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# Let's be free to disagree

Should the law criminalise "insulting" words or behaviour? Most people would say "no". The freedom to disagree and to challenge received wisdom lies at the heart of a democracy.

But Section 5 of the Public Order Act 1986 outlaws "insulting" conduct, and it is having a chilling effect on free speech.

Section 5 criminalises "threatening, abusive or insulting" words or behaviour which are likely to cause "harassment, alarm or distress".

The police need powers to maintain law and order. But the phraseology of Section 5 (which applies to England and Wales) is now being used as a speech crime to censor debate.

Parliament's Joint Committee on Human Rights, citing the case of a teenager arrested for labelling Scientology a cult, has called for the removal of the word "insulting" to raise the threshold of the offence. This should be done in the Protection of Freedoms Bill.

## MPs back change to protect free speech

MPs from across the political parties at Westminster are backing an amendment to remove "insulting" conduct from Section 5 of the Public Order Act. A vote on the amendment, tabled by Conservative MP Edward Leigh, is expected soon at the Report Stage of the Protection of Freedoms Bill.

The amendment is supported by a growing list of MPs including senior back benchers Tom Watson (Lab), Tim Farron (Lib Dem) and David Davis (Con). This comes after a debate on 1 March, the first on the Government's Protection of Freedoms Bill, in which MPs warned that public order legislation urgently needs amending to protect freedom of speech.

Major speeches were given by Edward Leigh and John Glen (Con). Tom Brake (Lib Dem) and others backed the change.

Mr Leigh said that free



MPs said the word "insulting" should be removed from Section 5.

speech is "a bedrock of true democracy", and that the "criminal law does not exist to protect people from feeling insulted". He continued: "We might not like what someone says and we might take offence, but lively debate and a robust exchange of ideas are integral parts of a true democracy."

Mr Glen explained that the ability to "voice one's opinion without fear of punishment or censorship is a fundamental human right" and highlighted alarming examples where this has been threatened by Section 5, including cases of street preachers unfairly targeted for speaking from the Bible.

# The need for public order laws



Fotolia/ToriJayne

Removing “insulting” from Section 5 would not prevent police from tackling hooliganism using other powers.

In 1986 the Home Secretary Douglas Hurd told Parliament that Section 5 was intended to “provide the police with more effective powers to protect the public against hooligan behaviour” but without undermining civil liberties. “[W]e have no desire to use the criminal law to enforce a particular social

standard”, he said.<sup>1</sup>

Clearly Section 5 needs amending to return to the higher threshold envisaged then. Removing “insulting” would not prevent hooliganism from being punished. Section 5 would still cover “threatening”, “abusive” and “disorderly” behaviour. Police do

have other powers. The Protection from Harassment Act 1997 criminalises repetitive harassment. The laws of public nuisance and breach of the peace are broad enough to catch a wide range of disorderly behaviour.

<sup>1</sup> House of Commons, Hansard, 13 January 1986, col. 794

## View from a former Senior Crown Prosecutor

“Looking back on the large number of [Section] 5 cases I have either prosecuted or defended over the years I cannot think of any ‘normal’ public order situation which could not be covered by the words ‘threatening and abusive’. Most cases under s5 involve people (often drunk) yelling aggressively and [swearing] and that is the sort of situation that s5 ... was supposed to deal with, it was never supposed to deal with the situation where individuals, whether street preachers or otherwise, were expressing their personal opinions”.<sup>1</sup>



Neil Addison,  
Co-author of *Harassment Law and Practice*,  
Blackstone Press

<sup>1</sup> See <http://religionlaw.blogspot.com/2010/05/what-have-you-been-saying-homophobic.html> as at 29 September 2010

## Parties say they support civil liberties

Labour leader Ed Miliband has said that in Government Labour were “too draconian on aspects of our civil liberties”.<sup>1</sup> The Liberal Democrat Party made a manifesto pledge to reform the Public Order Act “to safeguard non-violent protest even if it offends”.<sup>2</sup> Former Lib Dem frontbench spokesman, Evan Harris, speaking in March 2009, argued that Parliament “must make it clear, in statute and in the minds of the police, that there is no right not to be offended”.

“We need to get rid of the idea of insult, especially unintentional insult – as in section 5 of the Public Order Act 1986 – from our statute



Flickr/The GBI

Labour leader Ed Miliband

book”, Dr Harris said. At the time, Conservative front bench spokesman Dominic Grieve (now Attorney General) said he was “sympathetic” to the suggestion.<sup>3</sup>

<sup>1</sup> Politics.co.uk, 7 July 2010, see <http://tinyurl.com/2d32buv> as at 17 May 2011

<sup>2</sup> Liberal Democrat Manifesto 2010, page 93

<sup>3</sup> House of Commons, Hansard, 24 March 2009, col. 199

# 'Insult' cases under Section 5 of the Public Order Act

## Case #1 Ben and Sharon Vogelenzang

In March 2009 hotel owners Ben and Sharon Vogelenzang were charged by police under Section 5 of the Public Order Act, following a religious debate with a Muslim guest. In December 2009 they

were found innocent after a judge said their accuser's evidence was not reliable.

