



The Abolition of the Blasphemy Offences

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Author: Lucinda Maer

Parliament and Constitution Centre

During the Report stage of the *Criminal Justice and Immigration Bill 2007-08* the Liberal Democrat Dr Evan Harris tabled an amendment to abolish the offences of blasphemy and blasphemous libel. The Government indicated that they would consult the Church of England, and subject to the outcome of that consultation, produce their own amendment to the Bill during its passage through the Lords. Dr Harris therefore did not press his amendment to division.

The Government introduced an amendment to abolish the offences of blasphemy and blasphemous libel during the Committee stage in the House of Lords on 5 March 2008. This was passed by 148 to 87.

The House of Commons considered the Lords amendment on 6 May 2008 and agreed to it on a division by 378 votes to 57. The Bill received Royal Assent on 8 May 2008.

This note sets out the law of blasphemy and the arguments concerning its abolition. It also outlines a number of previous attempts to repeal or abolish the offence. In particular, this note looks at the Law Commission report of 1985, and the House of Lords Select Committee on Religious Offences Report of June 2003.

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A. The amendment to the *Criminal Justice and Immigration Bill 2007-08*

1. In brief

Blasphemy and blasphemous libel were defined by Halsbury's Laws Direct in the following terms:

Blasphemy is an indictable offence at common law consisting in a publication of contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, the Bible or the formularies of the Church of England. The publisher must intend to publish, but he need not intend that the words amount to blasphemy. It is immaterial whether the words are spoken or written; but, if written, they constitute blasphemous libel. The offence is punishable by fine and imprisonment at the discretion of the court.¹

During the Report Stage of the *Criminal Justice and Immigration Bill 2007-08* on 9 January 2008 the Liberal Democrat MP Dr Evan Harris tabled an amendment that:

"The offences of blasphemy and religious libel are abolished" – Dr Evan Harris ²

The Government minister, Maria Eagle, indicated that subject to the results of a consultation with the Church of England, an amendment would be brought forward in the House of Lords for this purpose.³ Dr Harris did not move his amendment.⁴

During Committee stage of the Bill in the House of Lords, the Government tabled an amendment to abolish the blasphemy offences. It was passed by 148 to 87.⁵

The legislation returned to the House of Commons on 6 May 2008. The Commons agreed with the amendment made in the Lords in a division by 378 to 57.⁶ The Bill received Royal Assent on 8 May 2008.

2. Second Reading in the House of Commons

When Evan Harris introduced the amendment to the *Criminal Justice and Immigration Bill* in the Commons debate, he outlined his views on the blasphemy offences as follows:

Blasphemy is an ancient law going back hundreds of years. I do not have time to provide a full history, but it should be pointed out that the last conviction for the offences in question was in 1977, and that the last successful public prosecution was in 1922. It is an old-fashioned, ancient law that is out of time and not needed any more. One does not have to be an ultra-moderniser to recognise that.

¹ Halsbury's Laws Direct, para 826

² HC Deb 9 January 2008 c437

³ HC Deb 9 January 2008 cc453-454

⁴ *Ibid.*

⁵ HL Deb 5 March 2008 c1147

⁶ HC Deb 6 May 2008 c667

Those laws are also unnecessary in two significant ways. First, enough laws dealing with outraging public decency and public order offences are already on the statute book to ensure that the removal of these two offences will not lead to widespread outrageous behaviour in public. We are talking about people being able to see theatre productions, watch television programmes, attend readings, and publish books and documents for specific audiences, without the threat of prosecution under the blasphemy laws. Secondly, as has been pointed out by a number of people more qualified than me to say it, the Almighty does not need the protection of these ridiculous laws, which is why many people with a religious perspective share the view that those offences should be abolished.

The offence of blasphemy is illiberal because its scope is uncertain. Its terms do not define—because the offence is not statutory, for one thing—what someone must do or say to be arrested, prosecuted and convicted. It is also an offence of strict liability, so not having intended to blaspheme is no defence to prosecution. One therefore cannot know when one is committing the offence, which was the main reason given by the Law Commission for seeking its abolition as long ago as 1985. Although people do not know whether they have committed the offence, it also commands an unlimited penalty, because no penalty is laid down in statute. The offence is discriminatory, in that it applies only to the Christian religion—and within that, only to the tenets of the Church of England.⁷

He went on to point out that in his view, the offence did not comply with the European Convention on Human Rights, and that it was also divisive in terms of cohesion. On this matter he explained his opinion that:

The offence is also divisive in terms of social cohesion, partly because it is discriminatory. The corollary of that is that it raises a sense of unfairness among other religions, particularly those whose adherents are more sensitive than adherents to the Christian faith – a sense that they are being singled out because they are not protected. It raises the expectation, which previous Governments may have sought to keep going, that they will be entitled to their own – Islamic, say, - version of a blasphemy law. The best way in which to make clear to the communities and people of this nation that we do not expect there to be protection of beliefs, is to abolish the existing blasphemy offences, and that is one of the strongest arguments for doing so.⁸

This was not Evan Harris's first attempt at amending legislation to abolish blasphemy. He moved a motion to amend to the *Serious Organised Crime and Police Bill* in February 2005 but this was lost by 339 to 80.⁹

Speaking for the Opposition, Nick Herbert (Shadow Justice Secretary) told the House that the Conservative party regarded that matter as one of conscience, and therefore would be a free vote matter.¹⁰ He explained that he would personally be voting for the abolition of blasphemy laws, but expressed a concern that the matter needed “far more careful

⁷ HC Deb 9 January 2008 c443

⁸ *Ibid.*, c444

⁹ HC Deb 7 February 2005 c1228

¹⁰ *Ibid.*, c451

consideration". He continued that, "In particular, the Church of England is entitled to be consulted properly about the proposal".¹¹

The Government minister, Maria Eagle, announced that the Government would hold a "short and sharp" consultation with the Church of England, and then subject to that consultation, bring forward an amendment to the Bill in the House of Lords. She stated that she:

... agree[d] with the many hon. Members who put their names to new clause 1 that it is high time that Parliament reached a settled conclusion on the issue. We accept that the offences have largely fallen into desuetude. The last prosecution for blasphemy was in 1977, in the case of Whitehouse and Gay News Ltd, as Members will recall. It follows that there have been no cases since the Human Rights Act 1998. The idea that the offences appear to be moribund was reinforced by the High Court's decision on 5 December 2007 that the Theatres Act 1968 and the Broadcasting Act 1990 prevent the prosecution of a theatre, the BBC or another broadcaster for blasphemous libel. That was the result of a case brought by Christian Voice in response to the play "Jerry Springer: The Opera". I understand that it is seeking leave to appeal.

Against that background, I can say that we have every sympathy for the case for formal abolition. However, we believe it necessary to consult the Anglican Church before bringing forward a provision that particularly affects it. That is what we are now doing urgently. Subject to that consultation, which I can assure hon. Members will be short and sharp, the Government intend to bring forward amendments in another place to achieve the aims of new clause 1.¹²

In response, Dr Harris agreed not to press the amendment to a division.¹³

3. Second Reading in the Lords

During the second reading in the Lords on 22 January 2008, the Lords minister Lord Hunt of Kings Heath explained the Government's plans to bring forward an amendment. He said:

...I want to alert your Lordships to one new provision – not an uninteresting provision at that. The House will be aware that on Report in another place a new clause was tabled, and subsequently withdrawn, which provided for the abolition of the common-law offences of blasphemy and blasphemous libel. In the other place, my honourable friend the Parliamentary Under-Secretary of State, Maria Eagle, advised that the Government would be conducting a short, sharp consultation with the churches, particularly the Church of England, on that matter. Subject to the outcome of that consultation, it is our aim to bring forward amendments to the Bill to abolish those essentially obsolete offences. I cannot give a guarantee, but I hope that it will be possible to table any such amendments in time for Committee.¹⁴

The Lord Bishop of Manchester, who spoke in the second reading debate, stated that:

¹¹ *Ibid.*, c452

¹² HC Deb 9 January 2008 cc453-454

¹³ *Ibid.*

¹⁴ HL Deb 22 January 2008 c131

I say today that we [the Church of England] welcome the consultation that the Government are undertaking before introducing their amendment, to which the Minister referred in his opening, supportive remarks about the Church of England. The Church of England itself is consulting other churches and religious bodies, and we hope the outcome of those consultations will be revealed shortly.¹⁵

Lord Avebury, who himself attempted to introduce legislation to abolish the offence of blasphemy in 2002 (see below) also spoke during the debate. Although he welcomed the Government's intention, he expressed "regret that the consultation will not be completed until after the Committee stage". He continued:

I have difficulty in understanding that, considering that all the organisations to be consulted gave voluminous evidence to the Select Committee in 2002. I should like to bet the right reverend Prelate the Bishop of Liverpool that none of them will have changed its tune in the intervening six years.¹⁶

4. The Joint Committee on Human Rights

The Joint Committee on Human Rights issued a report on the *Criminal Justice and Immigration Bill* on 25 January 2008; it considered the Human Rights implications of the legislation. The Committee stated that it welcomed the Government's commitment, subject to its consultation with the Church of England, to abolish to offences of blasphemy and blasphemous libel because:

...In our view the continued existence of these common law offences gives rise to an ongoing risk of violations on the right to freedom of expression (contrary to Article 10 ECHR) and of the right not to be discriminated against, on grounds of religion, in the enjoyment of the right to freedom of thought, conscience and religion (contrary to Article 14 ECHR in conjunction with Article 9).¹⁷

The Committee continued:

1.58 The risk to freedom of expression arises partly because the scope of the offence is uncertain and it does not require any intention to blaspheme to be proved as an element of the offence, which makes it potentially very wide in scope. This combination of lack of legal certainty and the potential breadth of the offence can have a considerable chilling effect on freedom of speech. Although no actual prosecution has been brought since 1976, the continued existence of the offences makes private prosecution a possibility, as was recently demonstrated by the attempt by Christian Voice to bring a private prosecution against the BBC in respect of "Jerry Springer: the Opera".

