

X index

on censorship

Art and the Law

A guide to the legal framework impacting on artistic freedom of expression

CHILD PROTECTION
COUNTER TERRORISM
OBSCENE PUBLICATIONS
RACE AND RELIGION

PUBLIC ORDER



Vivarta

These information packs have been produced by Vivarta in partnership with Index on Censorship and Bindmans LLP.



Acknowledgements

The packs have been made possible by generous pro-bono support from lawyers at Bindmans LLP, Clifford Chance, Doughty Street, Matrix Chambers and Brick Court.



The packs have been designed and printed by Clifford Chance, Greg Thompson, Design Specialist, Document Production Unit

Art & the Law - Public Order - A Guide to the Legal Framework Impacting on Artistic Freedom of Expression is published by Vivarta. This publication is supported using public funding by the National Lottery through Arts Council England. It is licensed under Creative Commons CC BY 2.0, excepting where copyright is assigned elsewhere and marked accordingly.



ISBN: 978-0-9933345-0-4

Vivarta is a digital media news lab and advocate for free expression rights. As vivarta.org we help defend free expression through investigative reporting and creative advocacy. As vivarta.com we apply new digital media, security and situational analysis tools to support this work. The Free Word Centre, 60 Farringdon Road, London EC1R 3GA www.vivarta.org

Five areas of law covered in this series of information packs

Public Order

Child Protection

Counter Terrorism

Obscene Publications

Race and Religion

They can all be downloaded from indexonensorship.org/artandoffence or order a print copy from info@indexonensorship.org – postage will be charged.

Editors' note

As with the other documents in this series, this booklet is intended as an introduction to the legal framework that underpins the qualified right of freedom of expression enjoyed by artists and arts organisations in the UK. We hope that it will be of some assistance to artists, curators, gallery management and trustees who seek to protect artistic freedom of expression, especially when planning to programme challenging and controversial works.

This pack is not a substitute for legal advice.

If you are unsure about your responsibilities under the law at any time, you must obtain independent specialist legal advice. Some of the lawyers at work in the sector at time of publication are listed on the website.

Legal Adviser - Hugo Leith, Brick Court Chambers

Editorial team:

Julia Farrington – Associate arts producer, Index on Censorship/Vivarta

Jodie Ginsberg – Chief executive, Index on Censorship

Rohan Jayasekera – Vivarta

Contents

Preface	4
Foreword by Gurpreet Kaur Bhatti	5
Freedom of expression	6
Public order offences explained	8
The powers of the police and prosecuting authorities	10
Practical guidance for artists and arts organisations	13
Questions and answers	15
Appendix I: Documenting and explaining a decision	19
Appendix II: Sample letter for approaching the police	20
Appendix III: An explanation of Special Police Services by Tamsin Allen	21

Police at The Vaults, Waterloo attending the picket, organised by Boycott the Human Zoo, of The Barbican's production of Brett Bailey's Exhibit B. Police advice led to the cancellation of all five nights of the performance.
© Thabo Jaiyesimi / Demotix



Preface

Freedom of expression is essential to the arts. But the laws and practices that protect and nurture free expression are often poorly understood both by practitioners and by those enforcing the law. The law itself is often contradictory, and even the rights that underpin the laws are fraught with qualifications that can potentially undermine artistic free expression.

As indicated in these packs, and illustrated by the online case studies which can be found at indexoncensorship.org/artandoffence, there is scope to develop a greater understanding about the ways in which artists and arts organisations can navigate the complexity of laws, and, how and when to involve the police. We aim to put into context the constraints implicit in the qualified rights set out in the European Convention on Human Rights and address unnecessary censorship and self-censorship.

Censorship of the arts in the UK results from a wide range of competing interests – public safety and public order, religious sensibilities and corporate interests. All too often these constraints are imposed without clear guidance or legal basis.

These law packs are the result of an earlier study by Index on Censorship: *Taking the Offensive*, which showed how self-censorship manifests itself in arts organisations and institutions. The causes of self-censorship ranged from the fear of causing offence, losing financial support, hostile public reaction or media storm, police intervention, prejudice, managing diversity and the impact of risk aversion. Many participants in our study said that a lack of knowledge around legal limits contributed to self-censorship.

These packs are intended to tackle that lack of knowledge. We intend them as “living” documents, to be enhanced and developed in partnership with arts groups so that artistic freedom is nurtured and nourished.

**Jodie Ginsberg, chief executive,
Index on Censorship**



Foreword by Gurpreet Kaur Bhatti

There is art that soothes, pleases and comforts and there is art that prods, pokes and disturbs. Both kinds can be magical and they both need to be available to audiences.

I have always been attracted to taboo subjects and I have a visceral desire to question and understand that part of the human condition which is abhorrent and difficult. Ignoring the creative impulses within me would be akin to gagging a child in a playground.

What is provocative is not always easy to behold and is bound to offend at times. Art tests our boundaries and our limits and artists must be allowed and encouraged to investigate the most unbearable corners of existence because it is only by entering the shadow that we have awareness of light.

We live within a culture of anxiety, increasingly dominated by a corrosive fear of adverse reaction. Safety and security seem to be worshipped at all costs. It is this unspoken fear of discomfort and unease which kills creativity, whereas tiny moments of faith – a single word, a brush stroke, the germ of an idea – are what help it to flourish.

Every artist has an impetus to tell a story, to impart something. We are explorers and truth tellers. However, in order for what is created to connect with an audience we need the machinery of institutions to support and navigate the work.

Our institutions need to leap in with artists, be brave enough to put on complex work they believe in and then use their imaginations if they have cause to defend it. Surely the best kick in the face for austerity is to encourage artists to take risks and pursue a path of provocation and interrogation.

I hope leaders in the arts can employ dynamism and courage as they fight for freedom of expression and if necessary shout loudly about why it has to be at the core of our cultural fabric in order for the arts in Britain to thrive and be truly diverse.

