Crime and Courts Bill 2012

House of Lords Report Stage

Amendment 119: Section 5 Public Order Act 1986

December 2012

For further information contact:

Angela Patrick, Director of Human Rights Policy
email: apatrick@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists.

2. The Crime and Courts Bill was introduced to the House of Lords immediately after the Queen's Speech on 10th May 2012. This briefing has been produced in support of Amendment 119.[1] This amendment, tabled in the names of Lord Dear, Baroness Kennedy of the Shaws, Lord Mackay of Clashfern and Lord Macdonald of River Glaven would reform Section 5 of the Public Order Act 1986 (POA) to remove the threat of criminal sanction from speech or conduct deemed "insulting". JUSTICE has long argued for such reform.[2]

3. The Government concluded the latest consultation on this issue in January 2012.[3] No response has yet been published. We consider that the Crime and Courts Bill provides an ideal opportunity for Parliament to address the disproportionate impact upon freedom of expression that criminalising "insulting" language or conduct produces. Responding to the debate on this issue at Committee Stage, the Minister asked for more time to consider the 2,500 responses to the consultation paper, which covered a number of criminal justice issues other than this one.[4] JUSTICE considers that after 12 months, further delay is difficult to explain and Parliamentarians must scrutinise the lack of substantive response to these amendments closely.

---

[1] We produced a similar briefing in support of Amendment 155, tabled during Committee Stage, but not moved. See HL Deb, 4 Jul 2012, Cols 775 – 782.
[2] The previous Government consulted on this issue in 2009. JUSTICE's response can be found here: http://www.justice.org.uk/resources.php/185/public-order-act-1986-section-5-amendment-justice-response. Most recently JUSTICE proposed amendments to the Protection of Freedoms Bill in order to amend the Act without further delay: http://www.justice.org.uk/resources.php/137/protection-of-freedoms-bill
[3] JUSTICE's submission to the Government Consultation is available here: http://www.justice.org.uk/data/files/resources/316/Microsoft-Word-JUSTICE-Police-Powers-Protest-Response-Jan-2012-FINAL.pdf
[4] HL Deb, 4 July 2012, Cols 780-781

Section 5 Public Order Act 1986

4. Freedom of expression is arguably 'the primary right in a democracy', without which 'an effective rule of law is not possible'.[5] In England and Wales its importance has long been recognised by the common law:[6] In particular, it is a fundamental aspect of freedom of expression that included is not merely the expression of ideas or sentiments that everyone in society agrees with or approves of. If the right to freedom of expression is to mean anything, it must also extend to forms of expression that others find offensive or insulting, including ideas that 'offend, shock or disturb'.[7] This aspect of freedom of expression is especially important in the context of protests and demonstrations and other circumstances where the expression is political, for expression of political ideas enjoy particularly strong protection under article 10 of the European Convention on Human Rights[8] and the jurisprudence of the ECtHR.[9]

5. In addition to engaging freedom of expression, arrests for section 5 POA offences will also frequently interfere with the right to freedom of assembly, protected under Article 11 ECHR.[10]

6. Section 5 POA provides:

> *(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.*

---

[5] Lord Steyn in *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277 at p297. Case-law quotations and references in the 'General remarks' section of this document are taken from R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed), (OUP, 2009).
[6] *Bonnard v Perryman* [1891] 2 Ch 269 at p284.
[7] See e.g. the decisions of the European Court of Human Rights in *Lehideux and Isornia v France* (2000) 30 EHRR 665, para 55; *De Haes and Gijsels v Belgium* (1997) 25 EHRR 1.
[8] See e.g. *Thorgeison v Iceland* (1992) 14 EHRR 843, para 62.
[9] See *Thorgeison v Iceland* (1992) 14 EHRR 843, para 62: Political expression includes discussion of matters of public concern.
[10] See Joint Committee on Human Rights, Seventh Report of Session 2008-2009, *Demonstrating respect for rights? A human rights approach to policing protest*, Written Evidence – Volume I (HL 47-I/HC 320-I), available at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47i.pdf For JUSTICE's evidence see Volume II (HL 47 – II/HC 320 – II) available at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47ii.pdf

It is important to note there is *no* requirement on the prosecution under section 5 to prove either that:

- the alleged offender *intended* to cause 'harassment, alarm or distress'; or
- any person was actually *caused* 'harassment, alarm or distress'.

6. In our view, it is especially problematic that a prosecution is mounted on the basis of insulting words or behaviour when the alleged victim of the offence is the arresting officer.[11]

7. There is no right, either in English law or under the ECHR, not to be offended. While there is clearly a public interest in the criminal law protecting members of the public from being threatened or harassed by others, merely causing offence (or being likely to do so) through words or conduct in a public place should not, without more, constitute a criminal offence. Public words and conduct which some members of society would have been offended by in previous centuries has been responsible for important social and political reforms: the assertion of racial and gender equality; gay Pride marches; religious worship. It is essential for the progress of society that we do not ossify public views by censoring debate on matters of current public controversy.

8. Strongly held social, political and religious views mean that offence is easily taken often on both sides of a debate: for example, on topics as heterogeneous as abortion and conflict in the Middle East. Such subjects, however, remain of extreme importance and ordinary citizens, as well as the media and political classes, must be able to discuss them, debate and demonstrate, without fear of arrest and prosecution. For members of the public, expression in public places remains one of the most important methods of publicising a view or attracting attention to a cause. While the internet has to some extent democratised the media, the visual impact and news coverage attracted by prominent demonstrations such as the 2003 march against the war in Iraq and the protests by supporters of the Tamil community in Sri Lanka in Parliament Square cannot be rivalled by a blog or online post.

[11] See also e.g. *Southard v DPP* [2006] EWHC 3449 (Admin). See also Home Office, *Consultation on Police Powers to Promote and Maintain Public Order,* October 2011, page 8.

9. The removal of the word 'insulting' from s5 POA would go some way to prevent the overuse of this power. It is uncontroversial, in our view, that 'threatening' words and conduct should be restrained by the law. However, the word 'abusive' in s5 POA remains problematic since it can be defined as 'insulting or rude.'[12]

10. The 'abusive' element of s5 is outside the scope of this amendment. Clear guidance should be developed by the CPS and issued to police officers to distinguish disproportionate uses of the legislation in the case of 'abusive' words and behaviour (similarly for the extremely broad category of 'disorderly behaviour' which we believe should also be subject to scrutiny and reform). In particular, we do not consider that prosecution should result for, without more, the use of a single swear word against a police officer (for example, the case of *Southard* – see above), since this may be a waste of public funds as well as detrimentally criminalising the person concerned. This is particularly so where a section 5 offence appears at the end of a charge sheet because 'abusive' language has been used during the course of an arrest for another offence, or a charge results because of swearing during a stop and search. This adds little if anything to the prosecution of the main offence and can harm community relations with the police in the context of the disproportionate use of stop and search against certain ethnic groups, or in relations between police and young people. In these cases it is likely that a verbal warning would suffice.[13]

11. **JUSTICE fully supports the removal of the word 'insulting' from section 5 Public Order Act 1986 as proposed by Amendment 119.**

JUSTICE

December 2012

[12] Chambers 21st Century Dictionary

[13] We note that since the consultation on this issue in 2009, a number of controversial cases about the scope of Section 5 POA have arisen. See for example, *Reda v DPP* [2011], EWHC 1550 (Admin) QBD, where an individual was charged after shouting "fuck the police" on the street. This was heard by a police officer emerging from a nearby building who arrested the defendant. See also *Harvey v DPP* QBC, 17 November 2011.