1.59 The offences also discriminate on grounds of religion because they only protect the Christian religion, and even within that religion they only protect the tenets of the Church of England. Unlike the narrowly drawn offence of incitement to religious hatred, which protects people of all religions and none against intentionally

¹⁵ HL Deb 22 January 2008 c143

¹⁶ HL Deb 22 January 2008 c176

¹⁷ Joint Committee on Human Rights, *Legislative Scrutiny: Criminal Justice and Immigration Bill*, 25 January 2008, HL 37 HC 269 2007-08, para 1.57

threatening words and behaviour, the offences of blasphemy and blasphemous libel provide no protection to people of other religions. The only conceivable justification which might be offered for such differential treatment on grounds of religion can be the historical one that the Church of England is the established church of this country, but in our view such a reason cannot be a sufficient justification even in a modern ethnically mixed society comprised of many people of different faiths and none. We note that even the established church itself does not apparently seek to justify the continued existence of the blasphemy laws.

1.60 Although the old European Commission of Human Rights (now replaced by the reformed European Court of Human Rights) declined to find the UK's blasphemy laws to be in breach of freedom of expression or discriminatory, that was more than 25 years ago. **In our view, for the reasons we have summarised above, the continued existence of the offences can no longer be justified, and we are confident that this would also, in today's conditions, be the view of the English courts under the Human Rights Act and the Strasbourg Court under the ECHR. We therefore look forward to the Government amendment to the Bill in the Lords abolishing the offences of blasphemy and blasphemous libel. The amendment proposed in the Commons had the virtue of simplicity, by just abolishing the two offences. We recommend that the Bill be amended to similar effect.**¹⁸

5. Comment from religious and secular groups

The intention to introduce an amendment to abolish the blasphemy offences was set out in a letter to the *Telegraph* newspaper, published on 8 January 2002. The signatories of the letter included the former Bishop of Oxford, Lord Harries of Pentregarth. The letter stated:

Sir - In the light of the widespread outrage at the conviction of the British teacher for blasphemy in Sudan over the name of a teddy bear is it not time to repeal our own blasphemy law?

The ancient common law of blasphemous libel purports to protect beliefs rather than people or communities. Most religious commentators are of the view that the Almighty does not need the "protection" of such a law.

We are representatives of religious, secular, legal and artistic opinion in this country and share the view that the blasphemy offence serves no useful purpose. Yet it allows partisan organisations or well-funded individuals to try to censor broadcasters or intimidate small theatres, print media or publishers.

Far from protecting public order - for which other laws are more suited - it damages social cohesion.

It is discriminatory in that it only covers attacks on Christianity and Church of England tenets and thus engenders an expectation among other religions that their sensibilities should also be protected by the criminal law (as with the attempt to charge Salman Rushdie) and a sense of grievance among minority religions that they do not benefit from their own version of such a law.

¹⁸ Joint Committee on Human Rights, *Legislative Scrutiny: Criminal Justice and Immigration Bill*, 25 January 2008, HL 37 HC 269 2007-08, paras 1.58-1.60

As the Law Commission acknowledged in 1985, when it recommended repeal, it is uncertain in scope, but lack of intention is no defence, and the law is unlimited in penalty.

This, together with its chilling effect on free expression and its discriminatory impact, leaves it in clear breach of human rights law. In the end, no one is likely to be convicted under it.

The Church of England no longer opposes its abolition on principle and the Government has given no principled reason to defend its retention.

We call on MPs to support the amendment proposed by Evan Harris, Frank Dobson and David Wilshire tomorrow to the Criminal Justice and Immigration Bill and on the Government - which rightly criticises countries like Sudan for their blasphemy laws - to give it a fair wind.

Philip Pullman, Rt Rev Lord Harries of Pentregarth, Ricky Gervais, Nicholas Hytner, Shami Chakrabarti, Professor Richard Dawkins, Rt Rev Lord Carey of Clifton, Professor A.C. Grayling, Sir Jonathan Miller, David Starkey, Lord Lester of Herne Hill, Stewart Lee, Michael Cashman, Joan Smith, Lady D'Souza, Peter Tatchell, Lisa Appignanesi, Hanif Kureishi, Lord Desai, Roger Smith and Hari Kunzru¹⁹

The *Times* reported that the Church of England would not resist the move to abolish the blasphemy offences. It quoted Dr Rowan Williams, the Archbishop of Canterbury, as saying that:

...the legacy of the blasphemy laws was "awkward and not very workable" before he received an honorary degree in Divinity from Durham University today.

The Archbishop admitted that the announcement would be "contentious in some quarters" but he said, "I think the concerns about public respect and public order that lie behind the blasphemy laws are likely to be catered for in other ways now".

The Church of England has now been invited to discuss and submit a response to the proposed abolition of the law, but Dr Williams said the Church had made its position "reasonably clear" about the issue. "It is not going to resist the repeal of the blasphemy laws given their awkward and not very workable legacy at present".²⁰

Ekklesia, a Christian think tank, has backed the repeal of UK Blasphemy laws. In a statement on their website, the group stated that:

"Human rights advocates, including people of faith, have quite rightly campaigned against blasphemy laws in Pakistan and other countries, and having them on the statute in the UK is both an offence and an anachronism", said Ekklesia co-director Simon Barrow.

¹⁹ Letter to the editor, *Repeal of Blasphemy Law*, 8 January 2008

²⁰ 'Church will not oppose abolition of blasphemy laws', *The Times*, 11 January 2008

He adds: "Privileging one religion above other views is indefensible in a democracy, and for Christians there is the added irony that Christ was himself arraigned on a charge of blasphemy. Using the law to attack opinions about belief is to misuse it, and suggesting that God needs protection against free speech makes no theological sense at all."

"The Christian message is about the power of self- giving love, not the love of one's own power. This is why it is wrong religiously as well as legally and democratically", says Barrow.²¹

The British Humanist Association issued a Press Notice which urged Members of Parliament to vote for the abolition of blasphemous libel during the Report Stage of the *Criminal Justice and Immigration Bill 2007-08*:

Hanne Stinson, BHA Chief Executive, said, 'The abolition of the outdated blasphemy laws is long overdue. Those laws are supported neither by the public nor by the courts – as evidenced by the recent refusal by the High Court to allow a blasphemy case against the BBC Director-General to go ahead. The blasphemy laws in the UK – which protect only Anglican beliefs in any case – are clearly contrary to the principle of free speech, are probably contrary to human rights laws which protect freedom of expression, and are totally out-of-place in the context of our increasingly diverse and increasingly non-religious society.'

Defenders of the blasphemy laws often highlight the fact that they are not used in effect, but recent years have seen a number of attempts to invoke them. Comedian and BHA supporter Stewart Lee's 'Jerry Springer – The Opera' was the subject of protests by religious campaigners against free speech which had a negative impact on the production and even went as far as court.

Mr Lee commented, 'Britain is one of the most secular societies in the world where the right to free speech is protected by law, but even so there are many religious groups trying to censor people just because they don't like what they're saying. The archaic laws against blasphemy appear to give them legitimacy.'

Ms Stinson observed, 'The very fact that attempts to prosecute using the blasphemy laws are going all the way to the High Court proves that those laws are not dead letters and that they continue to have the potential to negatively affect people's lives. That we still have these laws is an outrage, but they could be abolished very quickly and easily, which is why we are delighted to see a proposed amendment in the Criminal Justice and Immigration Bill which intends to do just that.'

