

ARTICLE19



United Kingdom (England and Wales): Responding to ‘hate speech’

2018

Country Report

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Executive summary

In this report, ARTICLE 19 sets out to establish the legal and regulatory framework in which ‘hate speech’ has been dealt with in the United Kingdom (UK), with a focus on England and Wales, and a particular focus on the media.

The problem of ‘hate speech’ is not new in the UK; however, recent events and technological innovation have thrown the issue of ‘hate speech’ in the UK into sharper focus. The debate surrounding Britain’s exit from the European Union (Brexit), the murder of the Member of Parliament Jo Cox by a right wing extremist in June 2016, and the prevalence of ‘hate speech’ on social media have prompted a renewed interest in the challenge of balancing free expression and the protection of robust social and political discourse with the need to promote respect for the dignity and autonomy of others.

The legal framework governing ‘hate speech’ in the UK has evolved over many centuries, with some acceleration in the last fifty years due to the development of anti-discrimination legislation and human rights law. This legal framework has developed on a piecemeal basis into its current state, creating a complex web of criminal sanctions, civil causes of action, and regulatory codes.

The UK has no written constitution, and English criminal law has no governing instrument such as a penal code. The criminal restrictions reflect the UK’s piecemeal legal structure. The most important (and controversial) criminal laws in this area involve ‘incitement to hatred’ on the grounds of race or of religious or sexual orientation. Harassment may also amount to a criminal offence, and if motivated by hatred towards those on the basis of a protected characteristic, the offence will be aggravated and attract a more severe sentence.

The report finds that the police and the Crown Prosecution Service are equipped (subject to funding constraints) to prosecute individuals engaging in ‘hate speech’ of sufficient gravity that it should be criminalised, and that they do bring such prosecutions under one or several of the array of laws that exist to tackle these crimes. However, the report has found that the criminal law has not been used against a media outlet for many years, and never for engaging in ‘hate speech’ in relation to any person or group of persons on the basis of a protected characteristic. In terms of the regulatory environment, whilst individuals may bring complaints against the self-regulated media, such complaints are limited in scope, uncertain in outcome, and are not always easy to access. Furthermore, there is no mechanism by which the very powerful British print media may be held to account for the disparagement of a group of persons on the basis of a protected characteristic.

There are a number of civil actions that might arise in the case of the commission of ‘hate speech.’ Those include harassment, defamation, misuse of private information, or private actions under the Equality Act 2010. Generally, the bringing of a civil action in relation to an incident involving ‘hate speech’ is cumbersome and expensive, and the report has identified only limited examples.

The regulatory environment is also in a state of development, although there is no coherent government policy guiding this. In relation to broadcast media, the position is relatively settled. However, in relation to print media, the outlook is very uncertain. Recent events and the proliferation of online ‘hate speech’ have led to calls to reform the current legal landscape. There are also real questions over the extent – if any – to which the government may seek to regulate online media. Whilst much has recently been said on this matter, little concrete action has been proposed.

Summary of recommendations:

- All relevant legislation - in particular the criminal law provisions - should be revised for their compliance with international human rights standards applicable to ‘hate speech’.
- The provisions on incitement to hatred should be reviewed with a view to making them more effective and usable.
- The advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence should be prohibited in line with Articles 19(3) and 20(2) of the International Covenant on Civil and Political Rights (ICCPR), establishing a high threshold for limitations on free expression as set out in the Rabat Plan of Action, as well as prohibitions on direct and public incitement to genocide and incitement to crimes against humanity.
- The protective scope of any measures to address ‘hate speech’ should encompass all protected characteristics recognised under international human rights law. In particular, the list of protected characteristics should be revised in light of the right to non-discrimination as provided under Article 2(1) and Article 26 of the ICCPR.
- The UK Government should develop a comprehensive plan for the implementation of the Rabat Plan of Action. In particular, it should adopt and implement a comprehensive plan for training law enforcement authorities, the judiciary, and those involved in the administration of justice on issues concerning the prohibition of incitement to hatred and ‘hate speech.’ A multi-stakeholder strategy to counter ‘hate speech’ in all its forms and in line with international human rights obligations should be discussed and adopted in partnership by all relevant stakeholders, including state institutions, civil society organisations, broadcast and print media, as well as Internet platforms and operators.
- Civil law remedies should be strengthened and made fully accessible to provide stronger remedies for victims of ‘hate speech.’ The government should also remove practical obstacles to ensure that victims of ‘hate speech’ and discrimination can rely on civil law to seek protection of their rights. In particular, it should ensure that changes to the legal aid system do not undermine the right of access to courts and effective remedy for victims of ‘hate speech.’
- Ofcom, the UK’s communications regulator, should continue its constructive review of ‘hate speech’ in the broadcast media and continue to develop policy guidance for the media.

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- Self-regulatory bodies for print media should increase their internal diversity and in particular ensure that their membership includes members from minorities and other groups subject to discrimination. They should also develop further guidelines on reporting on groups subject to discrimination, and streamline the complaint process to prevent individuals being discouraged from bringing claims. Effective measures should be taken to address violation of self-regulatory bodies' codes of conduct. Self-regulatory bodies should also organise regular training courses and updates for professional and trainee journalists on the internationally binding human rights standards on 'hate speech' and freedom of expression, and on the relevant ethical codes of conduct.
 - Public officials, including politicians, should acknowledge that they play a leading role in recognising and promptly speaking out against intolerance and discrimination, including instances of 'hate speech'. This requires recognising and rejecting the conduct itself, as well as the prejudices of which it is symptomatic; expressing sympathy and support to the targeted individuals or groups; and framing such incidents as harmful to the whole of society. These interventions are particularly important when intercommunal tensions are high, or are susceptible to being escalated, and when political stakes are also high, such as in the run-up to elections.
 - Media organisations and media outlets should recognise that they play an important role in combatting 'hate speech' and intolerance and prejudices in the media. They should intensify their efforts to provide adequate responses. They should ensure that they fully respect relevant ethical codes and ensure that ethical codes of conduct on 'hate speech' are effectively implemented and that effective measures are undertaken to address any violations. The ethical codes should be internalised by journalists and media outlets in order to ensure a full compliance with them.

Introduction

The problem of ‘hate speech’ is not new in the United Kingdom (UK), in particular because of its colonial past and long history of nationalist conflict. However, recent events and technological innovation have thrown the issue of ‘hate speech’ in the UK into sharper focus.

‘Hate speech’ against migrants and refugees was a prominent feature of the ‘Brexit’ campaign prior to the 2016 referendum on the UK’s membership of the European Union (EU), and was seemingly prevalent in the aftermath of the decision to leave the EU. Several reports have documented an increase of reported incidents of ‘hate crime’ in the UK during this period.¹ In June 2017, the UK held a general election that returned the Conservative Party to power, although without a majority, with immigration continuing to be a topic of public debate during the election and, in some instances, those discussions leading to instances of ‘hate speech.’² In the aftermath of several recent terrorist attacks in the UK, individuals from, or perceived to be from, Muslim communities have additionally faced a discriminatory backlash. There has also been a reported increase in hate crimes against persons with disabilities and transgender individuals. The majority of reports related to discriminatory hatred are, however, racially motivated.³

Political parties, in particular the populist anti-migrant UK Independence Party (UKIP) and other political actors, have themselves been responsible for contributing to intolerant political discourse, especially on the topic of immigration. Moreover, politicians, including the current and former Prime Minister, have made inflammatory remarks about migrants and minorities as well as statements that human rights protections should be changed “if they get in the way” of the country’s fight against terrorism.⁴ ‘Hate speech’ in the legacy media also continues to be a problem, in particular in the tabloid press, which frequently foments prejudice against, and promotes negative stereotypes of, minorities and migrants.⁵

Technological innovation – including online news platforms, social media, and the ubiquity of mass and targeted communication – has greatly facilitated public discourse. However, technology has also played a role in the degradation of public discourse: exaggerating differences in political opinion; disseminating extreme content to a very wide audience; and, facilitating those who wish to sow division and hatred. A number of reports have documented the rise of ‘hate speech’ on social media, including anti-immigrant or anti-refugee language, racist abuse, or anti-Muslim comments.⁶

These problems, and the murder of the Member of Parliament (MP) Jo Cox by a right-wing extremist in June 2016,⁷ have prompted a renewed interest in the challenge of balancing freedom of expression and the protection of robust social and political discourse with the need to promote respect for the dignity and autonomy of others. They have also raised serious questions about how to address the potential for violent action

from those holding extremist or fixated views. This has led to calls to reform the current legal landscape, including, in particular, in order to address ‘hate speech’ and other issues on social media (such as online harassment). Whilst much has recently been said on the issue, little concrete action has been proposed.

