

ITEM NO: 7

REPORT TO:	STANDARDS COMMITTEE
DATE:	8 September 2015
REPORT OF:	Sandra Stewart – Executive Director Governance & Resources (Monitoring Officer)
SUBJECT MATTER:	FREEDOM OF EXPRESSION LEGAL FRAMEWORK
REPORT SUMMARY:	<p>The Committee will recall that we have previously approved guidance and training for both members and staff about the benefits of Social Media and also the pitfalls. The Equality and Human Rights Commission have issued a guide that explains the legal framework, which protects freedom of expression and the circumstances in which that freedom may be restricted in order to prevent violence, abuse or discrimination.</p> <p>The guidance explores the boundaries between freedom of expression, unlawful discrimination and harassment, and hate speech. It also considers various contexts in which freedom of expression is curtailed. There are, of course, other aspects of the right to freedom of expression (such as privacy, libel and defamation) which will be covered in future publications.</p> <p>There is considerable debate at both national and international levels about what types of contentious language or communication should be either permitted or prohibited.</p> <p>The Equality and Human Rights Commission have therefore set out in this guidance the legal framework in Great Britain.</p>
RECOMMENDATION(S)	It is recommended that this guidance is communicated more widely and that a simple guidance note is produced by the Council's communications team for sharing with elected members and staff.
FINANCIAL IMPLICATIONS: (Authorised by Borough Treasurer)	There are no significant financial issues arising from this Report.
LEGAL IMPLICATIONS: (Authorised by Borough Solicitor)	These are set out in the guidance.
RISK MANAGEMENT:	Standards Committees should be aware of the National position in order that consistency of approach is taken in respect of setting and advising on local ethical and standard issues.
LINKS TO COMMUNITY PLAN:	Support the current arrangements for ethical and corporate governance of the Authority to ensure that the public can have confidence in local government.
ACCESS TO INFORMATION	NON-CONFIDENTIAL This report does not contain information which warrants its

consideration in the absence of the Press or members of the public

REFERENCE DOCUMENTS:

The background papers relating to this report can be inspected by contacting the report writer, Sandra Stewart, the Council's Borough Solicitor and statutory Monitoring Officer by:



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GUIDANCE • LEGAL FRAMEWORK

Freedom of expression

About this publication

What is the aim of this publication?

This publication provides guidance on the equality and human rights legal framework which applies to freedom of expression in England and Wales and in Scotland.

Who is it for?

This guide is intended for a broad range of people and organisations who may be interested in how the law regulates potentially offensive forms of expression, including parliamentarians, NGOs, journalists and members of the public.

What is inside?

This guide covers:

- The legal basis for freedom of expression in England, Scotland and Wales
- Limitations on freedom of expression in different contexts including those relating to hate speech
- Criminal offences relating to hate speech and sentencing
- Freedom of expression and the media
- The role of public bodies in hate speech cases
- The role of regulators
- How freedom of expression applies in relation to:
 - Employment situations
 - Service provision
 - Education, and
 - Electoral conduct
- The role of the Commission

Why has the Commission produced it?

The Equality and Human Rights Commission promotes and enforces the laws that protect our rights to fairness, dignity and respect.

What formats are available?

This guide is available from www.equalityhumanrights.com. For information on accessing a Commission publication in an alternative format, please contact: correspondence@equalityhumanrights.com.

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Introduction

This guide explains the legal framework which protects freedom of expression and the circumstances in which that freedom may be restricted in order to prevent violence, abuse or discrimination. It explores the boundaries between freedom of expression, unlawful discrimination and harassment, and hate speech. It also considers various contexts in which freedom of expression is curtailed. There are, of course, other aspects of the right to freedom of expression (such as privacy, libel and defamation) which will be covered in future publications.

There is considerable debate at both national and international levels about what types of contentious language or communication should be either permitted or prohibited. This is reflected in different levels of protection in different countries. Here we set out the legal framework in Great Britain.

Summary of key points

- Freedom of expression is a fundamental right protected under the Human Rights Act 1998 by Article 10 of the European Convention on Human Rights. It is also protected under the common law.
- Protection under Article 10 extends to the expression of views that may shock, disturb or offend the deeply-held beliefs of others.
- Any restrictions on freedom of expression must always be clearly set out in law, necessary in a democratic society for a legitimate aim, and proportionate.
- Subject to these conditions, freedom of expression may be limited in some circumstances and in particular does not protect statements that unlawfully discriminate against or harass, or incite violence or hatred against, other persons and groups, particularly by reference to their race, religious belief, gender or sexual orientation.
- No one can rely on the human right to freedom of expression to limit or undermine the human rights of others.
- It is not always easy to draw the boundary between expressing intolerant or offensive views (which are afforded protection under Article 10) and hate speech or other very offensive communication so serious that it is not so protected. Factors likely to be relevant in making the distinction will include the intention of the person making the statement, the context in which they

make it, the intended audience, and the particular words and form of communication.

- Freedom of expression is protected more strongly in some contexts than others. In particular, a wide degree of tolerance is accorded to political speech and debate during election campaigns.
- It is nonetheless a criminal offence to stir up hatred on racial or religious grounds or on the ground of sexual orientation. Offensive or insulting language may also constitute harassment, either under the Equality Act 2010, or if directed at an individual under the Protection from Harassment Act.
- In addition to the criminal law, there are a number of different contexts in which the law provides additional protection against offensive or harassing conduct. These contexts include employment, service delivery and education.
- Public bodies must respect the rights to both freedom of expression and freedom from discrimination. They are also subject to particular duties which require them to have due regard to the need to promote good relations between different communities protected by equality law. This may require them actively to challenge the use of offensive communication.

