

## SHOULD INSULTS BE CRIMINAL?

Section 5 of the Public Order Act 1986 outlaws "threatening, abusive or insulting" words or behaviour if they are likely to cause "harassment, alarm or distress".

Criminalising 'threats' and 'abuse' has wide support. Both clearly denote a higher degree of seriousness. But because 'insult' is a very subjective concept, and is much less serious, Section 5 is widely regarded as a threat to free speech.

Reform Section 5 is a broad-based campaign calling for the removal of the term "insulting" from Section 5. This is a policy advocated by the Joint Committee on Human Rights,<sup>1</sup> and supported by civil liberties groups including Liberty and Justice,<sup>2</sup> and by the Independent Police Complaints Commission.<sup>3</sup> We support Lord Dear's Crime and Courts Bill amendment which implements this policy.

## THE PUBLIC ORDER ACT 1986

The wording of Section 5 has been a concern since the passage of the 1986 Act itself. Although similar wording had appeared in earlier legislation, in 1986 the threshold was lowered to include anything "within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby". No one need actually be alarmed. Such alarm need only be "likely" in the view of police or prosecutors.

At the time Professor A.T.H. Smith, now Cambridge Professor of Criminal and Public Laws, said: "Because of the potential breadth of the language in which the section is drafted, it affords scope for injudicious policing".<sup>4</sup>

As he steered the Bill through Parliament, Government Minister Lord Glenarthur said "insulting" did not mean merely "rude or annoying".<sup>5</sup> But according to Judge Peter Thornton QC in *The Law of Public Order and Protest* published in 2010 Section 5 had indeed extended the criminal law "into areas of annoyance".<sup>6</sup>

## THE JOINT COMMITTEE ON HUMAN RIGHTS

In 2009 the Joint Committee on Human Rights (JCHR) observed: "Whilst arresting a protestor for using 'threatening or abusive' speech may, depending on the circumstances, be a proportionate response, we do not think that language or behaviour which is merely 'insulting' should ever be criminalised in this way".<sup>7</sup>

In the same year Lord Lester of Herne Hill moved an amendment on behalf of the JCHR to delete 'insulting' from Section 5. Speaking in support, the late Lord Monson observed that, "the word 'abusive' can be judged objectively, but 'insulting' is totally subjective. What one person finds

offensive, the next person may be indifferent to... It did not matter very much at first, because I think that the public 20-odd years ago were less thin-skinned than they are now... People are positively encouraged to be touchy, both by the media – whether deliberately or not – and pressure groups".<sup>8</sup>

Lord Pannick QC, supporting the amendment said: "I find it very difficult to think of an example of conduct which is neither threatening nor abusive but which it is appropriate for the criminal law to prohibit under Section 5 because it is nevertheless insulting, yet one can think of many obvious cases of conduct which may be perceived to be insulting – it is a subjective test".<sup>9</sup>

Lord Henley, speaking at the time as an Opposition frontbencher, appeared to have some sympathy: "I agree with the noble Lords, Lord Monson and Lord Pannick, that it is difficult to imagine occasions when it would be appropriate to use 'insulting' – which it is suggested should be removed – in the criminal law but not to use 'threatening or abusive'...".<sup>10</sup>

In the Commons, Liberal Democrat Evan Harris, also on the JCHR, tabled the same amendment. Conservative spokesman Dominic Grieve MP (now Attorney General) indicated he was "sympathetic" to the suggestion.<sup>11</sup>

In 2011 Edward Leigh MP tabled an identical amendment to remove "insulting". 65 MPs from across the parties co-sponsored it. The JCHR responded: "We consider that this would be a human rights enhancing measure and would remove a risk that these provisions may be applied in a manner which is disproportionate and incompatible with the right to freedom of expression, as protected by Article 10 ECHR and the common law".<sup>12</sup>

## THE GOVERNMENT CONSULTATION

In response to pressure from MPs the Government began a consultation on whether "insulting" should be removed. The consultation began on 13 October 2011 and closed on 13 January 2012.<sup>13</sup> The consultation was to be finalised in time to inform proceedings on the Protection of Freedoms Bill in the House of Lords.<sup>14</sup> The Government missed that deadline. The Bill received Royal Assent on 1 May 2012.

Governments should respond to a consultation within three months of closing. In July 2012, six months after the closing date, Lord Mawhinney, speaking on the Crime and Courts Bill, challenged the Government over the delay. Then Home Office minister Lord Henley apologised. Citing the 2,500 responses received he stated, 'we have some considerable time before we get to Report. That might make it easier to come to that considered view. I hope at that point we will be able to put forward the Government's considered view to the House'.<sup>15</sup> Report Stage on the Crime and Courts Bill began in November 2012.

An amendment to remove "insulting" has been tabled by Lord Dear, Baroness Kennedy of the Shaws, Lord Macdonald of River Glaven and Lord Mackay of Clashfern. Reform Section 5 is urging Peers to vote for this amendment. The Government cannot be allowed to delay this urgently-needed civil liberties reform any longer.