ARTICLE 19 finds that UK legislation contains robust guarantees for both the right to freedom of expression and the right to equality, and a range of mechanisms by which ‘hate speech’ can be addressed under English Law. Three principle areas are covered: criminal restrictions, civil actions, and the regulatory environment. However, the applicable legislation does not necessarily fully comply with international freedom of expression standards.

This report therefore examines the compliance of the applicable legal framework on ‘hate speech’ in the UK, in particular in England and Wales,^{*} with international human rights standards and offers recommendations for improvement.⁸ It does not set out to examine in any detail the incidence of ‘hate speech,’ or how ‘hate speech’ has very recently become a political issue in the UK.

The report is part of a broader project by ARTICLE 19 in six EU countries (Austria, Germany, Hungary, Italy, Poland, and the United Kingdom) to identify commonalities and differences in national approaches to ‘hate speech,’ specifically in the media, and to recommend good practices for replication, as well as concerns to be addressed.

International human rights standards

In this report, the review of the legal framework on ‘hate speech’ in the UK (England and Wales) is informed by international human rights law and standards, in particular regarding the mutually interdependent and reinforcing rights to freedom of expression and equality.

The right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR)⁹ and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR).¹⁰

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive, or impart information or ideas of any kind, regardless of frontiers, through any media of a person’s choice. The United Nations (UN) Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States’ compliance with the ICCPR, has affirmed the scope extends to the expression of opinions and ideas that others may find deeply offensive,¹¹ and this may encompass discriminatory expression.

While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19(3) of the ICCPR, provided that the limitation is:

- **Provided for by law**, so any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly;
- **In pursuit of a legitimate aim**, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (*ordre public*), or of public health or morals; or
- **Necessary in a democratic society**, requiring the State to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.¹²

Thus, any limitation imposed by the State on the right to freedom of expression, including limiting ‘hate speech’, must conform to the strict requirements of this three-part test. Further, Article 20(2) of the ICCPR provides that any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence must be prohibited by law (see overleaf).

At the European level, Article 10 of the European Convention on Human Rights (European Convention)¹³ protects the right to freedom of expression in similar terms to Article 19 of the ICCPR, with permissible limitations set out in Article 10(2).¹⁴ Within the EU, the right to freedom of expression and information is guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union.

The right to equality

The right to equality and non-discrimination is provided in Articles 1, 2, and 7 of the UDHR.¹⁵ These guarantees are given legal force in Articles 2(1) and 26 of the ICCPR, obliging States to guarantee equality in the enjoyment of human rights, including the right to freedom of expression and equal protection of the law.

At the European level, the European Convention prohibits discrimination in Article 14 and, more broadly, in Protocol No. 12.

Limitations on 'hate speech'

While 'hate speech' has no definition under international human rights law, the expression of hatred towards an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response international human rights law requires from States:¹⁶

- Severe forms of 'hate speech' that international law *requires* States to prohibit, including through criminal, civil, and administrative measures, under both international criminal law and Article 20(2) of the ICCPR;
- Other forms of 'hate speech' that States *may* prohibit to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias-motivated threats or harassment; or
- 'Hate speech' that is lawful and should therefore be protected from restriction under Article 19(3) of the ICCPR, but which nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State.

Obligation to prohibit

Article 20(2) of the ICCPR obliges States to prohibit by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". In General Comment No. 34, the HR Committee stressed that while States are *required* to prohibit such expression, these limitations must nevertheless meet the strict conditions set out in Article 19(3).¹⁷

The Rabat Plan of Action,¹⁸ adopted by experts following a series of consultations convened by the UN Office of the High Commissioner for Human Rights (OHCHR), advances authoritative conclusions and recommendations for the implementation of Article 20(2) of the ICCPR.¹⁹

- **Incitement.** Prohibitions should only focus on the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence, rather than the advocacy of hatred without regard to its tendency to incite action by the audience against a protected group.

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- **Six-part threshold test.** To assist in judicial assessments of whether a speaker intends and is capable of having the effect of inciting their audience to violent or discriminatory action through the advocacy of discriminatory hatred, six factors should be considered:
 - **Context:** the expression should be considered within the political, economic, and social context prevalent at the time it was communicated, for example the existence or history of conflict, existence or history of institutionalised discrimination, the legal framework, and the media landscape;
 - **Identity of the speaker:** the position of the speaker as it relates to their authority or influence over their audience, in particular if they are a politician, public official, religious or community leader;
 - **Intent** of the speaker to engage in advocacy to hatred; intent to target a protected group on the basis of a protected characteristic, and knowledge that their conduct will likely incite the audience to discrimination, hostility, or violence;
 - **Content of the expression:** what was said, including the form and the style of the expression, and what the audience understood by this;
 - **Extent and magnitude of the expression:** the public nature of the expression, the means of the expression, and the intensity or magnitude of the expression in terms of its frequency or volume; and
 - **Likelihood of harm occurring, including its imminence:** there must be a reasonable probability of discrimination, hostility, or violence occurring as a direct consequence of the incitement.
 - **Protected characteristics.** States' obligations to protect the right to equality more broadly, with an open-ended list of protected characteristics, supports an expansive interpretation of the limited protected characteristics in Article 20(2) of the ICCPR to provide equal protection to other individuals and groups who may similarly be targeted for discrimination or violence on the basis of other recognised protected characteristics.
 - **Proportionate sanctions.** The term "prohibit by law" does not mean criminalisation; the HR Committee has said it only requires States to "provide appropriate sanctions" in cases of incitement.²⁰ Civil and administrative penalties will in many cases be most appropriate, with criminal sanctions an extreme measure of last resort.

The Committee on the Elimination of all forms of Racial Discrimination (the CERD Committee) has also based their guidance for respecting the obligation to prohibit certain forms of expression under Article 4 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) on this test.²¹

At the European level, the European Convention does not contain any *obligation* on States to prohibit any form of expression, as under Article 20(2) of the ICCPR. However,

the European Court of Human Rights (European Court) has recognised that certain forms of harmful expression must necessarily be restricted to uphold the objectives of the European Convention as a whole.²² The European Court has also exercised particularly strict supervision in cases where criminal sanctions have been imposed by the State, and in many instances it has found that the imposition of a criminal conviction violated the proportionality principle.²³ Recourse to criminal law should therefore not be seen as the default response to instances of harmful expression if less severe sanctions would achieve the same effect.

At the EU level, the Council's framework decision "on combating certain forms and expressions of racism and xenophobia by means of criminal law"²⁴ requires States to sanction racism and xenophobia through "effective, proportionate and dissuasive criminal penalties". It establishes four categories of incitement to violence or hatred offences that States are required to criminalise with penalties of up to three years. States are afforded the discretion of choosing to punish only conduct which is carried out in "a manner likely to disturb public order" or "which is threatening, abusive, or insulting", implying that limitations on expression not likely to have these negative impacts can legitimately be restricted. These obligations are broader and more severe in the penalties prescribed than the prohibitions in Article 20(2) of the ICCPR, and do not comply with the requirements of Article 19(3) of the ICCPR.²⁵

Permissible limitations

There are forms of 'hate speech' that target an identifiable individual, but that do not necessarily advocate hatred to a broader audience with the purpose of inciting discrimination, hostility, or violence. This includes discriminatory threats of unlawful conduct, discriminatory harassment, and discriminatory assault. These limitations must still be justified under Article 19(3) of the ICCPR.

Lawful expression

Expression may be inflammatory or offensive, but not meet any of the thresholds described above. This expression may be characterised by prejudice and raise concerns over intolerance, but does not meet the threshold of severity at which restrictions on expression are justified. This also includes expression related to the denial of historical events, insult of State symbols or institutions, and other forms of expression that some individuals and groups might find offensive.

This does not preclude States from taking legal and policy measures to tackle the underlying prejudices of which this category of 'hate speech' is symptomatic, or from maximising opportunities for all people, including public officials and institutions, to engage in counter-speech.

Freedom of expression online

International law

At the international level, the UN Human Rights Council (HRC) recognised in 2012 that the “same rights that people have offline must also be protected online”.²⁶ The HR Committee has also made clear that limitations on electronic forms of communication or expression disseminated over the Internet must be justified according to the same criteria as non-electronic or ‘offline’ communications, as set out above.²⁷

While international human rights law places obligations on States to protect, promote, and respect human rights, it is widely recognised that business enterprises also have a responsibility to respect human rights.²⁸ Importantly, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on FOE) has long held that censorship measures should never be delegated to private entities.²⁹ In his June 2016 report to the HRC,³⁰ the Special Rapporteur on FOE enjoined States not to require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extra-legal means. He further recognised that “private intermediaries are typically ill-equipped to make determinations of content illegality”,³¹ and reiterated criticism of notice and take-down frameworks for “incentivising questionable claims and for failing to provide adequate protection for the intermediaries that seek to apply fair and human rights-sensitive standards to content regulation”, i.e. the danger of “self- or over-removal”.³²

The Special Rapporteur on FOE recommended that any demands, requests, and other measures to take down digital content must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under Article 19(3) of the ICCPR.³³

European law

At the EU level, the E-Commerce Directive requires that Member States shield intermediaries from liability for illegal third party content where the intermediary does not have actual knowledge of illegal activity or information and, upon obtaining that knowledge, acts expeditiously to remove or disable access to the content at issue.³⁴ The E-Commerce Directive prohibits Member States from imposing general obligations on intermediaries to monitor activity on their services.³⁵ The regulatory scheme under the E-Commerce Directive has given rise to so-called ‘notice-and-takedown’ procedures, which have been sharply criticised by the special mandates on freedom of expression for their lack of clear legal basis and basic procedural fairness.