Article 10 of the 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.

The legal basis for freedom of expression

Freedom of expression is a fundamental right under British law, as well as under European Union law and international human rights law. In particular, freedom of expression is protected by Article 10 of the European Convention on Human Rights. This is part of the law of England, Scotland and Wales because it is included in the Human Rights Act 1998.¹ The right to freedom of expression is also a fundamental common law right.²

Freedom of expression applies to everyone, and means that people are generally free to talk about or write about or otherwise express their ideas and opinions without any censorship or interference from the state, subject only to the narrow exceptions set out below. Those who enjoy the right include corporations, media organisations and campaign groups.

Generally Article 10 prohibits the state from interfering with freedom of expression. This would prevent, for example, the government attempting to ban particular forms of political or artistic expression. The prohibition is not limited to the government but also includes all public bodies such as local authorities, schools and universities.

For the most part, Article 10 does not apply to decisions taken by companies or private bodies. For example, the right to freedom of expression would not cover a newspaper editor's refusal to publish a letter or a decision by Facebook or Google to remove content from their websites.

In some cases, however, Article 10 can require the government to take positive steps in order to protect free expression. In relation to state-funded broadcasting, for example, the state has a duty to ensure that a diverse range of views are accessible.³

Why is freedom of expression protected?

The European Court of Human Rights (ECtHR) has frequently described freedom of expression as one of the 'essential foundations of a democratic society'⁴ because it

¹ See also Scotland Act 1998 and the Government of Wales Act 2006: An Act of the Scottish Parliament or the Welsh Assembly is not law if it is incompatible with any of the Convention rights. Scottish and Welsh Ministers also have no power to act in a manner incompatible with any Convention right.

² *Derbyshire County Council v Times Newspapers* [1995] AC 534.

³ *Informationsverein Lentia and others v Austria* (1993).

⁴ *Handyside v the United Kingdom* (1976).

guarantees the right of every person to exchange information, debate ideas and express opinions. This is especially important in the context of politics, in order that members of the public can decide how to vote and which policies to support. However, freedom of expression also underpins artistic, scientific and commercial development, and plays an essential role in holding public bodies to account and in uncovering wrongdoing, such as the Watergate scandal.

Because these objectives are considered so important, the law protects not only the expression of opinions which are uncontroversial but also those that ‘offend, shock or disturb’.⁵ Limits on freedom of expression can only be justified where it is strictly necessary to do so, as explained in the next section.

Although Article 10 protects many different kinds of expression, the particular level of protection can vary considerably depending on the *type* of expression involved. For example, political campaigning, journalism and commentary on matters of public interest are generally given a very high degree of protection. Accordingly, in those spheres very little interference with freedom of expression can be justified.

Limitations on freedom of expression

Article 10 is not an absolute but a qualified right which means that the rights of the individual must be balanced against the interests of society. Whether a restriction on freedom of expression is justified is likely to depend on a number of factors, including the identity of the speaker, the context of the speech and its purpose, as well as the actual words spoken or written. A great deal will therefore depend on context, such as whether words are used at a social event, in an employment context, in the media or when providing or receiving goods or services. These contexts are considered in more detail below.

Speech that is intended to inform rather than offend attracts greater protection, even if it could be construed as racist.⁶ Beliefs, opinions and ideas – even deeply-held beliefs – cannot be immune to criticism or satire. Democracy depends on people being free to express, debate and criticise opposing viewpoints. The courts have generally held that the right to free expression should not be curtailed simply because other people may find it offensive or insulting. Article 10 allows restrictions to be placed on freedom of expression for any of the following specific purposes:

⁵ *Delfi As v Estonia* (2014).

⁶ *Jersild v Denmark* (1994).

- in the interests of national security or public safety (for instance to prohibit hoax bomb claims)
- for the prevention of disorder or crime (for instance to prohibit incitement to violence)
- to protect health or morals (for instance laws against certain types of pornography)
- for the protection of the reputation or rights of others (as reflected in our defamation law and the prohibition on harassment under the Equality Act 2010)
- for preventing the disclosure of information received in confidence (for example, trade secrets), or
- for maintaining the authority and impartiality of the judiciary.

Even where a restriction is for one of these legitimate purposes, it must also be shown that the restriction is lawful (meaning that it is clearly set out in legislation and that the interference with freedom of expression is ‘necessary in a democratic society’). The court has interpreted this to mean that, in every case where there is an interference with freedom of expression, a balance must be struck between the right of the individual to express himself or herself and the broader public interest justifying the interference (for example, the protection of the rights of others). In particular, the restriction must be *proportionate* to the legitimate purpose that the state or public bodies are seeking to uphold.

