A Proposed Amendment to the Protection of Freedoms Bill

OPINION

Introduction

1. I am instructed by my clients, the Christian Institute, to consider the government's written objections to a proposal to remove the word 'insulting' from *section 5* of the *Public Order Act 1986*. The suggested mechanism for this amendment is the addition of a new *Clause 1* to the *Protection of Freedoms Bill*.

2. In particular, I am asked to advise on the government's expressed concern that such an amendment would, as a matter of law, prevent the prosecution of conduct that ought rightly to be considered criminal, and that this could adversely impact upon vulnerable groups.

3. In the context of this discussion, it is important to underline the role of freedom of expression (and indeed of assembly[1] and of religion) in a democracy. As the European Court of Human Rights stressed in *Handyside v the United Kingdom [1979-80] 1 E.H.R.R. 737*:

> *"Freedom of expression constitutes one of the essential foundations of (democratic) society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10 (2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."*

[1] See for example *Ziliberberg v Moldova* (Application No 61821/00) (unreported) 4 May 2004, "*the right to*

The Relevant Legislation

4. *The Public Order Act 1986* contains three separate provisions that are concerned with words or behaviour considered to be threatening, abusive or insulting. *Section 5* provides:

> **5 Harassment, alarm or distress**
>
> (1) A person is guilty of an offence if he—
> (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
> (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
> within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.
>
> (2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.
>
> (3) It is a defence for the accused to prove—
> (a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or
> (b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
> (c) that his conduct was reasonable.
>
> . . .
>
> (6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

5. In contrast, *Section 4A* deals with the situation where harassment, alarm or distress is caused intentionally;

> **4A Intentional harassment, alarm or distress**
>
> (1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he—
> (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
> (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
> thereby causing that or another person harassment, alarm or distress.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling.

(3) It is a defence for the accused to prove—
(a) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
(b) that his conduct was reasonable.

. . .

(5) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

6. Finally, the offence of causing fear or provocation of violence is found in section 4:

4 Fear or provocation of violence

(1) A person is guilty of an offence if he—
(a) uses towards another person threatening, abusive or insulting words or behaviour, or
(b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,
with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is distributed or displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

. . .

(4) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

Insulting behaviour

7. While a person cannot be guilty of the *section 5* offence without being at least aware that the words or behaviour he uses may be considered threatening, abusive or

insulting, the question as to whether the conduct is actually caught by any of those terms remains an objective test. It is a question of fact for the tribunal[2]. So even where an individual did not himself consider his words or behaviour to be insulting, so long as the tribunal of fact subsequently finds that they were, and the individual concerned was aware they might have been, that is sufficient to prove guilt.

8. What is insulting is therefore that which the tribunal determines it to be, applying the law to the established facts of the case. And whilst it cannot be said that "*wherever there is disrespect or contempt for people's rights there must always be insulting behaviour*" (*Brutus v Cozens [1973] AC 354* as per Lord Morris at p.864B), and that "*words which are rude or offensive are not necessarily insulting* (*R v Ambrose (1973) 57 Cr.App.R 538, p.540*), "*an ordinary sensible man knows an insult when he sees or hears it*" (*Brutus v Cozens* at p.862G), and the word 'insulting', like 'abusive' and 'threatening', carries its "*ordinary natural meaning*" (*Brutus v Cozens* as per Viscount Dilhorne at p.865G).

9. In *R v Evans [2004] EWCA Crim 3102*, Dyson LJ noted that it was reasonable to suppose that the House of Lords in *Brutus v Cozens* would have adopted the same approach to the meaning of the phrase 'abusive behaviour' as they did to 'insulting behaviour[3]. However, the way in which words are spoken or their context is capable of robbing words of their offence- something may be found which "*remove[s] the sting of [the] comments*" (*DPP v Humphrey [2005] EWHC 822*. In *Southard v DPP [2006] EWHC 3449* the words '*fuck you*' or '*fuck off*' were said to be potentially abusive[4], and in the circumstances of the case, actually so.

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[2] See *Brutus v Cozens* [1973] AC 354: "*the word 'insulting'....appears to me...to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have ben proved*" (Lord Reid at 861D, emphasis added).