The limited shield from liability for intermediaries provided by the E-Commerce Directive has been further undermined by the approach of the European Court. In *Delfi AS v. Estonia*, the Grand Chamber of the European Court found no violation of Article 10 of

the European Convention where a national court imposed civil liability on an online news portal for failure to remove “clearly unlawful” comments posted to the website by an anonymous third party, even without notice being provided.³⁶ A joint dissenting opinion highlighted that this “constructive notice” standard contradicts the requirement of actual notice in Article 14 para 1 of the E-Commerce Directive, necessitating intermediaries to actively monitor all content to avoid liability in relation to specific forms of content, thus additionally contradicting Article 5 of the E-Commerce Directive.³⁷

Decisions subsequent to *Delfi AS* appear to confine the reasoning to cases concerning ‘hate speech’.³⁸ More recently, the European Court rejected as inadmissible a complaint that the domestic courts had failed to protect the applicant’s right to privacy by refusing to hold a non-profit association liable for defamatory comments posted to their website by a third party. The Court noted that the comments were not ‘hate speech’ or direct threats and were removed upon notice (though a formal notice-and-takedown procedure was not in place).³⁹ The position and resources of the intermediary were also relevant factors.⁴⁰

Lastly, the 2016 European Commission’s Code of Conduct on Countering Illegal Hate Speech,⁴¹ developed in collaboration with some of the major information technology companies, constitutes a (non-legally binding) commitment to remove “illegal hate speech”, defined on the basis of the Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law,⁴² within 24 hours. While the Code of Conduct is ostensibly voluntary, it is part of a concerning trend whereby States (including through intergovernmental organisations) are increasing pressure on private actors to engage in censorship of content without any independent adjudication on the legality of the content at issue.⁴³ In short, the law on intermediary liability remains legally uncertain in Europe, with tensions between the European Court’s jurisprudence and the protections of the E-Commerce Directive, as well as the guidance of the international freedom of expression mandates.

Basic legal guarantees in national law

An enabling environment for freedom of expression and the right to equality

Legal protection of the right to freedom of expression

The UK has no written constitution. Until the coming into force of the Human Rights Act 1998⁴⁴ the only constitutional protection afforded to freedom of expression was to be found in the Bill of Rights (1689), but the protection applied only to MPs.⁴⁵ A right to free speech (or expression) was not generally recognised by the common law. However, restrictions on freedom of expression (including on the basis of 'hate speech') was provided by a relatively disparate group of common law and legislative provisions.⁴⁶

Those restrictive measures have a long history. The crime of *scandalum magnatum* – a form of criminal defamation protecting only the powerful⁴⁷ – dates back to 1275. Seditious libel and blasphemy laws were extensively used throughout the Middle Ages and beyond to restrict dissent, and printing and public performances have been subject to state regulation for many centuries.⁴⁸ The crime of obscene libel emerged in the 18th century, and a number of Obscene Publications Acts have followed.⁴⁹

In 2000, the right to freedom of expression was explicitly recognised by the Human Rights Act. Under this legislation, the right to freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights (European Convention), is protected by law in the UK. Courts are under an obligation to interpret legislation in a manner compatible with the right, if possible.⁵⁰ Moreover, it is unlawful for a public authority to act in a manner that is incompatible with this legal protection.⁵¹

Moreover, the right to freedom of expression is provided a statutory guarantee in educational settings. The Education (No. 2) Act 1986 provides that every individual and body of persons concerned in the governance of any relevant educational establishment shall take such steps as are reasonably practicable to ensure that freedom of speech, within the law, is secured for those using and connected to the educational establishment.⁵² This includes a duty to ensure that the use of premises is not denied based upon the beliefs, views, or policy objectives of any person seeking to use them. It also requires each governing body to keep (and keep up to date) a relevant code of practice, and to enforce this code.⁵³ In only two recorded cases under these provisions,⁵⁴ the courts have given educational establishments a reasonably wide margin in which to determine the issue of reasonable practicability. Recently, the issue of freedom of expression in educational settings, particularly in tertiary education, has been the subject of particular scrutiny and debate.⁵⁵

Legal protection of the right to equality

The universal legal protection of individuals against 'hate speech' in the UK did not emerge until the latter part of the 20th century. Harold Wilson's Labour governments of the 1960s and 1970s oversaw an extensive and radical programme of equality legislation, including the Race Relations Act 1965, the Sex Discrimination Act 1975, and the more comprehensive Race Relations Act of 1976.⁵⁶ It was not until 1995 that a Disability Discrimination Act was passed, and the UK's anti-discrimination laws remain a patchwork to this day. What now unifies them into a workable canon is the Human Rights Act 1998 and the requirement that UK laws must now be consistent with the more cohesive body of rights and case law of the European Convention. It remains the case, however, that domestic laws governing discrimination on the grounds of protected characteristics are an unwieldy and opaque tangle of primary, secondary, and European legislation.

A step towards the codification of these laws was taken by way of the Equality Act 2010, which seeks to bring into one piece of primary legislation protections based on the protected characteristics of age, disability, gender identity, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. The Equality Act also created the Public Sector Equality Duty (PSED):⁵⁷ a duty on public authorities to consider how their policies and decisions affect those with protected characteristics. The PSED applies to the Police and to the Crown Prosecution Service (CPS), and therefore has direct relevance to the issue of 'hate speech,' in that decisions made by those bodies in relation to crimes perpetrated on the basis of a protected characteristic must be made with the duty in mind.⁵⁸

Prohibitions of ‘hate speech’ in criminal law

English criminal law is not governed by a single overarching statute or set of governing statutes such as a penal code. It is made up of disparate statutory (Acts of Parliament and subordinate legislation) and common law (conventional but unwritten rules and laws governed by judicial precedent) provisions.

For some years now, the criminal law has been trying to grapple with hate crime. It has done so by the creation of some specific, statutory ‘hate crime’ offences, such as racist chanting at football matches or incitement to hatred based upon a protected characteristic, and by provisions that aggravate certain primary offences, where those offences involve targeting one or more protected characteristic.

Criminal provisions directly restricting ‘hate speech’

Those criminal offences most likely to involve ‘hate speech’ include the following offences.

- **Stirring up racial hatred:** According to Section 18 of the Public Order Act 1986,⁵⁹ “a person who uses threatening, abusive, or insulting words or behaviour, or displays any written material which is threatening, abusive, or insulting, is guilty of an offence if: a) he intends to thereby stir up racial hatred, or b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.”⁶⁰ The offence can include such things as making a speech, displaying a racist poster, publishing written material, performing a play, or broadcasting something in the media. It must first be proved that the conduct is threatening, abusive, or insulting, before going on to consider whether the accused either intended to stir up racial hatred, or made that outcome more likely. ‘Racial hatred’ is defined as hatred against a group of persons by reference to “colour, race, nationality (including citizenship), or ethnic or national origins.”⁶¹

In its guidance notes on prosecuting incitement crimes, the CPS highlights the importance of freedom of expression⁶² as well as the detrimental effect of ‘hate speech’ on individuals and society.⁶³ It notes that ‘hatred’ is a very strong emotion and that “stirring up racial tension, opposition, even hostility may not necessarily be enough to amount to an offence.”⁶⁴ In the absence of evidence of intention, or evidence from which the intention can be inferred, the prosecution must assess what ‘likely’ means; it must mean more than merely possible.