In one case, for example, a journalist in Denmark who made a documentary on young extremists was convicted of helping to spread racist statements, which was a criminal offence in Denmark. The ECtHR held that the journalist’s conviction violated his right to freedom of expression under Article 10 because the Danish prohibition against spreading racist statements, although a legitimate restriction in general, had been applied too broadly in his case. As an example of how context matters, the Court noted that the statements had been broadcast as part of a serious news programme and were intended for an informed audience.⁷

Hate speech

Although there is no universally accepted definition, *hate speech* is generally understood to describe forms of expression which incite violence, hatred or

⁷ *Jersild v Denmark* (1994).

discrimination against other persons and groups, particularly by reference to their ethnicity, religious belief, gender or sexual orientation, language, national origin or immigration status.⁸

Like the right to freedom of expression, the right of each person to be protected from discrimination and violence are fundamental human rights.⁹ In particular, Article 20(2) of the International Covenant on Civil and Political Rights requires that ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.¹⁰ Thus the right to freedom of expression does not protect expression which seeks to *incite violence, hatred or discrimination* against others.¹¹ Accordingly, the ECtHR has confirmed that it ‘may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite or justify hatred based on intolerance’.¹²

Even in the context of apparently intolerant statements, however, a balance must still be struck between the right of individuals to express points of view which others may find offensive or insulting, and the rights of others to be protected from hatred and discrimination. For this reason, the *context* in which the statement was made is highly relevant.

Examples of how context affects whether communications are unlawful

Individual members of the public are free to say anything that is not specifically prohibited by law, provided that they do not defame or harass others or commit a criminal offence.

However, additional restrictions may arise in many situations, for instance:

- in the workplace
- when providing or receiving goods and services

⁸ E.g. Recommendation No. R(97) 20 on ‘hate speech’ adopted October 1997 by Committee of Ministers of Council of Europe.

⁹ E.g. the right to non-discrimination under Article 7 of Universal Declaration of Human Rights 1948, Article 26 of International Covenant on Civil and Political Rights 1966, Article 5 of Convention for the Elimination of All Forms of Racial Discrimination 1969, and Article 14 of European Convention on Human Rights.

¹⁰ See also Article 4 of the Convention for the Elimination of All Forms of Discrimination of Racial Discrimination 1969.

¹¹ E.g. *Vejdeland and others v Sweden* (2014) 58 EHRR 15.

¹² *Erbakan v Turkey* (2006).

- in education settings, and
- during election campaigns.

‘Everyone on disability benefit is a fraud’ – is an example of a pejorative and factually incorrect statement that would not ordinarily be actionable if made by a private individual but would certainly be subject to restriction in the context of schools, for example. If it were specifically targeted at an individual, such as a political opponent in an electoral context, then it might be defamatory.

An intolerant expression of a point of view which offends some people is less likely to be considered hate speech if expressed in a political speech or a public debate in which different points of views are being exchanged and are open to challenge.¹³

When referring to race, religion or other characteristic, there is a fine line to be drawn between political expressions that are legitimate and communications that may not be protected by Article 10.

‘Romanians should not be let into our country’, although offensive, would normally be protected as political speech under Article 10 ECHR, on the basis that EU freedom of movement is a legitimate issue of political debate. However a Belgian convicted for handing out leaflets stating ‘Send non-European job-seekers home’ and ‘Stand up against the Islamification of Belgium’ could not rely on his Article 10 right to overturn his conviction.¹⁴

However, in certain circumstances, the statement could cross the line into incitement to hatred. A statement likely to inflame an already tense situation or provoke conflict is more likely to be viewed as hate speech by the courts.

‘Gypos cause all the crime around here’ – is an offensive statement that a private individual could lawfully express to another in a purely private context provided it involved no harassment. However, once made in a public context this could give rise

¹³ See e.g. *Gündüz v Turkey* (2005).

¹⁴ *Feret v Belgium* App. No. 15615/07.

to a prosecution for incitement, for example, if made over a loudspeaker in front of a volatile crowd with the intention of inciting racial hatred.

The ability of others to avoid being exposed to an offensive expression can also be a factor. An image published in a book or website which must be sought out is more likely to be protected than a poster displayed in public.

'24 signs she's a slut' is the kind of material available on the internet that is unlikely to be actionable purely by being posted. If, however, it is specifically communicated to, or directed at, an individual or group it could result in legal action. In the workplace, it could give rise to dismissal or disciplinary action. Repetition of any statement against the recipient's wishes will increase the likelihood of it constituting harassment.

Extreme hate speech will sometimes fall outside the scope of Article 10 entirely. This is because Article 17 of the European Convention on Human Rights states that Convention rights cannot be relied upon in order to 'engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' of others.

Shortly after the 9/11 attacks, a man in Shropshire put up in his window a poster which showed the Twin Towers in flame and which read 'Islam out of Britain – Protect the British People'. He was subsequently convicted of causing an aggravated offence under the Public Order Act 1986. When he complained to the ECtHR that his criminal conviction had violated his right to freedom of expression, the Court rejected his complaint on the basis that 'the words and images on the poster amounted to a public expression of attack on all Muslims in the UK'.¹⁵ Since the poster was 'a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism', the man could not rely on Article 10.

¹⁵ *Norwood v the United Kingdom* (2004).

In a similar case in France, the ECtHR rejected a complaint from a writer who had been convicted of publishing a book which denied the existence of the Holocaust. In that case, the Court held that 'denying crimes against humanity [was] one of the most serious forms of racial defamation of Jews and of incitement to hatred of them'.¹⁶ Again, it held that the prohibition against abusing rights under Article 17 of the Convention prevented the writer from relying on the right to freedom of expression.

However, even if Article 17 had not applied, the courts would probably have found that Britain and France had acted proportionately in limiting through criminal sanctions these forms of expression.