[3] See also *DPP v Clarke* (1991) 94 Cr App R 359

[4] At [22], and further: "*frequently though they may be used these days, we have not yet reached the stage where a Court is required to conclude that those words are of such little significance that they no longer constitute abuse*"

The Government's Objections

10. The government objects to the proposed deletion of the word "*insulting*" from *section 5* on the basis that this "*could result in the Courts being left in the invidious position of having to decide on a case by case basis whether particular words or behaviour were criminally 'abusive' or merely non criminally 'insulting'*"[8].

11. In my view, this objection cannot not bear serious scrutiny.

12. The Courts have long been clear that the question of what is threatening, abusive or insulting, is one for the tribunal of fact applying the ordinary meaning of those commonly understood words. Every day across the jurisdiction, magistrates and juries apply their common sense and the law to decide whether a defendant's conduct comes within the definition of a particular statutory term. Magistrates receive assistance from their legal advisors and juries are directed on the law by professional judges as part of this frankly straightforward process.

13. In any case, the Courts are routinely required to distinguish between behaviour that is merely disrespectful or offensive, for example, and behaviour that is insulting and therefore caught by statute. This process apparently causes magistrates and juries no intrinsic difficulty and there is no reason at all why it should. As Dyson LJ explained in relation to the meaning of 'abusive behaviour' in *R v Evans* [2004] *EWCA Crim 3102 [2005] 1 WLR 1435*:

> "*we do not consider that the phrase is ambiguous or so vague as to be beyond the understanding of the ordinary person. It is no more uncertain than 'insulting behaviour*'"

14. In the circumstances, there appears to be no sound basis for the suggestion that, under the proposed amendment, the Courts would have any new difficulty in distinguishing between non-criminal behaviour that is merely insulting and abusive behaviour that is clearly criminal.

[8] James Brokenshire MP to Mrs Cheryl Scott, 13 June 2011

The Impact of the Amendment Upon Vulnerable Victims

15. An apparently more substantial concern raised by the government is that the proposed amendment would disadvantage the victims of hate crime, since it would "*allow people to mock and verbally torment disabled and other vulnerable people without committing an offence, even where the overall circumstances and failure to respond to requests to desist could properly be described as criminal*"[9].

16. In my view this objection is also misconceived, primarily because it appears to misunderstand the current law.

17. Setting aside the obvious rejoinder that the behaviour described here is almost certainly to be characterised as abusive rather than merely insulting, and so would remain explicitly criminal in any event, there are also many alternative provisions apt to criminalise the '*torment'* of the disabled. Such behaviour would almost certainly merit prosecution under *section 4A*, and it would also likely attract the provisions of the *Protection from Harassment Act 1997*, which carries a heavier penalty, in any event.

18. The *Protection from Harassment Act 1997* states:

> **1 Prohibition of harassment**
>
> (1) A person must not pursue a course of conduct—
> (a) which amounts to harassment of another, and
> (b) which he knows or ought to know amounts to harassment of the other.
>
> …
>
> (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to [or involves] harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to [or involved] harassment of the other.

19. *Section 7* of the Act makes it plain that harassment includes causing alarm or distress to an individual and that the relevant conduct can include speech. In my judgement, it is beyond argument that the examples of criminal conduct against disabled people given

[9] James Brokenshire MP to Mrs Cheryl Scott, 13 June 2011

by the government would attract prosecution under the Protection from Harassment Act. If proved, conviction and in all likelihood imprisonment would follow.

Insulting versus Abusive

20. In its opposition to the proposed amendment, the government appears to rely upon *R v Haque and Choudhury*, a case in which two men were convicted under *section 5* after burning poppies at a Remembrance Day parade[10]. It seems to be suggested that because this case was prosecuted under the 'insulting' provisions, it somehow represents an example of conduct that could no longer be prosecuted in the event that the proposed amendment becomes law.

