CAMPAIGN AGAINST CENSORSHIP

Formerly the Defence of Literature and the Arts Society

Submission to the Deputy Prime Minister's 2010 Law Review

(published in this form in 2011)

INTRODUCTION

In May 2010, the Right Honourable Nick Clegg MP, the Deputy Prime Minister and Minister for Constitutional and Political Reform, invited individuals and groups to submit proposals for reforms to the law that they would like to be considered by the new coalition government. The following is the CAC's submission.

THE COVERING LETTER

To: The Rt. Hon. Nick Clegg, MP, Deputy Prime Minister, House of Commons, London, SW1A 0AA.

26th September 2010

Dear Sir,

LAW REFORM

I enclose the Campaign's contribution to your consultation in the form of a draft Bill listing the changes we should like to see considered.

If there is anything you would like amplified or that you feel needs clarification please let me know.

For further information about the Campaign please write to the above address or go to www.dlas.org.uk.

Yours faithfully,
(Hon. Secretary)

THE SUBMISSION AND EXPLANATORY NOTES

Note: The following is the edited-for-publication version of the CAC's submission accompanied by explanatory notes in italics which do not form part of the Bill but which did form part of the submission.

A Bill to reform the law on freedom of expression; to amend or repeal censorship legislation, including abolition of certain common law offences.

Contents

(1) The enactments specified in Schedule 1 of this Bill are amended or repealed as set out in that Schedule.

(2) The Common Law offences specified in Schedule 2 of this Bill are abolished.

(3) (1) This Bill may be cited as the Freedom of Expression Bill.

(2) This Bill shall come into force at the expiration of one month beginning with the date it is passed.

(3) This Bill shall extend to Scotland and Northern Ireland.

Schedule 1. Amendments and repeals
(1.1) Town Police Clauses Act, 1847 (10+11 Vict.

c.89).

Section 28. Delete "every person who publically offers for sale or distribution, or exhibits to public view any profane book, paper, drawing, painting or representation, or sings any profane or obscene song or ballad or uses any profane or obscene language".

The activities described are adequately covered by more recent public order legislation.

(1.2) Customs Laws Consolidation Act, 1876 (39+40 Vict. c.36).

Section 42. Delete "indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles".

This old enactment is still sometimes used to prevent the importation of items which are lawful elsewhere in the EU. The use of the word "indecent" is particularly undesirable as it prohibits the importation of goods which are lawful if produced inside the United Kingdom.

(1.3) Post Office Act 1953 (1+2 Eliz.2 c.36).

Delete section 11, subsection (1) (b).

Subsection (1) c delete "an indecent or".

There is no good reason to criminalise ordinary correspondence. Unsolicited mail is not affected.

(1.4) Obscene Publications Act 1959 (c.66).

Section 2, Subsection (1) delete "whether for gain or not" and substitute "for gain".

Delete Subsection (1)(a).

Subsection (2) delete "summary".

Subsection (3) amend so that it shall be the task of the prosecution to show cause why goods should be forfeited, not of the defence to show cause why they should not.

(1.5) Obscene Publications Act 1964 (c.74).

Section 1 (4) amend so as to make compatible with 1959 Section 2 (3) as amended.

This note applies to both 1.4 and 1.5. The Obscene Publications Acts are unsatisfactory in many ways and there have been many calls for their repeal. However, the 1959 Act does provide a definition of obscenity which is flexible-enough to change with the times. Total repeal would open the way for the "laundry list" approach. The other advantage of the 1959 Act is that it provides for a "public good" defence. The suggested amendments would ensure that more cases are defended and that works which may be ahead of their time or seek to push the boundaries of what may be said or shown would be less likely to fall foul of the law.

(1.6) Theatres Act 1968 (c.54).

Repeal sections 2 and 3.

Prohibits some theatrical performances needlessly, because people are very unlikely to visit a theatre without some idea of what they are going to see. If the performance is not one they will find entertaining, they can stay away.

(1.7) Criminal Law Act 1977 (c.45).

Repeal section 53.