Hate speech in criminal law

Legislation has provided three methods to combat hate crime. These are:

- Specific offences classified as hate crimes
- An aggravating factor for any other offences committed through racial or religious hostility
- Enhanced sentencing for any hate crime offence.¹⁷

Specific offences classified as hate crimes

Some specific offences classified as hate crimes which may be relevant to freedom of expression include: stirring up hatred, sending threatening and grossly offensive communications and harassment contrary to the Protection from Harassment Act as well as, in Scotland, offences aggravated by prejudice.

Stirring up hatred

In England and Wales, the use of hate speech may constitute the criminal offence under the Public Order Act 1986 of inciting racial hatred or of stirring up hatred on the grounds of religion or of sexual orientation.¹⁸

¹⁶ *Garaudy v France* (2003).

¹⁷ See Hate Crime Operational Guidance, College of Policing 2014.

Incitement can be carried out by making a speech, displaying a racist poster, publishing written material, performing a play or broadcasting in the media.

The elements to the offence of stirring up racial hatred differ from those for stirring up hatred based on sexual orientation or religion.

(1) **Racial hatred requires** threatening, abusive or insulting words or conduct and an intention to stir up hatred, or a likelihood of doing so.¹⁹

(2) **Religion or sexual orientation hatred requires** threatening words or conduct and an intention to stir up hatred. A specific defence protects freedom of expression by providing that neither criticising, insulting or ridiculing religious beliefs nor criticising sexual conduct or practices or urging restraint are offences of stirring up hatred.²⁰ Expressing a view on the marriage of same-sex couples does not of itself constitute an offence because of a specific provision that ‘any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred’.

In Scotland, only those parts of the Public Order Act which prohibit racial hatred are in force and the Public Order Act is rarely used in practice. Instead, racist acts and remarks are usually prosecuted under the Criminal Law (Consolidation) (Scotland) Act 1995 or as an aggravated offence under the Crime and Disorder Act 1998.²¹ Hate crimes related to other characteristics²² are also prosecuted as aggravated offences attached to a substantive charge such as breach of the peace. Other laws prohibit offensive behaviour which is likely to incite public disorder at, or travelling to and from, football matches. These laws protect a range of protected groups including religious groups, social or cultural groups with religious affiliation, ethnic or national

¹⁸ The racial hatred offences are in sections 18 to 23 of the Public Order Act (‘POA’) 1986. These apply in England and Wales and Scotland. The offences of stirring up hatred on the grounds of religion and sexual orientation are in sections 29B to 29F. These apply to England and Wales only.

¹⁹ Racial hatred is defined in section 17 POA 1986 as ‘hatred against a group of persons ... defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins’.

²⁰ This is consistent with the position under international law: see e.g. paragraph 48 of General Comment No. 34 of the UN Human Rights Committee (CCPR/C/GC/34) in relation to the right to freedom of expression under Article 19 of the International Covenant on Civil and Political Rights: ‘Prohibitions on displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.... Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith’.

²¹ Religious Prejudice under section 74 Criminal Justice (Scotland) Act 2003, Sexual Orientation and Transgender Identity under section 2 Offences (Aggravation by Prejudice) (Scotland) Act 2009, Disability under section 1 Offences (Aggravation by Prejudice) (Scotland) Act 2009.

²² Ibid.

groups, or groups defined by sexual orientation, transgender identity or disability²³ and are regularly used in practice to combat sectarianism.²⁴

The Lord Advocate has published “Prosecution Guidance in Relation to Same Sex Marriage” in relation to public order offences. When expressing a view on same sex marriage, where comments or behaviours do not incite hatred and are not intended to cause public disorder they will not be subject to criminal prosecution..²⁵

Threatening and grossly offensive communications

In England and Wales, sending any letter, email, photograph or recording which is indecent, grossly offensive or which conveys a threat is an offence if the sender intends to cause distress or anxiety to the recipient.²⁶ This is the provision usually employed to prosecute those who threaten others through Twitter, though incitement may also be charged.

In Scotland, it is an offence to communicate threatening material, including images, to another person.²⁷ Threatening material can take two forms:

- Material which contains or implies a threat to carry out a seriously violent act, which is likely to cause fear and alarm and where the person communicating either intends to cause fear and alarm or is reckless as to whether they will, or
- Material sent with the intent of stirring up religious hatred. Freedom of expression is protected to the extent that discussion or criticism of religion or belief or religious practices is expressly permitted, as are expressions of antipathy, dislike, ridicule, insult or abuse towards religions.

It is also an offence across Great Britain to make improper use of a public electronic communications network, such as by sending grossly offensive, indecent, obscene, menacing or annoying phone calls and emails.²⁸

²³ Section 1 Offensive behaviour at football matches and threatening communications (Scotland) Act 2012.

²⁴ A Football Banning Order may be imposed preventing the accused from attending any football matches throughout the UK or abroad for up to 10 years.

²⁵ Section 16 of the Marriage and Civil Partnership (Scotland) Act 2014 and the Prosecution Guidance in relation to Same-Sex Marriage.

²⁶ Section 1 Malicious Communications Act 1988.

²⁷ Section 6 of the Offensive Behaviour at Football Matches and Threatening Communications (Scotland) Act 2012.

²⁸ Section 127 of the Communications Act 2003.

