



SUB-REPORT COMMISSIONED
TO ASSIST THE ALL-PARTY
PARLIAMENTARY INQUIRY
INTO ANTISEMITISM

ADDENDUM CONSIDERATION
OF LAW AND PROSECUTION-
RELATED ISSUES

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Foreword to Addendum of All- Party Inquiry into Antisemitism

I am very grateful to Richard Matthews QC and to Jonas Milner for their detailed scrutiny of the criminal justice legislation intended to check anti-Semitism. Their well-reasoned Addendum is very helpful. It emphasises the need for keeping prosecutorial guidelines under review, whilst emphasising that the legislative framework is sound and fit for purpose.

As recent events have demonstrated, the threat of violence to the Jewish community in our country and elsewhere is a real one which we must all co-operate together to counter. This paper is very helpful in identifying priorities and showing us the best way forward.

Dominic Grieve QC MP

All-Party Parliamentary Inquiry into Antisemitism

Addendum consideration of law and prosecution-related issues

January 2015

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Executive summary

The background to this addendum is the very considerable rise in anti-Semitic incidents that occurred over the summer of 2014, many via social media, and the publication of the latest update report 'Government Action on Antisemitism' in December 2014.

We set out the history of the various reports and iterations of CPS policy. We note that the development of the new "Hate-crime Assurance Regime" is a further policy refinement and will undoubtedly be subject to continuing review by the CPS, which we expect will include consideration of whether racially or religiously aggravated offences should revert to being within the remit of Special Crime and Counter-Terrorism Division (SCCTD)

This addendum sets out a summary of the existing statutory and procedural framework for the prosecution of offences involving anti-Semitic communications and highlight how there is no statutory offence which is specifically tailored to communications involving race/religious hate that are published online/ via social media.

Having considered whether there exists a need for the creation of such an offence our conclusion is that the existing legislative provisions are both suitable and satisfactory and there is no body of evidence justifying the complex and fraught process required to create another offence encompassing activity that is within the ambit of existing penal legislation.

The CPS is in the course of putting into place a new regime in relation to the decision making process in regard to and proceedings for offences concerned with hate-crime, known as 'Hate-crime Assurance', initially as a pilot from January 2015 and this appears to represent a further development of policy in this area that was announced in May 2014 by the Director of Public Prosecutions

Having reviewed the policy developments that have occurred and the existing CPS guidance on the specific offences concerned with online communications/ via social media, we invite consideration of the following:

- whether, if it is not within the hate-crime guidance materials developed by the CPS, there is need for guidance that addresses when and in what

circumstances “extreme tactics deployed by anti- Israel demonstrators on UK streets” will be held to amount to “criminal acts” that “will be prosecuted”

- whether, if it is not within the hate-crime materials developed by the CPS, guidance that specifically addresses racist/ religious hatred based communications sent via social media should be developed (beyond that which is within 'Guidelines on Prosecuting cases involving communications sent via social media'¹).

Relevant Background

In its recently published “Government Action on Antisemitism”², the Government acknowledge that 2014 saw an increase in anti-Semitism. It notes, on page 6:

“It’s almost a decade since the APPG Against Antisemitism held their Inquiry into antisemitism and while we have made considerable progress in addressing antisemitism, this is undermined when British Jews are sought out, attacked and abused by individuals or organised groups on the extreme right, the extreme left and Islamist extremists. These attacks are regrettably exacerbated at times of heightened tension in the Middle East. In July and August this year the Community Security Trust, an organisation that looks after the safety and security needs of the Jewish community, recorded 543 antisemitic incidents. This is more than the total recorded during the whole of 2013.

...

We are well aware that concerns have been raised over the summer at the perceived lack of action against some of the extreme tactics deployed by anti-Israel demonstrators on UK streets. We recognise that some of these incidents have caused alarm and distress amongst the Jewish community. We have asked the national policing lead on hate crime to work with public order leads to look at how arrests and charges can be clearly communicated and publicised by police forces to provide reassurance to local communities that criminal acts will be prosecuted.

...

In addition, the Community Security Trust recorded a twenty five percent increase in the number of antisemitic incidents occurring on social media which meant that many incidents

¹ See: http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/

² See: <https://www.gov.uk/government/publications/government-action-on-antisemitism>

were no longer contained between victim and perpetrator, but were broadcast to, and shared amongst, many. Jewish individuals and organisations were singled out for antisemitic abuse via social media, with the most high profile being the targeting of Luciana Berger MP by a Far Right activist on Twitter.”