The amendment to abolish the offences of blasphemy and blasphemous libel has been tabled by Evan Harris MP to the Criminal Justice and Immigration Bill.²²

The National Secular Society has also campaigned for the repeal of the blasphemy law. Their website stated that they "have been working closely with our Honourary Associate Dr

²¹ Ekklesia, *Christian Think-tank backs repeal of UK blasphemy laws*, <http://www.ekklesia.co.uk/node/6540>

²² British Humanist Association Press Notice, *Abolish blasphemy laws now: BHA and Stewart Lee call on MPs*, Available at <http://www.humanism.org.uk/site/cms/newsarticleview.asp?article=2408>

Evan Harris MP, who has identified an opportunity to challenge the blasphemy law in the House of Commons".²³

In opposition to the move to repeal blasphemy laws, the organisation Christian Voice wrote to the *Telegraph*:

Sir - I am the one seeking to bring a private prosecution for blasphemy in the case of Jerry Springer: the Opera against the director-general of the BBC and the show's producer.

You published a letter (January 8) from more than a dozen campaigning atheists and two clergymen arguing for abolition of our blasphemy laws. The author and director of Jerry Springer: the Opera was among the signatories, as were Philip Pullman and Richard Dawkins.

Your correspondents are wrong to say the blasphemy law "purports to protect beliefs". His Dark Materials and The God Delusion have been published, both criticising Christian beliefs, without falling foul of it. No, the blasphemy law seeks, primarily, to maintain simple respect for Almighty God, Jesus Christ and the Bible.

Curiously, it is always the person of the Lord Jesus Christ who is the target of blaspheming poets, playwrights and artists. This was true in the Gay News poem, the most recent successful prosecution for blasphemy, and it was true in Jerry Springer: the Opera, which is still in the courts.

It is not the law against blasphemy that damages social cohesion, it is the lack of any civilised standards of decency, restraint and respect in the world of the arts.

Of course, the law against blasphemy discriminates in favour of Christianity, because historically, culturally and constitutionally, Britain is a Christian country, as Professor Dawkins himself conceded only last month.

That being said, the existence of the blasphemy law should engender a proper respect for the sacred and so provide an umbrella of protection for the deeply held religious beliefs of others.

As the Bishop of Rochester said at the weekend, we need to affirm the Christian roots of British society. We need to start standing up for Christianity, for God, Jesus Christ and the Bible, before it becomes illegal to do so.

Stephen Green, National Director, Christian Voice, Carmarthen ²⁴

The Rt Rev. Tom Butler, Bishop of Southwark, used his "Thought for the Day" slot on the BBC Radio 4 Today Programme to set out his views on the blasphemy offence. The day before the amendment was to be debated in the House of Lords he explained his view that:

Back in 1675 when it was taken over by the civil courts, the law of blasphemy was not so much about religion, it was about sedition - for, in shaky times, an attack on the

²³ <http://www.secularism.org.uk/parliamentaryattempttoabolishbla.html> (last viewed 6 March 2008)

²⁴ Letter to the Editor, *Law on Blasphemy*, 9 January 2008

official religion of the state was perceived as an attack on the state, for it was that religion which helped glue society together.

The question for us, it seems to me, in equally shaky times, is what are the beliefs and understandings which are the glue holding our society together, and how do we create, strengthen or undermine them? For many people in Britain their religious belief go to the heart of what it means to be a good citizen, others interpret their lives in other ways. If society is not to be weakened all must be honoured and respected.

The possible removal of what is now generally recognized as being a not very workable law should not be interpreted as a secularising move or as a general licence to attack or insult religious beliefs. It should spur us all to work harder to respect and protect the common good.²⁵

6. The Archbishops' response to the Government Consultation on Blasphemy

The Archbishops published their response to the Government's consultation on 29 February 2008. They said that although they had "serious reservations" about legislating at this time, the Church would not oppose abolition now. The letter which was sent by the Archbishops to Hazel Blears, the Secretary of State for Communities and Local Government, stated that:

... in 2002 the Church of England expressed support in principle for a new offence of incitement to religious hatred. In a submission to the Select Committee on Religious Offences the Archbishops' Council noted that "if such an offence were enacted and proved effective, that would provide the context in which the current offence of blasphemy could be repealed."

Developments since then have reinforced that analysis, while pointing to the need for caution.

Firstly, the eventual introduction of the offence of incitement to religious hatred in 2006 proved extremely contentious. It is still too early to be sure how the new law will operate in practice and we shall all be helped to clarify our minds as we see what the courts will do in this regard.

Secondly, the increased significance of issues touching on religious identity, both in this country and internationally, has underlined the importance of not lightly changing laws that, though their day-to-day importance may be small, nevertheless carry a significant symbolic charge.

Thirdly, as recently as 5th December the High Court underlined the very high threshold that has to be passed for a prosecution to be brought. Essentially this means that "there must be contemptuous, reviling, scurrilous and/or ludicrous material relating to God, Christ, the Bible or formularies of the Church of England. Second, the publication must be such as tends to endanger society as a whole, by endangering the peace, depraving public morality, shaking the fabric of society or tending to cause civil strife. ... This element will not be shown merely because some people of particular sensibility are, because deeply offended, moved to protest. It will

²⁵ The Rt Rev. Tom Butler, "Thought for the Day", *BBC Radio 4 Today Programme*, 4 March 2008

be established if but only if what is done or said is such as to induce a reasonable reaction involving civil strife, damage to the fabric of society or the equivalent.”

Fourthly, as is apparent from the debate in the Commons on 9th January, a number of those calling for the repeal of the offences misunderstand both what the existing law is intended to achieve and the extent to which, in doing so, it protects particular religious beliefs. The recent High Court decision seems to us to make it even clearer than before that the real purpose of the offences is the preservation of society from civil strife, rather than the protection of the Divine or any particular religious beliefs; and in so far as achieving that end indirectly protects religious beliefs, they are the beliefs of Christians generally, not just those of the Church of England.

Against that background we in the Church of England have serious reservations about the wisdom of legislating at this moment, and especially as part of a Bill introduced to deal with quite different matters, themselves of significant importance. In the light of the recent High Court decision, which should make it a good deal harder for prosecutions to be brought in all but the most compelling circumstances, it is not clear that there is a pressing need for repeal until there has been more time to assess the impact of the offence of incitement to religious hatred.

Nevertheless, having signalled for more than 20 years that the blasphemy laws could, in the right context, be abolished, the Church is not going to oppose abolition now, provided we can be assured that provisions are in place to afford the necessary protection to individuals and to society.

If the Government does introduce the necessary amendments in the House of Lords it will, in our view, be particularly important that there is clarity over precisely why the offences are being abolished and what the implications of their abolition are for the position of the Christian religion - in relation to both the State and society more generally. At a time of continuing debate about the nature of our society and its values, this change needs to be seen for what it is, namely the removal of what has long been recognised as unsatisfactory and not very workable offences in circumstances in which scurrilous attacks on the Christian religion no longer threaten the fabric of society. It should not be capable of interpretation as a secularising move, or as a general licence to attack or insult religious beliefs and believers.

The place of Christianity in the constitutional framework of our country, governed as it is by the Queen, in Parliament, under God, is not in question in the current debate. The relationship between Church and State, reaffirmed by the Government last July in *The Governance of Britain*, will continue to provide a context in which people of all faiths and none can live together in mutual respect in this part of the Realm.²⁶

7. Debate in the Lords on the Government amendment to abolish blasphemy

The Government’s proposed amendment to the *Criminal Justice and Immigration Bill* was debated on 5 March 2008. It stated:

²⁶ Letter sent by the Archbishops to the Right Honourable Hazel Blears MP, Secretary of State for Communities and Local Government, 29 February 2008, <http://www.cofe.anglican.org/news/pr2008.html> (last viewed 6 March 2008)

After Clause 129, insert the following new Clause—

“Blasphemy and blasphemous libel

(1) The offences of blasphemy and blasphemous libel under the common law of England and Wales are abolished.

(2) In section 1 of the Criminal Libel Act 1819 (60 Geo. 3 & 1 Geo. 4 c. 8) (orders for seizure of copies of blasphemous or seditious libel) the words “any blasphemous libel, or” are omitted.

(3) In sections 3 and 4 of the Law of Libel Amendment Act 1888 (c. 64) (privileged matters) the words “blasphemous or” are omitted.

(4) Subsections (2) and (3) (and the related repeals in Schedule 38) extend to England and Wales only.”²⁷

Other amendments to abolish the blasphemy offences had also been tabled by the Earl of Onslow and by Lord Avebury. Neither moved their amendments.

