any of the tests of obscenity that are to be found in them but instead took these judgments to indicate simply that in deciding whether a publication is obscene regard should be had to the extent, manner, purport and purpose of the publication, the character of the literary context in which the offending matter is found, the good faith of the publisher, and any other relevant factor.[52] Wickham J.'s test of whether the issue of *Pelican* under consideration was obscene was thus simply to ask whether, taking into account all these factors, the "average man"[53] would regard this paper as obscene.[54] In particular, the judge said:

> The verification of the proposition "Mackinlay published an obscene paper" will be tested by [the] average man by taking into consideration such matters as the occasion of placing the material before others, the reason for it, the significance of the material itself, the context of it, the immediate audience intended and whether for the general public or for a limited class of the general public, the motive of publication, the sincerity of purpose, the nature of the publication generally, including general merit or otherwise, and involving such questions as to whether it is tantamount to a public nuisance, whether dirt for dirt's sake, or dirt for money's sake, whether it encourages anti-social behaviour, and so on. . . . In short, all the circumstances surrounding the

51 Note that by s. 5 of the Indecent Publications Act, nothing in that Act applies to any work of recognised literary, artistic or scientific merit, or to any medical work or treatise. Cf. s. 204 of the Criminal Code (Obscene publications and exhibitions), which provides that it is a defence to a charge under that section to prove that it was for the public benefit that the act complained of should be done.

52 at p. 22.

53 On Wickham J.'s idea of the "average man", see at pp. 25-26.

54 See pp. 25, 26.

> matter will be considered both as telling for the affirmative of the proposition and as telling against it.[55]

Wickham J.'s own opinion was that the issue of *Pelican* in question could not reasonably be termed obscene. "Taking everything into consideration", he said, "the evidence does not indicate that this was other than a student paper of limited circulation issued by, for and to a group of persons the training of most of whom requires the development of their critical faculties in an atmosphere of freedom of expression, or that the main theme of the issue was other than intended to be a serious discussion on an important matter of current interest to most of those likely to read it".[56]

From the previous paragraph it is clear that although Wickham J. was prepared to accept—though not without reservations[57]—that the basic standard upon which to test obscenity was the standard of the general community,[58] he was nonetheless prepared to make allowances for the class of persons who were intended and likely to come into contact with any allegedly obscene publication regardless of whether the publication of that matter were restricted solely to members of that class. The judge said, for example, with specific reference to *Pelican,* that in determining whether that paper was obscene the reasonable man should take into account "the immediate audience intended"[59] and not that he should take into account the actual or potential audience of the paper. And when giving his reasons why he did not hold the paper to be obscene he said that the paper was nothing other than a student newspaper "issued by, for and to a group of persons the training of most of whom requires the development of their critical faculties",[60] despite the fact that at the beginning of his judgment he had noted that copies of the issue of *Pelican* in question had been freely available on the University campus to members of the general public and that some copies had in fact reached members of the public.[61] Wickham J.'s attitude in this respect is certainly more liberal than that adopted by the majority judges who followed the strict rule laid down by Helsham J. in *Chance International Pty. Ltd. v. Forbes* and it would also appear to indicate a completely different approach to the matter of obscenity from that of the majority judges,

55 See p. 26.
56 See p. 27.
57 See his observations at p. 25.
58 *loc. cit.*
59 See p. 26.
60 See p. 27.
61 See p. 19.

for whereas both Virtue S.P.J. and Lavan J. would seem from their judgments to have regarded the aim of the law relating to obscenity as principally to protect society from evil and detrimental effects,[62] Wickham J. would appear in his judgment to have regarded the aim of the law relating to obscenity as principally to protect society from matter which they might regard as unduly repugnant to good taste. The former attitude is in urge practical; the latter is essentially cultural or aesthetic.

The principal ground on which Wickham J. was prepared to allow the appeal in *Mackinlay v. Wiley* was misdirection by the trial magistrate.[63] Wickham J. criticised as irrelevant to the question of whether the publication under consideration was obscene the magistrate's statement that "the law has always regarded the young to be most vulnerable to obscenity, and censorship generally is aimed at the protection of youth", and he also criticised both as irrelevant and as unsupported by evidence the magistrate's finding that there was no valid reason for making any distinction in this case between University students and other young people.[64] The main criticism, however, that Wickham J. made of the magistrate's directions, was that he mentioned so few of the considerations that he (Wickham J.) believed ought to be taken into account when determining whether a publication is obscene.[65] By criticising the magistrate in this respect it would appear that Wickham J. was also obliquely criticising the majority judges, for it is clear from the judgments in this case that the considerations that the magistrate mentioned as being relevant to the matter of obscenity were those which the majority judges also considered to be relevant to this matter. This oblique criticism also extends to the principal test of obscenity which the magistrate had adopted and which was subsequently approved by the two majority judges, *viz.* whether the publication under consideration could be

62 See, e.g., the judges' references at pp. 9-10, 15, to the effect that pornography could have on University students, and Virtue S.P.J.'s mention of "the inference of law of tendency to deprave or corrupt" in his second test for determining whether a publication is legally obscene (at p. 8). Such an attitude concerning the aim of the law relating to obscenity is clearly reminiscent of the attitude of the Court in *R. v. Hicklin*; if this is so, why did the majority judges in *Mackinlay v. Wiley* not follow the *Hicklin* test of obscenity instead of Windeyer J.'s test in *Crowe v. Graham and Others* which *prima facie* displaces that test?