## WIDE SUPPORT FOR REFORM FROM MPS

A ComRes poll of MPs found that 62% agree that it is no business of the criminal law to outlaw insults. 58% agree that the word "insulting" should be removed from Section 5 to protect freedom of speech with just 22% disagreeing. Only 17% of MPs say that removing "insulting" from Section 5 would undermine the ability of the police to protect the public.<sup>16</sup>

## DOES OUTLAWING INSULTS PROTECT THE VULNERABLE?

In 2009 the Home Office claimed, "if 'insulting' is removed from the offence, it is possible that people who mock and verbally torment disabled and other vulnerable people would commit no offence".<sup>17</sup> Similar arguments have been proffered in more recent correspondence from the Home Office.

But there are tougher and more targeted laws such as incitement to racial hatred and a range of 'aggravated' offences where hostility to the group to which the individual belongs is taken into account. Along with general laws such as public nuisance and breach of the peace, these give police with all the powers they need to protect minority groups. The "abusive" limb of Section 5 would cover most, if not all, genuine cases of public disorder. And any repeated harassment of an individual (i.e. more than one incident) is caught under the Protection from Harassment Act 1996.

It has also been suggested that the "insult" limb of Section 5 is necessary to prosecute those who disrupt Remembrance Day marches or burn Remembrance Day poppies. Again, this ignores the existence of other legislation such as Section 4(a) of the Public Order Act which outlaws intentional harassment, alarm or distress.

The excessively broad nature of Section 5, and its damaging impact on civil liberty, cannot be justified by such narrow, fact-specific cases which could be addressed by targeted legislation if Parliament were so minded.

Lord Macdonald of River Glaven QC, former Director of Public Prosecutions, comprehensively dismissed these arguments against reform of Section 5 in a legal opinion dated 31 August 2011 which can be read at [www.reformsection5.org.uk](http://www.reformsection5.org.uk)

Some ask whether removing "insulting" would legalise swearing at police officers. It would not. Swearing would still be caught by Section 5 if "insulting" were removed. In *Southard v DPP* (2006) EWHC 3449 the police officer concerned gave evidence of having felt "threatened" by the swearing defendant and the judge repeatedly used the word "abusive" to describe the expletives used.<sup>18</sup>

### 'THE RIGHT TO BE INSULTING'

Keir Starmer, Director of Public Prosecutions, recently said: "We live in a democracy, and if free speech is to be protected there has to be a high threshold. People have the right to be offensive, they have the right to be insulting, and that has to be protected".<sup>19</sup> Although he was not speaking about the Public Order Act, clearly his remarks have wider significance.



Rowan Atkinson speaks in support of Reform Section 5. Go to YouTube.com & search for "Reform Section 5" to hear his speech.



# PUBLIC ORDER ACT 1986

1986 CHAPTER 64

## PART 1

### NEW OFFENCES

#### 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.
- (4) [REPEALED]
- (5) [REPEALED]
- (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.

## FOOTNOTES

- <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
- <sup>2</sup> Liberty, Liberty's Response to the Home Office's 'Your Freedom' Consultation, October 2010, paras 27-29; Justice, Response to Home Office Consultation: Amendment to Section 5 of the Public Order Act 1986, September 2009, para 15
- <sup>3</sup> Memorandum submitted by the Independent Police Complaints Commission (IPCC) to the Joint Committee on Human Rights, May 2009, para 20
- <sup>4</sup> Smith, A T H, *Offences Against Public Order*, Sweet & Maxwell, 1987, page 117
- <sup>5</sup> House of Lords, Hansard, 16 July 1986, col. 929
- <sup>6</sup> HHJ Peter Thornton QC et al, *The Law of Public Order And Protest*, Oxford University Press, 2010, page 36
- <sup>7</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, para 85
- <sup>8</sup> House of Lords, Hansard, 28 October 2009, col. 1188
- <sup>9</sup> House of Lords, Hansard, 28 October 2009, col. 1188
- <sup>10</sup> House of Lords, Hansard, 28 October 2009, col. 1189
- <sup>11</sup> House of Commons, Hansard, 24 March 2009, col. 199
- <sup>12</sup> Joint Committee on Human Rights - Eighteenth Report, *Legislative Scrutiny: Protection of Freedoms Bill*, 13 September 2011, para 158
- <sup>13</sup> Consultation on Police Powers to Promote and Maintain Public Order, Home Office, October 2011
- <sup>14</sup> House of Commons, Hansard, 10 October 2011, cols. 82 and 88
- <sup>15</sup> House of Lords, Hansard, 4 July 2012, col. 781
- <sup>16</sup> Full data can be viewed at [www.reformsection5.org.uk/downloads](http://www.reformsection5.org.uk/downloads)
- <sup>17</sup> Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-second Report of Session 2008-09 - Joint Committee on Human Rights, 13 January 2009, para. 17
- <sup>18</sup> Southard v DPP [2006] EWHC 3449 at 8 and 22
- <sup>19</sup> BBC News, 11 October 2012, see <http://www.bbc.co.uk/news/technology-19910865> as at 20 November 2012