The amendment was introduced by Baroness Andrews, the Parliamentary Under-Secretary of State at the Department for Communities and Local Government. Lord Lester of Herne Hill added his name to the amendment. Baroness Andrews stated:

The Government are of the view that it is now time that Parliament came to a settled conclusion on this matter for two key reasons. First, the law has fallen into disuse and therefore runs the risk of bring the law as a whole into disrepute. Secondly, we now have new legislation to protect individuals on the grounds of religion and belief...²⁸

Baroness Andrews responded to those who claimed that abolition of the blasphemy offences would represent a drift towards the secularisation of the state:

...The amendment is about removing offences that have long been recognised as unsatisfactory and unworkable. It is not an attack on the sacred in our society...

In my personal view, the decision by the churches not to oppose the amendment reflects the resilience of Christian belief in this country and its significance in our history, culture and character. We have a strong tradition in this country of respect for others, justice, the right to freedom, the right to belief and a sense of right and wrong. The Christian tradition has had a profound effect on the way in which these freedoms and traditions have been shaped. It continues today in the role that it plays in contributing to and shaping the life of our communities.

I make the point of saying that because, in thanking the churches, I have to stress that the Government are well aware of concerns expressed particularly, but by no means exclusively, by members of the Christian community that abolition would represent further evidence of a drift towards secularisation. Let me reassure noble Lords that we have been at pains to emphasis that the proposal is in no way an attack on those beliefs or values or on the church, let alone on Christians themselves. Indeed, I believe that, by removing a law that has fallen into disuse and some disrepute, we are demonstrating confidence rather than the reverse...²⁹

²⁷ HL Deb 5 March 2008 c1118

²⁸ *Ibid.*, c1118

²⁹ *Ibid.*, c1122

The Archbishop of York questioned the timing of the proposed abolition of blasphemy. He repeated the concern in the Archbishops' letter to the Secretary of State (quoted in full above) that the offences against incitement to religious hatred are new on the statute book and are yet to be tested in the courts. He said:

... The common law offence of blasphemy could be said to serve the four following ends: the protection of society in the sense that it is important that religion, or at least the Christian religion, be treated with respect; the protection of public order; the protection of the bonds that hold society together in a more general sense; and signalling the fact that the Christian religion holds a special place within the social and constitutional fabric of the nation. Were the current offence to be abolished, no other single offence could clearly achieve all these ends. What are the Government doing to ensure that they protect them?

I finish by saying that the protection of society is achieved by ensuring that the Christian religion is treated with respect and by signalling the fact that the Christian religion holds a special place in the social and constitutional fabric of the nation governed by the Queen in Parliament under God as understood by the Church of England by law established. How are we going to guard this? I shall listen eagerly to the Minister to see whether we are given further assurances.³⁰

The Bishop of Portsmouth also spoke in the debate. He argued that:

...We have a fairly adequate although not perfect law about religious hatred. Therefore we should repeal the blasphemy law as an act of realism and generosity, but certainly not as one of secularisation.³¹

The Bishop of Durham similarly explained that he hoped it was clear that "in supporting the government amendment I am not for one minute colluding with the mood towards secularism, liberalism or any such agendas".³²

The Bishop of Chester, however, decided not to support the amendment. He explained:

There are issues of deep symbolism here and it would be wiser not to push this through as a late provision in this very unsatisfactory Bill but to delay for further consideration.³³

Lord Neill of Bladen also stated that the Lords "should not rush to judgment on this proposal which comes before us today at a very late stage".³⁴

Baroness O'Cathain argued against the amendment:

Let us be clear. The amendment before us proposes to legalise the most intense and abusive attacks on Christ, who is the central figure in our history. As the Bible records, God has exalted Him to the highest place and given Him a name beyond

³⁰ *Ibid.*, c1128-1129

³¹ *Ibid.*, c1134

³² *Ibid.*, c1138

³³ *Ibid.*, c1141

³⁴ *Ibid.*, c1142

every other name. The fundamental question is this: should we abolish Christian beliefs and replace them with secular beliefs? As long as there has been a country called England it has been a Christian country, publicly acknowledging the one true God. Over the centuries the Christian world view has given us individual liberty and parliamentary democracy. Christians have been at the forefront of humanitarian endeavours; we need only call to mind Wilberforce, Shaftesbury and Josephine Butler. Noble Lords may cry "freedom" in support of Amendment No. 144B, but I urge them to pause and consider that the freedom we have today was nurtured by Christian principles and continues to be maintained and guarded by them. I urge noble Lords to oppose Amendment No. 144B.³⁵

In the event, the amendment was passed by 148 to 87.³⁶ The vote was whipped by the Government because, according to Baroness Andrews, "we think that it is sufficiently important to take our supporters through the lobby this evening".³⁷ The Bishop of Chester had called for the vote to take place unwhipped as in his view it was a matter of conscience.³⁸ The Liberal Democrats had not been whipped.³⁹ Amongst those voting for the amendment were the Bishops of Durham and Portsmouth. Those who voted against included the Bishops of Chester, Rochester, and Southwell and Nottingham.

8. Debate in the Commons on the Lords amendment

The House of Commons considered the Lords amendments to the *Criminal Justice and Immigration Bill* on 6 May 2008.

The debate covered much ground. Particular points of interest included the extent to which the abolition of the blasphemy offence could be seen as a movement towards a secular society, and if so, whether this was to be lauded or a cause for concern.⁴⁰ Questions were raised about the continued establishment of the Church of England. Some Members argued in favour of disestablishment, however others reacted by indicating that if the abolition of the blasphemy offence was a step towards disestablishment, they would vote against it.⁴¹ The protection to Christian beliefs offered by the new offence of incitement to religious hatred was discussed.⁴² There was also some debate about the original purpose of the blasphemy offence: whether it was to protect the state, the Church, or to prevent civil strife.⁴³

The closing remarks made by the minister, Maria Eagle, were that:

I do not believe for a moment that the fact that we are taking the opportunity to get rid of offences that have fallen into disuse and are no longer useable indicates that the Government are not in favour of Christianity, or want to disestablish the Church. I noticed that one or two Opposition Members, including the right hon. Member for Maidstone and The Weald (Miss Widdecombe), asserted that the problem was not

³⁵ *Ibid.*, c1131

³⁶ *Ibid.*, c1147-1148

³⁷ *Ibid.*, c1147

³⁸ *Ibid.*, c1140

³⁹ *Ibid.*, c1144

⁴⁰ HC Deb 6 May 2008 c651

⁴¹ *Ibid.*, c644

⁴² *Ibid.*, c648

⁴³ *Ibid.*, c651

that the offences were not usable, but that there was no will to use them. I would dispute that; I do not think that they are usable because of the way things have developed over the years. We have discussed those developments during the passage of the legislation. If it is simply a matter of will, the right hon. Lady will note that the last time someone tried to use the offences was in 1977 – they have not been used by the public authorities since 1920. So it is not simply the present Government or Labour Governments who have not sought to use the offences or not had the will to use them, but every Conservative Government as well.

I do not believe for a minute, and I am sure that the right hon. Lady does not believe, that if the offences were to go when the Bill receives Royal assent and if the Commons agrees to the Lords amendments tonight, we will end up with a more secular society or a society that denies its Christian heritage. Christians and Christian organisations in this country are well able to assert their own history.⁴⁴

The House of Commons agreed to the Lords amendment by 378 to 57.⁴⁵

The vote was unwhipped on the Conservative benches.⁴⁶ The Minister indicated that “As far as I am aware, we Government Members are on a whipped vote, but Members will vote whichever way they wish”.⁴⁷ On his revolts.co.uk website, Prof Phil Cowley of Nottingham University pointed out that:

... On a free vote, 37 Conservative MPs - including David Cameron and 20 other members of the Tory frontbench - supported a Lords amendment abolishing the common law criminal offences of blasphemy and blasphemous libel; 57 Conservatives - including Shadow Home Secretary, David Davis, together with 15 other members of the Tory frontbench - voted in the no lobby. By contrast, Labour and the Liberal Democrat MPs were wholly united in favour of abolition.⁴⁸

B. The law of blasphemy

1. The law

In the Select Committee on Religious Offences 1993 report the Committee explained that they had asked their advisor, Professor David Feldman, to construct “as best as he could a modern definition of the elements of common law offence as it stands”. He came up with the following formulation:

Blasphemy is committed “by anyone who makes public words, pictures, or conduct whereby the doctrines, beliefs, institutions, or sacred objects and rituals of the Church of England by law established are denied or scurrilously vilified or there is objectively contentious, violent or ribald conduct or abuse directed towards the sacred subject in

⁴⁴ *Ibid.*, c666

⁴⁵ *Ibid.*, c667

⁴⁶ *Ibid.*, c640

⁴⁷ *Ibid.*, c666

⁴⁸ <http://www.revolts.co.uk/>, post dated 7 May 2008

question, likely to shock and outrage the feelings of the general body of Church of England believers in the community.⁴⁹

The Law Commission also gave a summary of the law in its 1985 report:

...first, that it appears that the offence protects only the Christian religion, together with the rituals and doctrines of the Church of England. Secondly, it is now established that no mental element is required for commission of the offence other than an intention to publish the offending words. Thirdly, there are statutory provisions which require the order of a “judge at Chambers” to be obtained for the institution of any proceedings against a newspaper editor and effectively prevent the publication of the blasphemy in question even in “fair and accurate” reports of the proceedings. Finally, like most offences at common law, the offence is triable only on indictment and punishable with a fine and imprisonment, upon which there are no statutory limits.⁵⁰

The Law Commission 1981 Working Paper explained that:

...Blasphemy was originally an ecclesiastical offence punishable in the ecclesiastical courts, but by the end of the 17th century the sanctions which could be imposed by those courts had lost their effectiveness, while other courts capable of dealing with religious offences (the Court of Star Chamber and the Court of High Commission) had been abolished. The Court of King’s Bench filled this gap and Taylor was the first reported case...⁵¹

The *Blasphemy Act 1697* was repealed in 1969. The Act had created the offence of denying certain tenets of the Christian religion after having been brought up in or having professed that religion. There had been few, if any, prosecutions under it. A 1966 Law Commission report recommended that the law was obsolete and that it should be repealed. This was implemented by the Criminal Law Act 1967.⁵²

The common law offences (as were) are set out in the appendix below which is taken from the Select Committee on Blasphemy’s 2003 report. There are also a number of offences set out in nineteenth century legislation which relate to blasphemous libel and to public worship.

Halsbury’s Laws Direct included a short section on blasphemy and blasphemous libel. It defined these offences in the following terms:

Blasphemy is an indictable offence at common law consisting in a publication of contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, the Bible or the formularies of the Church of England (1). The publisher must intend to publish, but he need not intend that the words amount to blasphemy (2). It is immaterial whether the words are spoken or written (3); but, if written, they constitute

⁴⁹ Select Committee on Religious Offences, *Religious Offences in England and Wales*, HL 96 2002-03, Appendix 3, paragraph 6

⁵⁰ The Law Commission, *Offences against religion and public worship*, 18 June 1985, HC 442 1984-85 pp3-4

⁵¹ The Law Commission, *Offences against religion and public worship*, Working Paper No. 79, 1981, p 28, pp4-5; Taylor (1676) 1 Vent. 293; 86 E.R. 189.

⁵² See The Law Commission, *Offences against religion and public worship*, Working Paper No. 79, 1981, p 28

blasphemous libel (4). The offence is punishable by fine and imprisonment at the discretion of the court (5).

(1) *Whitehouse v Gay News Ltd, R v Lemon* [1979] AC 617 at 665, 68 Cr App Rep 381 at 410, HL, per Lord Scarman. It is not blasphemy to attack any religion except Christianity: *Whitehouse v Gay News Ltd, R v Lemon* supra; *R v Gathercole* (1838) 2 Lew CC 237; *R v Chief Metropolitan Magistrate, ex p Choudhury* [1991] 1 QB 429, [1991] 1 All ER 306, DC (attack on Islamic religion not covered by common law offence of blasphemy). The present formulation is to be compared with what appeared to be the formulation prior to *Whitehouse v Gay News Ltd, R v Lemon* supra, namely the publication of words attacking the Christian religion or the Bible so violent, scurrilous or ribald as to pass the limits of decent controversy and tend to lead to a breach of the peace: *R v Ramsay and Foote* (1883) 48 LT 733; *Bowman v Secular Society Ltd* [1917] AC 406, HL; *R v Waddington* (1822) 1 B & C 26; *R v Hetherington* (1841) 4 State Tr NS 563; *R v Boulter* (1908) 72 JP 188; *R v Gott* (1922) 16 Cr App Rep 87, CCA.

The prohibition of blasphemy is not inconsistent with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 10 (freedom of expression): *Wingrove v United Kingdom* (Application 17419/90) (1996) 24 EHRR 1, ECtHR. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see constitutional law and human rights vol 8(2) (Reissue) para 122 et seq.

(2) *Whitehouse v Gay News Ltd, R v Lemon* [1979] AC 617, 68 Cr App Rep 381, HL. See also the decision of the Court of Appeal sub nom *R v Gays News Ltd* at [1979] QB 10, 67 Cr App Rep 70, CA.

(3) *R v Boulter* (1908) 72 JP 188; *R v Gott* (1922) 16 Cr App Rep 87, CCA.

(4) If the defendant pleads not guilty to the publication of a (blasphemous) libel, he may rebut evidence of publication where done by the act of another person by his authority on proof of evidence that such publication was made without his authority, consent or knowledge, and that the publication did not arise from want of due care or caution on his part: Libel Act 1843 s 7; and see libel and slander vol 28 (Reissue) para 300. A criminal prosecution against any proprietor, editor or any person responsible for the publication of a newspaper for any libel published in it may not be commenced without the order of a judge in chambers: see the Law of Libel Amendment Act 1888 s 8; and libel and slander vol 28 (Reissue) para 303. However, s 8 does not apply to a prosecution for an offence under the Criminal Procedure and Investigations Act 1996 s 60 (offences in respect of reporting of assertions): see s 61(5); and libel and slander vol 28 (Reissue) para 303. Nothing in the Law of Libel Amendment Act 1888 s 3 (newspaper reports of proceedings in court privileged) authorises the publication of any blasphemous matter: see s 3 proviso; and libel and slander vol 28 (Reissue) para 299. Nothing in the Criminal Procedure and Investigations Act 1996 s 58 or s 59 (orders in respect of, and restrictions on reporting of, assertions) affects the Law of Libel Amendment Act 1888 s 3 (privilege of newspaper reports of court proceedings): see the Criminal Procedure and Investigations Act 1996 s 61(4); and libel and slander vol 28 (Reissue) para 302.

As to the power to search for and seize a blasphemous libel, and as to the disposal of any blasphemous libel so seized, see the Criminal Libel Act 1819 ss 1, 2; and para 370 note 8 ante.

(5) See *R v Taylor* (1676) 1 Vent 293; and paras 1583, 1673 post.⁵³

2. Recent blasphemy cases

There has not been a public prosecution for blasphemy since 1922.⁵⁴ The 1977 *Whitehouse v Lemon* and *Gay News Ltd.* case was a private prosecution for blasphemous libel for having

⁵³ Halsbury's Laws Direct, para 826

published a poem entitled “The love that dares to speak its name”. The defendants were convicted on a majority verdict of 10 to 2. An appeal against the verdict was dismissed.

In December 2007 High Court ruled that broadcasters and theatres are exempt from blasphemy actions. The organisation Christian Voice had brought a private prosecution in respect of the play *Jerry Springer: the Opera*. The Claimant contended that no matter what the merits or demerits of the artistic qualities of the work, it contained material which was contemptuous and reviling of the Christian religion, of Christ and several biblical characters, and of the tenets of the Church, and further that it was delivered in a scurrilous and ludicrous manner. The district judge refused to issue the summonses; she held that the prosecution was precluded by the *Theatres Act 1968*, that there was no prima facie case of blasphemous libel, and that the application bordered on the vexation given the long delay and the circumstances in which the offence had been invoked (although this was not a reason for her decision). The claimant applied for judicial review of this decision. The High Court found that the two reasons given for her decision were correct, and that the application for judicial review must be refused.⁵⁵

In March 2008 the House of Lords Appeals Committee rejected a petition from Stephen Green, national director of Christian Voice, to hear an appeal against the High Court Judgement. Lord Bingham, who head the panel of three Law Lords, was quoted as saying “Permission is refused because the petition does not raise an arguable point of law of general public importance which ought to be considered by the House at this time, bearing in mind that the cause has already been the subject of judicial decision and reviewed on appeal”.⁵⁶

Michael Phillips, Solicitor to Stephen Green, wrote to *The Times* after the Law Lords’ judgment:

Sir, The House of Lords has decided not to hear the appeal from the High Court’s decision in the case of Stephen Green v The City of Westminster Magistrates’ Court (Jerry Springer, the Opera), as it was not felt by the House to have “sufficient public interest”. We believe that the House of Lords erred in declining to hear the appeal, since the High Court’s decision was bad law; indeed, one commentator described the decision as “without legal merit”.

The last blasphemy case was brought 30 years ago and it would appear as though the Establishment of this country has moved a long way since then. Many believe that the law is an anachronism which has no place in a modern Britain. We believe that the contrary is true.

