NATIONAL CAMPAIGN FOR THE REFORM
OF THE OBSCENE PUBLICATIONS ACTS
NCROPA

FIGHTING SEXUAL CENSORSHIP

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29th November 1991

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The Chairman,
Royal Commission on Criminal Justice,
Whittington House,
19 Alfred Place,
London,
WC1E 7LG.

Dear Sir,

SUBMISSION OF THE NATIONAL CAMPAIGN FOR THE REFORM OF THE OBSCENE PUBLICATIONS ACTS TO THE ROYAL COMMISSION ON CRIMINAL JUSTICE

The National Campaign for the Reform of the Obscene Publications Acts (NCROPA) wishes to make the following submission for the consideration of the Royal Commission on Criminal Justice.

1. It is an unfair and unjust practice whereby the usual and generally accepted burden of proof of guilt in criminal proceedings is reversed and where the defendant is thereby effectively required to prove that he (or she) is 'not guilty' of a crime, rather than the onus of proof being on the prosecutor and whereby he is required to prove that the defendant is guilty.

This practice occurs as the result of what we regard as flawed legislative drafting in several statutes. Those with which the NCROPA is mostly concerned are in connection with search, seizure and/or forfeiture processes. They are:-

(1) The Obscene Publications Acts 1959 - Section 3.

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(2) The Customs Consolidation Act 1876 - Section 42 (as amended)

and (3) The Customs and Excise Management Act 1979 - Section 139(6) and Section 145.

The Obscene Publications Act 1959 - Section 3

This Section refers to powers of search and seizure. Sub-section (3) requires that the defendant has "to show cause why the (seized and allegedly 'obscene') articles or any of them should not be forfeited." In other words, the defendant is required to prove his 'innocence', rather than the prosecutor the defendant's guilt.

The Customs Consolidation Act 1876 -Section 42

This imposes a restriction on the import into the U.K. of allegedly "indecent or obscene" articles ("prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles."). Any alleged infringement of this Section results, one way or another, (either by Crown prosecution or 'quasi-criminal' civil proceedings), in the defendant (or respondent) being required to prove his or her 'innocence' (i.e. that the seized articles are not "indecent or obscene") rather than the prosecutor (or complainant) his or her 'guilt', (i.e. to prove that the seized articles are "indecent, etc")

The Customs and Excise Management Act 1979 - Sections 139(6) & 145

Section 139(6) of this Act authorises Schedule3 of this Act "to have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited under the customs and excise Acts".

(Schedule 3 of the Act deals with "Provisions Relating to Forfeiture" including, in Sections 8-12 of this Schedule,provisions for

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'Proceedings for condemnation by court').

Section 145 of this Act details 'General provisions as to legal proceedings' for an offence under the customs and excise Acts for condemnation under Schedule 3 of this Act.

Notwithstanding that the NCROPA is campaigning for the complete removal of the provision in Section 42 prohibiting allegedly "indecent or obscene" articles, we believe that defendants/respondents in court proceedings in such search/seizure/forfeiture cases should not be gravely disadvantaged in this way, which represents a complete denial of that basic principle of British justice 'Innocent until proved guilty'. Such practices, disgracefully facilitated and perpetuated by the several Acts herein described, render the accused person 'Guilty until proved innocent'. This requires urgent change. We also deplore the accused's denial of the right to a jury trial in such search/seizure/forfeiture cases. This also requires urgent remedy.

2. The now fully operative legislation regarding the Courts' empowerment to confiscate the proceeds of a criminal offence is far too sweeping and, again, fundamentally flawed by its implicit requirement for a defendant to prove that any of his or her assets have not been derived from crime. This is, in effect, another instance of reversal of the usual 'burden of proof' from the shoulders of the prosecutor to those of the defendant - another instance in British justice of the 'guilty until proved innocent' syndrome. It is wrong in principle and should be changed.

The enabling legislation for the implementation of this process is contained in the Criminal Justice Act 1988 - Part VI, which refers to the 'Confiscation of the Proceeds of an Offence'; and Schedule 4 of that Act which refers to confiscation orders.

and in S.I. 1999/1570, which refers to offences regarding which con-

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fiscation orders can be made.

3. The situation which prevails in this country whereby acquitted defendants in so-called "obscene" publications cases are ever at risk of being subjected not only to 'double-jeopardy', but sometimes 'triple','quadruple' and even 'quintuple' jeopardy is, we believe, an outrage.