The Evolution of the Approach to Prosecuting Anti-Semitic Offences

In September 2006 the All-Party Parliamentary Group Against Antisemitism published its report into Antisemitism in the UK³. The Inquiry sought to examine a broad spectrum of issues, including the nature of contemporary antisemitism, the efforts made to confront it and the further measures that could be introduced.

At paragraphs 68-70 of the report, the Inquiry expressed concern about the low number of prosecutions resulting from complaints of anti-Semitism, and also noted the concerns that they had heard about the effectiveness of the prosecution process in cases of incitement to racial hatred. In its summary of conclusions, on page 52, the Inquiry recommended that the CPS investigate the reasons for the low number of prosecutions, and also review prosecutions of incitement to racial hatred and report back to Parliament.

In the Government’s response to the Inquiry’s report (published in March 2007) at page 6 the CPS accepted the recommendations of the inquiry as set out above.

The Government’s “One Year on Progress Report”⁴ was published in 2008. It noted on page 10 that the CPS had engaged with the Jewish community; obtained data from the Metropolitan Police Service and the Greater Manchester Police, and reviewed racial hatred cases with its Counter Terrorism Division. It also noted that the CPS were developing an 'Action Plan' which would set out the work required in the future. The report also touched on the issue of 'internet hate crime', stating:

“The Government believe the prevalence of hate on the Internet has become an increasing concern.”

³ See: <http://www.antisemitism.org.uk/wp-content/uploads/All-Party-Parliamentary-Inquiry-into-Antisemitism-REPORT.pdf>

⁴ See: <https://www.gov.uk/government/publications/all-party-parliamentary-inquiry-into-antisemitism-government-response-one-year-on>

In December 2010 the Government published its 'Three Years on Progress Report'. Significantly, the report noted that agreement had been reached for all police forces to record anti-Semitic hate crimes, leading to the publishing of the first set of official anti-Semitic crime statistics in 2010.

In terms of the prosecution of anti-Semitic crime, the report noted the work previously accomplished by the CPS, which led to the publication of the CPS hate crime report⁵. The key findings of the CPS are summarised on p.13 of the Government's report, and notably they included:

“prosecutors would benefit from better guidance to help them identify and refer cases to the Crown Prosecution Service’s Counter Terrorism Division”.

The CPS action plan which followed was aimed at improving the approach to prosecuting anti-Semitic crime in four main ways, which included the provision of guidance set out above.

We note this as significant because at the time of the publishing of the Progress Report in December 2010, the CPS policy in relation to the referral of cases to the Serious Crime and Counter Terrorism Division ('SCCTD') had changed. This is noted within the guidance on racist and religious crime that the CPS publish on their website⁶:

“In contrast to the handling arrangements for cases involving incitement to racial hatred and stirring up religious hatred (see above), there is no requirement for CPS Areas to refer racially or religiously aggravated offences to SCCTD. The requirement to refer cases involving religiously aggravated offences to HQ ceased in October 2010.

The case should be referred to the Area’s Hate Crime Co-ordinator to be reviewed or supervised by an experienced prosecutor.”

There is little material published to explain the reasoning and justification for this shift in policy. We make no criticism of the decision, but simply note it would seem that a relatively short time after the recommendations set out above, the CPS policy changes have rendered one of them obsolete.

The Director of Public Prosecutions approved a Hate Crime Strategy in May 2014 with an associated delivery plan signed off shortly afterwards. On page 12 of the December 2014 Government Response to Antisemitism, the intended approach to

⁵ See: https://www.cps.gov.uk/publications/docs/CPS_hate_crime_report_2008.pdf

⁶ See: http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/

the prosecution of anti-Semitic crimes is set out, summarising the hate crime strategy that is to be implemented. In particular, there are several areas where the CPS approach to hate crime prosecutions will be assisted – including a 'Hate Crime Assurance' regime which has been implemented from the beginning of this year, and 'Prosecutor Support' in the form of online toolkits.