Recently there has been another blasphemy case which we believe has fallen foul of the law, namely the grotesque statue of Jesus Christ with an erect penis in the Baltic Art Centre, Gateshead. Many Christians demonstrated against this and the strength of feeling ran high. Many expressed their desire to destroy the statue, but desisted, knowing this not to be lawful. Those same people have expressed a desire to assist in a private prosecution for blasphemy. The police have shown no interest in dealing with these grievances, as far as we are aware, and the art centre displayed the statue

⁵⁴ R v Gott (1922) 16 Cr App R 87

⁵⁵ R (on the application of Green) v City of Westminster Magistrates’ Court and others, 5 December 2007

⁵⁶ As quoted in “Lords ruling on Springer blasphemy ‘will bring judgment’”, *Western Mail*, 5 March 2008

until the end of the exhibition. We strongly believe that it is in the public interest to prevent such lewd and offensive displays.

It would seem that because Christians are peace-loving their faith is now considered fair game by the liberal Establishment and arts world. The law which is in place to protect that which is central to millions of people in Britain (15 per cent of whom regularly go to church) will offer no redress against gratuitous offence against God and their faith. With only three prosecutions in 100 years, it can hardly be said that the law has a chilling effect on free speech. Indeed, Richard Dawkins has never been threatened with a blasphemy prosecution. The law is there to stop only the most outrageous, spiteful, gratuitous acts which serve no legitimate aim in a democratic society, other than to insult the Christian faith.⁵⁷

C. Previous interest in the abolition of the blasphemy offences

1. Incitement to religious hatred and the blasphemy offences

The debate on blasphemy laws has in the past been linked to that about incitement of religious hatred. Baroness Scotland explained how the Government's position linked the discussion of religious hatred to blasphemy during the course of the debate on an amendment which would have abolished blasphemy offences tabled during the House of Lords report stage on the *Racial and Religious Hatred Bill*, Bill 11 2005-06. She stated:

My right honourable friend the Home Secretary has also made it clear that the Government are not prepared to legislate on blasphemy without first consulting with a range of faith and other interests. Many leaders from faiths not protected by the law on blasphemy see the symbolic protection for religion as important. My right honourable friend the Home Secretary is also keen that any legislation in this area should take place with the full involvement of the Church of England. In the past, there has been confusion between incitement to religious hatred and blasphemy and we should try to put an end to that confusion. Therefore, I am keen that we do not add to it by addressing both issues in the same Bill, especially as we try to chart a rather tortuous path through some of the difficulties with which we are currently faced.

The Government believe that incitement should be bedded down before moving on and looking at the detail of blasphemy. Therefore, although I am extremely grateful to the noble Lord, Lord Avebury, for raising these issues, I say, in the words of my noble friend Lord Wedderburn, that the time is not ripe. On this occasion, the phrase is correct. We have moved a long way, but we cannot quite say that we have considered all views and that this is the time for the abolition of blasphemy. I hope that the noble Lord will not find it necessary to test the opinion of the House, either now or before the Bill leaves this House.⁵⁸

The offence of incitement to religious hatred is now enshrined in the *Racial and Religious Hatred Act 2006*.⁵⁹

⁵⁷ Letter to the Editor, *The Times*, 5 March 2008

⁵⁸ HL Deb 8 November 2005 cc540-541

⁵⁹ See Library Research Paper RP 05/48, [The Racial and Religious Hatred Bill](#); See also Library Standard Note SN/PC/3768 [Racial and Religious Hatred Bill – a note on the Bill's progress](#)

The *Anti-Terrorism Crime and Security Bill 2001-2002* included provisions on inciting religious hatred but following opposition in the House of Lords these provisions were dropped. As a consequence, Lord Avebury introduced the *Religious Offences Bill* which included provisions both to introduce religious hatred offences but abolish those of blasphemy (see below).

The provisions on inciting religious hatred were then included in the *Serious Organised Crime and Police Bill 2004-05*. During the passage of that Bill attempts were made to repeal the blasphemy laws. On report stage, an amendment that would have abolished the offences of blasphemy and blasphemous libel was voted down (Ayes 80, Noes, 339).⁶⁰ The religious hatred provisions were removed from the Bill before it received Royal Assent in the run-up to the 2005 General Election.

In its manifesto for that General Election, the Labour Party announced that it would bring forward a law to outlaw incitement to religious hatred. During the first Session of the Parliament, the *Racial and Religious Hatred Bill 2005-06* was introduced. Again, during its passage through Parliament, attempts were made in both Houses to add provisions to the Bill to repeal the existing blasphemy laws. In the House of Commons amendments that would have abolished the law of blasphemy were tabled both for Committee and Report stages but were not selected. In fact, according to Baroness Scotland during the Lords report stage of the Bill, "blasphemy was, ruled out of scope in the Commons".⁶¹

In the House of Lords, however, amendments to abolish the offences of blasphemy and blasphemous libel and other religious offences were debated at report stage on 8 November 2005. One vote took place, on an amendment that would have added a clause abolishing blasphemy and blasphemous libel; any distinct offence of disturbing a religious service or religious devotions; and any religious offence of striking a person in a church or churchyard. The amendment was rejected by 153 votes to 113.⁶²

2. Previous Government positions on blasphemy

On a number recent occasions, ministers in the House of Lords stated that the Government had no plans to initiate a review of the blasphemy laws. First, in March 2006:

Lord Stoddart of Swindon asked Her Majesty's Government:

What is their response to the call by the Foreign Minister of Turkey for the European Union to alter blasphemy laws to protect Islam as well as Christianity; and whether European action in this area would be consistent with the principle of subsidiarity.

The Minister of State, Home Office (Baroness Scotland of Asthal): Any change relating to the law of blasphemy would have to begin with a review in which various options could be considered. All UK faiths and interested parties, particularly the established Church, would need to be consulted and the issues examined in some

⁶⁰ HC Deb 7 February 2005 c1228

⁶¹ HL Deb 8 November 2005 c540

⁶² HL Deb 8 November 2005 cc520-543

depth. We have no plans to initiate such work, but would be content to listen to representations on the subject. We doubt that there is any competence under the European treaties for EU action in this area. Even if there were, we would require some persuasion that there was a legitimate need for EU action in this field.⁶³

Secondly, in April 2006:

Lord Lester of Herne Hill asked Her Majesty's Government:

Whether they will initiate a public consultation on the reform of blasphemy law, having regard to the recommendations of the Law Commission for England and Wales and subsequent events.

The Minister of State, Home Office (Baroness Scotland of Asthal): We have no plans to initiate a public consultation, but would be content to listen to representations on the subject.⁶⁴

And, also in May 2006:

Lord Stoddart of Swindon asked Her Majesty's Government:

Whether they have any plans to bring forward legislation to repeal the law of blasphemy.

Lord Bassam of Brighton: We have no plans to initiate such work.⁶⁵

3. The *Religious Offences Bill* [HL] Bill 39 2001-2002 and the Select Committee on Religious Offences

On 8 January 2002, Lord Avebury introduced a Bill to abolish certain religious offences and to amend the *Public Order Act 1986* to include religious hatred offences. The Second Reading took place on 30 January 2002.⁶⁶ At the end of the debate, the Bill was committed to a Committee of the Whole House. However, there were a number of calls for further discussion of the Bill in a select committee, and Lord Avebury then proposed this to the House of Lords' Liaison committee. The Select Committee on Religious Offences was established in May 2002.

The Committee's report, *Religious Offences in England and Wales*, was published in June 2003.⁶⁷ The report is a thorough examination of the law of blasphemy and of offences against public worship. The Select Committee received a great deal of written evidence, and held a number of oral evidence sessions. The report contained an appendix which sets out the law on blasphemy. This is reproduced as an appendix to this note. The report concluded:

We support the protection of everyone's right to freedom of thought, conscience and religion, and the freedom to manifest one's religion or beliefs, under Article 9 of the European Convention on Human Rights, and we consider that the ordinary law gives

⁶³ HL Deb 28 March 2006 cWA104

⁶⁴ HL Deb 19 April 2006 cWA227

⁶⁵ HL Deb 2 May 2006 cWA47

⁶⁶ HL Deb 30 January 2002 cc314-339

⁶⁷ Select Committee on Religious Offences, *Religious Offences in England and Wales*, HL 96 2002-03

that protection. We agree however that there is a gap in the law as it stands. We have examined whether there needs to be any additional protection either for believers as a class, or for the objects connected with their beliefs. There is no consensus as to whether such protections should exist and, if so, the precise forms they should take, but we do agree that the civil and criminal law should afford the same protection to people of all faiths, and of none.