Let's not forget that institutions also need support from wider society so it is heartening to know that politicians, lawmakers and the police are finally committing to this conversation and there is the chance to move forward and learn from past mistakes.

Making important artwork isn't necessarily easy and the end product may not be palatable. But if the work is deemed excellent enough by institutions to be put on in the first place, then it should not be taken off under any circumstance. Art's function, after all, is not to maintain the status quo but to change the world. And some people are never going to want that to happen.

Gurpreet Kaur Bhatti is a playwright. Her play Behzti (Dishonour) was cancelled by the Birmingham Repertory Theatre following protests against the play.

Freedom of expression

Freedom of expression is a UK common law right, and a right enshrined and protected in UK law by the Human Rights Act¹, which incorporates the European Convention on Human Rights into UK law. The most important of the Convention's protections in this context is Article 10.

ARTICLE 10, EUROPEAN CONVENTION ON HUMAN RIGHTS

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

It is worth noting that freedom of expression, as outlined in Article 10, is a qualified right, meaning the right must be balanced against other rights.

Where an artistic work presents ideas that are controversial or shocking, the courts have made it clear that freedom of expression protections still

apply. As Sir Stephen Sedley, a former Court of Appeal judge, explained: "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having." (*Redmond-Bate v Director of Public Prosecutions*, 1999)

Thus, to a certain extent, artists and galleries can rely on their right to freedom of expression under Article 10 of the European Convention on Human Rights: the right to receive and impart opinions, information and ideas, including those which shock disturb and offend. As is seen above, freedom of expression is not an absolute right and can be limited by other rights and considerations.

Artists and artistic organisations including galleries, theatres and museums may also draw protection from other protected rights, such as freedom of assembly, which is covered by Article 11 of the European Convention on Human Rights and in turn the Human Rights Act. Article 11 states:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

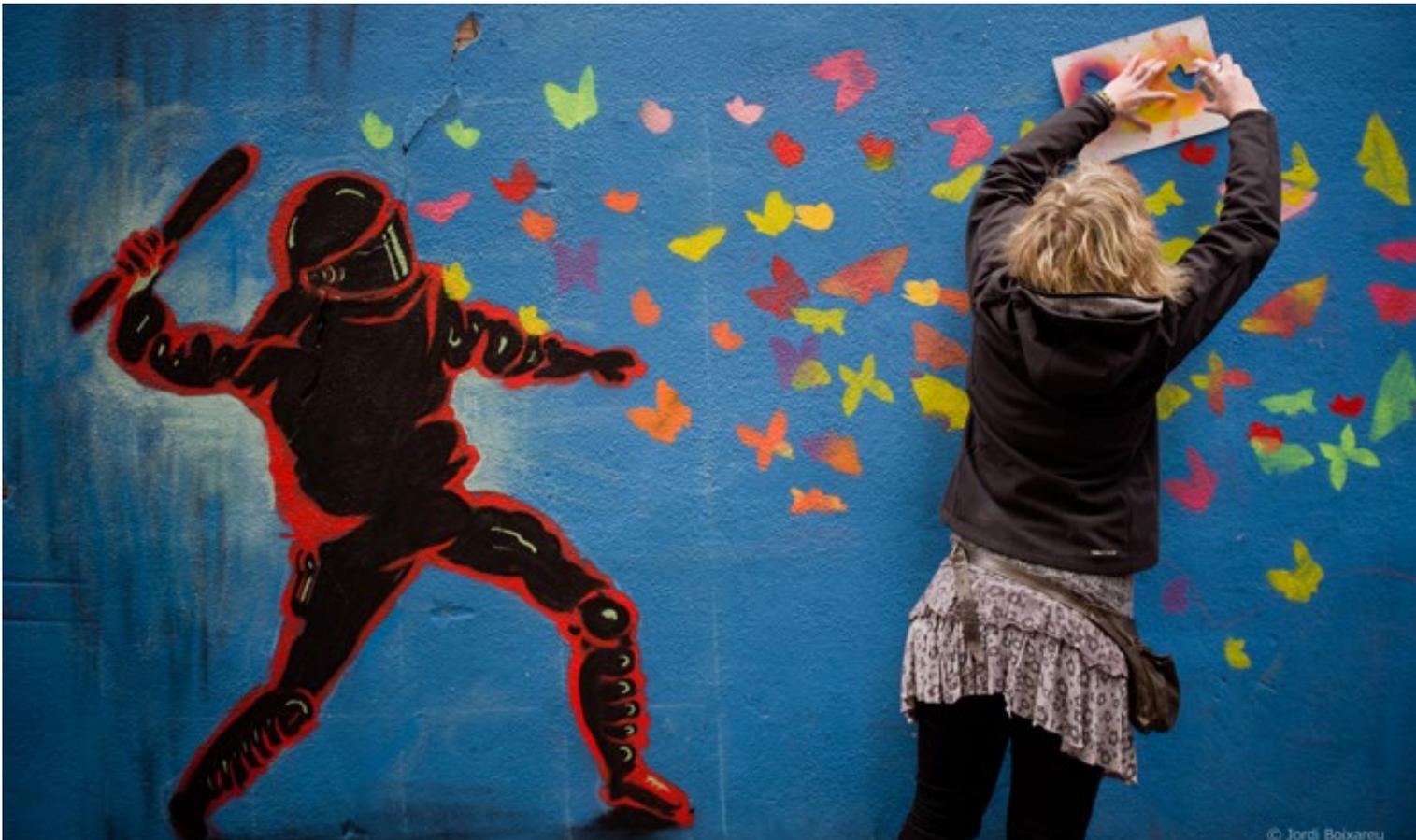
¹ At the time of writing (June 2015), the government is considering abolishing the Human Rights Act and introducing a British Bill of Rights. Free expression rights remain protected by UK common law, but it is unclear to what extent more recent developments in the law based on Article 10 would still apply.