These provisions have been applied to ‘hate speech’ cases, for example in the *R v Umran Javed and Others* case. The case concerned a demonstration on 3 February 2006 in Central London in reaction to the publishing of cartoons depicting the Prophet Mohammed in various European countries, although not in the UK.⁶⁵ During

the demonstration, violent slogans were chanted and broadcast from a speaker mounted on a vehicle.⁶⁶ Three men who led the chanting were convicted of varying degrees of criminal responsibility under Section 18 of the Public Order Act 1986, as well as Section 4 of the Offences Against the Person Act 1861. The Court of Appeal⁶⁷ reduced their sentences considerably (from six years to four years, and from four years to 30 months), stating:

The videos that we have seen did not portray the scene [of frenzy...]. While at times the chanting was loud and enthusiastic, the demeanour of the demonstrators did not appear to be violent or threatening. There was a considerable police presence. The police decided that to intervene might provoke disorder and this evaluation may well have been correct. Having said this, the demonstration took place only six months after the London bombings of July 7 and, at times, both these, the Madrid bombings and the attack of September 11 were the subject of approbatory chanting. The exhortations on some of the placards and the subject matter of the chanting were offensive in the extreme. They were a demonstration of and an incitement to racial hatred.⁶⁸

- **Hatred on the grounds of religion or sexual orientation:** Part 3A of the Public Order Act 1986⁶⁹ sets out the crime of incitement to hatred on the grounds of religion or sexual orientation, which is committed if a person uses threatening words or behaviour, or displays any written material which is threatening, with the intention to stir up religious hatred or hatred on the grounds of sexual orientation. The introduction of these provisions was highly controversial; as a result, they were ultimately watered down, although they had originally been intended to mirror the provisions on incitement to racial hatred.⁷⁰

The provisions dealing with religious hatred only encompass threatening conduct (as opposed to incitement to racial hatred, which also encompasses abusive or insulting conduct), and only encompass conduct *intended* by the accused to stir up religious hatred (rather than additionally conduct *likely* to do so). No offence is committed if the conduct is committed inside a dwelling and is not witnessed by other persons in that or another dwelling, and it is a defence if the accused proves that he was inside a dwelling and had no reason to believe his conduct would be witnessed by anyone outside the dwelling.

The Public Order Act specifically prohibits the publishing and/or distribution of written material, recordings, etc., which is 'inflammatory,' in that it is threatening and intended to stir up religious hatred.

Specific reference is made to freedom of expression in Section 29J of the Public Order Act, which states that this part of the Act should not be read or 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".

Proceedings may only be brought by or with the consent of the Attorney General. All of the incitement offences in the Public Order Act 1986 are supplemented by associated offences of the distribution, broadcasting, performance, public display, and possession of inflammatory material.

Interpretation of criminal provisions directly restricting 'hate speech'

The CPS groups a number of potential offences (as per the above, in addition to a number of offences outlined in the subsequent section) into what it calls “racist or religious incidents”/“racist or religious hate crimes.”⁷¹ The CPS defines a ‘racist incident’ in line with the statement from the Stephen Lawrence Inquiry Report as “any incident which is perceived to be racist by the victim or any other person.”⁷² Applying that to the definition of a religious incident, a religious incident is “any incident which is believed to be motivated because of a person’s religion, by the victim or any other person.”⁷³ It should be noted that not all racist or religious incidents are crimes, and even those that are assessed as such may not be prosecuted because of a lack of evidence. The term ‘hatred on the grounds of sexual orientation’ is defined in the new section 29AB of the Public Order Act 1986 and is expressly limited to orientation towards persons of the same sex, the opposite sex, or both. It does not extend to orientation based on, for example, a preference for particular sexual acts or preferences.⁷⁴

Some offences have a race or religion element as a central aspect of the offence, whereas other offences may be only aggravated by the presence of a race or religion aspect. This latter group includes offences such as assault, wounding and damage, and, potentially of greater relevance to freedom of expression, harassment and public order offences such as causing people to fear violence. If proven, the presence of the aggravating factors will result in more severe sentences being handed down than would be given for the simple offences. A prosecutor must prove that the accused either demonstrated, or was motivated by, hostility to the victim based upon the victim’s belonging (or being perceived as belonging) to a particular racial or religious group.

There are also specific and detailed CPS guidelines on prosecuting cases involving communications sent via social media.⁷⁵ Importantly, the CPS provides further guidance⁷⁶ on the implementation of these provisions in practice. In its guidance on the application of **racial hatred provisions**, it specifies the following important aspects:

- **The nature of the offence:** The first thing that must be proven is “whether the behaviour is threatening, abusive or insulting” and “these words are given their normal meaning.” It also notes that the courts have ruled that behaviour can be “annoying, rude or even offensive without necessarily being insulting.”⁷⁷
- **Intent:** The CPS should consider whether the offender “intended to stir up racial hatred or whether racial hatred was likely to result.”⁷⁸ As noted above, “stirring up racial tension, opposition, even hostility may not necessarily be enough to amount to an offence.” The guidance notes that the intent to cause racial hatred is often obvious (e.g. “by making a public speech condemning a group of people because

of their race and deliberately encouraging others to turn against them and perhaps commit acts of violence”).⁷⁹ However, if the evidence is not clear, the CPS might “rely upon people’s actions in order to infer their intention.”⁸⁰

- **Context and likelihood of the hatred:** The guidance also notes that if it is not possible to prove intent to stir up racial hatred, the prosecution must show that “in all the circumstances, hatred was *likely* to be stirred up.”⁸¹ It specifies that ‘likely’ does not mean that racial hatred was simply possible, but the prosecution must examine the context of any behaviour very carefully, in particular the likely audience, as this will be highly relevant.⁸²

As for **religious hatred**, this is more difficult to prosecute when compared to racial hatred (for which the standard is already high) since the criminal offence only covers threatening words or behaviour (not insults or abuse) and only covers such words or behaviour that are *intended* to stir up religious hatred (not behaviour that is *likely* to stir up hatred).

There are several issues with these provisions in terms of their compliance with Article 20(2) of the ICCPR:

- **Prohibited conduct:** The provisions prohibit types of conduct that go far beyond those specified in Article 20(2) of the ICCPR (advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence) as requiring criminalisation. At the same time, the provisions fail to prohibit incitement to discrimination.
- The **protected characteristics** are limited only to those on race, religion, and sexual orientation. Other grounds excluded from protection are age and disability, among others.
- The provisions do not explicitly require the **intent** of the perpetrator to be proven. The CPS guidelines indicate that intent is not required if “racial hatred was likely to result.”

Criminal provisions indirectly restricting ‘hate speech’

There are a number of other offences that can be applied against ‘hate speech’, including:

- **Threats:** A threat to kill – however communicated – is an offence contrary to Section 16 of the Offences Against the Person Act 1861.⁸³ Threats short of a threat to kill are more likely to be dealt with as harassment or under the Malicious Communications Act 1988, the Communications Act 2003, or as public order offences (see overleaf). By Section 4 of the 1861 Act, it is also an offence to solicit, encourage, persuade or endeavour to persuade, or propose to any person, to murder another person.

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- **Harassment:** By Section 1 of the Protection from Harassment Act 1997,⁸⁴ a person must not pursue a course of conduct which amounts to harassment of another person and which he knows, or ought to know, amounts to harassment of that person. ‘Harassment’ is not defined, save that it is said to “include alarming the person or causing the person distress.”⁸⁵ “A course of conduct” is conduct on more than one occasion⁸⁶ and must not be two distant incidents;⁸⁷ however, it has been held (in the civil context) that where publication takes place online, a single publication may constitute harassment where it is likely to come to the attention of the victim on more than one occasion.⁸⁸ Harassment is both a crime (by section 2) and a civil cause of action (by Section 3). Additionally, there is a statutory offence of stalking (Section 2A) which has a more severe sentence (51 weeks) than ordinary harassment.⁸⁹ Harassment is punishable on conviction by up to six months imprisonment,⁹⁰ or up to two years if it is racially or religiously aggravated.⁹¹ Harassment may be committed by publication,⁹² including in the media.⁹³ For example, in 2016, Saul Nyland was sentenced to six weeks in prison after pleading guilty to two counts of harassment at Liverpool Magistrates’ Court. He used social media to harass a victim on the basis of disability.⁹⁴
 - **Sections 4 and 5 of the Public Order Act 1986**⁹⁵ create the offence of using threatening, abusive, or insulting words or behaviour that cause, or are likely to cause, another person harassment, alarm, or distress. Section 5 creates the similar offence of displaying any writing, sign, or other visible representation which is threatening, abusive, or insulting within the hearing or sight of a person likely to be caused harassment, alarm, or distress, whether in a public or a private place. It is a defence to prove that the accused had no reason to believe that any such person was likely to be caused harassment, alarm, or distress, or that his conduct was reasonable.⁹⁶ Furthermore, a person is guilty of an offence under section 5 only if he intends the writing or sign or other visible representation to be threatening, abusive, or insulting.⁹⁷ Section 5 was applied on ‘hate speech’ in so called *Norwood case*. Following the terrorist attacks of 11 September 2001, Mr Norwood put a poster in his window which showed the Twin Towers burning with the following caption: ‘Islam out of Britain – Protect the British People.’ He was convicted of an aggravated public order offence under section 5, and his conviction was upheld by the European Court which agreed with the national court assessment that the poster was “a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism.”⁹⁸
 - Under Section 1 of **Malicious Communications Act 1988**, it is an offence to send to another person any message, letter, email, photograph, or recording which is indecent, grossly offensive, false and known or believed to be false, or which conveys a threat. It is a defence to show that any threat was to reinforce a demand and was reasonable. A person convicted of such an offence may be imprisoned for up to two years.⁹⁹
 - Under Section 127 of **Communications Act 2003**, it is an offence to make improper use of a public electronic communications network, such as by sending grossly offensive, indecent obscene, menacing, or annoying phone calls, emails, or other electronic communications.¹⁰⁰

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- The offence of **racialist chanting at football matches** prohibits to engage or take part in chanting of an indecent or racist nature at a designated football match.¹⁰¹ 'Chanting' means the repeated uttering of any words or sounds. 'Of a racist nature' means consisting of or including matter which is threatening, abusive, or insulting to a person by reason of his colour, race, nationality, or ethnicity.
 - **Racially or religiously aggravated offences:** The Crime and Disorder Act 1998 created racially or religiously aggravated offences in cases of assault (section 29), criminal damage (section 30), public order offences (section 31), and harassment (section 32). An offence is racially or religiously aggravated if at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim hostility based on the victim's membership (or presumed membership) of a racial or religious group, or the offence is motivated in whole or part by hostility towards members of a racial or religious group based on their membership of that group. A 'racial group' for these purposes is any group of people defined by reference to their race, colour, nationality (including citizenship), ethnic or national origins.¹⁰² A 'religious group' is any group of people defined by reference to religious belief, or lack thereof.