We assume that the development of the new “Hate-crime Assurance Regime” is a further policy refinement and will undoubtedly be subject to continuing review by the CPS, which will include consideration of whether racially or religiously aggravated offences should revert to being within the remit of SCCTD.

The Criminal Offences

Public order offences

s31 of the Crime and Disorder Act 1998 creates religiously and racially aggravated versions of the offences under sections 4, 4A, and 5 of the Public Order Act 1986. The maximum sentence for each of these offences is higher than the maximum for the corresponding “basic” offences (without religious or racial aggravation).

- s31(1)(a): Racially or religiously aggravated threatening, abusive, or insulting words, behaviour, or writing, which is either intended to or likely to cause fear of, or provoke, unlawful violence. Maximum sentence: 2 years imprisonment.
- s31(1)(b): Racially or religiously aggravated threatening, abusive, or insulting words, behaviour, or writing, which is intended to, and does, cause another person harassment, alarm, or distress. Maximum sentence: 2 years imprisonment
- s31(1)(c): Using racially or religiously aggravated threatening, abusive, or insulting words, behaviour, or writing, within the sight or hearing of someone likely to be caused harassment alarm or distress thereby. Maximum sentence: level 4 fine (only triable in the Magistrates’ Court).

“Racially and religiously aggravated” is defined as being that either at the time, immediately before or after committing the offence, the offender demonstrates hostility towards the victim’s membership of a racial or religious group, or the offence is wholly or partly motivated by hostility towards members of a racial or religious group (s28 of the Crime and Disorder Act 1998).

A “racial group” has a broad definition and includes reference to nationality or ethnic origins. References simply to “foreigners” or “immigrants” have in the past been upheld as falling within the definition of racial aggravation. Sikhs and Jews are included in the definition of a racial (not simply religious) group (Mandla v Dowell-Lee [1983] 2 AC 548).

Incitement to racial hatred

Part III of the Public Order Act 1986 contains a number of different offences relating to the incitement of racial hatred:

- s18: Using threatening, abusive, or insulting words or behaviour or displaying written material intending to, or which is likely to, stir up racial hatred. Maximum sentence: 7 years imprisonment.
- s19: Publishing or distributing written material which is threatening, abusive, or insulting, intending to, or which is likely to, stir up racial hatred. Maximum sentence: 7 years imprisonment
- Provisions with similar intentions exist relating to: presenting or directing a public performance (s20); distributing, showing, or playing a recording of visual images or sounds (s21); persons involved in a programme included in a programme service (s22); and possessing racially inflammatory material with a view to it being displayed, published, distributed, or played (s23). All of these have the same maximum penalty of 7 years imprisonment.

All of the above offences have the same key elements:

- Threatening, abusive or insulting words/material etc.
- An intention to, or a likelihood in all the circumstances that racial hatred will be stirred up. Likelihood is not the same as mere possibility.

Racial hatred is hatred against a group of persons defined by colour, race, nationality, ethnic origins etc. It will therefore be much the same as the definition under the Crime and Disorder Act 1998, though it is limited to solely racial, and not religious, hatred.

“Written material” has been held by the courts to include material published on the internet (R v Sheppard and Whittle [2010] EWCA Crim 65).

Incitement to religious hatred

Part IIIA of the Public Order Act 1986 contains a number of different offences relating to the incitement of religious hatred. These reflect the offences relating to racial hatred (above) but with two key differences:

- The words or behaviour must be threatening (not merely abusive or insulting);
- There must be an intention to stir up religious hatred, likelihood is insufficient.

This aside, the offences are identical to the six relating to racial hatred, the corresponding sections being s29B – 29G of the Public Order Act 1986. The maximum sentence for all the offences is 7 years imprisonment.

Malicious communications

There are specific offences relating to insults and abuse which is carried out online, specifically:

- s1 of the Malicious Communications Act 1988: Sending an electronic communication (or letter) which is indecent or grossly offensive, or conveys a threat, with the purpose of causing distress or anxiety. Maximum sentence: 6 months imprisonment (only triable in the magistrates’ court).
- s127 of the Communications Act 2003: Sending messages which are grossly offensive, or of an indecent, obscene, or menacing character, by means of a public electronic communications network

- Maximum sentence: 6 months imprisonment (only triable in the magistrates' court)

The courts have clarified that because a message sent by Twitter is accessible to all who have access to the internet, it is a message sent via a "public electronic communications network" (Chambers v DPP [2012] EWHC 2157 (Admin)). This logic would therefore apply to any similar social media communication. It does not matter whether the message is ever seen, it merely needs to be sent.