The following sections look at one element area of the law that may be used to have the effect of curtailing free expression: the Public Order Act – the law dealing with issues of public order.

It is worth noting at the outset that artists are rarely charged with public order offences under the act. For an arts organisation it is far more likely that a public order problem arises because of the reactions of third parties to the work of art. For example, a particular group may feel seriously offended, and there may be a risk of violent protest or disorder. Often, protestors may use the threat of potential violence that could result from a provocative work to argue it should be shut down.

Public order law will therefore more often impact artistic works where the police form the view that the reaction it triggers is serious enough to justify closing the work to maintain order. Such a case presents the problem of an otherwise lawful action that causes, results in, provokes or (more neutrally) precedes a breach or threatened breach of the peace, entailing violent action, such that the police require the otherwise lawful act to cease. This will be discussed in greater detail below.

Street art protest against police brutality: Barcelona 2015 © Jordi Boixareu / Creative Commons / Flickr



Public order offences explained

The guidance generally applies if you are considering exhibiting or otherwise presenting works that might, after consideration of public response, raise issues of public order.

An artistic performance or exhibition may present material or themes that cause offence to members of the public or members of different social groups. This is by far the most likely way that any public order issue might arise in relation to an artistic work.

Public order law is complicated and its application to any particular case will be fact-specific. It should be borne in mind that much of this area of law – in particular breach of the peace – is governed by the common law. Common law, also referred to as case law, is made by judges and developed in the cases that come before the court over time. This is in contrast to statutory law, which is written law passed by the legislature - the body within government empowered to pass laws. This means that for these areas there is no specific, relevant extract of written legislation.

Two types of laws should be considered when considering potential public order offences:

- Laws that create criminal offences, leading to arrest, prosecution and punishment.
- The powers of the police to deal with a breach of the peace (considered in the next section).

Laws that create criminal offences include:

- **The Public Order Act 1986 (POA)**
<http://www.legislation.gov.uk/ukpga/1986/64>
- **Theatres Act 1968** <http://www.legislation.gov.uk/ukpga/1968/54>

The Public Order Act creates several offences, particularly:

- Riot (Section 1)
- Violent disorder (Section 2)
- Affray (Section 3)
- Fear or provocation of violence (Section 4)
- Intentionally causing harassment, alarm or distress (Section 4a)
- Harassment, alarm or distress (Section 5)

It seems unlikely that Sections 1-4a will apply to most artistic performances. The use of violence in artistic performances is exceptional. It would be rare for an artistic performance to be performed with the intention of provoking violence and most artists, even when dealing with controversial material, would maintain that their intention is not to harass, alarm or distress another person, which would be an offence under Section 4a.

However, where a performance or other form of artistic expression does (exceptionally) involve violent acts, or could be seen as being done with the intent of provoking violence, or of harassing, alarming or distressing a person, then one or more of these provisions may apply. The artist should, in those cases, consider taking the steps explained later in this pack, particularly those that may assist in clarifying the artistic purposes and intentions of a work, as well as taking professional advice.

Section 5 of the Public Order Act differs from the others as it does not require the use or threat of violence, or a specific intention. It applies when a person uses words, behaviour, writings or visual representations that are threatening or abusive, or uses disorderly behaviour, within the hearing or sight of another person who is likely to be alarmed, harassed or distressed. The offence does not apply if the person had no reason to believe that there was any person in sight who could be caused harassment, alarm or distress, or was otherwise acting unreasonably.

Section 5 is therefore broader than the other offences, particularly Section 4a, as it can apply where the person is aware of the potential for their conduct to be threatening or abusive, even without intending this result.

As with the other provisions of the Public Order Act, artists whose work may fall into Section 5 should consider some of the ways of reducing the risk of prosecution discussed elsewhere in this pack. If a person commits an offence against the Public Order Act that is racially or religiously motivated, that person will also commit an offence under race and religious hatred legislation, and be liable to further punishment. This is discussed in detail in the

information pack on Race and Religion that forms part of this series of guides.

The Public Order Act itself also has additional rules applying to conduct intending to stir up racial or religious hatred, or hatred on the grounds of sexual orientation.

Parts III and IIIA of the act create offences against writings, plays, recordings or broadcasts where these are intended to stir up racial hatred (in Part III) or religious hatred or hatred on grounds of sexual orientation (Part IIIA).

However, Part IIIA specifically contains protections for free speech where religion is involved. This protection significantly narrows the scope of Part IIIA.

PEN AMENDMENT

Section 29J of Part IIIA (the so-called 'PEN amendment') states that the rules on public order must not be applied "in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system".

The Theatres Act 1968 provides a specific offence in Section 6 of using threatening, abusive or insulting words if these are used with intent to provoke a breach of the peace, or the performance as a whole is likely to occasion a breach of the peace. The concept of a breach of the peace is explained in the following section.

A defence is available where the performance is justified in the "public good", on the ground that the performance was in the interests of drama, literature or any other kind of art or learning.

The Theatres Act specifically states that a decision to prosecute under Section 6 may also only be taken by the attorney general. The requirement for the attorney general's permission means that a decision to prosecute is likely to be considered particularly carefully. As the attorney general has a higher profile than an ordinary prosecutor, one would expect his or her decision to be subject to greater public scrutiny.

If arrests have been made by the police, the Crown Prosecution Service (CPS) will consider whether, based on the evidence supplied by the police, there is a realistic prospect of conviction. This will include whether the work will meet the test of provoking public disorder and whether there is any defence that is likely to succeed. If there is enough evidence, the Crown Prosecution Service will consider whether it is in the public interest to prosecute, taking into consideration the competing rights of the artist, theatre, museum or gallery and others.

The powers of the police and prosecuting authorities

The police have statutory and common law powers to deal with disorder and to prevent anticipated disorder. They can do so by making arrests for various offences, and, importantly, by making arrests or giving directions to persons to prevent a breach of the peace.