(1.8) Protection of Children Act 1978 (c.37), as amended.

Delete "indecent" throughout and replace with "obscene".

Throughout the Act, add "for gain" after "possession".

"Obscene" is a stronger term than "indecent". There is a minority who find ALL images of nude or partially nude human beings, regardless of who made the image, where, when, why or of whom, "indecent". This can lead to people being criminalized for taking photographs of their own families for their own personal records. It is a very bad law that leaves parents feeling unable to take pictures of their own baby in the bath. We are opposed to the idea that mere possession of any material should be a criminal offence. Mere possession is too wide. The concept should be qualified before it constitutes a criminal offence as is the case in other parts of the EU. (If the principle, that mere possession of material can be a crime, is admitted, there is that much less to prevent a future government making possession of politically sensitive items a criminal offence.) For a working definition of "obscene", see Obscene Publications Act, 1959, section 1 (1). Nothing we propose would prevent recordings (e.g. videos) of criminal acts in progress being given in evidence when those acts are prosecuted.

(1.9) Local Government (Miscellaneous Provisions) Act 1982 (c.30).

Repeal Part 2, section 2.

Replace, if thought necessary, with a system analogous to those in force for controlling the sale of alcohol and tobacco products to minors.

This was the legislation which introduced a local authority licensing system for sex shops. Over half the local authorities in England and Wales do not issue any licences at all, thereby perverting a licensing system into outright prohibition. The consequences of prohibition (under-the-counter sales, inflated prices,

absence of quality control, fraud, corruption and the involvement of organised crime) could be avoided by abolishing the system, at least as far as the number of outlets is concerned. Adults who wish to purchase sexually explicit material but do not wish to visit a sex shop should be able to do so.

(1.10) Civic Government (Scotland) Act 1982 (d.45).

Repeal sections 45 and 51 and schedule 2.

Section 45 is the equivalent of the Local Government (Miscellaneous Provisions) Act (see 1.9 above). Section 51 relates to the display and sale of "obscene" material.

(1.11) Telecommunications Act, 1984 (c.12).

Section 43.

In subsection (1), paragraph (a) delete "an indecent, obscene" and insert "a".

The amendment would give consenting parties the right to communicate by telephone in terms which might be offensive to others who have not heard them. Unsolicited communication is not affected.

(1.12) Video Recordings Act 1984 (c.39).

Repeal sections 9 and 10.

Section 12.

Subsection (1) before "where a classification certificate" insert "where no classification certificate has been issued in respect of the video work or".

Delete "licensed" and "for which a licence is in force under the relevant enactment".

Subsection (2) delete subsection (b).

Subsection (3) delete "licensed" and "such".

Subsection (4) (b) delete "for which a licence was in force under the relevant enactment".

Delete subsection (5).

Subsection (6) delete "licensed".

Subsection (6) (b) delete "being sex shops for which licences are in force under the relevant enactment".

We do not oppose a system of classification designed to guide consumers in their choice. However, state-controlled pre-publication censorship of any medium is incompatible with the values of a free society. Practically no other country in the western world has such a system. The amendments ensure for British adults the same freedom of choice without affecting the existing system of classification.

(1.13) Cinemas Act 1985 (c.13).

Section 1, subsection (2) after "determine" add "other than regarding the content of films chosen".

Section 3, subection (3) after "police" add "other than regarding the content of films shown".

These amendments remove local authority control of films shown in cinema clubs. For ordinary commercial cinemas, there are factors (eg public order issues) which may affect the decision as to whether or not a film should be shown. Since the decision applies only to the local authority responsible, it is open to cinema patrons to travel to a less nervous jurisdiction.

(1.14) Criminal Justice Act 1988 (c.33).

In sections 160 and 161 delete "indecent" and insert "obscene".

For difference between "indecent" and "obscene" please see 1.4 and 1.8 above.

(1.15) Broadcasting Act 1990 (c.42).

Repeal sections 177 and 178.