Section 146 of the Criminal Justice Act 2003 provides for increased sentences for offences which are aggravated by hostility towards the victim based upon sexual orientation, disability, or transgender identity. In such cases, the court must treat the fact that the offence was committed in such manner as an aggravating feature for the purpose of sentencing, and state in open court that the crime was aggravated by hostility towards the relevant protected characteristic(s).

As for the application of these provision in 'hate speech' cases, for example, in December 2016 Joshua Bonehill-Paine was convicted by a jury of the racially aggravated criminal harassment of Luciana Berger MP.¹⁰³ The harassment engaged in by Mr Bonehill-Paine involved an extensive campaign of anti-Semitic online abuse waged against Ms Berger. Mr Bonehill-Paine had sought to argue at the trial that he was legitimately exercising his right of free speech, but this was roundly rejected in the judge's sentencing remarks.¹⁰⁴

- Additionally, section 2 of the Terrorism Act 2006¹⁰⁵ created an offence of the dissemination of terrorist material, either intentionally or recklessly. There have been a number of successful prosecutions under section 2 against individuals. The Terrorism Act 2006 includes a vague and wide definition of 'terrorism', which has led to the misuse of the Act to stifle legitimate political and social protest.

Interpretation of criminal provisions indirectly restricting 'hate speech'

In relation to any crime (including all those set out above), prosecutors may only start a prosecution if a case satisfies a two-stage test:

- At the first stage a case must pass the evidential test; there must be sufficient and sufficiently cogent evidence to provide a realistic prospect of conviction of the

offence under consideration. The test is satisfied if an objective, impartial, and reasonable jury, bench of magistrates, or judge sitting alone would – based on the evidence available to the prosecutor and what is known to them about the defence’s likely case – be more likely to convict than acquit.

- If, but only if, the evidential test is passed, a prosecutor must go on to consider whether a prosecution is required in the public interest. The public interest stage has particular significance in cases involving hate speech, and prosecutors are required to “have regard to whether the offence was motivated by any form of discrimination against the victim’s ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender identity; or the suspect demonstrated hostility towards the victim based on any of those characteristics. The presence of any such motivation or hostility will mean that it is more likely that prosecution is required.”¹⁰⁶

The CPS keeps a record of charging decisions and has published annual reports since 1999.¹⁰⁷

Efforts to amend existing legislation on ‘hate speech’

In 2016, the Home Affairs Parliamentary Select Committee launched an inquiry into ‘Hate crime and its violent consequences.’¹⁰⁸ The terms of reference include *inter alia*:

- The effectiveness of current legislation and law enforcement policies for preventing and prosecuting hate crime and its associated violence;
- The barriers that prevent individuals from reporting hate crime, and measures to improve reporting rates;
- The role of social media companies and other online platforms in helping to identify online sources of hate crime and to prevent online hate incidents from escalating;
- The role of the voluntary sector, community representatives, and other frontline organisations in challenging attitudes that underpin hate crime;
- The type, extent, and effectiveness of the support that is available to victims and their families and how it might be improved.

In its Fourteenth Report,¹⁰⁹ the Committee stated, in relation to the adequacy of the current criminal legislation, that witnesses found the ‘hate speech’ legislation to be “out of date and vague on the sort of language or behaviour that is illegal” and “incredibly unclear on where the line on criminality lay.”¹¹⁰ Whilst noting the guidance issued by the CPS, the Committee also noted that the Law Commission has said that such guidelines are “no substitute for clearer, statutory provisions.”¹¹¹ The Commission cited evidence to the Committee that the current law lacks legal certainty.

The Committee also concluded that most legal provisions in this field predate the Internet and that “the Government should review the entire legislative framework governing

online hate speech, harassment and extremism and ensure that the law is up to date,” while maintaining freedom of expression and open public debate in a democracy.¹¹² The Committee’s inquiry is ongoing and at the stage of receiving evidence.

Measures against ‘hate speech’ in administrative law

Except for regulatory framework on the media (see section on media regulation on page 32), there are no ‘hate speech’ offences under English law that are recognisable as ‘administrative.’

The regulatory landscape generally applies only to corporate bodies providing particular kinds of media services. The extent of an individual’s liability for anything involving ‘hate speech’ is demarcated either by the criminal law (as set out previously) in which case sanctions imposed by the state include imprisonment, fines, and/or injunctions restraining or requiring particular conduct; or by the civil law (as set out overleaf) in which private parties may seek from a court redress as between themselves, and a court may order the payment of damages between the parties, and in certain cases may impose injunctions to regulate the parties’ conduct towards each other.

Civil actions against ‘hate speech’

There are a number of civil causes of action that may apply in cases involving ‘hate speech’ and/or which might give rise to a remedy for a victim of ‘hate speech’ depending on the circumstances.

- **Harassment:** The Protection from Harassment Act 1997¹¹³ establishes a civil cause of action. Harassment is conduct that is: targeted at an individual;¹¹⁴ calculated and/or likely to cause alarm and/or distress; and in all the circumstances is oppressive and unacceptable.¹¹⁵ A person must not commit a course of conduct amounting to harassment which s/he knows or ought to know amounts to harassment, where a course of conduct involves conduct on more than one occasion.¹¹⁶ Doing so renders him/her liable to an injunction and civil damages for the statutory tort of harassment.¹¹⁷ The standard of conduct capable of engaging the statutory tort of harassment is the same as that capable of giving rise to criminal liability.¹¹⁸

There is no explicit public interest defence; however, the prohibition against harassment does not apply in relation to certain conduct, *inter alia* if the person who pursued it shows that in the particular circumstances the pursuit of the course of conduct was reasonable.¹¹⁹

Harassment conduct includes speech.¹²⁰ For example, in 2001 *Thomas v News Group Newspapers*¹²¹ the Court of Appeal allowed a claim to proceed based upon publications about the claimant in a tabloid newspaper, *The Sun*. *The Sun* had identified the claimant as the author of complaints against police officers, published her name and place of work, and repeatedly made reference to the fact that she was black. She claimed to have received hate mail. The parties in the case agreed that: “the publication of press articles calculated to incite racial hatred of an individual provides an example of conduct which is capable of amounting to harassment under the 1997 Act.”¹²²

There has not been a successful claim in harassment against a large media defendant since *Thomas v News Group Newspapers* case. In *Trimmingham v Associated Newspapers Ltd* case¹²³ the claimant failed in her claim against Associated Newspapers over a series of articles which made repeated reference to her sexuality and a number of comments elicited by those articles on the defendant’s website. The court found that although the material sued upon contained references to Ms Trimmingham’s clothes and appearance which were insulting and offensive, the defendant ought not to have known that the language used was sufficiently distressing to the claimant as to amount to harassment of her, and the defendant’s actions were not so unreasonable as to attract censure.

Moreover, employers may be vicariously liable for harassment carried out by their employees.¹²⁴ An employer will be liable for the wrongful conduct of an employee where such conduct is within ‘the field of activities’ assigned to the employee.¹²⁵ Such conduct might be targeted at fellow employees or at third parties. Thus in any case where ‘hate speech’ is committed in the course of employment, there may be recourse to the employer for a financial remedy.

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- **Privacy/data protection causes of action:** The emerging tort of misuse of private information and the statutory mechanism by which personal and sensitive personal data are governed¹²⁶ may in certain circumstances engage issues of ‘hate speech’ - although only collaterally. This tort is now¹²⁷ the primary cause of action where a claimant complains of invasion of privacy, or ‘intrusion’ upon his or her personal autonomy. Damages may be awarded both for distress and for loss of control of the claimant’s private information.¹²⁸ Most of the leading cases in misuse of private information involve the media, mostly the tabloid press, publishing or intending to publish private information about an individual or individuals. Whilst such information may well include details of protected characteristics, or may derive its salaciousness and commercial interest from such characteristics (for example, the information that a celebrity is gay is undoubtedly private, but until recently was routinely ‘revealed’ in the national press), this is collateral to the tort.