21. In my view, this argument is entirely misconceived.

22. This is because, in his judgment, Chief Magistrate Howard Riddle specifically noted that the defendants' conduct "*as well as being insulting…may also be seen as abusive*", Furthermore, and given the risk of public disorder from the defendants' behaviour, he considered prosecution to have been a proportionate interference with the individuals' rights to freedom of expression. It would, I think, be extremely challenging to contend that the behaviour of these men was not abusive and I conclude that they would certainly have faced prosecution even under amended legislation.

23. A similar point can be made in the case of *Abdul v DPP [2011] EWHC 247 [2011] H.R.L.R. 16*. Here, the High Court dismissed an appeal against the conviction under *section 5* of five appellants for protesting at a homecoming parade of soldiers from Afghanistan and Iraq. They had chanted "*British soldiers murderers*" and "*British soldiers go to hell*". Gross LJ noted that the Court below had held that the words were "*both abusive and insulting*". Davis J concluded that such behaviour was "*personally abusive and....set in context, potentially inflammatory*"

[10] See letter to Therese Coffey MP, received on 30 June 2011

24. Finally, in *Norwood v DPP [2002] EWCH 1564* the District Judge found that the poster complained of was "*abusive and insulting to Islam"*, and in *DPP v Clarke [1992] 94 Cr. App. R. 359* the holding up of pictures of aborted foetuses was found to be both abusive and insulting. None of these decisions appears to be in the least surprising.

25. In these circumstances, it is perhaps understandable that a 1994 Home Office study should find that a large majority of *section 5* cases brought before the courts involved threatening or abusive behaviour, rather than insulting conduct, even in a period before the advent of the Human Rights Act 1998, which incorporated European Convention free expression rights into domestic UK law.

Breaches of the Peace

26. In any case, public disturbances are also frequently preventable as breaches of the peace, and this aspect of the law would be left quite untouched by the proposed amendment. A breach of the peace exists whenever harm is actually done or is likely to be done to a person or in his presence to his property, or a person is in fear of being so harmed, through an assault, an affray, a riot, an unlawful assembly or any another disturbance (*R v Howell [1982] QB 416*). An individual who refuses to desist from behaving in a way that risks these outcomes when warned to do so by a constable, commits the offence of obstruction and may be arrested and prosecuted for this crime.

27. In *Hammond v DPP [2004] EWHC 69*, where the case was put on the basis that the display of signs saying "*Stop immorality. Stop homosexuality and stop lesbianism*" was insulting (and therefore whether they were also abusive was not decided), the facts revealed that on a prior occasion members of the public confronted by the signs had tried to set them on fire, and the defendant had covered his poster on a bus because he believed it might cause a 'fracas'. On the day in question, some people were aggressive: some threw soil at the appellant and "*one person was hit over the head with the placard*". A police constable was "*of the view that the appellant was provoking violence*". Several named people were personally insulted and distressed by the sign.

28. In my view, it is highly probable that breach of the peace powers could have been exercised in such a case or that, alternatively, a *section 4* provocation of violence offence proved.

29. As Lord Rodger explained[11] in *Laporte v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55 [2007] 2 AC 105*:

> "*Sometimes, lawful and proper conduct by A may be liable to result in a violent reaction from B, even though it is not directed against B. If B's resort to violence can be regarded as the natural consequence of A's conduct, and there is no other way of preserving the peace, a police officer may order A to desist from his conduct, even though it is lawful. If A refuses, he may be arrested for obstructing a police officer in the execution of his duty.*"

30. So there are many alternative powers in existence to prevent or to prosecute behaviour that is abusive, or risks a breach of the peace, or amounts to harassment, or has religious, racial, sexual or disability hatred elements, or where people are placed in fear.

31. It is my considered view that in all foreseeable categories of case, the removal of the word 'insulting' from *section 5* is highly unlikely to affect the State's ability to prevent or to prosecute those aspects of criminal behaviour relied upon by the government in its response to the proposed amendment. Either *section 5* will remain applicable, since the conduct is plainly threatening or abusive in any event, or an alternative may be proved under *section 4* or section *4A,* or the behaviour may be curtailed as a breach of the peace, or alternative offences will have been committed.