Harassment contrary to the Protection from Harassment Act

In England and Wales harassment is both a criminal offence and a civil action under the Protection from Harassment Act 1997. Harassment is also prohibited under the Equality Act 2010, although its sanctions are primarily civil rather than criminal (see the sections on Employment and Service providers).

Harassment is repeated behaviour which causes distress or alarm. The courts will look at whether a reasonable person would think the behaviour amounts to harassment.

In one case under the Protection from Harassment Act, the group of companies which ran Chessington World of Adventure sought an injunction against Mr Cave to prevent him from continuing with an email and website campaign criticising safety at the theme park following an injury to a child. The High Court refused to grant an injunction on the grounds that Mr Cave's campaign against the theme park was a legitimate exercise of his freedom of expression protected under Article 10.²⁹

This case involved a civil claim under the Act. However, a sustained campaign of hate speech could constitute the criminal offence of harassment.

An offence under the 1997 Act will be committed where there is:

- a course of conduct of at least two incidents
- which amounts to harassment of another, and
- which the defendant knows, or ought to know amounts to harassment.

In Scotland, the Protection from Harassment Act 1997 only partially applies and operates differently. The statutory test for harassment (except in domestic abuse situations) requires:

- a course of conduct which amounts to harassment of another and
- either (a) is intended to amount to harassment of that person, or (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment.

In Scotland, a criminal offence is committed if a non-harassment order is breached. Stalking is also an offence³⁰ and harassment can be a form of the common law offence of breach of the peace. If the offence is committed as a result of 'malice and

²⁹ *Merlin Entertainment LPC and others v Peter Cave* [2014] EWHC 3036 (QB).

³⁰ S.39 Criminal Justice and Licensing (Scotland) Act 2010.

ill-will' this can be taken into account in sentencing, as an aggravated offence, discussed below.

Racially or religiously aggravated offences

Any criminal offence which is perceived by the victim or any other person to be motivated by hostility towards a person's race or religion or perceived race or religion is a racially or religiously aggravated crime across GB.

The Law Commission reported on the potential extension of the law on hate crime, in particular, suggesting that the aggravated offences might be extended to disability, sexual orientation and transgender identity.³¹

Courts' sentencing powers

In England and Wales, crimes such as assault and criminal damage will be prosecuted as racially or religiously aggravated where the offender is motivated by hostility or hatred towards the victim's race or religious beliefs (actual or perceived).

As well as the specific aggravated offences, the law deals with hate crimes through special sentencing powers usually referred to as 'enhanced sentencing'.³² The judge can increase the sentence for an offender convicted of any offence if it was motivated by hostility or involved a demonstration of hostility on the basis of any of five characteristics: race, religion/faith, sexual orientation, disability and gender-identity.

In Scotland, where a criminal offence is motivated by, or the accused expresses, 'malice and ill-will' related to disability, sexual orientation, transgender identity or religion, this could be an offence aggravated by prejudice. Such aggravation will be stated on conviction and taken into account in sentencing.³³

Freedom of expression and the media

Alongside Parliament and the courts, the media plays a vital role as a public watchdog in a democratic society. Media scrutiny of government and opposition encourages good governance, by helping to expose corruption or conflicts of

³¹ Hate Crime: Should the Current Offences be Extended (Law Com no. 348) May 2014.

³³ Sections 145-146 Criminal Justice Act 2003.

³³ Offences (Aggravation by Prejudice) (Scotland) Act 2009, in respect of religious prejudice, section 74 of the Criminal Justice (Scotland) Act 2003 and in respect of race, s.96 Crime and Disorder Act 1998.

interest. It enables the public to participate in decision-making through free access to information and ideas. Article 10 therefore gives journalists considerable latitude to express controversial views and opinions, on the basis that ‘freedom of the press and other news media affords the public of one of the best means of discovering and forming an opinion on the ideas and attitudes of political leaders’.³⁴

Article 10 includes a right to receive information, not merely to impart it. The ECtHR has repeatedly held that the public has a right to be informed by the press of matters of important public interest.

Newspapers and other forms of print media (including websites and other electronic media) may nonetheless commit a criminal offence³⁵ if they publish ‘written material’ which is ‘threatening, abusive or insulting’ and, in doing so, either intend to ‘stir up racial hatred’ or are aware that racial hatred ‘is likely to be stirred up’.

However, publishers will not be guilty of an offence if they can show that they were ‘not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting’.³⁶

As always, the context in which a publication presents controversial material is likely to make a considerable difference when assessing the extent to which it is protected from prosecution or civil actions by Article 10.

The Charlie Hebdo cartoons were plainly controversial and viewed by many Muslims as deeply offensive. Following the Paris attacks, most media outlets in Great Britain declined to publish them notwithstanding that they were widely published elsewhere. However, it seems unlikely that any publisher would have been prosecuted for publishing them so long as they believed that it was in the public interest to do so. On the other hand, a newspaper or magazine that repeatedly published offensive material with the deliberate intention of stirring up racial or religious hatred would not be entitled to the same protection under Article 10.

Note that the broadcast media (television and radio) are subject to greater regulation of their content. Political communications on television and radio are regulated by Ofcom under the Communications Act 2003. Broadcasters have significant responsibilities to act impartially. The broad restrictions in the UK on political

³⁴ See e.g. *Animal Defenders v the United Kingdom* (2013).

³⁵ Contrary to section 19 of the Public Order Act 1986.