63 See p. 27.

64 See pp. 26-27.

65 See p. 26.

said to offend against the current standard of decency in the community. Wickham J. said of this:

> This approach cannot be said to be wrong but the difficulties in it must nevertheless be appreciated. The transition from "obscenity" to "decency" immediately warns of the danger of a slide, but more importantly the approach begs three questions, namely, is there a current public standard of decency in the community? and if so how is it discovered? and what is it? There must be reference back to the average man previously described and the formula provides, therefore, a very slippery point of departure, with the result that but a small deviation from the straight path to the Shining Gate may end in the quagmire of error.[66]

Wickham J.'s observations in the passage just cited are important for they draw attention to the fact that any test of obscenity which is not in fact (as opposed to in theory) objective—and this will include Wickham J.'s own test—is fraught with difficulties and even with dangers. The most obvious difficulty lies in assessing whether any article under consideration does contravene the permitted limits and the most obvious danger lies in the fact that those who have to exercise this power of censorship may do so unreasonably. Nonetheless, with our present knowledge of the positive effects of pornography and obscenity in such an unsatisfactory state,[67] these difficulties and dangers must be faced, for the only alternative is to ignore them and by so doing perhaps even to increase them. Fortunately, Australian judges —as opposed to English judges—have tended in recent years openly to recognise many of the problems that any test of obscenity must for the time being involve. Perhaps the best example of this is the abandonment by Australian judges, led by Windeyer J. of any pretence that a workable test of obscenity can as yet be objective, and yet another example is the open recognition that some Australian judges have given to the fact that by the criterion of the current public standard of decency in the community one really means nothing more than what the arbiter of fact in any case considers to be the current

66 *loc. cit.*

67 There is as yet no precise knowledge of the psychological or social effects of pornography or obscenity, and such information as there is on this matter is too meagre to be used as the sole basis upon which to determine whether an article is indecent or obscene. For an account of such information as there is on this subject, see, e.g., Richard G. Fox, *The Concept of Obscenity*, pp. 140-152; (Arts Council of Great Britain), *op. cit.*, pp. 54-61, 82-83, 120-124; C. H. Rolph (ed.), *Does Pornography Matter?* (1961), chs. 3, 5; *Report of the Commission on Obscenity and Pornography* (intro. Clive Barnes) (1970), Part 3, II.

public standard of decency.[68] One may perhaps deplore the openly subjective nature of the present Australian test of obscenity,[69] but for the time being there can be little alternative to such a test if there is to be a legal curb on the dissemination of pornographic and obscene articles. At least the open recognition by the Australian Courts today that they do follow such a test has the virtue of being both honest and accurate. The same cannot be said of the statements of the principal Australian tests of legal obscenity prior to *Crowe v Graham and Others* in 1968, nor of the present statutory test of obscenity in England at the present day.[70]

ANTHONY DICKEY*

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68 See n. 27-28 and text, *supra.*

69 As does, e.g., Richard G. Fox in his casenote on *Crowe v. Graham and Others* in (1969) 3 ADELAIDE L. REV. 392, at pp. 398-402.

70 In England the *prima facie* objective *Hicklin* test of obscenity was incorporated into the Obscene Publications Act of 1959. S. 1 (1) of that Act now states: ". . . an article shall be deemed to be obscene if its effect . . . is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it". That English Courts still attempt to apply this test of obscenity as an objective test—and that it is quite impossible to do so—can clearly be seen from the Queen's Bench Divisional Court's and the House of Lords' recent decision in *D.P.P. v. Whyte* (see [1972] CRIM. L.R. 234 (Q.B.D.); [1972] 3 All E.R. 12 (H.L.)) in which it was decided that middle-aged men who habitually read pornographic publications were incapable (Q.B.D.)/capable (H.L.) of being further depraved and corrupted.

Ironically, although the English Courts attempt to apply the statutory test of obscenity as an objective test, they expressly refuse to allow expert evidence to be admitted concerning the actual effects of alleged obscene articles on the ground that the question of obscenity is a matter exclusively for the tribunal of fact; the only exception concerns evidence in respect of the effects of alleged obscene articles on children. See *D.P.P. v. A. & B.C. Chewing Gum Ltd.* [1967] 2 All E.R. 504; *R. v. Anderson and Others* [1971] 3 All E.R. 1152. Australian Courts follow the English Courts in this matter; see Richard G. Fox, *The Concept of Obscenity,* ch. 8 (c). For details of such objective tests as are used by English prosecuting authorities in order to decide whether to commence a prosecution under the Obscene Publications Act, see C. H. Rolph, *Books in the Dock,* pp. 89-91, 94-95.

It is interesting to note that the Longford Committee recommended that the legal definition of the term "obscene" in the U.K. should be changed to (in effect) that which is presently current in Australia; it recommended that the definition of this term be as follows:

> An article or a performance of a play is obscene if its effect, taken as a whole, is to outrage contemporary standards of decency or humanity accepted by the public at large.

(See *Pornography: The Longford Report* (1972), pp. 427-28.)

* *Lecturer in Law, University of Western Australia.*