



25 Red Lion Square

London WC1R 4RL

TEL: 020 7404 3126

FAX: 0870 762 8971

EMAIL: enquiries@secularism.org.uk

WEB: www.secularism.org.uk

Consultation on police powers to promote and maintain public order

A response by the National Secular Society

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About the National Secular Society

The National Secular Society (NSS) is a non-profit non-governmental organisation, founded in 1866. Based in the UK, it advocates the separation of religion and state and promotes secularism as the best means to create a society in which people of all religions or none can live together fairly and cohesively. The NSS sees secularism, that is, the position that the state should be neutral in matters of religion, as an essential element in promoting equality between all citizens. It therefore takes a keen interest in such causes as social cohesion and the fight against all forms of discrimination.

The NSS campaigns — at the UK, EU and international levels — on issues relating to the protection of Human Rights, discrimination, freedom of expression, social cohesion, education and the rule of law. The NSS seeks a society where law and the administration of justice are based on equality, respect for Human Rights and objective evidence without regard to religious doctrine or belief.

We welcome the opportunity to respond to this consultation. We will limit our comments to questions that fall within the remit of our work.

QUESTIONS ON SECTION 5 OF THE PUBLIC ORDER ACT

1. Do you think there is a clear difference between ‘insulting’ words and behaviour and ‘abusive’ words and behaviour? Please give examples.

There is a fairly clear difference in English usage between the words, but the NSS is concerned that the word ‘insulting’ sets the bar for a criminal offence far too low by potentially criminalising (and therefore having a chilling effect on) legitimate freedom of expression - including that intended for the public good. No distinction is made by the law between claiming insult to people’s beliefs and personal abuse. We believe that criminal law should protect individuals from serious abuse, but not their beliefs. We are aware that many Islamic extremists consider that anyone who insults Islam should be put to death and fear that the inclusion of ‘insulting’ in the law invites pressure on prosecuting authorities to seek prosecutions for insults which in our view are entirely unjustified.¹

There is often confusion between respect for individuals and respect for beliefs. While respect for the rights of the individual is enshrined in law, beliefs and organisations do not and should not automatically command respect in a democracy. Consequently, they should not expect the right not to be insulted, while individuals should be protected from abuse.

Everyone regards some ideas as sacred or unchallengeable, but those same ideas may well be thought blasphemous, irrational or even harmful by others. The law as it stands has a chilling effect on those trying to mitigate the harm they see. For example, with the bar as low as ‘insulting’, it is feasible that those seeking to oppose the use of sharia law in the UK on the grounds of diminished rights it allows to women compared with UK law could be accused of ‘insulting’ individuals who hold strong beliefs about the moral code and religious law of Islam. That such views should be suppressed by the law or even by its chilling effect is not in the public interest.

Such concerns are not merely speculative. Unreasonable curtailment of freedom of expression when religion has been criticised on Human Rights grounds has even occurred at the United Nations. When the International Humanist and Ethical Union (IHEU – to which we are affiliated) tried to make a brief joint statement at the UN Human Rights Council (UNHRC) about honour

¹ <http://www.thereligionofpeace.com/Quran/016-insulters-islam.htm>.

killings, female genital mutilation and stoning, they were constantly interrupted by the Egyptian representative who accused them of trying to “crucify Islam”.² IHEU has also been accused of ‘inciting hatred’ by the same delegation, and has been prevented from speaking about the lack of conformity of sharia law with international human rights law when Pakistan objected that it was “insulting to our faith to discuss sharia law in this forum” (our underlining).³ Sharia cannot now be discussed at the UNHRC except by experts, presumably all approved Muslims.

While believers in any one religion are not a homogenous mass, a vocal minority – frequently extremists – often claim to speak for whole communities and claim insult where the majority of moderate believers would see none.

The European Court of Human Rights’ guide to the implementation of Article 10 of the European Convention on Human Rights states that *Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith*⁴.

On a psychological level, the perception of an insult is predominantly an intellectual process, whereas there is a stronger emotional component to feeling abused.

2. In your experience, are ‘insulting’ words and behaviours less serious than ‘abusive’ words and behaviours. Please give examples.

The NSS considers that abuse covers more serious language and behaviour and contains an element of potential threat, menace, harassment or humiliation. Insult is more to do with challenging or criticising values, beliefs or self-image. In some cases, this can be a justified challenge or criticism in objective terms.

The fact that ‘abuse’ is used in terms like ‘child abuse’ or ‘abuse of human rights’ illustrates that it is generally perceived as a more serious issue. Making ‘insult’ an offence is therefore disproportionate.