In exercising these powers, the police also have duties to give protection to the freedom of speech of all groups and individuals, and any other relevant freedoms, including the right to protest and to manifest a religion. The role of the police naturally shifts with changes in culture and the law. The current position is that the police, as a public authority, have an obligation to ensure law and order and an additional obligation to preserve, and in some cases to promote, fundamental rights such as the right to protest and the right to freedom of expression protected by Articles 10 and 11 of the European Convention on Human Rights, currently incorporated into the UK's domestic law.

The result is that the police conduct a pragmatic balancing act between the different parties. However, where public order issues arise, the policing of artistic expression is very much part of the police's core duties and, as a public body, the police must act within their powers and discharge duties to which they are subject.

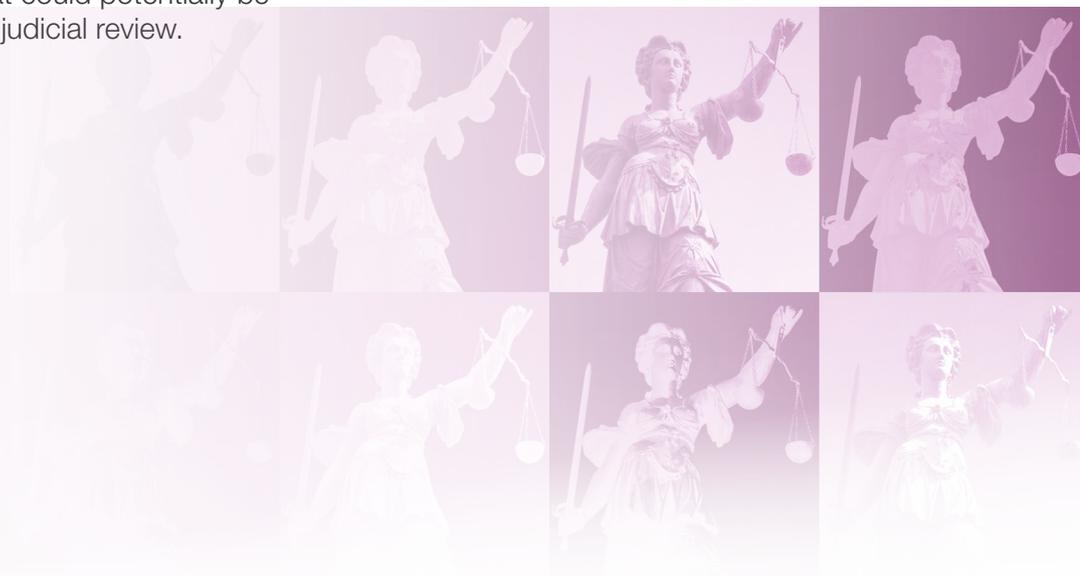
At present, there is limited relevant guidance available on the policing of artistic events and therefore policy practice in this area may lack consistency. This is an area that could potentially be subject to challenge by way of judicial review.

JUDICIAL REVIEW

Actions by the police and the authorities are subject to review by the courts. Convictions can only be imposed by a court, and may in turn be appealed. Police actions to detain or direct people on the grounds of preventing a breach of the peace may also be reviewed. In general terms, the test on such a review is whether, in light of what the police officer knew at the time, the court is satisfied that it was reasonable to fear an imminent breach of the peace. The information made available to the police by an artistic organisation or artist before an incident may occur is therefore critical to the officer's, and the court's, assessment.

<https://www.judiciary.gov.uk/you-and-the-judiciary/judicial-review/>

In addition to laws creating offences, the concept of a breach of the peace also gives the police preventive powers to arrest a person to prevent a breach of the peace. Causing a breach of the peace is not in itself a crime. However, the police may arrest a person to prevent a breach of the peace, and may require the person to undertake to keep the peace as a condition of release.



BREACH OF THE PEACE

Courts (not parliament) have defined the concept of a breach of the peace. At its essence, it involves violence or threatened violence, that is: “whenever harm is actually done or is likely to be done to a person or in his presence to his person, or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance”. A police officer may arrest a person threatening to breach the peace, or give the person directions to prevent a breach, where the breach is imminent.

The powers of the police may only be exercised where the breach is in fact imminent. The powers must also be exercised in a manner consistent with human rights protections, including freedom of expression under Article 10 of the European Convention on Human Rights. Judicial Review proceedings may be brought against the police where their actions contravene these requirements.

As set out above, there are various offences that could conceivably apply to artistic organisations. These offences, however, generally contain stringent conditions as to intention that are unlikely to be applicable. However, a number of controversial works have been forced to cancel or close because of threats of public disorder from groups or individuals who have been offended by the content of a work. Some prominent cases are discussed online: indexoncensorship.org/artandoffence.

In the arts sphere, the legal issue is likely to be that the reaction to a particular work entails or threatens a breach of the peace justifying its closure or other directions by the police, so as to maintain order. A failure to comply with such a direction can result in arrest. The legal test the courts apply in determining whether the police directions were valid is whether the person undertaking the lawful action is acting reasonably, and also whether the response to that lawful action is reasonable. A person will be acting reasonably if he or she is exercising his or her lawful rights, without unreasonably interfering in any material way with the rights of others.

TEST OF REASONABLENESS

A standard of “reasonableness” involves a balancing of factors and the competing interests, and the line is not clear-cut. The assessment of reasonableness in the realm of artistic expression, will take account of a range of factors, including:

- The protection of rights under the European Convention on Human Rights. The clearer it is made that the work has artistic purposes, the greater weight this factor would be likely to carry.
- The willingness (especially as apparent to the police) of the artist to consider ways of mitigating any reaction that may result.
- Conversely, the stance of those opposed to the artistic work, such as their willingness to accommodate the right of the artist to free expression under some restrictions.

