

***Home Office***

***Consultation on police powers to promote  
and maintain public order***

***Response by:***

***Christian Concern***

***The Christian Legal Centre***

**Christian**  
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## **Questionnaire:**

**Home Office consultation on police powers to promote and maintain public order**

**Closing date: 13 January 2012**

**E-mail response to: [PolicePowers@homeoffice.gsi.gov.uk](mailto:PolicePowers@homeoffice.gsi.gov.uk)**

## **About Us**

Christian Concern is a policy and legal resource centre that identifies changes in policy and law that may affect the Christian heritage of our nation. The team of lawyers and advisers at Christian Concern conduct research into, and campaign on, legislation and policy changes that may affect Christian freedoms or the moral values of the UK. Christian Concern reaches a mailing list of over 40,000 supporters. <http://www.christianconcern.com>

Christian Concern is linked to a sister and separate organisation, the Christian Legal Centre, which takes up cases affecting Christian freedoms. <http://www.christianlegalcentre.com>

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## Answers to 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.**

Yes.

There is clearly a difference between ‘insulting’ words and behaviour and ‘abusive’ words and behaviour: it takes far less to ‘insult’ a person than it does to ‘abuse’ him or her.

Furthermore, whether a person is insulted or not is highly subjective and largely depends on the perception of the hearer. On the contrary, ‘abusive’ words are more objective, depending less on the mere perception of the hearer and more on an objective criteria as to what constitutes ‘abusive’ words within our society (for example, swear words).

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

Yes.

The natural and ordinary meaning of the words ‘insulting’ and ‘abusive’ clearly suggest that ‘abusive’ is more serious than ‘insulting’. There are innumerable instances where one could be insulted without being abused. However, it is far more difficult to think of a scenario where one could be abused without that abuse also being insulting. Thus, every form of abuse is insulting, but not all insults are abusive.

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

Yes.

In *Redmond-Bate v DPP* [2000] H.R.L.R. 249 Sedley LJ stated 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.’ However, the Government’s insistence on keeping the use of ‘insulting’ words/behaviour as a criminal offence, despite the numerous examples of the offence’s misuse,

greatly limits a citizen's fundamental right to freedom of speech and can create a 'chilling effect' through self-censorship.

In recent times several street preachers have been arrested by the police under section 5 of the Public Order Act. In 2010 Dale McAlpine was arrested under section 5 after several police officers told him that "it is against the law" to describe homosexual conduct as a sin. He spent several hours in a police cell before being released. In 2001 another street preacher, Harry Hammond, was arrested and successfully prosecuted for displaying a sign which stated: "Jesus Gives Peace, Jesus is Alive, Stop Immorality, Stop Homosexuality, Stop Lesbianism, Jesus is Lord."

Such examples clearly demonstrate the limitations imposed on freedom of speech caused by the criminalisation of 'insulting' words.

The United Kingdom's current approach to freedom of speech can be contrasted with other countries, such as the United States. In U.S. the courts have consistently given robust protections to freedom of speech, even when, or perhaps especially when, that speech has been offensive. For example, in the recent case of *Snyder v. Phelps* 562 U.S. (2011) the Supreme Court of America held by an eight to one margin that the speech of a fanatical preacher who picketed the funerals of dead soldiers was constitutionally protected, despite the preacher using incredibly offensive language on his signs, such as: "Thank God for Dead Soldiers," and "God Hates You". The Court held that society 'must tolerate insulting, and even outrageous speech in order to provide adequate breathing space for the freedoms protected by the first amendment.'

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

Removing the word 'insulting' from section 5 will enable citizens to speak freely without fear of arrest and prosecution. Members of society that regularly speak publicly, and often on controversial issues, will specifically benefit from having the word 'insulting' removed from the Act. However, the benefit of living and participating in a society that respects and robustly protects freedom of speech and freedom of expression will be felt by all members of society.

We do not believe removing 'insulting' from the Act will have a negative impact on any specific groups.

**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?**

Our concerns are primarily with the legislation itself. However, criminalising ‘insulting’ words will always lead to problems of interpretation as ‘insulting’ is such a subjective concept. Hence, as long as it remains a criminal offence to ‘insult’ someone, there will be problems with interpretation. The simplest solution, and the solution that best guarantees protection for the fundamental right of freedom of speech, is to remove ‘insulting’ from the Public Order Act.

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

No. Quite simply, there have been far too many cases of misuse to suggest that the ‘reasonableness’ defence is an adequate safeguard. Whilst some defendants have been released quickly following a wrongful arrest by the police, the case of Ben and Sharon Vogelenzang went all the way to court before it was thrown out and they were acquitted. The defence of reasonableness did nothing to prevent their arrest, nor did the defence of reasonableness prevent the subsequent unsuccessful prosecution by the CPS.