The same principles apply to the statutory data protection regime. It is to be noted that ‘sensitive personal data’ - which is given enhanced protection in the Data Protection Act 1998¹²⁹ - specifically includes information pertaining to many aspects of protected characteristics.¹³⁰ As held by the High Court¹³¹ and confirmed by the Court of Appeal,¹³² damages for breaches of the Data Protection Act 1998 include damages for distress. Thus a publication which unlawfully deploys sensitive personal data in a manner recognisable as ‘hate speech’ may therefore be liable to the data subject in damages, including damages for distress, and the fact that the publication has amounted to ‘hate speech’ would be likely to aggravate such damages. However, as with the tort of misuse of private information, the issue of ‘hate speech’ is collateral to the cause of action. In both cases (misuse of private information and the Data Protection Act 1998 regime), media defendants may seek to rely upon public interest defences.

- **Employment Law:** Employees are in some circumstances entitled to protection from ‘hate speech’ by fellow employees, and the law recognises that employers may sanction workers – including by dismissing them – who engage in ‘hate speech’ against their colleagues and/or third parties.

In addition to the issues of work-place harassment (see above), ‘hate speech’ based upon a protected characteristic and targeted at one employee by another is very likely to constitute direct discrimination and give rise to a remedy under the Equalities Act 2010.¹³³ The Act effectively creates a duty upon employers to reasonably prevent such conduct, for example by having clear policies outlawing discriminatory conduct and training where necessary. The protected characteristics include age, disability, gender reassignment, marriage and civil partnership, race, sex, and sexual orientation. The Act also prohibits harassment¹³⁴ and/or victimisation based upon any protected characteristic.

Actions in the Employment Tribunal against employers by employees claiming direct discrimination and/or harassment based upon a protected characteristic are relatively common, and frequently involve ‘hate speech.’ For example:

- In 2010, a factory manager had made insulting and offensive comments about a disabled and wheelchair-using employee and union representative,

including calling him “Ironside” after a well-known TV detective who also used a wheelchair. The Employment Tribunal rejected the employer’s contention that the claimant had referred to himself by the same nickname, and found that the conduct had violated the claimant’s dignity. He was awarded £6,000.¹³⁵

- In 2011, a delivery driver had witnessed colleagues using racially derogatory comments about others, for example referring to a colleague as a “golliwog.” He himself had been referred to as “black Brian” to distinguish him from a white colleague also called Brian, and he had been told when heard speaking patois to “stop speaking that jungle talk.” Further, his employer had done nothing to discipline another driver who had expressed extreme and violent racist views, despite a complaint. The claimant succeeded in his claim, with the tribunal noting that even though some of the racist conduct was not directed at him, it nevertheless had the effect of violating his dignity.¹³⁶
- **Private actions under the Equality Act 2010:** The protections against discrimination in the Equality Act 2010 extend beyond the employer/employee relationship to providers of some services (including education) and occupiers of some premises. The prohibition under the Act covers instances of discriminatory ‘hate speech’ targeted at service/premises users or potential users. Actions for contraventions of these non-employment provisions (other than the few that create criminal offences) may be brought in the County Court and the remedies are damages and/or a declaration. Such actions are, however, relatively rare.
- The UK also has a tort of **defamation**,¹³⁷ but it is not a particularly apt tort by which to approach ‘hate speech.’ English defamation law is rather narrow; for example,¹³⁸ it cannot be invoked by a class of people, such as an ethnic or religious group. Apparently defamatory statements may include or elicit ‘hate speech’ but may not be a sound basis for an action. For example, derogatory comments made on the basis of a protected characteristic, whilst upsetting to the subject, may not in fact damage his or her reputation so as to meet the required threshold, or to the extent that they are factual, may be true.¹³⁹

In terms of the effectiveness of these provisions to provide redress to victims of ‘hate speech,’ various reports show that victims rarely seek redress under these provisions. This is either due to the lack of “confidence that they will be believed” or out of fear of further retaliation.¹⁴⁰ It has also been documented that there are a number of obstacles for those who wish to pursue those cases in the courts. These include: statutory time limitation under the Equality Act;¹⁴¹ payment of fees to file discrimination cases to employment tribunals;¹⁴² and the lack of skills, experience, advice, and legal aid to the victims.

Efforts to amend existing civil provisions on ‘hate speech’

There have been calls to review the applicable legislation as it applies to social media. For example, on 14 March 2017 the home affairs parliamentary select committee heard evidence from representatives of Google and Facebook.¹⁴³ The Chair of the Committee, Yvette Cooper MP, noted the failure of social media companies to act on “many cases of

vile online hate crimes, harassment or threats” and highlighted that “it cannot be beyond the wit and means of multi-billion dollar social media companies like Twitter, Facebook, and Google to develop ways to better protect users from hatred and abuse. They have a duty to do so. We will be asking the companies about specific cases, why they didn’t act, and what they intend to do about it now.”¹⁴⁴

It is not however clear what, if any, legislative measures Parliament is prepared to take in relation to social media companies and their role in facilitating or disseminating ‘hate speech.’

Role of equality institutions in relation to public discourse and ‘hate speech’

The Equality and Human Rights Commission (the EHRC)¹⁴⁵ plays an important role in countering ‘hate speech’ in the UK.

The EHRC regularly collects general information regarding ‘hate speech,’ including on social media. For instance, on 29 July 2016, it published two reports containing information about hate crime which included sections on ‘hate speech’:

- The first report, *Causes and motivation of hate crime*, included a section on ‘Online (cyber hate) hate crime perpetrators’ analysing amongst other things the characteristic profiles of cyber offenders;¹⁴⁶
- The second report, *Prejudice and unlawful behaviour, exploring levers for change*, referred to trigger events for online hate speech based on incidents reported by TellMAMA, a charity supporting victims of anti-Muslim hate.¹⁴⁷

The EHRC has also issued guidance on the legal framework relating to freedom of expression which includes references to the legal framework in respect of ‘hate speech.’¹⁴⁸ However, the EHRC does not consider that it has any role in the determination of complaints regarding ‘hate speech’:

- It refers complainants who think they may be victims of a crime to the Police or to the Independent Police Complaints Commission or, in Scotland, the Police Investigations and Review Commissioner;¹⁴⁹
- It makes it clear that it is not its role to determine whether in individual cases offensive comments may or may not be protected by Article 10 of the European Convention;¹⁵⁰
- It advertises on its website the online reporting of ‘hate speech’ to various governmental and non-governmental organisations.¹⁵¹

However, the EHRC considers that it may have a “duty to make enquiries” in relation to ‘hate speech’ in individual cases where the facts of a case suggest that a public authority or a body exercising public functions may have committed an unlawful act or may not have complied with the Public Service Equality Duty (PSED).¹⁵² For instance, the EHRC made enquiries regarding the failure by the Police to investigate properly the case of a Gypsy Traveller who had been the victim of online ‘hate speech.’ It found that there was a difference between the Police 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.¹⁵³

The “duty to make enquiries” alluded to by the EHRC appears to be a reference to sections 31 and 32 of the Equality Act, 2006:

- Section 31 provides in essence that the EHRC may assess the extent to which or the manner in which a public authority or body exercising public functions has complied with the PSED;
- Under section 32, the EHRC has the power, if it thinks that a public body has failed to comply with the PSED,¹⁵⁴ to send compliance notices to this body asking amongst others that it provides information for the purposes of assessing compliance with the duty. The EHRC may also serve a notice requiring compliance with the duty or detailing the steps that need to be taken to ensure compliance. If the public body fails to comply with the notice, the EHRC can apply for a court order requiring the public body to comply.

The EHRC could therefore assess compliance with the PSED by public service media (for example, the BBC). However, it does not have discretion to assess compliance with the duty in respect of the provision of content.¹⁵⁵

The EHRC occasionally produces guidance for the media on reporting on certain minorities. For instance, in 2013, the EHRC published guidance entitled *Gypsy Travellers in Scotland - a resource for the media*.¹⁵⁶

Media regulation and ‘hate speech’

Government frameworks on media policy

No overarching policy

The UK government does not have an overarching policy promoting plurality, diversity, and inclusion of minorities in media. The last general policy paper in relation to the government’s media policy dates back to the 2010-2015 period (updated in March 2015). The report, *2010 to 2015 government policy: media and creative industries*, was issued by the Department for Culture, Media and Sport.¹⁵⁷ It did not refer to plurality, diversity, or inclusion of minorities. The current government has not published any general policy paper in relation to its media policy.