The conversation included discussion about whether Islamic dress for women is a form of oppression and whether Jesus is the Son of God or just a prophet of Islam.

The Muslim lady, Erika Tazi, later complained to police and the Christian couple suffered months of anxiety as they waited for the trial.

In court Mrs Tazi accused the couple of launching an hour-long verbal attack against her.

She claimed they had called her a terrorist and mocked her Islamic headscarf.

But Mrs Tazi's claims were contradicted by other witnesses and, after hearing all the evidence, District Judge Richard Clancy said her version of events could not be trusted and hinted that the police should have handled the matter more appropriately.

The police and Crown Prosecution Service combined the Section 5 charge with a "religious aggravation". This would have increased the maximum fine from £1,000 to £2,500 each.

Ben and Sharon's hotel business was devastated by the prosecution.



## Case #2 Dale Mcalpine

In April 2010 street preacher Dale Mcalpine was arrested and held in a police cell after saying to a Police Community Support Officer that homosexual practice is a sin. The comments were not made during his public preaching but afterwards when the PCSO had raised the issue with him. The police bail conditions banned Mr Mcalpine, of Workington in Cumbria, from preaching in public.

The Crown Prosecution Service dropped the case before it came to trial.

Cumbria Police later admitted it had acted unlawfully, giving £7,000 compensation to Mr Mcalpine in settlement for a claim of wrongful arrest, unlawful imprisonment and breach of his human rights.



## Case #3 Andy Robertson



Police officers used Section 5 to try to stop Andy Robertson preaching in Gainsborough marketplace in June 2008, claiming people might be "offended". Mr Robertson, from The Open-Air Mission, had preached there for ten years and described the incident as "disturbing".

## Case #6 Kyle Little

Kyle Little, 19, after being warned by police officers for using bad language in the street, was arrested and later prosecuted under Section 5 for a "daft little growl" and a "woof" towards two Labradors that came bounding towards him. After the arrest he was detained by police for five hours, despite the dogs' owner not wanting any prosecution. At the cost of £8,000 to the taxpayer, Newcastle Crown Court acquitted Little of the charge.<sup>1</sup>

<sup>1</sup> The Daily Telegraph, 28 April 2007

## Case #4 Animal Rights Campaigners

Demonstrators in Worcester were threatened with arrest and seizure of property under Section 5 for protesting against seal culling using toy seals coloured with red food dye.

Police informed them that the toys were deemed distressing by two members of the public. The police then ordered them to move on.

One protester commented, "I can't see how a toy seal would be offensive to anyone."<sup>1</sup>

<sup>1</sup> Worcester News, 21 March 2006. See also <http://www.indymedia.org.uk/en/2006/03/336399.html> as at 28 September 2010

## Case #7 Harry Hammond

In 2002 an elderly Bournemouth street preacher, Harry Hammond, was convicted for displaying a sign which said that homosexual conduct is immoral and fined £300 plus £395 costs. The High Court later upheld the conviction, saying magistrates were entitled to find the sign "insulting" to homosexuals.<sup>1</sup> Although Mr Hammond had been assaulted by a crowd and knocked to the ground, only Mr Hammond was ever arrested.

<sup>1</sup> Hammond v Department of Public Prosecutions, [2004] EWHC 69 (Admin)

## Case #5 Scientology protester

In May 2008 a 16 year-old protester faced a trial for holding a placard outside a Scientology centre saying: "Scientology is not a religion, it is a dangerous cult." The boy claims police told him he could not use the word "cult". He explained to officers that similar wording had been used by a judge in a 1984 court case. The police insisted he take down the sign, gave him the court summons and confiscated the sign when he refused. City of London Police claimed they respected the right to demonstrate but had to "balance that with the right of all sections of community not to be alarmed, harassed or distressed". They referred to the Crown Prosecution Service the allegation that the sign was "abusive or insulting". Advocacy group Liberty took up the case and there was widespread criticism of the police. The CPS dropped the case.<sup>1</sup>

<sup>1</sup> The Guardian, 23 May 2008; The Daily Telegraph, 21 May 2008. See also <http://www.liberty-human-rights.org.uk/media/press/2008/free-speech-victory-as-charges-against-teen-anti-scientology-protestor.php> as at 27 September 2010



# Free speech and the Protection of Freedoms Bill

Home Secretary Theresa May introduced the Protection of Freedoms Bill to the Commons by saying: "Today we have a rare opportunity. The Bill gives us a chance to roll back the creeping intrusion of the state into our everyday lives, and to return individual freedoms to the heart of our legislation."<sup>1</sup>

Yet the Bill misses an opportunity to repeal a law which has led to some alarming restrictions on free speech, a crucial individual freedom. There is widespread support for removing the word "insulting" from Section 5

of the Public Order Act 1986 but the Bill fails to do so.