Hence, regardless of whether convictions resulted, the fact that people are being arrested under section 5 creates an immensely chilling effect on freedom of expression.

**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?**

Although clear guidance to police officers is to be welcomed, the problems with the law will always remain so long as it is a criminal offence to ‘insult’ someone.

Several police officers were present at the arrest of Dale McAlpine, yet not one of them was seen to properly understand the law. Moreover, when Mr. McAlpine was ultimately arrested, it was on the basis of a “racially aggravated” offence, which, given the facts of the case, was absurd.

The proliferation of cases that have come to the public’s attention, where police officers have arrested members of the public and then later been forced to drop the charges, suggests that the problems with the law cannot be fixed merely by guidance alone. Again, the simplest solution, and

the solution that best guarantees protection for the fundamental right of freedom of speech, is to remove 'insulting' from the Public Order Act.

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

No.

There have been numerous instances of the police arresting members of the public under section 5 and later releasing them without pressing charges. In the cases of Dale McAlpine and Anthony Rollins, this resulted in the police being successfully sued for wrongful imprisonment. The sheer number of cases where police have had to release members of the public without charge clearly demonstrates that the threshold for arrest is far too low. This will always be the case as long as it is a criminal offence to 'insult' somebody.

**9. Additional comments:**

Section 3(1) of the Human Rights Act 1998 states that: "So far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the Convention rights." One such Convention right is freedom of expression. Article 10 of the European Convention on Human Rights states:

**Article 10**  
**Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and im-partiality of the judiciary.

Freedom of expression is a foundational human right and has 'special importance' under the Convention (*Ezelin v. France*, App. no. 11800/85, 26 April 1991). In the case of *Handyside v. United Kingdom*, App. no. 5493/72, 7 December 1976, the European Court held that:

‘Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man...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”.’

Freedom of expression is not an absolute right and can be limited in certain circumstances. However, for a restriction on freedom of expression to be justified under Article 10 § 2 and therefore lawful, the interference in question must be: (1) prescribed by law; (2) in pursuit of a legitimate aim; (3) and necessary in a democratic society. The three conditions must be met concurrently for the interference to be justified.

We believe that the criminalisation of ‘insulting’ words is not justifiable under Article 10 § 2 and is therefore in violation of the European Convention.

In *The Sunday Times v. The United Kingdom*, App. no. 6538/74, 26 April 1979, the European Court held that the law in question must be formulated with sufficient precision to enable the citizen to regulate his conduct to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

It is very difficult to see how the criminalisation of ‘insulting’ words passes this test. The word ‘insulting’ is highly subjective, open to misuse and misapplication by the authorities and is not a precise term. Hence, it does not allow citizens to regulate their conduct adequately.

Moreover, it is unlikely that the restrictions on freedom of expression caused by the word ‘insulting’ in section 5 of the Public Order Act would be considered “necessary in a democratic society”. The Court has held that the word “necessary” must be interpreted strictly and does not have the flexibility of expressions such as “useful”, “reasonable” or “desirable”. Furthermore, for a restriction to be considered “necessary” it must be in pursuit of a “pressing social need” and must be proportionate to the aim pursued. It is possible that there was a “pressing social need” in 1986 when the Public Order Act was enacted to address serious football hooliganism. However, no pressing social need exists today for the numerous instances where the law has been wrongly applied to restrict perfectly lawful speech.

Furthermore, the criminalisation of certain speech caused by section 5 cannot be considered proportionate to any legitimate aim pursued. In 2003 Swedish Pastor Ake Green was arrested for preaching a sermon against homosexuality. He was subsequently convicted under a Swedish law that

criminalized expressions of disrespect (or 'insulting' words) towards homosexuals. However, in 2005 the Supreme Court of Sweden acquitted Mr. Green of all charges. Referring to numerous European Court cases, the Supreme Court held that 'it is probable that the European Court of Human Rights, when examining the limitation on ÅG's right to preach his ideas based on the Bible which a verdict of guilty would constitute, would find that the limitation is not proportionate and thereby would constitute a violation of the European Convention'(Case No. B 1050-05, 29 November 2005). Therefore, the Swedish law had to be interpreted in light of the Convention and Pastor Ake Green was acquitted because his arrest would not have been a proportionate means of pursuing a legitimate aim under the Convention.

## **Conclusion**

Quite simply, the use of 'insulting' words or behaviour should not be a criminal offence. Criminalising such speech strikes the wrong balance between freedom of expression and respect for the rights and freedoms of others. Whilst further guidance for the police may remedy the current problems with the law in part, the primary problem is with the word 'insulting' itself, which sets the threshold for a criminal offence far too low. If the United Kingdom is to live up to its obligations under the European Convention, it must allow speech that can 'offend, shock or disturb', and this must surely include speech which has the potential to cause insult. To reiterate the words of Sedley LJ: 'Freedom only to speak inoffensively is not worth having.'