32. Finally, the removal of the word 'insulting' from *section 5* would bring English law into line with Scots law: the new *section 38* of the *Criminal Justice and licensing (Scotland) Act 2010* is confined to 'threatening and abusive' conduct. I am not aware

[11] See also, relevantly, Sedley LJ in *Redmond-Bate v DPP* [2000] H.R.L.R. 249: *"If the appellant and her companions were (like the street preacher in Wise v. Dunning) being so provocative that someone in the crowd, without behaving wholly unreasonably, might be moved to violence he was entitled to ask them to stop and to arrest them if they would not. If the threat of disorder or violence was coming from passers-by who were taking the opportunity to react so as to cause trouble (like the Salvation Army in Beatty v. Gilbanks), then it was they and not the preachers who should be asked to desist and arrested if they would not."*

that an inability to prosecute merely insulting conduct has caused any law enforcement difficulties in that jurisdiction.

Proportionality

33. Of course there are bound to be some cases presently caught by *section 5* that would be decriminalised under the terms of the proposed amendment; that, presumably, is its point. So where the words complained of are merely insulting rather than abusive, *and* where there is no evidence of any intent (inferred or otherwise) to harass, to alarm or to distress, nor any person actually so affected, nor any objective likelihood of immediate violence arising, nor any fear of such violence, then it may be that such words and behaviour would not be caught by the amended *section 5* or by any other legislation.

34. But the pressing question is whether such anaemic conduct as remains to be considered by the criminal law should be subject to penal sanction at all, and whether State interference in the context of mere insults of that character can properly be justified, or regarded as a proportionate interference by the State in freedom of speech, assembly or religion.

35. Sedley LJ reminded the courts in *Redmond-Bate v DPP [2000] H.R.L.R. 249* that "*free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having*". As argued in *Hammond*, a "*heckler's veto"* would not only offend the European Convention, but the English common law as well.

36. In a recent decision concerning potential tort liability for the intentional infliction of emotional distress by disgraceful Wetsboro Baptist Church protests at the funerals of dead American servicemen[13], the United States Supreme Court was concerned that a jury is "*unlikely to be neutral with respect to the content of (such) speech, posing a real*

[13] *Snyder v Phelps et al* 562 US (2011), decision No.09-751, 2 March 2011

danger of (their) becoming an instrument for the suppression of ...vehement, caustic and sometimes unpleasant expression" Such a risk was "*unacceptable: in public debate [we] must tolerate insulting, and even outrageous speech in order to provide adequate breathing space for the freedoms protected by the first amendment".*

37. In most circumstances, the Court concluded, "*the burden normally falls upon the viewer to avert further bombardment of [his] sensibilities by simply averting his eyes".* After all, the "*purpose of all speech protection...is to shield just those choices of content that in someone's eyes are misguided, or even hurtful*".

38. Closer to home, in a case regarding the banning of an electoral broadcast by the Pro-Life Alliance, Lord Scott said:

> *"Indeed, in my opinion, the public in a mature democracy are not entitled to be offended by the broadcasting of such a programme. A refusal to transmit such a programme based upon the belief that the programme would be "offensive to very large numbers of viewers" (the letter of 17 May 2001) would not, in my opinion, be capable of being described as "necessary in a democratic society ... for the protection of ... rights of others". Such a refusal would, on the contrary, be positively inimical to the values of a democratic society, to which values it must be assumed that the public adhere*"[14].

Conclusion

39. In my view, the government's expressed concerns about this amendment appear to be without foundation. In particular, the terms of the amendment appear unlikely to de-criminalise those categories of serious, distressing and disruptive conduct cited by ministers in opposing reform.

40. On the contrary, it seems clear that only the most low-level insulting words and behaviour would evade prosecution or other police intervention under this amendment, and that any consequent increase in the risk to public order is likely to be minimal to non-existent.

[14] *R(Prolife Alliance) v BBC* [2002] EWCA Civ 297 [2004] 1 A.C. 185

41. In contrast, the terms of the proposed amendment may underline a commitment to freedom of speech, assembly and religion, and they appear capable of achieving a safe balance between these critical civil liberties and public order by recognising, as Laws LJ remarked in *Tabernacle v SSHD* [2009] EWCA Civ 23, that "*rights worth having are unruly things*"[15].

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[15] At [43]