³⁶ Section 19(2) of the Public Order Act 1986.

advertising on television and radio have recently been held to be a justifiable interference with the rights of campaigning groups to free expression.³⁷

Freedom of expression applies to online media in much the same way as it does to print media.³⁸ In particular, website owners are free to decide for themselves which material they wish to publish and it is not a breach of freedom of expression for a website to moderate comments in order to remove material which might prove offensive. However, care should be taken not to do this in a discriminatory manner (for example, by removing racist language except when it relates to Gypsies and Travellers).

What impact does offensive speech have?

The use of inflammatory language based on individual characteristics does not help promote constructive and informed dialogue and can cause personal distress and damage community relations. However, communications that cause offence whether by discriminatory tweets, or online posts or publications will not constitute a criminal offence unless they meet the statutory conditions outlined above.

Whether it is protected by Article 10 or is a criminal offence, the Commission considers that there are many reasons why offensive language should be avoided as far as possible. Most importantly, the use of very offensive terms or the expression of offensive ideas can create an environment where harassment based on hatred can flourish, as our Inquiry into disability-related harassment uncovered.³⁹

CPS guidance⁴⁰ states:

It is essential in a free, democratic and tolerant society that people are able to robustly exchange views, even when these may cause offence. However, we have to balance the rights of the individual to freedom of expression against the duty of the state to act proportionately in the interests of public safety, to prevent disorder and crime, and to *protect* the rights of others.

[Hate speech is] particularly hurtful to victims as they are being targeted solely because of their personal identity, their actual or perceived racial or ethnic origin or their actual or perceived belief or faith.

³⁷ *Animal Defenders International v the United Kingdom* (2013).

³⁸ See e.g. *Delfi As v Estonia* (2014).

³⁹ Hidden in plain sight – the inquiry final report. Available at: www.equalityhumanrights.com/legal-and-policy/our-legal-work/inquiries-and-assessments/inquiry-into-disability-related-harassment/hidden-in-plain-sight-the-inquiry-final-report

⁴⁰ Applicable in England and Wales only.

The impact on victims is different for each individual, but there are common problems. They can feel extremely isolated or fearful of going out or even staying at home. They may become withdrawn, and suspicious of organisations or strangers. Their mental and physical health may suffer in a variety of ways.

The confusion, fear and lack of safety felt by individuals have a ripple effect in the wider community of their racial or religious group. Communities can feel victimised and vulnerable to further attack.

In Scotland, the Crown Office and Procurator Fiscal Service issues the Prosecution Code which sets out a number of factors (including public interest) to be taken into account in deciding whether to proceed with a prosecution. The guidance states that 'the public interest is likely to require prosecution where criminal behaviour was ... motivated by any form of discrimination against the victim's ethnic or national origin or religious beliefs'.⁴¹ The Crown Office has a zero tolerance prosecution policy for hate crimes.⁴²

The role of public bodies in hate speech cases

The state and UK public bodies have a simultaneous duty to protect individuals from hate crime whilst facilitating freedom of speech as broadly as possible. Public authorities, including the courts, are bound by the Human Rights Act and must seek to strike the proper balance between those competing interests.

For example, a local authority could not ban the distribution of political material with which it disagreed. However, the freedom of individuals to receive information does not generally place any positive obligation on the state to gather or disseminate information.

A public authority or a body carrying out public functions also has a statutory duty to comply with the public sector equality duty (PSED). This is a duty to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and other conduct that is prohibited by the Equality Act 2010
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it

⁴² See <http://www.copfs.gov.uk/publications/prosecution-policy-and-guidance#GAP> at pages 6-7.

⁴² See <http://www.copfs.gov.uk/our-priorities/hate-crime>

- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

A relevant protected characteristic means age, disability, gender, gender reassignment, pregnancy and maternity, race, religion or belief or sexual orientation.

Having due regard to the need to foster good relations involves having due regard, in particular, to the need to tackle prejudice and promote understanding.⁴³

Accordingly, a public body must consider not only the freedom of expression of the person responsible for hate speech but also the PSED to tackle prejudice and promote understanding. So, for example, when the police consider whether to investigate a case of online hate speech, or whether to refer a case to the CPS for a prosecution decision, they must take into account all of their statutory duties, including under the Human Rights Act and the PSED.

The role of regulators

Regulators carry out public functions and are subject to the Human Rights Act and to the PSED. Some regulators have specific responsibility for forums in which hate speech can be disseminated. Ofcom has such responsibility in relation to complaints about broadcasting. The Independent Press Standards Organisation deals with complaints about newspapers, and the Advertising Standards Authority deals with advertising.

Each of those bodies has a duty to seek to strike the proper balance when protecting freedom of expression conflicts with other duties, remembering the very high threshold that will apply in cases which involve the media, or engage the public interest and in particular political comment. For entertainment rather than politics, the threshold will be lower. The Advertising Standards Authority upheld a complaint about some posters advertising a Channel 4 series 'Big Fat Gypsy Weddings' on the basis that they were irresponsible, offensive and reaffirmed negative stereotypes and prejudice against the Traveller and Gypsy communities, finding in effect that the advertiser's Article 10 rights would not be infringed by a ban on the posters.⁴⁴

⁴³ More detail can be found in our separate technical guidances on the Public Sector Equality Duty for England, Scotland and Wales at www.equalityhumanrights.com/search/site/technical%20guidance

⁴⁴ See www.asa.org.uk/Rulings/Adjudications/2012/10/Channel-Four-Television-Corporation/SHP_ADJ_197451.aspx

Employment

In the workplace, there are additional restrictions on free speech. Freedom of expression does not protect workers from disciplinary action arising either from a breach of the Equality Act or of the employer's policies. These policies might, for example, concern dignity at work or relate to the objectives of protecting the employer's reputation.