If the work itself is in breach of public order legislation and if arrests have been made, the Crown Prosecution Service (CPS) will consider whether, based on the evidence supplied by the police, there is a realistic prospect of conviction. This will include whether the work will meet the test of provoking public disorder and whether there is any defence that is likely to succeed. If there is enough evidence, the Crown Prosecution Service will consider whether it is in the public interest to prosecute, taking into consideration the competing rights of the artist, museum, theatre or gallery and others.

In the case of a breach of the peace, this is not a criminal offence and will not be considered by the Crown Prosecution Service. It remains in the hands of the police who may detain an individual for a few hours and then release them.

The Crown Prosecution Service guidelines on prosecuting social media give an interesting insight into how expression in other media, including the arts, may be considered and can be read here: http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/

Some examples of court decisions

In the *Nicol v Director of Public Prosecutions* (1996) case, protestors disrupted an angling competition by throwing sticks at the fishing lines, and ignored a police officer's warning to stop. The officer's decision to arrest the protestors was upheld, as their conduct was considered by the court to be unreasonable and very likely to provoke a violent reaction by the anglers.

By contrast, in *Verrall v Great Yarmouth Borough Council* (1981), the court held that a possible breach of the peace arising from a meeting of the National Front in council property was not a good reason to allow the council to cancel the arrangement to provide the premises.

Nor do the court's decisions always go one way: it was ruled that Christians preaching from cathedral steps about abortion, attracting a hostile but non-violent crowd, should not have been arrested (*Redmond-Bate v Director of Public Prosecutions* 2000). By contrast, Islamic protestors picketing the homecoming of a regiment from Afghanistan and Iraq, shouting offensive slogans, and whose picket provoked threats and abuse from those welcoming the soldiers had their convictions under Section 5 of the Public Order Act upheld (*Abdul v Director of Public Prosecutions* 2011).

Protesters from Equity, the actors union, and other arts professionals' trade unions form a human chain in protest at government cuts to arts and culture funding © Dave Evans / Demotix



Practical guidance for artists and arts organisations

Being prepared to defend the work to critics is very important and may well be useful in establishing legal grounds opposing directions² by the police to close works down or for defending a criminal charge. This should be carefully documented – see Appendix I: Documenting and explaining a decision.

The issues to consider include:

- Making your motivation and reasons for making or displaying the work clear and why you consider the work to have artistic merit.
- Providing the context for the work, what the artist is seeking to achieve, their previous work, the role of controversy in their work etc. If the artist does not have a substantial body of work, put the work and the artist in a wider context.
- Considering the public interest in this work and how it contributes to a wider debate in society.
- Being aware that the right to freedom of expression includes the right to express ideas and opinions that shock, offend and disturb. You might draft a free speech statement for your organisation.

SAMPLE FREE SPEECH STATEMENT

To exhibit a work of art is not to endorse the work or the vision, ideas, and opinions of the artist. It is to uphold the right of all to experience diverse visions and views. If and when controversies arise from the exhibition of a work of art, we welcome public discussion and debate with the belief that such discussion is integral to the experience of the art. Consistent with our fundamental commitment to freedom of speech, however, we will not censor exhibitions in response to political or ideological pressure.

National Coalition Against Censorship guidelines
www.ncac.org

² The police might well give advice or a recommendation in certain situations – which would be simply advisory. But under the law on breach of the peace they can also give directions.

- Being aware that other rights have to be balanced against the right to freedom of expression including the right to religion and the right to assembly.
- Demonstrating an awareness of similar work that has been successfully presented and keeping abreast of reactions to similar works.
- Taking account of the physical surroundings of the event, in particular the building itself. A risk assessment should consider the potential dangers to the public in the case of protest, such as narrow accesses, structural instability, plate glass etc.
- Taking account of the impact on staff, the need for special training and the possible costs of additional security. See the Behud case study at indexonensorship.org/artandoffence.

Advance preparation should bear in mind the principal legal standard of “reasonableness”. The factors relevant to meeting that standard may include:

- The artistic purposes of an organisation, both to invoke Article 10 and to refute suggestions of other motivations.
- Engagement with the authorities; making early contact will make it easier for them to protect your right to freedom of expression.
- Engagement with the press and individual complaints.
- An openness to managing the risk of disorder, at least in principle, and subject to the imperative of ensuring that the artistic work is not unduly constrained.

Some artistic organisations and venues consider making contact with groups who have a different viewpoint to discuss an education, outreach or debate programme. In the event of problems later, attempts to establish a dialogue with possible objectors are likely to be looked on favourably by the public authorities.

If you expect a strong reaction from certain groups you may choose to approach the police in advance of a performance or exhibition, including to ask for assistance in carrying out a risk assessment.

At some point, individuals or groups offended by a work of art may well contact the police directly and ask them to prevent publication or production. Those objecting to the work may make the case that it will place the arts organisation in breach of its obligations not to cause alarm or distress by abusive or insulting conduct (ie, under the Public Order Act) or that the work itself is provoking a breach of the peace, actual or threatened.

It can be useful to make contact with community liaison officers in the area. They should have a pre-existing relationship with the relevant group. They may be able to provide you with valuable advice and also function as an intermediary in any discussions.

Once the artwork is open to the public, those producing or exhibiting artistic material may also need to contact the police. Protesters may attempt to stop audiences attending, stop a performance or destroy a work of art that they find offensive.