3. In your view, does having ‘insulting’ words and behaviour as a criminal offence restrict people from expressing themselves freely?

The weapon of claiming insult is increasingly being used against freedom of expression, partly because it is hard to challenge such a subjective response. People or groups who claim the right not to be insulted often demand the right to offend others in the expression of their beliefs, moral values and so on.

Freedom *from* discrimination or censorship and freedom *to* communicate is vital in a democracy in debate, reportage, creative media and any public arena.

We believe that the Council of Europe Resolution 1510 backs up our position: *There cannot be a democratic society without the fundamental right to freedom of expression. The progress of society and the development of every individual depend on the possibility of receiving and imparting information and ideas. This freedom is not only applicable to expressions that are*

² <http://www.secularism.org.uk/discussionofreligiousquestionsno.html>

³ <http://www.secularism.org.uk/uploads/freedom-of-expression-conscience-and-religion.pdf> and

<http://www.secularism.org.uk/97633.html>

⁴ Page 54

*favourably received or regarded as inoffensive but also to those that may shock, offend or disturb the state or any sector of the population.*⁵

The removal of 'insulting' would afford greater protection to freedom of expression – for both the religious and non-religious. We support the campaign by religious groups like the Christian Institute to protect their right to freedom of expression while we also want to ensure that 'insulting' cannot be used by the religious to prevent debate or criticism. We do not want the law used as a weapon against anyone who disagrees with or challenges someone else's beliefs.

And, similarly, the Joint Committee on Human Rights, has said that *We recommend that the Government amend section 5 of the Public Order Act 1986 so that it cannot be used inappropriately to suppress the right to free speech, by deleting the reference to language or behaviour that is merely "insulting". This amendment would provide proportionate protection to individuals' right to free speech, whilst continuing to protect people from threatening or abusive speech. We suggest such an amendment.*⁶

We support the concerns expressed by Liberty, who have already called on the Government to remove the word 'insulting' because they are *concerned about the breadth of offences under section 4A and 5 of the Public Order Act 1986 (POA) which we believe can have a chilling effect on free speech and an impact on legitimate protests... While the courts may be reluctant to convict a person in relation to using 'insulting' words or signs, the mere fact that this is a criminal offence is enough to stifle freedom of expression.*⁷

The NSS also agrees with senior lawyer Neil Addison's comment that *Insults should not of themselves be even considered as criminal. Looking back on the large number of s5 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".*⁸

Stifling free expression is counterproductive. It makes victims of people denied the freedom and insulates views from the most effective deterrents: counter-argument and criticism. Cultures that violate basic human rights are generally the keenest to restrict freedom of expression.

The Parliamentary Assembly of the Council of Europe states that: *The Assembly is of the opinion that freedom of expression (...) should not be further restricted to meet increasing sensitivities of certain religious groups.*⁹

The NSS endorses this view. To do otherwise would afford unacceptable special privileges to a group or culture at the cost of others and/or individuals.

However, we emphasise that we are equally concerned to protect the religious at risk of prosecution from those complaining that religious beliefs are insulting to them. For example, pensioner Harry Hammond was arrested, charged and convicted under section 5 for wearing a sandwich board in public in Bournemouth saying 'Jesus Gives Peace, Jesus is Alive, Stop Immorality, Stop Homosexuality, Stop Lesbianism, Jesus is Lord'¹⁰. He died while awaiting appeal. The NSS would defend his rights to freedom of expression despite not endorsing his message.

⁵ Council of Europe <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta06/ERES1510.htm#1#1>

Resolution 1510 (2006) In accordance with Article 10 of the European Convention on Human Rights (ETS No. 5)

⁶ <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/4702.htm>

⁷ <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-response-to-the-your-freedom-consultation-october-2010.pdf>

⁸ <http://religionlaw.blogspot.com/2010/05/what-have-you-been-saying-homophobic.html>

⁹ <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta06/ERES1510.htm#1#1> **Resolution 1510 (2006)**

¹⁰ <http://www.bailii.org/ew/cases/EWHC/Admin/2004/69.html>

Similarly, the Bishop of Chester was questioned by police under section 5 after he said that some gays should 'reorientate' themselves with the help of the medical profession¹¹. Although we do not agree with the Bishop, his right to express his beliefs should not be curtailed on the grounds of insulting homosexuals.

4. In your view, would removal of the word 'insulting' from section 5 have any particular impact on specific groups? Please give examples.