Workplace 'banter' is not permitted if it has the effect of harassing an employee.

Harassment in the workplace under the Equality Act 2010 includes unwanted behaviour related to age, disability, race, sex, gender reassignment, religion or belief or sexual orientation, which has the purpose or effect of:

- violating a person's dignity, or
- creating for that person an intimidating, hostile, degrading, humiliating or offensive environment.

'Unwanted behaviour' can include any kind of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical conduct.

This type of harassment is not a criminal offence but can constitute the ground for a claim in the Employment Tribunal.

The EAT has ruled that the dismissal of an employee for non-work related tweets was potentially fair where the tweets could be seen by staff and customers at 65 stores.⁴⁵ Conversely, an employer who demoted someone for posting comments disapproving of marriage of same-sex couples on Facebook was found to have acted in breach of contract. The judge ruled that while workplace rules can sometimes restrict the use of social media outside work, his Facebook wall was inherently non-work related and the colleagues able to access it had chosen to become his Facebook friends.⁴⁶

Where however an employee raises concerns as a whistleblower about their employer's conduct, they may be able to rely on Article 10 if they are dismissed or disciplined. In some circumstances, yet to be tested in our courts, the right to freedom of expression may afford protection where our current law on whistleblowing does not. In deciding whether the communication is protected by Article 10, the court will have regard to a number of factors including: any alternative channels for making

⁴⁵ *Game Retail Ltd v Laws* UKEAT0188/14.

⁴⁶ *Smith v Trafford Housing Trust* [2012] EWHC 3321 (Ch).

the disclosure; whether disclosure was authentic and in the public interest; whether the whistleblower acted in good faith and reasonably; the impact on the employer and the severity of the sanction on the employee⁴⁷.

Service providers

Under the Equality Act, harassment in relation to service provision operates in a similar way to harassment in the workplace. Service providers include private, voluntary and public bodies, and include anyone who is concerned with the provision of services, goods or facilities to the public (or to a section of the public), whether or not for payment.

Harassment occurs when a service provider engages in unwanted conduct which is related to age, race, sex, disability or gender reassignment and which has the purpose or the effect of:

- violating the service user's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for the service user.

This type of harassment is not a criminal offence but can constitute the ground for a claim in the civil courts. So if a security guard at a nightclub verbally abuses a customer in a way that meets the definition above, this would constitute unlawful harassment. The restriction on the guard's freedom of expression, in this context, would be justified by reference to the need to protect the rights of customers. Note, however, that there is a specific exemption for the content of television, radio and online broadcasting (including editorial decisions) which is designed to ensure that this provision does not have the effect of stifling free expression.⁴⁸

Education

There are specific sensitivities around what teachers can say in the classroom. It is impossible to provide a general rule, beyond those explained above, that draws a clear line between free expression and unlawful discrimination.

⁴⁷ *Guja v Moldova* (2008) and *Heinisch v Germany* (2011)

⁴⁸ Schedule 3 para 31(1) Equality Act 2010.

In relation to marriage of same-sex couples, there is a specific exemption to ensure that schools with a religious character may continue to teach the position of their particular faith in relation to marriage and same-sex relationships. However, schools must ensure that this teaching is done in an appropriate, reasonable, professional and sensitive way. However, if for example, a teacher tells pupils that gay and lesbian people ‘will go to hell’ and ‘need to be cured’ or uses other hostile and degrading language which offends or intimidates a gay pupil, that would be unlawful discrimination or harassment under the Equality Act.

Universities and colleges have obligations under education law⁴⁹ to protect and promote freedom of speech on their premises, as far as is reasonably practicable within the law, and are institutions where openly debating challenging ideas is expected. Thus the limitations on freedom of expression that universities can lawfully impose will be less than in the context of schools.

Electoral conduct

The right to freedom of expression gives very strong protection to political speech and materials, provided that no criminal offence is committed. This is especially true in the context of elections. As the ECtHR has stated: ‘it is particularly important in the period preceding an election that opinion and information of all kinds are permitted to circulate freely’.⁵⁰

Accordingly, all who participate in the democratic process (including those who criticise and challenge perceived ‘discriminatory’ conduct) are given considerable leeway to express themselves, to contribute to debates and to make criticisms, even if the views expressed are provocative, shocking, disturbing or offensive to some people.

In recent election campaigns, a number of incidents have been reported of intolerant and discriminatory behaviour, particularly in relation to racist election material.⁵¹ Such material may not fall foul of electoral law, nor meet the threshold for incitement to racial hatred. Nevertheless, local authorities can counter misleading information given by political parties and may seek to do so in order to comply with their duties

⁴⁹ Section 43 of the Education (No 2) Act places a positive duty on universities and colleges to take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.

⁵⁰ *Bowman v the United Kingdom* (1982).

⁵¹ See e.g. paragraphs 26-39 of the report of the All-Party Parliamentary Inquiry into Electoral Conduct (October 2013), which provides a number of examples of reported incidents.

under the PSED by publishing objective and factual information. Political parties, as associations and employers, have duties under the Equality Act 2010 not to discriminate against their members or prospective members and employees.