Anti-war campaigner Brian Haw lived for 10 years from 2001 in Parliament Square as a protest against UK and US foreign policy. The government introduced strong legal controls on such protest as a result, and Haw was arrested in January 2008. He died in 2011. His work was commemorated by an installation at Tate Britain by Mark Wallinger and a musical by Youth Music Theatre at the Riverside Studios, London. © Press Association

The police will be expected to intervene to prevent violence or damage to property whilst aiming to keep the artwork open to the public. They will be expected protect the rights of both the artists and protesters to freedom of expression. Here, too, there are more details online at indexonensorship.org/artandoffence

As good practice, you should have a written policy on dealing with public order issues arising from artistic work, setting out the processes to go through in response to protests, threats and acts of violence connected to the production or exhibition of controversial artistic material. See the guidelines drawn up by the US-based National Coalition Against Censorship for an example: <http://ncac.org/resource/guidelines-for-state-arts-agencies-museums-university-galleries-and-performance-spaces/>



Questions and answers

Q. What is the difference between Article 10 of the European Convention on Human Rights and Article 19 of the UN Declaration on Human Rights?

A. Freedom of expression, as outlined in Article 10, is a qualified right, meaning considerations regarding its protection must be balanced against other rights and interests. Article 19 of the UN Declaration on Human Rights, which also addresses freedom of expression, is less qualified: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”. Nevertheless, even within the UN Declaration there are provisions which contemplate some qualification of the freedom expressed in Article 19. It is the European Convention on Human Rights which is currently relevant to UK law.

Q. Can I challenge a decision by a local authority or police body?

A. Yes. The usual way of doing so would be via judicial review. You should seek specialist legal advice before bringing your claim. Be aware that you must bring your claim as soon as possible and in any event no later than three months after the decision you wish to challenge. Judicial review is not ordinarily an effective means of overturning decisions quickly. Claims often take many months to be heard. However, it is possible to apply for a claim to be heard quickly if there are good grounds to do so. Even if you succeed you will not usually recover damages: they are awarded at the court’s discretion. The court might quash the decision under challenge, and/or require the public authority to adopt a different procedure in its decision-making.

Q. What are the costs to the organisation calling for review? If the review finds in favour of the arts organisation – is compensation payable and are expenses reimbursed?

A. There would be court fees in filing the review, as well as the need to pay legal costs to their own lawyers (unless acting pro bono), and the risk of being required to pay legal costs for the

opposing party, if they succeed. If the arts organisation does succeed, it may be entitled to reimbursement of expenses (usually around 60-70%) and it may be entitled, in some cases, to an award of money by the court.

Q. In the case of policing of public order incidents relating to protest provoked by art work: how would you begin to determine the threshold for going to judicial review?

A. In principle, if it could be shown that the police overreacted and even caved in to criticism by the protestors, then this could indicate that grounds for judicial review would arise. For example, it must be shown that the threatened breach of the peace is imminent – if the police acted precipitously, then this could be one ground of review. If the police acted on the basis of irrelevant considerations (such as criticism of their conduct), then that would be a ground. If the police failed to consider the possibility of alternatives to closure, or Article 10 rights generally, then these could also be grounds.

Q. Given that judicial review takes a long time, what are the options for an arts organisation to challenge police advice at the time of the protest itself?

A. If the organisation believes that it has grounds to challenge police directions to avoid a breach of the peace, it can seek to take legal action on an urgent basis. For practical purposes, the first step would be to advise (usually through solicitors) the police that the organisation intends to take action. Legal action – including forms of urgent interim relief – can in some cases be swift – this is more likely if the organisation has its case prepared and documented in advance. Realistically, however, it will typically be the case that legal action will not be determined until some time later. Until the legal action is determined by the courts, the organisation and/or its members or employees would risk arrest if they do not comply with police directions.

Q. What is the Heckler's Veto?

A. In the United States, the "Heckler's Veto" is a "controversial legal position taken by law enforcement officers based on an alleged right to restrict freedom of speech where such expression may create disorder or provoke violence." (Duhaime's legal dictionary of US law). It is recognised in US law as a defence to override the constitutional right to freedom of expression.

In the UK, it is used outside the legal framework, to describe the power of protest to silence speech, whether or not it is reinforced by the police. More recently the term "assassin's veto" has been coined to describe the way a fear of extreme violence could silence speech.

Q. Can the police charge for attending my theatre, museum or gallery to police a violent protest?

A. Yes, in some circumstances. The police have a right to charge for Special Police Services (under Section 25 of the Police Act 1996). Those involved in artistic organisations should seek to clarify in advance (where possible) whether the police forces are entitled or expect to charge for their support. When deciding whether a particular role falls within the scope of Special Police Services, factors to be taken into account will include:

- Have the police been asked to provide support at the event?
- Were they asked to provide services that go beyond what is necessary (in their view) to maintain order?
- Has the artistic organisation agreed to pay for those services?
- Are police officers deployed on private property or in a public space?
- Has an act of violence already occurred (or at least is imminent), or are the police there in a preventative capacity?
- Is this a single event or one of many?
- Is the artistic agency inviting attendees and charging them to see the material?
- Does the commanding officer have to summon extra resources to deal with the risk?

(See Appendix III for fuller discussion).

Q. What do I do if the police officer threatens to arrest me for a public order offence or in relation to a breach of the peace, connected to another individual's protest against my work?

A. Contact a lawyer. Consider the criteria (and steps you may have taken) as set out in the Practical Guidance section above, in order to show that the work is protected by Article 10 and that you have acted reasonably. Remind the officer that your Article 10 rights include the right to shock and offend. Point out that you have not broken the law and that the police should arrest those individuals who are breaking the law: in this case those engaged in riot/affray/violent disorder. Stress that it is not reasonable for the other party to react violently to your creative contribution and that you are prepared to take reasonable steps to enable both you and those protesting to express themselves. Make creative suggestions to enable the police to balance up their competing obligations.

Q. Does artistic merit have an impact on the extent to which freedom of expression will be protected?

A. It is more likely that works will be protected if the author is well known and if it is generally considered that the work has artistic merit. This is something which may not be obvious to some non-specialist police officers and so it is important that you make early contact in order to contextualise the work and explain its importance. This is not always a guarantee of success, however, as the removal of Richard Prince's work *Spiritual America* from the Tate in 2009 testifies.

