

In the Matter of the Church Society and the United Protestant Council
Notes for Conference

1. Freedom of expression, and the freedom of thought, conscience and religion are axiomatic freedoms in a democratic society.

2. These rights are now enshrined in the Human Rights Convention / Human Rights Act 1998, subject to certain restrictions:

Article 10¹ (1) – the right to freedom of expression,
(2) – restrictions on that right.

Article 9² (1) – the right to freedom of thought, conscience and religion,
(2) – restrictions on that right.

3. Clearly, those who wish to exercise their right to these freedoms, which would include preaching in public, are entitled to do so, provided they are not restricted in so doing, by

¹ 10(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...

10(2) The exercise of these freedoms, since it carries 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....

² 9(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance;

9(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society, in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others.

virtue of Articles 10(2) or 9(2).

4. Any such restriction must be

(1) prescribed by law, and

(2) be necessary in a democratic society in the interests of public safety, for the prevention of disorder or crime.

5. The need for the restriction must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.

6. In the present context, the statutory measure which is most likely to represent a restriction on these rights is (as was successfully employed in Harry Hammond's case) section 5 Public Order Act 1986. [Similar, but more serious offences are reflected in (a) section 4 POA – Fear of provocation of violence, and (b) section 4A POA - Intentional harassment, alarm and distress].

7. Section 5 POA states as follows:

(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 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 the 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) A constable may arrest a person without a warrant if-

(a) he engages in offensive conduct which the constable warns him to stop, and

(b) he engages in further offensive conduct immediately or shortly after the warning.

(5) In subsection (4) the offensive conduct means conduct the constable reasonably suspects to constitute an offence under this section, and the conduct mentioned in (a) and the further conduct need not be of the same nature.

(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.

8. Section 6(4) POA is relevant to the mental element involved in the offence. It states:

A person is guilty of an offence under section 5, only if he intends his words and behaviour, or the writing, sign or other visible representation to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting, or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly.

9. Notwithstanding the rights established in Articles 10(1) and 9(1), it is clear that those rights are subject to limitations prescribed by law (section 5 POA) and necessary in a democratic society – ie the prevention of disorder or crime, and the protection of public order (10(2) and 9(2)). Assuming that the suspect has offended against the section, the requirement of a warning, and then (if it goes unheeded) arrest without warrant, leading, upon conviction, to a fine, would in my view, clearly be regarded as proportionate to the end sought to be achieved by the limitation to the rights.

10. Each case will inevitably depend upon its own facts.

11. Taking the facts of Mr Hammond's case, he was a very genuine Evangelical Christian, who had preached for 20 years. He has displayed, in a square in central Bournemouth, a placard bearing the words "*Stop Immorality, Stop Homosexuality, Stop Lesbianism*". He had, on an earlier occasion, received hostile reaction to this placard, and so had covered it up, on the material date, on his bus journey to Bournemouth. On preaching in the square, the placard and his preaching did cause anger and aggression amongst certain members of the small crowd (30 or 40 strong) that had gathered around him, with expressed feelings ranging from annoyance, to upset, shock and distress. Some

people claimed to have found it insulting, either personally, or to the gay community generally.

12. For a section 5 POA offence to be triggered the words/behaviour or the writing/sign/other visible representation must first be either *threatening*, *abusive*, or *insulting*, or amount to *disorderly behaviour*. It was not suggested either in the Magistrates Court or Divisional Court proceedings, that it fell into the *threatening* or *abusive* category. Clearly there was no question of any threat being issued, expressly or by implication, and nor was there any abuse – in the sense, for example of foul language or display. Disorderly behaviour was never alleged. The Crown’s case was that it was *insulting*.

13. What is meant by the word *insulting* in this context? It should be given its ordinary meaning, again each case turning on its own facts. In *Brutus v Cozens 1973 AC 854*, it was said that to be insulting, the conduct must be more than just vigorous, distasteful, unmannerly, objectionable or even offensive.

14. Whilst it is true that the Divisional Court upheld the magistrates conviction, it seems clear that they did so with some difficulty and hesitation. That is apparent from the language of Lord Justice May, paragraph 32 of judgement. Far from expressing strong agreement with the magistrates’ findings, he uses language such as “*I have not found this question easy...*”, “*...not without hesitation...*” etc. In the end, the Court decided that the conviction should stand, essentially because the magistrates finding could not be said to

be perverse.

15. I have discovered that the Divisional Court subsequently refused to certify the matter as a point of general importance, and refused leave to appeal. If, which is still uncertain, the matter is to be taken to Strasburg, it will involve a very lengthy process; even if the point were found to be admissible, the case might not ultimately be decided for three to four years; no immediate changes are therefore foreseeable.

16. In my opinion, it was most unfortunate that the Divisional Court resolved the matter in this way, and I feel that many differently-constituted courts would have decided in Mr Hammond's favour. I believe that many Courts would have taken the view that Mr Hammond was doing no more than lawfully exercising his fundamental freedoms of expression, thought, conscience and religion, for which this country is supposedly renowned, and that although his placard/preaching may have angered and upset people, they were not genuinely insulted.

17. What risks are involved in someone following Mr Hammond's example of preaching publicly against the sin of homosexual activity?

(1) It could of course lead to a member or members of the public taking violent objection to him;

(2) It could well lead to his arrest; it should be presumed that police forces around the country will have been made aware of Mr Hammond's case, and have even issued instructions to constables to arrest preachers, in similar circumstances.

(3) Upon conviction, it will lead to a fine (there is no question of any prison sentence) and of course, to a loss of “good character”.

18. What is to be avoided?

(1) Any language, whether spoken or written, or any conduct

(a) which could amount to a threat;

(b) which could be regarded as abusive, e.g. swearing or other intemperate language;

(c) which is sexually explicit;

(d) which is aimed personally at a member or members of the audience, (as this could be regarded as insulting).

19. Other safeguards:

(1) If a police officer attends, and issues a warning to stop what he regards as “offensive conduct” (as he must do), consider at that point; no offence could then have been committed.

(2) If the matter is taken to the Magistrates’ Court, ensure, through good legal representation, that the Crown are put strictly to proof as all elements of the offence, in particular-

(a) that the conduct was truly insulting (witnesses should be firmly tested),

(b) that it was within the hearing or sight of a person to be caused harassment, alarm or distress thereby;

(c) that he was aware that his conduct may be insulting.

(3) Make use of the statutory defences set out at section 5(3)POA, in particular, claim that his conduct was reasonable (5(3)(c); (note – that the burden of proof shifts here to the Defence, on a balance of probabilities).

(4) Consider calling as a Defence witness, any independent member of the audience who was not “insulted” by the conduct, to balance the scales.

(5) Refer the Court, in particular, to the doubts and hesitations expressed by Lord Justice May in paragraph 32 of the Hammond judgement.

(6) Be prepared, in the event of a conviction in the Magistrates’ Court, to appeal to the Divisional Court, and hope for a more sympathetic hearing.

20. I am of course aware of the great importance that the Church Society and the United Protestant Council attach to public preaching on this subject. Whilst it is impossible to guarantee that doing so will not result in arrest and conviction, I would not go so far as to advise members strongly against continuing such preaching. Each preacher should be aware of the risks, consider the safeguards, and then should make up his own mind as to whether he feels the potential benefits of preaching outweigh those risks.

Barry Kogan

May 2004