There are matters of profound concern in the community, or communities. There exists a series of subjects on which Parliament alone can reach decision: the debate will be intense. What the proceedings of the Select committee have made clear is that it is perfectly possible to conduct this debate, among witnesses and members of all persuasions, with equanimity and understanding. There is recognition that the differences need to be resolved, and there is much good will on which to draw in so doing.⁶⁸

The Committee made no recommendations. A Government response was published in December 2003 which “broadly endorsed” the Select Committee’s analysis but stated that the Government should be “extremely cautious” about proposing and formulating legislation.⁶⁹

4. The 1985 Law Commission Report, Offences against religion and public worship

In 1981 the Law Commission published a Working Paper on *Offences against religion and public worship*.⁷⁰ The Commission received over 1,800 responses, more than 175 petitions bearing a total of 11,770 signatures.⁷¹ The Law Commission, in their final report which was published in June 1985, pointed to the influence of the National Viewers’ and Listeners’ Association.⁷²

The report made recommendations to abolish or repeal certain common law and old statutory offences in the field of offences relating to religion and public worship. The report concludes that:

Blasphemy and blasphemous libel at common law provide protection only for the Christian religion and, it seems, the tenets of the Church of England. We take the view that, where members of society have a multiplicity of faiths or none at all, it is invidious to single out that religion, albeit in England the established religion, for protection. In our view, therefore, for this reason and for other reasons earlier summarised, the common law cannot remain as it is...⁷³

⁶⁸ Select Committee on Religious Offences, *Religious Offences in England and Wales*, HL 96 2002-03, 10 June 2003, paras 137-138

⁶⁹ Home Office, *The Government reply to the Report from the Religious Offences Committee Session 2002-2003 HL 95 – Religious Offences*, Cm 6091, December 2003

⁷⁰ The Law Commission, *Offences against religion and public worship*, Working Paper No. 79, 1981

⁷¹ The Law Commission, *Offences against religion and public worship*, 18 June 1985, HC 442 1984-85, para 2.6

⁷² The Law Commission, *Offences against religion and public worship*, 18 June 1985, HC 442 1984-85

⁷³ The Law Commission, *Offences against religion and public worship*, 18 June 1985, HC 442 1984-85, para 2.54

The Commission recommended abolition without replacement as “we have no doubt that any replacement offence which might be devised would in practice prove to be unacceptably wide in ambit”.⁷⁴

However, a Note of Dissent was published along with the main report. This stated that two of the Commissioners agreed that the common law offence of blasphemy should be abolished without enactment of any new offence, however, they believed that the preferable course would be to enact a new offence in its place.⁷⁵

In the wake of the Law Commission recommendation, a number of private Members’ bills were introduced in both Houses of Parliament.⁷⁶

⁷⁴ *Ibid.*, para 2.56

⁷⁵ *Ibid.*, p41

⁷⁶ *Religious Prosecutions (Abolition) Bill 1988-89; Blasphemy Bill 1988-89; Religious Prosecutions (Abolition) (No 2) Bill [HL] 1988-89; Blasphemy Bill 1989-1990; Blasphemy (no 2) Bill 1989-90; Commonwealth of Britain Bill 1990-91; Blasphemy (Abolition) Bill [HL] 1994-95*

D. Appendix: Appendix 3 of the House of Lords Select Committee on Religious Offences, *Religious Offences in England and Wales*, HL95 2002-03

(A) UNTIL 1998

1. Blasphemy (and blasphemous libel) is a common law offence with an unlimited penalty. The content of the current law is obscure and, from the evidence that the Committee has received, is widely misunderstood. In 1981 the Law Commission observed that it was "hardly an exaggeration to say that whether or not a publication is a blasphemous libel can only be judged *ex post facto*"[133]. It should be added that more recent academic opinion has shared the view that the law of blasphemy is uncertain:

- "A general criticism of the law of blasphemy is its uncertainty, given the vagueness of deciding what does constitute the Christian religion."[134]
- "To say precisely what constitutes the law of blasphemy is difficult if not impossible."[135]
- "In fact, the *actus reus* of the crime of blasphemy has been expressed in so many different ways that it is hard to know what conduct is or is not caught by it."[136]

2. The legal notion of blasphemy dates back many centuries. Faith was seen to be the root of society's political and moral behaviour. Therefore, to challenge that faith or to offend against it was to seriously threaten the very fabric of political and moral society and had to be punished severely. Clearly, that is no longer the case. Some might regret that, but it does not alter the fact that the law is now concerned with the preservation of the peace of the realm, and the concern is not so much with views of the deity as with the satisfactory state of society.

3. The present state of the law of blasphemy rests, in the main, on decisions made by courts in the nineteenth century. In the twentieth century there were only four reported judgements. One, *Whitehouse v Lemon* (the "Gay News" case) [137], has the authority of the House of Lords but concerns only the question of the *mens rea* (the mental element or guilty mind), necessary for the commission of the offence. Some remarks about the *actus reus* (the criminal act or the substantive content of the offence) were made in passing in the speeches in this case, but the court did not hear full argument on these matters and the remarks are thus merely of persuasive significance. Another case [138], reaffirming that the protection of the blasphemy law extended only to the beliefs of the Church of England and that Salman Rushdie's "Satanic Verses" book could not be prosecuted for blasphemy against Islam, was decided by the Divisional Court and is thus a comparatively low level authority. *Bowman v. Secular Society Ltd* [1917] AC 406, a House of Lords case, affirms earlier rulings that held that for there to be blasphemy there must be intemperate or scurrilous language. *R v Gott* (1922) 16 Cr App R 87 is only two paragraphs long and merely rejects an appeal against conviction and sentence. Many of the nineteenth century decisions that are central to the law are, by modern standards, badly reported. Many reports are very brief. This, amongst other things, makes describing the law of blasphemy very difficult.

4. In the 1917 case mentioned above, Lord Sumner observed that "the gist of the offence of blasphemy is a supposed tendency...to shake the fabric of society generally" (p. 459). Historically, English law took the view that "to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the Laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law"[139]. Blasphemy and sedition were seen as interlinked crimes involving the

subversion of the state. By the nineteenth century, however, the law became more specific. In *Gathercole's Case* ((1838) 2 Lewin 237) the court held that a "person may, without being liable for prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian Religion (save the established religion of the country)". The courts held, more generally, that it was "no longer true that 'Christianity is part of the law of the land'"[140]. The law of blasphemy was thus restricted to protecting the tenets and beliefs of the Church of England, other religions being protected only to the extent that their beliefs overlapped with those of the Church of England.

5. Some elements of the law are clear. First, the House of Lords decided in *Whitehouse v Lemon* that the offence is one of strict liability. That is to say, whether one intended to commit an act of blasphemy is immaterial; all that matters is whether or not one did in fact publish the material that is the subject of prosecution. Secondly, as noted above, the offence protects only the Church of England. This latter point is a matter on which the Committee received much evidence, with many seeking to argue that the law as it is currently stated extends to protect the Christian faith in general. It is clear, however, that this is not the case. In the "Satanic Verses" case, the court held that "extending the law of blasphemy would pose insuperable problems and would be likely to do more harm than good" (p 452). Although some judgements have sometimes suggested that it might be better if the law were more widely stated (most notably Lord Scarman in *Whitehouse v Lemon* (at p 308)), it is settled law that at present it extends only to protect the Church of England.

6. As to what precisely constitutes a blasphemy, the matter is obscure, and it is this that justifies the Law Commission's view quoted in paragraph 1 above. Even among Christian communities there is considerable disagreement about the extent of the offence. The Select Committee asked Professor D J Feldman, Legal Adviser to the Joint Committee on Human Rights, to construct as best he could a modern definition of the elements of the common law offence as it stands today. From the decided cases it would seem that blasphemy is committed "by anyone who makes public words, pictures or conduct whereby the doctrines, beliefs, institutions, or sacred objects and rituals of the Church of England by law established are denied or scurrilously vilified or there is objectively contemptuous, violent or ribald conduct or abuse directed towards the sacred subject in question, likely to shock and outrage the feelings of the general body of Church of England believers in the community". As the Law Commission's view indicates, quite what this means when it comes to applying the law to any given set of facts is difficult to say.

7. It must be appreciated that the definition has developed historically to meet various, primarily political rather than religious, perceptions of a need for the law to protect institutions, originally the State itself. This is acknowledged by the Church of England, although not welcomed by them. But there is a profound objection to it from the Evangelical witnesses and organisations such as Christian Voice. Their position is that the law prohibits "anything that contains contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the formularies of the Church of England as by law established". The objectors place heavy reliance on Lord Scarman's opinion in the "Gay News" case, and on the quotation by him and other Law Lords of *Stephens' Digest of the Criminal Law*. However, these passages do not form part of the ratio of the House of Lords judgement and therefore carry limited weight. It should be added that it is also the case that, on the authority of *R v Hetherington*, material is not blasphemous if it is presented "in a sober and temperate and decent style", even when it questions the doctrines and beliefs of the Church of England. However, the line between that which is sober etc. and that which is not has not been

subject to extensive examination by the courts. Equally, it would be difficult to determine what constitutes scurrilous, contumelious etc.