Q. Is there a right not to be offended?

A. Under UK law there is no legal right not to be offended. The European Court of Human Rights has stated on numerous occasions that the right to freedom of expression includes the right to shock, disturb and offend. Artists are therefore free to cause as much offence as they want, provided that their actions do not stray into the prohibited areas discussed above.

Q. Is it a good idea to proactively approach groups who have a track record of campaigning to silence the kind of work being presented, to take part in debates?

A. If there is a clear, pre-existing opinion that seeks only to close down certain expression, then alerting groups, likely to be exceptionally antagonistic, may be counter-productive. It may give fodder to groups who can easily misuse/misrepresent the show so as to publicise their own agenda. However, contextualising the work as one of many voices in your programme as a whole, planning post-show discussions with diverse opinion and taking the opportunity of the artwork to discuss controversial and divisive issues raised in the artwork strengthens the organisation's position if the work is contested.

Q. Do I have to give the script of a play or images I intend to exhibit to the police or local authority prior to the show opening if requested?

A. You only have to provide a copy of a script (or any document or property) if the police or local authority has a legal power to view and seize that material. Under Section 10 of the Theatres Act 1968, if a senior police officer has reasonable grounds for suspecting that a performance of a play is likely to be in breach of public order legislation then s/he may make an order in relation to that play. An order under that section empowers any police officer to require the person named in the order to produce a script of the play and to allow the officer to make a copy of it.

Accordingly, if a local authority or the police ask to see particular artistic material you should ask them to clarify whether they are demanding that you hand over the material, or whether they are simply asking for your voluntary co-operation. If they are demanding that you provide the material, ask them to identify the legal power that gives them the right to do this and ask to see a copy of any order made under the Theatres Act 1968.

You should make a contemporaneous note of their answers. If the police are simply seeking your voluntary co-operation then you do not

have to give them anything. If in doubt about the scope of their powers, consult a lawyer.

Q. In general is it a good idea to cooperate with the police?

A. Yes, in general, it is, for both practical and legal reasons. For practical reasons, as a matter of common sense, the more cooperative and constructive an artistic body appears to be, the less likely it is that the police would move precipitously to shut down a work. For legal reasons, conveying information to the police about the purposes of a work, and a willingness to consider alternatives, will be relevant to the reasonableness test.

Q. What happens if police advise you not to continue with something / take it off as they have unspecified concerns about public safety – but tell you it is your choice and they can only advise you?

A. The artist would in principle be free to continue with the work. It would be advisable, however, to ensure that the reasons held by the police were understood. It may also be prudent to take professional advice. It may also assist to understand from the police the criteria they will apply at a later time in deciding whether to intervene.

Q. What responsibilities for safety do employers have to staff and the public in relation to continuing with an artwork that is attracting sustained protest?

A. Organisations have duties to their employees, and members of the public present on their premises. These duties may extend to making an organisation liable in the event of injury to a person resulting from the unlawful act of a third party if, for example, that unlawful act was plainly foreseeable. A duty is discharged by taking reasonable steps to avoid injury; in some cases, it may be that the risk of injury is serious enough that it justifies closing a work. This is governed by a different body of law on which specialist advice should be taken.

Q. What can you do if, despite discussion and meetings, police respond with inadequate resource – and/or officers that are not properly briefed?

A. In this circumstance, two things appear more likely to happen. First, a breach of the peace becomes more probable. This in turn can only increase the likelihood that the police would act more quickly to shut down a work. Secondly, the greater risk of disorder increases the risks to employees and to the public, with attendant liabilities on the part of the organisation.

Q. What is the law around social networks, and how social networks can inflame, resulting in potential public order issues?

A. It is clear that public order offences may be committed by persons using social networking sites. A specialised body of law on the use of telecommunications services also applies, which may provide further restraints on unlawful, inflammatory action. The Crown Prosecution Service has issued guidelines on social media that are available here: http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html

It is worth noting that these guidelines are not always followed.

Q. What recourse does an artist or organisation have in libel laws in relation to what is said during a conflict over artwork?

A. A person may commit a libel, which is a form of tort, by making statements damaging to another person's reputation. It is conceivable that in a dispute over an art work, a person may attack the character, morals, skill etc. of the artist. In some cases, such an attack would constitute a libel. However, a range of defences may also apply. It would be necessary to take specialist advice.

Q. Can individuals or groups offended by a work of art call on the police directly to prevent publication or production?

A. Yes, any person may make a complaint to the police and request their intervention. But the police (and any other official) must decide whether such intervention is appropriate and lawful in accordance with the range of factors analysed above.



Appendix I: Documenting and explaining a decision

Please note: Appendices are examples only and not a substitute for legal advice.

Example: A theatre is planning to present a play by a new playwright that tells the story of a young woman growing up in an oppressive religious community. It contains scenes of parody that satirise tenets of the faith.

Decisions to put on a piece of work may be documented as follows:

Reasons for the decision

1. The artist's motivation is to explore the abuse of power and hypocrisy in religious communities.
2. It responds to a debate of public interest, the role of religion in shaping society's attitudes towards relationships/sexuality/family/gender.
3. The piece contributes to a critical argument about all belief systems and stimulates legitimate debate in this case.
4. There is public interest in exposing corruption, injustice or malpractice.
5. There is a public interest in freedom of artistic expression itself and we consider that this is work of value which should be seen to further the important public debate.
6. The work has artistic merit and we wish to support the work of young emerging artists.
7. The work can be seen in the context of other previous plays that present contentious views of religion in legal if challenging ways.
8. The work forms part of a broader programme designed to educate or stimulate discussion where other faiths are represented.

We recognise that the content is challenging and provocative. In order to prepare the audience we have taken the following steps:

- a. We have considered whether or not our advertising material should contain warnings that the theatre contains scenes which could offend.
- b. We have carefully considered our own guidance policy with regard to equal rights and representation of racial and religious issues (and/or the relevant local or other authority) and are confident that the play falls within the policy guidelines.