An individual may be guilty of offences relating to online material, even if the server which hosts the material is hosted abroad, as long as a "substantial measure" of the activities constituting the crime take place in England and Wales (R v Sheppard and Whittle [2010] EWCA Crim 65).

Under s145 of the Criminal Justice Act 2003 sentencing for the above offences will be aggravated if the offence was racially or religiously aggravated.

Prosecution Practice and Guidance

In practice there is some overlap between the offences above. Significantly, it is the choice of the CPS as to which is charged.

Guidelines on prosecuting offences involving communications via social media were published by the CPS in 2013⁷. These make clear that care must be taken when considering prosecuting for public order offences, as "public order legislation is primarily concerned with words spoken or actions carried out in the presence or hearing of the person being targeted (i.e. where there is physical proximity between the speaker and the listener) and there are restrictions on prosecuting words or conduct by a person in a dwelling." In practice this means that online offences will most often be prosecuted under the Malicious Communications Act 1988 or the Communications Act 2003, unless they are serious enough to be prosecuted under the incitement provisions.

⁷ http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media

Examples of the type of cases which have been prosecuted under the different statutes include:

- Prosecution under s127 of the Communications Act 2003 for an anti-Semitic tweet sent to Luciana Berger MP which included a picture of the MP with a yellow star on her forehead and the hashtag “Hitler was right”. The offender received 4 weeks imprisonment.⁸
- Prosecution under s1 of the Malicious Communications Act 1988 for a football fan who sent a number of tweets making derogatory comments about black players on a rival team. He received a suspended prison sentence.⁹
- Prosecution for a racially aggravated public order offence (under s31(1)(b)) for someone who posted derogatory tweets about the footballer Fabrice Muamba, who had collapsed, and who then entered into racist exchanges with other Twitter users. He received a 56 day prison sentence.¹⁰
- Prosecution for a large number of incitement offences under Part III of the Public Order Act for individuals had published online a number of pamphlets making derogatory remarks and claims about Jews and black people. The writer of the material received 2 years and 4 months imprisonment, and the publisher received 4 years and 10 months imprisonment.¹¹

The decision whether to charge

The incitement to racial or religious hatred offences under the Public Order Act 1986 can only be prosecuted with the consent of the Attorney General.

Article 10 of the European Convention on Human Rights provides that everyone has the right to freedom of expression. This is subject to restrictions prescribed by law for the prevention of crime and disorder, and for the protection of the rights or reputation of others (among other restrictions). In order to ensure that the legislation above is compliant with Article 10, the courts have confirmed in a number of cases that comments which are merely controversial should not fall foul of the law.

⁸ <http://www.theguardian.com/uk-news/2014/oct/20/man-jailed-antisemitic-tweet-labour-mp>

⁹ <http://www.theguardian.com/uk/2012/feb/06/sunderland-fan-guilty-racist-tweets>;
<http://www.bbc.co.uk/news/uk-england-tyne-17183384>

¹⁰ <http://www.theguardian.com/uk/2012/mar/27/student-jailed-fabrice-muamba-tweets>

¹¹ R v Sheppard and Whittle [2010] EWCA Crim 65

In Chambers v DPP [2012] EWHC 2157 (Admin), the Lord Chief Justice made it clear that: "Satirical, or iconoclastic, or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matters, banter or humour, even if distasteful to some or painful to those subjected to it should and no doubt will continue at their customary level..." Similarly, in Dehal v CPS [2005] EWHC 2154 (Admin), Moses J, referring to section 4A of the Public Order Act 1986, held that: "... the criminal law should not be invoked unless and until it is established that the conduct which is the subject of the charge amounts to such a threat to public order as to require the invocation of the criminal as opposed to the civil law".

Due to this, the CPS guidelines make clear that communications which are grossly offensive, indecent, or obscene (as opposed to threatening, incitement etc) will be subject to a high threshold, and prosecution may not be in the public interest. The guidelines state that: "A communication sent has to be more than simply offensive to be contrary to the criminal law. Just because the content expressed in the communication is in bad taste, controversial or unpopular, and may cause offence to individuals or a specific community, this is not in itself sufficient reason to engage the criminal law." In addition, in order to ensure compliance with Article 10, any prosecution must be both necessary and proportionate.

