



## **Criminal Justice and Courts Bill 2014**

### **Written Evidence submitted by CAC**

#### **Introduction: About CAC**

The Campaign Against Censorship is the successor to the Defence of Literature and the Arts Society, which was founded in 1968 to assist writers, artists and others threatened by censorship and to campaign for reform of our censorship laws. In 1983 DLAS was re-launched as the Campaign Against Censorship with the object of promoting freedom of expression in all its forms and combating restrictions on that freedom and on its exercise.

The guiding principles of the Campaign are:

1. The right to obtain and impart knowledge.
2. Freedom from censorship.
3. Freedom for creative artists to present their perceptions, interpretations and ideas.
4. Support for victims of censorship without discrimination on the grounds of sex, sexual orientation, race, politics or religion.

For further information please visit the website at [www.dlas.org.uk](http://www.dlas.org.uk).

#### **Written Evidence**

1. The Criminal Justice and Immigration Act 2008 criminalized possession of "extreme pornographic images". The activities whose depiction were covered by the Act did not specifically include rape, either actual or simulated. Clause 16 of the Criminal Justice and Courts Bill, now being considered, is intended to add rape, defined as non-consensual penetration, to the list.

2. The clause is not about preventing rape. It is about preventing people looking at pictures which may or may not depict rape.

3. In spite of some alarmist comments, the Campaign recognises that works of art known as "The Rape of So-and-so" are not affected because they do not show penetration. Their titles are a legacy of a time when "rape" could mean nothing more than "abduction". However, some paintings, drawings, prints and engravings might fall foul of the Bill because although the people who drafted it, when they wrote "image", probably had photographic and digital images in mind they did not say so, either this time or in Section 63 of the 2008 Act. It is specified that an illegal image should be "explicit and realistic" and it is possible that those who chose the wording believed that no image other than some kind of photograph could be realistic, but again, they do not say so.

4. There is no exemption for works of art and no defence of artistic or other merit. The drafters may have believed that no image can be both pornographic (defined as "produced solely or principally for the purpose of sexual arousal") and the work of a famous artist. The risk is small, but enough to cause a "chill factor", as sometimes happens at exhibitions when the organisers feel constrained to remove an item from display because someone thinks it may be illegal. The same applies to images published in hard copy or displayed online unless they are specifically exempt, which we feel that they should be. The Bill should provide defences of artistic merit or historical record.

5. Section 64 of the 2008 Act, which also applies in the current Bill, states that classified films, including R18, are excluded from the prohibition of “extreme images”. It then goes on to exclude from the exclusion an extract from a classified film if it is “of such a nature that it must reasonably be assumed to have been extracted solely or principally for the purpose of sexual arousal”. An image would be illegal if it portrayed non-consensual penetration and a “reasonable person” is expected to decide whether or not the persons in the image are real. There is nothing about whether or not the act is real. It seems to be assumed that there is no such thing as an image of a simulated rape, such as might be extracted from a film. It would be constructive for the law to be made clear; are images of simulated non-consensual sex acts meant to be illegal or not?

6. Subsection (3) of Clause 16 provides a very limited defence. It is a defence for a person to prove that they “directly participated in the act or any of the acts portrayed”, “that the act or acts did not involve the infliction of non-consensual harm on any person” and that “what is portrayed as non-consensual penetration was in fact consensual”. People charged with possession of what appears to be a rape image, who do not themselves appear in that image, cannot easily plead in their defence that the act shown was consensual even if they were present when it took place. People who simply possess the image cannot, of course, say whether it was consensual or not. We suggest that there is something amiss if an alleged perpetrator has a defence but everybody else has not. Also it should be for the prosecution to prove lack of consent, not for defendants to prove that consent was given.

7. Law-abiding people whose sexual fantasies happen to include violence are already treated as sex offenders solely for what they imagine and their lives may well be wrecked even if they are then acquitted. This clause would increase their numbers. (Though female masochists appear to be excluded from these.) The legislation, existing and proposed, is so confusedly worded that failed prosecutions are likely, bringing the law into disrepute.

8. In 2008 it was promised that guidance would be issued to define what Sections 63 to 68 of the Criminal Justice and Immigration Act were intended to mean and how they should be used. The guidance provided is unclear and we ask that a clearer and less confusing version be issued before any cases are brought under amended legislation.

9. The Campaign holds that mere possession of any material, no matter how distasteful to others, should not be a criminal offence. If the material is fiction, prosecution for possessing it is an attempt to control what people think. Trying to control what people think is the behaviour of a dictatorship; it has no place in a democracy. It is also futile; no state apparatus, however oppressive, has ever succeeded in doing it. If the material is factual, it may or may not be evidence that a serious crime has been committed. (In the present example, depending on whether or not there was consent.) To criminalize possession not only makes a criminal of someone who has only thought about it, it makes it unlikely that he or she will voluntarily hand the evidence to the authorities.

### Summary

We ask that:

1. guidance be provided to clarify the terms in both the 2008 Act and the Bill, in particular what is meant by “image”
2. the law distinguish clearly between images that show real events and those that do not
3. the law provide a defence for fictional images that are both sexually explicit and treated with skill and
4. it refrain from treating people who do not and cannot know whether or not an act was consensual as though they were complicit in it.

Thank you for your attention.

Mary Hayward (Hon. Secretary, CAC)  
18<sup>th</sup> March 2014

### Editor’s Note

This is the slightly revised and reformatted text of the CAC’s formal submission.

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