However, the UK government occasionally develops *ad hoc* initiatives in this respect. For instance, in July 2014, the Department for Business Innovation and Skills set up a programme to offer internships to 300 people of underrepresented groups in the creative industries, including in broadcasting services.¹⁵⁸ In December 2016, the Department for Culture, Media and Sport announced that it was seeking views on a plan to create a new pilot fund of £60 million *inter alia* to increase plurality in programmes offered by public service media.¹⁵⁹

Office of Communications (Ofcom)

Office of Communications (Ofcom), the regulator for the communications industry, which regulates amongst others broadcast media, has legal obligations to promote plurality, diversity, and inclusion of minorities in the media.

The key piece of legislation governing Ofcom’s role with regard to regulating broadcast media is the Communications Act 2003.¹⁶⁰ The Enterprise Act 2002¹⁶¹ also plays a role in relation to ensuring plurality. Under these Acts, Ofcom is required to comply with several requirements in respect of plurality¹⁶² and diversity and inclusion of minorities.¹⁶³

Ofcom has also issued guidance on diversity for the broadcasting industry, together with the EHRC. For example, in August 2015, Ofcom and the EHRC launched a guide entitled *Thinking outside the box*, which aimed at setting out steps organisations can take to improve fairness and diversity without falling foul of the law (e.g. use of paid internships, of databases that can lawfully identify potential employees from underrepresented groups, of tie break provisions which allow an employer to select the person from an underrepresented group if two candidates are equally qualified).¹⁶⁴ Ofcom has also developed an equality and diversity toolkit on its website for broadcasters.¹⁶⁵

Ofcom is also required to make arrangements for licensees to promote equal opportunities in employment on the basis of gender, race, and disability.¹⁶⁶ Ofcom has therefore developed a *Guidance on arrangements for the promotion of equal opportunities in the broadcasting industry*, which includes a number of minimum requirements for licensees in this area.¹⁶⁷

Public service broadcasting

Public service broadcasters¹⁶⁸ have been assigned purposes which include promoting diversity, including meeting the needs and interests of different audiences and of ensuring “that cultural activity in the United Kingdom, and its diversity, are reflected.”¹⁶⁹ Ofcom issues reports every year assessing whether the public service broadcasting complies with the purposes of public service television broadcasting.¹⁷⁰

In return for providing these public service broadcasting services, the institutions receive certain benefits, predominantly access to terrestrial spectrum (the radio waves that support wireless communication) to broadcast their services, prominence on electronic programme guides on television, and in the BBC’s case, the licence fee.¹⁷¹

From April 2017, the BBC is also regulated by Ofcom. The BBC Royal Charter insists on the purpose of representing diversity. *Inter alia*, it lists amongst the BBC’s public purposes: “to reflect, represent and serve the diverse communities of all of the UK’s nations and regions and, in doing so, support the creative economy across the United Kingdom: the BBC should reflect the diversity of the UK both in its output and services.”¹⁷² The BBC should therefore “accurately and authentically represent and portray the lives of the people of the UK,” [...] “raise awareness of the different cultures and alternative viewpoints that make up its society.”¹⁷³ Additionally, the BBC Agreement, which sits alongside the Charter, insists on plurality and inclusion of minorities. It contains the obligation to reserve programmes for independent production¹⁷⁴ and to provide equal opportunities between men and women, between people of different racial groups and able and disabled people.¹⁷⁵

‘Hate speech’ under media laws

Broadcast media

The key instrument for the regulation of broadcast content is the Ofcom Broadcasting Code (the Broadcasting Code).¹⁷⁶ It applies to broadcasters who are required by the terms of their Ofcom licence to observe the Standards Code and the Fairness Code, which are to be interpreted as references to the Broadcasting Code. Observance of this Code is also required in the case of the BBC in the BBC Agreement¹⁷⁷ and in the case of S4C (the

Welsh public channel), by statute.

Prior to the last update of the Broadcasting Code in May 2016, it only contained rules restricting ‘hate speech’ to the extent it constituted a crime of encouragement or incitement to the commission of a crime¹⁷⁸ or could lead to disorder.¹⁷⁹ Whilst some of the elements of the Rabat six-part threshold test (the ‘Rabat test’) were included in the ‘How to use the Code’ guidance, they were not specifically set out.

The May 2016 Broadcasting Code amended the Code, restricting ‘hate speech’ where it “may not amount to an incitement to crime but is problematic and potentially extremely harmful to audiences.”¹⁸⁰ Section 3 is now entitled ‘Crime, disorder, hatred and abuse’ and contains several additions, some of which reflect the implementation of principles arising out of the Rabat test.

- First, ‘hate speech’ is defined as “all forms of expression which spread, incite, promote or justify hatred based on intolerance on the grounds of disability, ethnicity, gender, gender reassignment, nationality, race, religion, or sexual orientation.”¹⁸¹
- Second, the guidance on contextual factors incorporates some elements of the Rabat test. The guidance provides that significant contextual factors (under Rule 3.1) may include (but are not limited to):
 - The editorial purpose of the programme which refers at least partially to the ‘context’ and ‘extent’ limbs of the Rabat test;
 - The status or position of anyone featured in the material which matches the ‘speaker’ limb of the Rabat test; and/or
 - Whether sufficient challenge is provided to the material which reflects at least in part the ‘content and form’ limb of the Rabat test.
- Third, the Broadcasting Code contains two additional rules which specifically cover restriction of ‘hate speech’ and derogatory treatment when it is unlikely to amount to a crime but is nonetheless potentially in breach of other people’s rights:
 - Rule 3.2 provides that “material which contains hate speech must not be included in television and radio programmes except where it is justified by the context;”
 - Rule 3.3 provides that “material which contains abusive or derogatory treatment of individuals, groups, religions or communities, must not be included in television and radio services except where it is justified by the context.”

The guidance provided on the meaning of ‘context’ under these rules reflects some of the elements of the Rabat Principles. The guidance provides that ‘context’ includes *inter alia*:

- The genre and editorial content of the programme and the likely audience expectations, the service on which the material is broadcast, the likely size

and composition of the potential audience, and their likely expectation, which correspond at least partially to the ‘context’ and ‘extent’ limbs of the Rabat test;

- The extent to which sufficient challenge is provided to any instance of ‘hate speech’ which reflects at least in part the ‘content and form’ limb of the Rabat test; and/or
- The status or position of anyone featured in the material which corresponds to the ‘speaker’ limb of the Rabat test.
- The guidance unsurprisingly does not refer to the intent and likelihood limbs of the Rabat test, as these two limbs are more relevant in the context of criminal behaviour.

The May 2016 Broadcasting Code also includes a section entitled ‘Harm and abuse,’ which already existed under the previous version of the Broadcasting Code and might be of relevance to ‘hate speech.’ The core principle requires “to ensure that generally accepted standards are applied to the content of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material.”¹⁸²

These generally accepted standards include that broadcasters must ensure that material which may cause offence is justified by the context. They must be applied to the contents of programmes so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material.¹⁸³ Material which may cause offence includes discriminatory treatment or language (for example, on the grounds of age, disability, gender, race, religion, belief, and sexual orientation).¹⁸⁴ The guidance on ‘context’ also reflects some of the elements of the Rabat test.

Implementation of ‘hate speech’ provisions on broadcasting

The rules regarding the enforcement of the Broadcasting Code’s provisions relating to the content of programmes are contained in the ‘Procedures for investigating breaches of content standards for television and radio.’¹⁸⁵ Upon completing the procedure, Ofcom publishes all its decision on *Broadcast Bulletin* on Ofcom’s website.¹⁸⁶ In the case of a broadcaster who has seriously, deliberately, repeatedly, or recklessly breached the relevant requirement, Ofcom can impose a number of sanctions, depending on the circumstances of the case.¹⁸⁷

Prior to the entry into force of the May 2016 Broadcasting Code, Ofcom reported a very small number of breaches of ‘hate speech’ provisions (Rule 3.1.). It noted that its first finding of a breach of Rule 3.1 was recorded in 2012, and that between 2012 and January 2016 it had recorded a total of four breaches of Rule 3.1.¹⁸⁸ The four breaches of Rule 3.1 were:¹⁸⁹

- A breach by Radio Asian Fever, a Leeds community radio station, on which a

presenter, Sister Ruby, gave her interpretation of Qur'anic scriptures in relation to the treatment of homosexuals. She stated: "torture them, punish them, beat them and give them mental torture" and "punish them, both physically and mentally... beat them, humiliate them, admonish and curse them and beat them up." Breaches of Rules 2.3 (discriminatory treatment or language), 2.4 (the inclusion of material which condones or glamorises violent, dangerous or seriously antisocial behaviour), and 4.1 (responsibility in religious programmes) were also found;

- A breach by DM Digital, a satellite channel primarily aimed at an Asian audience in the UK, on which an Islamic scholar delivered a live televised lecture from Pakistan in which he stated that all Muslims had a duty to kill anyone who criticises or insults the Prophet Mohammed and also praised the killing of the Punjab governor Salmaan Taseer by his bodyguard Malik Mumtaz Qadri. Breaches of Rules 4.1 (responsibility in religious programmes), 4.2 (religious abuse), 5.4 (licensee's views in programmes), and 5.5 (due impartiality) were also found;
- A breach by Noor TV, a digital satellite television channel broadcasting programmes about Islam in a number of languages, including English, Urdu, and Punjabi, on which a presenter praised particular individuals who had murdered in the name of Islam. He also made various statements in which he said it was acceptable or the duty of a Muslim to murder any individual thought to have shown disrespect to the Prophet Mohammed. A breach of Rule 4.1 (responsibility in religious programmes) was also found;
- A breach by Sangat TV, a digital satellite channel broadcasting religious and general entertainment in English and Punjabi primarily directed towards the Sikh community in the UK, on which eight panellists discussing a violent street attack in London against Lieutenant General Bar, a former Indian army officer who commanded the military operation against the Golden Temple in Amritsar in 1984, made various statements which cumulatively constituted an indirect call to action to members of the Sikh community to take violent action against Lieutenant General Bar and other members of the Indian armed forces who had taken part in the operation.