The broad scope of Section 5 is a key problem in the lengthening list of cases where police have wrongly interfered with freedom of speech, as the examples in this briefing show. By allowing a person to be arrested simply for saying or doing something "insulting", Section 5 has effectively created a new thought crime.

Narrowing the scope of Section 5 would be a simple yet powerful move ideally suited to the purpose of the Protection of Freedoms Bill. A key principle of the Bill must



Theresa May introduced the Protection of Freedoms Bill.

surely be protecting the freedom to disagree.

<sup>1</sup> House of Commons, Hansard, 1 March 2011, col. 205

## Hate crime guidance

There is widespread concern that 'hate crime' guidance issued in 2005 by the Association of Chief Police Officers (ACPO) is harming free speech.

Respected constitutional lawyer Francis Bennion has criticised its emphasis on pursuing alleged incidents of 'hate' regardless of whether the allegation is true, or whether the incident is actually a crime.<sup>1</sup>

The guidance strays far beyond a proper response to the outcry over the Stephen Lawrence case, provoking police to intrude in all sorts of unrelated politicised issues which involve disagreement but not hatred.

It is easy to see how the guidance can encourage the police to use Section 5 of the Public Order Act, turning legitimate free speech into a thought crime.

<sup>1</sup> Bennion, F, 'New Police Law Abolishes the Reasonable Man (and Woman)', *Justice of the Peace*, 170, January 2006, pages 27-30

# Changing the law more effective than guidance



Government ministers are saying in correspondence that they would prefer to improve guidance to police rather than change the law. But removing "insulting" words or behaviour from the scope of Section 5 would have a much more positive influence on police on the ground than further guidance.

The wording of the law is in police officers' minds when arresting suspects, not the details of guidance, and in fact some guidance has been part of the

problem (see article across). The recent *Keeping the peace* guidance rightly urges police officers to consider people's freedom of speech and have particular regard for religious liberty, but the fact remains that Section 5 itself is too broad.

The central question is this: should the law criminalise words or behaviour that someone may find to be "insulting"? There is now a weight of evidence to prove that the answer is no.

## Campaigners speak out for free speech

Section 5 has sometimes been used to silence disagreement on the subject of sexual ethics. But homosexual campaigners have criticised police and prosecutors for doing so.

When Dale McAlpine was arrested for answering a question about homosexual conduct (see cases overleaf), Terry Sanderson of the National Secular Society labelled it “a ridiculously over-the-top reaction to someone exercising their right to freedom of speech.”<sup>1</sup>

Peter Tatchell of OutRage said that people should not be arrested for expressing their views in a “non-threatening and non-aggressive manner.” He added: “If offending others is accepted as a basis for prosecution, most of the population of the UK would end up in court.”<sup>2</sup>

Mr Tatchell also defended the elderly street preacher Harry Hammond (see cases overleaf). “If we want free speech to express our support for gay rights,” he wrote, “we must also respect the right of others to express a contrary view.”<sup>3</sup>

<sup>1</sup> See <http://www.secularism.org.uk/120395.html> as at 27 September 2010

<sup>2</sup> See <http://outrage.org.uk/2010/05/freedom-of-speech-must-be-defended-even-for-homophobes/> as at 27 September 2010

<sup>3</sup> *The Mail on Sunday*, 26 May 2002



## Parliamentary committee calls for removal of the word ‘insult’

An influential committee of MPs and Peers has called for the word “insulting” to be removed from Section 5 of the Public Order Act.

Parliament’s Joint Committee on Human Rights said it was concerned by evidence that the law had “been used to prevent people from freely expressing their views on matters of concern to them”.

The Committee did not think that language or

behaviour which is merely “insulting” should ever be criminalised in this way.

It recommended deleting the word “insulting” from Section 5, “so that it cannot be used inappropriately to suppress the right to free speech”.<sup>1</sup>

<sup>1</sup> Demonstrating Respect for Rights? A Human Rights Approach to Policing Protest, House of Lords and House of Commons Joint Committee on Human Rights, Session 2008–09, HL Paper 47-1, HC 320-1, vol. 1, paras 84 and 85



Section 5 of the Public Order Act 1986 applies to England & Wales.

## Civil liberties groups speak out

*Liberty* says Section 5 “can have a chilling effect on free speech and an impact on legitimate protests.” It comments: “The breadth of these provisions, exacerbated by the inclusion of the very subjective term of ‘feeling insulted’, and police policy in this area is of serious concern.” *Liberty* goes on to call for the repeal of Section 5 entirely (much more than simply removing “insult” from the offence), though many would say this is going too far.<sup>1</sup>

*Justice*, another civil liberties organisation, argues the offence is “extremely broad and can be used by police in a wide variety of circumstances at their discretion... In our view, the removal of the word ‘insulting’... would go some way to prevent the overuse of this power in the context of protests and demonstrations.”<sup>2</sup>

<sup>1</sup> See <http://tinyurl.com/6fkkg3m> as at 17 May 2011

<sup>2</sup> See <http://tinyurl.com/3hwffc8> as at 17 May 2011