These clauses allow the British government to proscribe foreign television channels. Until now they have been used to prohibit sexually explicit programmes which are lawful elsewhere in the European Union. (As though British people were less adult than their continental contemporaries.) However, once the principle, that foreign television channels can be illegal in the UK, is admitted, it would be open to a government to prohibit them for reasons other than sex.

(1.16) Criminal Justice and Public Order Act 1994 (c.33).

Repeal sections 84 to 89 inclusive and 91.

Sections 84-86 make illegal computer material which is lawful elsewhere in the EU while doing nothing useful to amend the Protection of Children Act. (see 1.8 above). Section 87 increases sentences under the Civic Government (Scotland) Act 1982. See notes 1.10 above and 1.19 below. Section 88 increases sentences under the Video Recordings Act 1984. Section 89 assumes that people can be stimulated or encouraged to commit offences by what they see on a video. We believe that legislation should be based on evidence, not anecdotes and newspaper headlines.

(1.17) Broadcasting Act 1996 (c.33).

Repeal section 108, subsection (1) (b) and (c).

Repeal section 109.

These sections impose an unjustified control on certain types of programme instead of trusting viewers to choose for themselves.

(1.18) City of Westminster Act 1996 (c.viii).
Repeal the whole Act.

This imposes additional legislation on sex establishments in central London. Please see section 1.9 above, particularly as regards the adverse effects of de facto prohibition.

(1.19) Criminal Justice and Immigration Act 2008 (c.4).
Part 5.
Repeal Clauses 63 to 71 inclusive.

These sections are a regrettable example of panic legislation. The offences they were intended to deal with are already covered by the Obscene Publications Acts and the Protection of Children Act.

Section 63 (6) and (7) is what we mean by a "laundry list". It reflects the social and personal attitudes prevalent in the first decade of the 21st century and is not likely to stand the test of time. Also it is possible that campaigns against the use of torture would be placed at risk.

Sections 69-70. See section 1.8. If images of children are to be used only as evidence that an offence has taken place, it follows that the images must be of real children, not imaginary or computer-generated ones.

Section 71. First, a sentence of as much as five years is excessive. People have received less than this for killing someone. Second, imprisonment is notoriously unfit for preventing the people aimed at from re-offending after their release; lengthening the available sentence does not change that.

(1.20) Police and Crime Act 2009 (c.26).
Repeal section 27.

This places restrictions on lap-dancing venues. Please see 1.9 above.

(1.21) Video Recordings Act 2010 (c.1).
Amend along the same lines as the 1984 Act.

Schedule 2 Common Law offences to be abolished.
(2.1) Conduct calculated or intended to corrupt public morals.
(2.2) Conspiracy to corrupt public morals.
(2.3) Conspiracy to outrage public morals.

The Law Commission Report on Conspiracy and Criminal Law Reform 1976 (No.76) recommended the abolition of these offences.

The law of conspiracy has an unfortunate history; it is not unknown for it to be used against people perceived as subversive but not obviously guilty of a definite offence. The concept of "public morals" may have been valid in earlier centuries but is very difficult to define in a multi-cultural, pluralistic, 21st century country.

Further Explanatory Notes

These do not form part of the Bill.

Title. The object of the Bill is to enable adults in the United Kingdom to communicate free from state control to the same extent as citizens of other member countries of the European Union.

Existing legislation is confused by the use of the Victorian term "indecent", which is out of place in our time and leads to needless restrictions on freedom of expression. Many of the enactments listed in the schedules were passed in the mistaken belief that there is a cause and effect connection between what people see and hear and what they do. This connection is unproven and unprovable and should not be used as an excuse for attempting to control what they see and hear and hence what they think. Attempts to control what people think are 1) wrong and 2) futile. Even the most dictatorial governments have never succeeded in completely controlling the minds of their citizens.

Most of the enactments listed relate to materials with a sexual content. (But please note that the legal definition of obscenity does not actually mention sex.) This is because sex is a particularly private and personal matter and hence a particular target for legislators who do not want people to think for themselves.

These suggestions for amendments and repeals may not be exhaustive.

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