(B) SINCE THE HUMAN RIGHTS ACT 1998

8. The body of English law has moved on since *Whitehouse v. Lemon*, not least through the passage of the Human Rights Act 1998. This does not exactly incorporate the European Convention on Human Rights (ECHR) as part of the domestic law of the UK, but it does require courts and tribunals, as public bodies (among many others) to interpret the law (henceforth "English" law, which includes Wales; the same applies in Scotland and Northern Ireland but this is not relevant to our deliberations) in such a way as to be consistent with the Convention. When the courts are considering statute law or subordinate legislation, there is a system (s.10) which enables the higher courts to certify that they cannot interpret the Act etc. in question so as to be compatible with the ECHR. In such an event there is a streamlined process whereby Parliament is able to make the requisite amendment. Nothing, however, is said about amending the common law, so if it is found to be inconsistent with the ECHR, however hard the court may try to interpret it so as to be compatible, it remains at present a matter for speculation how the problem might be resolved. In the case of a criminal conviction under a common law offence which contains elements incompatible with the ECHR, the appellate courts may well be left with no option but to quash the conviction. It would be possible for the court to invite Parliament to consider the terms of the offence, but the fast-stream procedure is not available and normal legislation would be required.

9. There are four Articles of the Convention which have a bearing on the matters before the Committee: 7, 9, 10 and 14. One aspect of the jurisprudence which has developed in the Strasbourg court is that the Convention has to be applied as a whole. This means that it may not be sufficient to look at one Article alone: it may interlock with another, with complex results. This legal innovation formed no part of the Law Commission's report but today it has overwhelming implications. The main problem which is likely to arise in the context of blasphemy derives from Articles 7 and 10. Article 7 appears to impose a prohibition on the creation of a retrospective offence. That is to say, nobody can be convicted or punished for acting in a manner which was not a criminal offence at the time of the action. In *Sunday Times v. UK* (1979) 2 EHRR 245 the Court said "...the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee...the consequences which a given action may entail". The subsidiary meaning of Article 7 may have a damaging effect on the common law of blasphemy because a criminal offence will violate Article 7 (or valid 'prescription by law' under other Articles) if its ingredients are unclear: a person must be able to foresee whether or not his proposed action is lawful.

10. Although no blasphemy case has been prosecuted in England and Wales since the passage of the Human Rights Act, and what follows is therefore necessarily speculative, it is our view that any prosecution for blasphemy today—even one which met all the criteria described in paragraphs 5-7 above—is likely to fail on grounds either of discrimination or denial of the right to freedom of expression. As long ago as 1980 Lord Diplock noted in relation to the criminal offence of defamatory libel that under Article 10.2 of the European Convention on Human Rights "freedom of expression may be subject to restrictions or penalties...only to the extent that those restrictions or penalties are necessary in a

democratic society for the protection of what generically may be described as the public interest"[141]. His words apply with even more emphasis to the crimes of blasphemy and blasphemous libel. European law also requires that restrictions placed on Article 10.1 rights must be prescribed by law, and that this means that the law must be certain, as to what is or is not permitted. This is part of the interpretation of Article 10.2 read in conjunction with Article 7.

11. The 1998 Act gives effect to the rights and freedoms guaranteed under the European Convention. Article 9 guarantees the freedom of thought, conscience and religion. Article 10 confers the right of freedom of expression. Article 14 prohibits discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". It is doubtful that an objective and rational justification could be provided for the difference in treatment of different religions and their beliefs, so there is a significant risk of the law of blasphemy violating Article 14 taken together with Articles 9 and 10. It should be noted that Articles 9 and 10 of the European Convention have equal status, in contrast to the United States of America, where freedom of expression is paramount.

12. In 1997 the European Court of Human Rights held that the English law of blasphemy was not in contravention of Article 10 (freedom of expression) of the European Convention[142]. However the ruling was not unequivocal. The Court said the law of blasphemy lay within the "margin of appreciation". This gives individual countries a degree of discretion in deciding what law is appropriate where there is insufficient common accord amongst Member States for the European Court of Human Rights itself to give a definitive ruling. The extent of the margin of appreciation in any given case is not fixed, and is affected by the changing social and legal climate within the Member States. For example, in a succession of decisions over the past two decades the European Court held that the United Kingdom's refusal to allow transsexuals to change their declared sex on official forms, marry on the basis of their changed sex and so forth was within the margin of appreciation. But in 2002 the Court reversed its earlier stance and decided that in the light of changes in social, legal and scientific circumstances the United Kingdom's position now put it in breach of both Article 8 and Article 12 of the Convention [143]. Thus, the Court's decision in *Wingrove* that there was not "as yet...sufficient common accord" to mean that the English law of blasphemy was in breach of the European Convention does not mean that it will not rule otherwise in the future.

13. The requirement to read the law of blasphemy in the light of the Human Rights Act 1998 provides a particular difficulty for the English courts. It is clear that the law discriminates between religions and between denominations of the same religion. It infringes notions of freedom of expression. Whilst the European Convention provides for the restriction of freedom of expression by State action in pursuit of legitimate aims such as the prevention of disorder, the Court has held that any restriction of freedom of speech must be proportionate to the legitimate aim that is being pursued [144]. The courts by themselves would have difficulty in redrawing the law, not least because the retrospective creation of criminal offences is contrary to Article 7 of the European Convention. Partially because of this, in the "*Satanic Verses*" case the Divisional Court felt itself unable to extend the law to cover non-Christian religions. This, however, was before the Human Rights Act had given the courts new powers and duties, not least the responsibility, under section 6(3)(a) of the Act, to ensure their judgements were compatible with the Convention. They would face formidable difficulties in either extending the law to other religions or in clarifying what the exact ambit of

the law might be. Equally, however, they could not simply ignore the clear discrepancies between the state of the current law and the requirements of the Act.

14. In the *Wingrove* case, the British Board of Film Classification adopted a definition of blasphemy along the same lines as *Whitehouse v. Lemon*, but omitting any reference to the Church of England. When this case came before the European Court of Human Rights the Court held (at para. 43) that "There appears to be no general uncertainty or disagreement between those appearing before the Court as to the definition in English law of the offence of blasphemy, as formulated by the House of Lords in the case of *Whitehouse v. Gay News* and *Lemon*...The Court is satisfied that the applicant could reasonably have foreseen that the film could fall within the scope of the offence of blasphemy". It is clear that both before the Commission and the Court, counsel for both sides presented a united front that Lord Scarman's speech in the *Gay News* case had defined the actus reus of blasphemy in common law (see para 47 of the Commission's opinion and para 43 of the Court's judgement). There must however be considerable doubt whether that view would have prevailed if the extent of the law of blasphemy had been fully argued and if it had not been wrongly assumed that the House of Lords had formulated it clearly in the "*Gay News*" case.

15. There are in prospect other problems about the common law offences: the disproportionality of an unlimited penalty; discrimination in favour of Christianity alone; and no mechanism to take account of the proper balance to be struck under Article 10 of the Convention. What may be even more difficult for an English court, performing its duty under s.6 (3)(a) of the Human Rights Act, is that a domestic court is not allowed the comfort of the "margin of appreciation" on which the Strasbourg Court can rely, so as to reach decisions which take account of the very diverse backgrounds from which domestic law originated, and thereby produce decisions which will not prove unacceptable to the State from which the appeal came. The State itself possesses a margin of appreciation in legislating for its own problems and the European Court will take cognisance of this; but the extent to which a parallel jurisdiction is available to the domestic courts in the UK is at an early stage of development.

133 "Offences Against Religion and Public Worship" (Law Commission Working Paper No. 79, 1981) para. 6.1.

134 St. John Robbilliard, "Religion and the Law" Manchester University Press (1984) p.37

135 A. Bradney "Religions, Rights and the Law" Leicester University Press 1993 p.82

136 D. Feldman "Civil Liberties and Human Rights in England and Wales" OUP (2002) p.913

137 *Whitehouse v Lemon* [1979] 2 WLR 281

138 *R v Chief Metropolitan Magistrate, ex parte Choudhury* [1991] 1 QB 429: the "Satanic Verses" case

139 *Taylor's Case* (1676) 1 Vent. 293

140 *R v Ramsay and Foote* (1883) 15 Cox CC 231 at p 235

141 *R v. Wells St Magistrate* [1980] AC 477, p483

142 *Wingrove v the United Kingdom* (1997) 24 EHRR 1. This case resulted from a refusal in 1989 by the British Board of Film Classification to issue a video classification certificate to a short film, "Visions of Ecstasy", on the grounds that it infringed the law of blasphemy. On appeal, the filmmaker claimed this violated his rights to freedom of expression (Volume III, pages 4 & 5).

143 *Goodwin v United Kingdom* (2002) 35 EHRR 447

144 *Handyside v. United Kingdom* (1979) 1 EHRR 737, p 754