The positive impact of removing 'insulting' would be to open up debate. Religious groups would be able to express views based on their beliefs without risking prosecution. Similarly, groups (and individuals) who want to challenge beliefs or criticise certain aspects of religions (for example, the treatment of women) would be afforded this right.

The NSS does not want to see the sort of stifling of legitimate freedom of expression by groups facilitated in UK law by the retention of 'insulting'. Removal of the word would expose certain groups to scrutiny that they may resent but which is essential to protect human rights, democracy and equalities.

We also note that Scottish law appears to operate effectively without criminalising 'insulting'. For example, the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2011 explicitly excludes 'insult' from the list of banned actions¹².

We challenge the claim that removing 'insulting' would leave vulnerable people exposed (the disabled are given as an example). Individuals are already protected from real harm or harassment by other laws. There are many alternative powers in existence to prevent or to prosecute behaviour that is abusive, risks a breach of the peace, amounts to harassment, has religious, racial, sexual or disability hatred elements, or where people are placed in fear – and the term 'abuse' would remain in section 5. We agree with the legal advice given by Lord Macdonald of River Glaven QC to the Christian Institute on this subject which states that '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'.¹³

5. If you do have concerns about the word 'insulting' remaining in section 5, can you explain if this is due to interpretation of the word or the actual legislation?

Legislation as it stands facilitates subjective interpretations of the word and applications of the law, and therefore poses a real potential threat to freedom of expression, both in the operation of the law and as a chilling effect on people inhibited or intimidated by potential prosecution.

The NSS believes that insult is too subjective and nebulous a concept, and too open to abuse. In addition, the idea of what is insulting changes with time and place; as the Parliamentary Assembly of the Council of Europe points out: *What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place*¹⁴.

¹¹ http://menmedia.co.uk/manchestereveningnews/news/s/72/72391_gay_see_a_doctor_says_bishop.html
http://menmedia.co.uk/manchestereveningnews/news/s/73/73269_gay_storm_bishop_to_go_on_leave.html

¹² 5A Protection of freedom of expression (1) For the avoidance of doubt, nothing in section 5(5) prohibits or restricts—
(b) expressions of antipathy, dislike, ridicule, insult or abuse towards those matters (our underlining).
<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/31384.aspx>

¹³ <http://www.christian.org.uk/macdonaldopinion.pdf>

¹⁴ <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta06/ERES1510.htm#1#1> **Resolution 1510 (2006)**

6. In your opinion, is the ‘reasonableness’ defence for ‘insulting’ (which is a statutory defence in section 5) an adequate safeguard against misuse?

Although reasonableness is a statutory defence, the interpretation of the word is variable and may depend on context. The removal of ‘insulting’ would remove any doubt or subjectivity about what is reasonable.

7 In your opinion, is guidance to police officers clear on when insulting behaviour constitutes an offence and an arrest should be made and is it sufficiently clear to ensure consistency of decisions?

As discussions on some forums for police officers make clear, guidance is not clear or adequate. Some officers are very unclear about how the current section 5 applies: the removal of ‘insulting’ would simplify the situation and give them a clear-cut basis for action.

For example, there is this comment from the UK Police Online forum:

*‘What is a worry is this is basic public order knowledge, the bread and butter as it were, and it appears a number of people, possibly officers, do not understand basic legislation. The definitions and points are widely available in print /online and have been explained in this thread yet people still can't grasp the basics’.*¹⁵

If ‘insult’ remains, we would recommend that much more emphasis should be placed on proceeding only where a *reasonable person* would feel abused or insulted.

In addition, protection of civil liberties is a matter for Parliament and should not rest on guidance which can be changed or ignored.

8 Do you think that the threshold for arrest under section 5 is set at the right level?

The police and courts are not required to specify which element of section 5 they are applying. If ‘insulting’ is taken out it will make clear that the threshold for arrest is at the more serious level of ‘abuse’. A higher threshold would simplify procedure for the police and prevent trivial cases such as a young man arrested in Oxford for calling a police horse ‘gay’¹⁶ or the teenager who was arrested and charged for displaying a sign outside a scientology building which said that ‘Scientology is a cult’¹⁷.

For more information please contact:

Keith Porteous Wood
Executive Director
National Secular Society

¹⁵ <http://www.ukpoliceonline.co.uk/index.php?/topic/31938-section-5-public-order-act/>

and <http://www.police999.com/forum/index.php?topic=542.0>

¹⁶ <http://news.bbc.co.uk/1/hi/england/oxfordshire/4606022.stm>

¹⁷ <http://www.guardian.co.uk/uk/2008/may/20/1>