This sometimes occurs where a defendant is prosecuted for publishing allegedly "obscene" articles, is found not guilty (i.e. the articles are determined to be not "obscene" by the Court), subsequently publishes the same, identical previously 'acquitted' articles in another area of legal jurisdiction (probably in a completely different part of the country), and is then prosecuted for a second time for publishing the very same 'legal' articles by a different Court from the one which heard the first prosecution.

The classic example of this are the cases of defendant Mr. John Lindsay, a film producer and former cinema club owner in the 1970s. Between 1974 and 1979 Mr. Lindsay was prosecuted five times, in five different Courts throughout England, including Birmingham Crown Court in 1974 and the Old Bailey, London (in 1979 or 80), for publishing exactly the same set of sexually explicit films and which the five entirely separate prosecutions claimed were "obscene" contrary to the provisions of the Obscene Publications Act 1959.

At the first four of these trials, Mr. Lindsay was acquitted (i.e. the Courts found that the articles (films) were not "obscene"). However, at the fifth trial, at Preston Crown Court in Lancashire (which the then Attorney General, Sir Michael Havers, refused to prevent from going ahead), Mr. Lindsay was convicted (i.e. the films were found to be "obscene") and he was sent to prison!

Such travesties of supposedly fair, British 'natural justice' should never be possible and we strongly urge legislative action to remedy this indefensible wrong.

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4. In addition to opposing any reversal of the 'burden of proof' in criminal proceedings, we also oppose any absence of the requirement for the prosecution to prove a 'guilty intent' on the part of an accused person.

   By way of example we refer the Commission to the case of R v Graham-Kerr (1988) I WLR 1098 (Court of Appeal). The decision in this case means that no 'mens rea' is required to secure a conviction under the provisions of the Protection of Children Act 1978 (as amended by the Criminal Justice Act 1988). (No other country in the European Community has legislation which criminalises mere possession of this type of material.)

5. When an official complaint is made against a police officer, not only should the result of the adjudication on that complaint by the Police Complaints Authority be made public, but the precise nature and extent of any disciplinary action taken against the complained-of officer should also be made public (including decisions where no disciplinary action was taken).

   This does not happen at present because the police always refuse to divulge such information (or, at least, the precise nature and extent of any disciplinary action taken) to the public.

   The NCROPA has recently experienced evidence of this tight secrecy with regard to Superintendent Leslie Bennett of the Metropolitan Police and formerly Head of Scotland Yard's Obscene Publications Department (TO13). Supt. Bennett was convicted at Bow Street Magistrates' Court on 10th October for the illegal use of the police national computer. The NCROPA wrote to the Metropolitan Police Commissioner, Sir Peter Imbert, on 21st October requesting details of what disciplinary action (if any) had been taken against Supt. Bennett as the result of his crime. In a reply from Commander David Stevens on 13th November, we were informed that "such proceedings are confidential and not open to discussion". (Copies of this correspondence are enclosed herewith.)

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This is a totally unacceptable practice which means that the police are virtually accountable to no-one, certainly not to the public. Disciplinary sanctions and punishments in other professional bodies (e.g. doctors, lawyers, priests etc.) are all made public and for the police, with more actual power than any other public institution, to be so protected by this veil of secrecy, is both dangerous and highly improper. Legislation is required, not only for the establishment of a completely independent Police Complaints investigative machinery, but also for the compulsory public disclosure of such police disciplinary actions.

Finally, the NCROPA is of the opinion that, no matter how much procedures are refined and improved, British criminal justice can never be fairly and properly dispensed where out-moded, ambiguously or sloppily drafted criminal law remains in force. Far too much unnecessarily repressive criminal censorship law remains in force in this country which incorporates entirely subjective tests for measuring such 'crime' and thus determining illegality. The concepts of 'obscenity' and 'indecency', and of 'depravity' and 'corruption' as they are legally enshrined in British law, are the worst examples of these inevitably completely subjective tests. It is high time they were got rid of by this country, as they have been got rid of long since, almost universally, by most other countries of the so-called 'free' world, and where 'freedom of expression' is not viciously curtailed by the draconian, absurdly imprecise legal restrictions to which U.K. citizens are subject. The best way to improve criminal justice in this country is to improve (and that will often mean repeal) much of our criminal law.

Yours sincerely,

David Webb,
Honorary Director,
National Campaign for the Reform of the Obscene Publications Acts

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