However, despite the above caveats, the CPS guidelines do make clear that where "there is clear evidence of an intention to cause distress or anxiety... particularly where there is a hate crime element to the communication(s)" then prosecution may well be in the public interest. This should ensure that offensive comments which can be characterised as hate crime continue to be prosecuted.

Discussion and Consideration

The need for any new offences

From the above it will be clear that there is no statutory offence which is specifically tailored to racist communications that are published online/ via social media. In the light of the increase in anti-Semitic online activity in the UK over the summer of 2014, consideration is given as to whether there exists a need for the creation of such a new and specific offence.

The majority of offensive 'tweets' or messages published online that are anti-Semitic

or racist in another way where prosecuted are likely to be proceeded with under the Communications Act 2003 or the Malicious Communications Act 1988. These are not offences that are subject to a statutory mechanism of becoming 'racially aggravated' in name, for example by s.28 of the Crime and Disorder Act 1998.

However, as described above, s.145 of the Criminal Justice Act 2003 dictates that where an offender is to be sentenced for an offence *other* than those covered by ss.29-32 of the Crime and Disorder Act 1998 which was "racially or religiously aggravated", then the Court *must* treat this as an aggravating factor and *must* declare that in open court. The definition of "racially or religiously aggravated" is the same as that contained within s.28 of the Crime and Disorder Act 1998. Therefore, in effect, the statutory position is as if s.28 did apply to the legislation that has been deployed to prosecute authors of anti-Semitic tweets.

It appears from the available evidence that the existing statutory regime is settled and operates sufficiently well to address unlawful anti-Semitic posts online. Indeed, the cases referred to above and others that have attracted attention within the media have been prosecuted under the existing legislation, and without expressed concern about any undue leniency of sentences, which indicates that sentencing courts have a good grasp of the relevant aggravating mitigating factors that are appropriate to apply. They have also been widely reported as being 'racist' offences¹², regardless of the lack of specific designation within the statutory scheme.

A specific and new "racist tweet" offence would bring the challenge of defining and establishing the boundary between what is unlawful (and why) and what is merely 'bad taste, controversial, unpopular etc'; and successfully balance this against the considerations of the rights to freedom of expression enshrined in Article 10 of the European Convention on Human Rights. It does not appear that without persuasive evidence of such a need, there can be justification for embarking upon the complex and fraught process required to create another offence encompassing activity that is within the ambit of existing penal legislation.

¹² For example, see: https://www.cps.gov.uk/northeast/cps_northumbria_news/racist_tweeter_sentenced/

The Policy and Guidance

At present the exact form of the CPS “Hate-crime Assurance Regime” and associated materials has not been published nor, obviously, has this new approach been witnessed in operation.

Furthermore, whilst the CPS ‘Guidelines on Prosecuting cases involving communications sent via social media’²¹ does consider the tension between Article 10 ECHR and the Malicious Communications Act 1988 / Communications Act 2003, it does not do so in regard to racial or religious hatred context. The guidance contained within these guidelines currently reads:

*“Prosecutors are reminded that what is prohibited under section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 is the sending of a communication that is **grossly** offensive. A communication sent has to be more than simply offensive to be contrary to the criminal law. Just because the content expressed in the communication is in bad taste, controversial or unpopular, and may cause offence to individuals or a specific community, this is not in itself sufficient reason to engage the criminal law. As Lord Bingham made clear in DPP v Collins [2006] UKHL 40:*

“There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates.”

In this regard, we invite consideration of the following:

- whether, if it is not within the hate-crime guidance materials developed by the CPS, there is need for guidance that addresses when and in what circumstances “*extreme tactics deployed by anti- Israel demonstrators on UK streets*” will be held to amount to “*criminal acts*” that “*will be prosecuted*”
- whether, if it is not within the hate-crime materials developed by the CPS, guidance that specifically addresses racist/ religious hatred based communications sent via social media should be developed (beyond that which is within ‘Guidelines on Prosecuting cases involving communications sent via social media’²⁴).

²¹ See: http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/

²⁴ See: http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/

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