Campaign Against Censorship Response to Public Consultation on Obscene Publications Legal Guidance, 2018

Note: Respondents were asked to provide their views by responding to a number of questions. For ease of reference, the text of each question is given first, followed by the CAC's response. Although the following is a copy of the both the relevant questions and the CAC's responses, it has been reformatted into a more readable document.

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Q1: Do consultees agree or disagree with the guidance that the showing or realistic depiction of sexual activity / pornography which constitutes acts or conduct contrary to the criminal law is (subject to the statutory defences) likely to be obscene?

CAC response: *Disagree. "Illegal" and "immoral/tending to deprave and corrupt" are not identical terms. Also showing or depicting an illegal activity is not the same as inciting people to commit it. It is not the business of the law to try to control what people only think about.*

Q2: Do consultees agree or disagree with the guidance that prosecutors must exercise real caution when dealing with the moral nature of acts not criminalized by law, and that the showing or realistic depiction of sexual activity / pornography which does not constitute acts or conduct contrary to the criminal law is unlikely to be obscene?

CAC response: *Agree, provided that "prosecutors must … not criminalised by law" means that prosecutors must not rely solely on their personal judgement as to what is or is not an immoral act (see response to Question 1). We suggest replacing the words "exercise real caution" with "not rely solely on their personal judgement" (which is subjective and may be out of step with that of the population at large).*

Q3: Do consultees agree or disagree with the guidance that prosecutors, when assessing obscenity, should consider:
a. Whether the activity is consensual;
b. Whether or not serious harm is caused;
c. Whether or not it is inextricably linked with other criminality; and
d. Whether the likely audience is not under 18 or otherwise vulnerable.

CAC response: *Agree, with one exception. The term "vulnerable" is used by campaigners for censorship to mean people whose social and /or moral standing they consider inferior to their own. It could mean almost anyone. The phrase "or otherwise vulnerable" should therefore be omitted.*

Q4: Do consultees agree or disagree with the guidance that the showing or realistic depiction of other acts or conduct which are contrary to the criminal law is also capable of being obscene?

CAC response: *Disagree. Please see the response to Question 1. Crime fiction in any medium usually upholds traditional moral values – the criminal ends up killed or captured. If a work is taken as a whole, as the Obscene Publications Act requires, it is the outcome which matters. Also as it stands this guidance means that any documentary or news bulletin which shows crimes being committed, or realistic reconstructions of crimes, is capable of being obscene. That is absurd.*

Q5: Do consultees have any further suggestions for guidance to prosecutors in assessing "obscenity" when considering allegations falling under the Obscene Publications Act 1959?

CAC response: *Yes. Numbers refer to subsections of that section of the draft Guidance headed "Evidential considerations", in which the Questions also appear.* [The following CAC responses are obliged to omit the text of the relevant subsections of the draft Guidance. Nevertheless, they provide a gist of the CAC's position.]

> ***7.*** *"A defence … unlikely to succeed." It is not for the prosecution to decide whether a defence shall succeed, it is for the court. As it stands this sentence might appear to pre-empt that decision. If, however, it is intended to reassure prosecutors that the defence is likely to fail and therefore need not be a concern, it should say so. We suggest adding "and need not give rise to difficulty" after "succeed" and that the reference to the Whyte case be inserted after that.*
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> *The Act is not concerned with "the once and for all corruption of the wholly innocent" at all. It does not say that anyone will be irreversibly corrupted by an obscene article, only that the effect of an obscene article is "such as to tend to deprave and corrupt". "Wholly innocent" is not a legal concept but a moral judgement. Traditionally, the age at which people become able to distinguish right from wrong is seven; above that age it is unlikely that normally-developing children will get much older without doing something that they know to be wrong, at which point they cease to be "wholly innocent" whether they have encountered obscenity or not.*
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> *"it equally … corruption;" there is nothing in the Obscene Publications Act to justify this statement. Since reading, seeing or hearing an obscene article is not a crime, it is not for the law to "protect" (i.e. prevent) people from doing it. The law's task as set out in the Act is to determine whether an article is in fact obscene and to facilitate its withdrawal from circulation if it is; it is not to make people feel "corrupted" (i.e. guilty) because they have been exposed to the result of a crime—publishing an obscene article—committed by someone else.*
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> *"the addict … his addiction:" the terms "addict" and "addiction" should not be used in this context. Pornography is not an addictive substance and there is no valid comparison between the person who reads or views it and the person who injects, inhales or swallows an addictive drug. The analogy between pornography and drugs was invented by pro-censorship campaigners in order to smear people who buy and create pornography by equating them with people who use and supply drugs. It is false. Everything in subsection 7 except the first sentence (with the amendment if accepted) and the case reference should be deleted.*
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> ***8.*** *Needs clarification. Does "should" mean "should be able to" which is appropriate, or does it mean "ought to", which is not? It is not a prosecutor's business to decide which evidence a jury ought to be allowed to hear.*
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> ***10.*** *It is nonsensical that conduct should be lawful but the showing or depiction of it should not be. Replace "is unlikely to be obscene" with "should not be charged as obscene".*
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> ***14.*** *Confuses whether an activity is illegal (which is the law's concern) with whether it is immoral, which is not. "Its criminalisation indicates its moral nature" is a phrase worthy only of Victorian "morality" campaigners and should be removed.*

16. *For "otherwise vulnerable" please see our response to Question 3.*

17. *See response to subsection 14. "An ill-defined … moral nature." The first of these sentences partially contradicts the second and both are irrelevant because it is not actual conduct but the showing or depiction of conduct which is the subject of the Guidance. They should be removed.*

"A publication … tend to normalise or glorify it. Accordingly," there is nothing in the Obscene Publications Act to suggest that prosecutors should take into account whether or not a publication was actually intended to deprave and corrupt. (See also the response to Question 1.) The words quoted above should be deleted because they are beyond the terms of the Act.

"offences against the person" – we hope that at least where showing or depiction, not the offences themselves, are concerned the Crown Prosecution Service will avoid getting caught up in campaigns over "violence against women"; as thought violence against men by other men happened less often or was less important.

"hate crimes"—please see response above on "normalise or glorify". Material supportive of hate crime should not be prosecuted unless it specifically advocates violence. Prosecution is unwise because it gives the accused the opportunity to pose as victims of persecution and/or martyrs to the cause of free speech. It may also serve to reinforce their claims that those they attack are privileged and that it is they whose cultural values or religious beliefs are under threat. Also prosecution of prejudice expressed in public does nothing to prevent it being expressed in private, nor to prevent the covert practice of discrimination.

20. *"Accordingly, … criminal law, and" these words are unacceptable and should be deleted. First, because they contradict the statements in subsections 10 and 14 and Question 1 that publications which show or realistically depict illegal conduct are "likely to be obscene" (or "capable of being obscene" in Question 4). Second, and more important, because whether or not a publication "is plainly obscene" is for a court, not a prosecutor, to decide.*

22. *"The undertaking … appropriate disposal." This is a left-over from a moral panic of the 1950s. The use of the word "pulp" dates it. There is nothing in the Obscene Publications Act 1959 which states or implies that there is a class of publication which is "not worthy of consideration by a judge and jury" and which need not, regardless of sections 3(4) and 3(5) of the Act, be allowed the opportunity to come before them. "Pulp" magazines (no longer the focus of anxiety that they were sixty years ago) are not exempt from the provisions of those sections. The sentences which refer to them should therefore be erased from the Guidance.*