Run – We Are Immortal © Wrangel / Getty iStock

Appendix II: Sample letter for approaching the police

This letter might be sent to the police in the lead-up to the screening of a film which might provoke protests from a section of the community.

Dear xx Police Force,

For the attention of xx community support officer.

We are xx, a local cinema who specialise in screening independent films.

We are considering screening xx over the two weeks between xx and xx. The film is an important work of art that includes xxx. We are of the opinion that the content of the film is lawful. We consider the screening of xx to be a valuable contribution to the public debate concerning xx. We also consider it to have genuine artistic merit and that the film-maker to be a serious and committed artist.

We are contacting you because we anticipate that members of the xx community may be offended by some of the film's content. We consider that our right to screen the film is protected under Article 10 of the European Convention on Human Rights (freedom of expression). That includes the right to shock and offend in appropriate circumstances.

Certain members of the community have publicly stated that they will not allow the screening of the film to go ahead. We are aware from (posts on internet forums/interviews given by community leaders/warnings received) that some individuals intend to forcibly prevent cinema attendees from entering the building on the night of xx.

We recognise that members of the community have the right to freely express their objections to the film and we welcome debate and peaceful protest. We have scheduled a public debate on xxx. However, we are concerned that the xx's community's own rights to freedom of expression will be exercised in a way that makes it impossible for the film to be screened, thereby denying our own rights to the same. We would like to open a dialogue with you and any relevant figures within the community.

We hope that, as a result of that dialogue, the rights of both parties to freedom of expression can be preserved.

Yours sincerely,

Appendix III: Special Police Services

An explanation of Special Police Services by Tamsin Allen, a partner and head of the media and information law team at Bindmans LLP

There are some instances where the police are entitled to levy an additional charge for their services, but those must be services that are outside the core responsibilities of the police. Section 25 of the Police Act 1996 deals with the “provision of special services” and states that: “The chief officer of police of a police force may provide, at the request of any person, special police services at any premises or in any locality in the police area for which the force is maintained, subject to the payment to the police authority of charges on such scales as may be determined by that authority.”

The phrase “provision of special services” is not defined by the act. The Association of Chief Police Officers’ (ACPO) guidance to senior police officers states: “An event is an occurrence, out of the normal activity that takes place to provide an experience or defined activity to commercial or non-commercial reasons. Special police services are police services provided over and above core policing at the request of a person or organisation.”

Case law indicates that special police services include policing football matches (Chief Constable of Greater Manchester v Wigan Athletic AFC Ltd 2008) and music festivals (Reading Festival Ltd v West Yorkshire Police Authority 2006).

The reason why football matches and music festivals might need additional policing is because of the risk of public order offences being committed and because the organisers themselves require additional police to ensure that they can discharge their own duties to keep the attendees safe. Where the police have provided services over and above those that have been specifically requested, organisers have not been required to pay.

The guidance draws a clear distinction between different categories of event: commercial events, intended to generate private profit; non-commercial events i.e. charitable or community events; and statutory events reflecting constitutional rights or processes.

It provides that: “Policing of statutory events is part of a core activity and no charges should be made” and defines statutory events as “events where there is no financial gain to the organiser and which reflect constitutional rights, or a cause of royal, national or defined public interest.”

As a public body, the police must act within their powers and discharge duties to which they are subject. They must take decisions rationally, fairly, and in a way which takes account of relevant considerations. Cultural organisations have a legitimate expectation that the police will follow published guidance unless there is a good reason to depart from it. At present, this guidance lacks clarity and therefore policy practice in this area may lack consistency. This is an area which could potentially be subject to challenge by way of judicial review.

As it is presently constituted, the guidance suggests that the real dividing line is between commercial and non-commercial events. In situations where fundamental rights are engaged, such as the staging of a highly controversial art exhibition where protests are expected, it is certainly arguable that policing is a core function notwithstanding that it is a commercial event.

The police may have felt they could waive the fee they originally requested in relation to the 2004 production of *Behud* because the theatre was a not-for-profit organisation. However there may well be situations where a theatre or exhibition space is a commercial organisation, but the work of art in question raises issues of artistic and political freedom of expression. For instance, under the guidance, the police could have charged the Birmingham Repertory Theatre at what appears to be the going rate of £10,000 per day for policing *Behud* had it not been cancelled.

Using the distinction between commercial and non-commercial events as a lodestone for determining whether or not the police can charge for special services is thus not necessarily appropriate. Attendance at football matches or music festivals does not, on the face of it, involve the exercise of fundamental rights.

The situation in respect of all theatre, art exhibitions or other forms of artistic expression, even where a profit is made, is quite different.

The police have an obligation to fulfil their core duties – those are now enhanced by their duties under the Human Rights Act not to act incompatibly with the European Convention on Human Rights. The convention imposes both a qualified obligation not to interfere with the exercise of the right to freedom of expression and protest and a positive obligation to take appropriate steps to protect those rights. This may change if the Human Rights Act is abolished.

The policing of artistic expression, where political sensitivity leads to the risk of public order issues, is part of the police's core function and duties and should not be a matter of commercial negotiation. Protection for these rights should under no circumstances depend on whether or not an organisation can afford to pay for it.

For more information about Taking the Offensive, Index on Censorship's programme supporting artistic freedom of expression in UK, including case studies illustrating all areas of the law covered in this series, please go to our website indexoncensorship.org/artandoffence.



Police separate pro-Palestinian and pro-Israeli protestors outside a performance by Jerusalem-based Incubator Theatre in Edinburgh.
© David Kettle / With permission





Xindex

on censorship

ISBN 978-0-9933345-0-4



9 780993 334504



ARTS COUNCIL
ENGLAND

LOTTERY FUNDED

Supported using public funding by

ARTS COUNCIL ENGLAND