Spoken or written comments about candidates seeking elected office by other candidates or third parties during the course of a democratic election fall outside the scope of the Equality Act 2010. Such comments might in certain instances be perceived as prejudiced and/or risk undermining community relations, but they do not generally give rise to breaches of equality law.

The PSED does not apply to political parties, candidates or campaigning organisations. This means they are under no obligation to have 'due regard' to the duty to foster good relations. However, the duty does apply to public authorities involved in the conduct of elections, including both local authorities and the Electoral Commission. Where the PSED applies, it requires rigorous consideration in advance of decision-making or policy-formulation, but it does not prescribe particular outcomes.

The boundary between legitimate free speech and the transgression of acceptable limits during the course of an election is not always clear-cut. In the final analysis only the courts can determine whether the right to free expression has been violated.

Electoral law

The Electoral Commission regulates and enforces the rules concerning democratic elections in the UK.

It has criticised the current legal and regulatory electoral regime as: 'fragmented, inconsistent and not up to date... accountability is fragmented and in many cases no one is able to intervene to ensure these standards are met'.⁵² The Law Commission is currently working on proposals to reform UK electoral law.

Section 106 of the Representation of the People Act 1983 makes it illegal to make false or misleading statements about the personal character or conduct of an election candidate during an election period. The Election Court upheld a complaint by the unsuccessful Liberal Democrat candidate about the conduct of the Labour MP Phil Woolas during the 2010 General Election, as a consequence of which Mr Woolas was required to vacate his seat, resulting in a by-election. Mr Woolas

⁵² Electoral Commission business plan (2012-2017).

appealed unsuccessfully against this verdict.⁵³ The High Court held that the restriction on the right to freedom of expression was in this case permissible because false statements undermined free and fair elections.

At first glance, the section 106 offence would not apply to many kinds of hate speech since it only prohibits false or misleading statements about a candidate's 'personal character or conduct' while hate speech is generally directed at social groups. However, a false or misleading statement about a candidate's ethnic or religious group could lead to prosecution. Examples would include an election pamphlet that suggested that a candidate's religious beliefs made him sympathetic to terrorists.

The Equality and Human Rights Commission

The Commission is a UN accredited National Human Rights Institution and a National Equality Body, with statutory duties and powers under the Equality Act 2006. These include a general duty to exercise its functions in a way which encourages and supports the development of a society in which there is mutual respect between different groups of people based on understanding and valuing of diversity and on shared respect for equality and human rights (which includes freedom of expression).

The Commission has a duty to exercise its powers to promote understanding of the importance of and to encourage good practice in relation to equality and diversity and human rights.

It also has a statutory duty to work towards the elimination of unlawful discrimination and towards the elimination of unlawful harassment. The Commission is subject to the PSED when exercising its powers.

What is the Commission's role in investigating incidences of offensive speech?

Criminal offences

The Commission has no remit to assess whether or not a crime has been committed. Complainants who believe they may be victims of crime are referred to the police, the complaints service of the relevant police force or to the Independent

⁵³ *Woolas, R. (on the application of) v Speaker of the House of Commons* (2010).

Police Complaints Commission or, in Scotland, the Police Investigations and Review Commissioner. They may also be advised to seek independent legal advice if they may have a civil claim, or if the police or prosecutor's decision may be susceptible to judicial review.

Complainants in England and Wales are encouraged to report hate crimes to the police directly or through the [True Vision](#) website.⁵⁴

Media controversies

It is not our role to judge in individual cases whether offensive comments may or may not be protected under Article 10. This is the role of the courts if infringement of that right is alleged. Nor is it for us to determine whether any particular comment reaches a criminal threshold. Nevertheless, the Commission considers that those in the public eye and in positions of influence, in particular, should act responsibly in relation to use of language when discussing sensitive issues.

Harassment or discrimination in the provision of services or public functions

As the national equality regulator, the Commission has a statutory role in relation to unlawful acts constituting breaches of the Equality Act (such as discrimination or harassment). Where the facts of a case suggest that an unlawful act may have been committed by a service provider or a person or body that carries out public functions, then it is within the Commission's powers to make enquiries to determine whether or not any further action should be taken.

In one example, we received a request for assistance from a Gypsy Traveller who had been the victim of grotesque online hate speech. A complaint had been made to the police, who had not taken it seriously. The Commission made enquiries of the police force about the difference between its response in this particular case and the response it had provided in relation to similar hate speech directed to an individual with a different protected characteristic. As a result, the police reviewed the case and referred it to the CPS for prosecution.

Public Sector Equality Duty

Where the facts indicate that a public authority or a body exercising public functions may not have complied with the PSED, the Commission may conduct

⁵⁴ See <http://www.report-it.org.uk/home>

enquiries to assess the extent to which or the manner in which it has complied. This may lead to collaborative working with the organisation concerned to improve compliance, including by way of formal agreement on an action plan.⁵⁵ It may be appropriate in certain cases to progress to formal enforcement action.

⁵⁵ Section 23 EA 2006.

Contacts

This publication and related equality and human rights resources are available from the Commission's website: www.equalityhumanrights.com

For advice, information or guidance on equality, discrimination or human rights issues, please contact the Equality Advisory and Support Service, a free and independent service.

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