The small number of findings before the entry into force of the May 2016 Broadcasting Code may be explained by the narrow scope of Rule 3.1, which was the only provision directly dealing with 'hate speech'.

This being said, it seems that, in such cases, Ofcom addressed 'hate speech' under Rules 2.1 (harmful and/or offensive material) and 2.3 (discriminatory treatment or language). This is evidenced by Ofcom's finding of a breach of Rules 2.1 and 2.3 by Peace TV, a channel broadcasting religious and other programming in Urdu from an Islamic perspective to audiences in the UK and internationally, which broadcast a programme of public lectures given by Dr Israr Ahmed, an Islamic scholar who died in 2010, in which he discussed the role and actions of Jewish people through history, and repeatedly portrayed them in overwhelmingly negative and stereotypical terms.¹⁹⁰

Following the entry into force of the May 2016 Code, five breaches of Section 3 of the Code were found. This does not seem to have led to a significant increase in claims thus far, and there remains a very limited number of claims. The five breaches were:

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- Breaches of Rules 3.2 and 3.3 by Kanshi Radio, a satellite radio station that provides speech and music programmes for the Asian community in the UK, which broadcast a song containing frequent repeated examples of violent and sexual imagery and extremely offensive references to the Islamic faith. It portrayed, amongst other examples, a Sikh man describing in very crude and disrespectful terms his having sex with a Muslim woman;¹⁹¹
 - Breaches of Rules 3.1 and 3.2 by Ariana News, a general entertainment channel originating from Afghanistan and broadcast by satellite in the UK, which closed a news item regarding the attack of a train in Germany by an Islamic State supporter with a video where the perpetrator waved a knife, talked about his allegiance to Islamic State, and threatened Germans with slaughter in their own homes;¹⁹²
 - Breaches of Rules 3.1 and 3.2 by Iman FN, a Sheffield-based community radio, which during the month of Ramadan replaced its usual breakfast live show with a series of lectures by Anwar al-Awlaki, an American radical Muslim cleric who was designated a global terrorist by the US Government in 2010. The radio station explained that they obtained the material from YouTube and that, due to time constraints, they had neglected to fully review the material before it was broadcast. On 5 July 2017, Ofcom considered the breaches in this case to be extremely serious and decided to suspend the licence of Iman FM for 21 days.¹⁹³ At the end of this period, Ofcom revoked the licence permanently;¹⁹⁴
 - Breaches of Rules 3.1, 3.2, and 3.3. by Radio Dawn, a community radio in Nottingham and the surrounding area, in relation to the broadcast of devotional vocal music that suggested that violent acts committed by Muslim people against non-Muslim people would bring honour to Islam, as well as offensive references to non-Muslim people;¹⁹⁵
 - Breaches of Rules 3.2 and 3.3 by Radio Ikhlas, a community radio station in the Normanton area of Derby, for broadcasting statements that constituted ‘hatred’ against the Ahmadiyya community. In March 2018, Ofcom found these breaches were very serious and put the radio station’s licensee on notice for the imposition of a statutory sanction.¹⁹⁶

There are no regulations specifically promoting positive standards on reporting on issues affecting minorities and countering ‘hate speech.’ However, Section 5 of the Broadcasting Code contains general rules on accuracy and impartiality in matters of political or industrial controversy and matters relating to current public policy which are applicable to reporting on issues affecting minorities. These rules are enforceable pursuant to the procedure described above.

Furthermore, non-binding guidance has been developed by the Black Members’ Council of the National Union of Journalist (NUJ). The Black Members’ Council drafted race reporting guidelines which have been adopted by the NUJ.¹⁹⁷

There are also several non-governmental initiatives in respect of reporting on issues affecting minorities, including media guides relating to specific minorities in British

society (e.g. *The British Muslim media guide*, which was prepared by the Forum Against Islamophobia & Racism)¹⁹⁸ and studies on media coverage of ethnicity and religion, which include data on the UK (e.g. *Reporting ethnicity and religion*,¹⁹⁹ or *Getting the facts right: Reporting ethnicity and religion*).²⁰⁰

Industry initiatives

Additionally, numerous industry initiatives aim at promoting access to media for minorities. These include, for example:

- The BBC's diversity strategy for 2016 to 2020 which contains objectives such as having a work force at least diverse, if not more so, than any other industry, covering a much wider range of diversity than any other broadcaster, making diversity something that everyone at the BBC understands and all those who make programmes for the BBC support;²⁰¹
- Channel 4's launch of a 360° Charter which contains 30 significant activities worth £5m of investment and covers a wide definition of diversity including BAME,²⁰² disability, LGBT, gender and social mobility.²⁰³ In January 2016, it published a report - *360° Diversity Charter: One Year On* - outlining its plans for 2016 and showing their progress against the 30 initiatives outlined in the original Charter;²⁰⁴
- The Creative Diversity Network (CDN), a forum paid for by its members (BAFTA, the BBC, Channel 4, Channel 5/Viacom, Creative Skillset, PACT, ITN, ITV, Media Trust, S4C, Sky, and Turner Broadcasting), which brings together organisations which employ and/or make programmes across the UK television industry to promote and share good practice in diversity. One of the key initiatives developed by CDN is Project Diamond, an industry wide diversity monitoring system which will provide detailed, consistent, and comprehensive monitoring and reporting of diversity;²⁰⁵
- Sky has set targets for BAME persons to make up to 20% of actors in screen roles, at least one senior internal role in Sky's original entertainment production team, and 20% of writers on all team written shows across all new Sky entertainment productions.²⁰⁶ It also launched a Women in Leadership programme which includes a range of plans to help Sky achieve a better gender balance.²⁰⁷

Media self-regulation and 'hate speech'

Print media in the UK is self-regulated,²⁰⁸ either by one of the two independent regulators - the Independent Monitor of the Press (IMPRESS)²⁰⁹ or the Independent Press Standards Organisation (IPSO)²¹⁰ - or by the media itself (e.g. *Financial Times* and *The Guardian*).

The Royal Charter on self-regulation of the press provides a framework in respect of print media;²¹¹ it established the membership of and the criteria used by an independent

panel, the Press Recognition Panel, to decide whether to recognise a self-regulator.²¹² Pursuant to the Royal Charter, the criteria for recognition include conditions regarding the constitution of the board of the self-regulators. These conditions do not include requirements that minorities be represented.²¹³ Further requirements for the self-regulators seeking recognition are set out in the Royal Charter, none of which relates to diversity or representation of minorities.²¹⁴

There are no figures available demonstrating whether any of the IPSO²¹⁵ or IMPRESS²¹⁶ key bodies are filled by those from a minority background; neither have any internal regulation regarding the representation of minorities on these bodies.

However, to date the reach of the Royal Charter is limited.²¹⁷ IMPRESS is the only regulator that has been found to comply with it, yet IMPRESS does not regulate any national newspaper, as they have refused to join IMPRESS, criticising amongst other things its perceived lack of independence.²¹⁸

Both IMPRESS and IPSO require the publications they regulate to comply with their codes of conduct:

- **The IMPRESS's Standards Code**²¹⁹ includes provisions about accuracy and non-discrimination which may be relevant to the regulation of 'hate speech.' It also contains one provision specifically dealing with 'hate speech,' but only to the extent it constitutes incitement to hatred.
 - Clause 1 of the Standards Code relates to accuracy. These provisions partially address an important concern voiced by stakeholders by requiring that inaccuracies are corrected with due prominence "which should normally be equal prominence."²²⁰
 - Clause 4 relates to discrimination. It requires publishers not to make prejudicial or pejorative reference to a person on the basis of that person's age, disability, mental health, gender reassignment or identity, marital or civil partnership status, pregnancy, race, religion, sex or sexual orientation, or another characteristic that makes that person vulnerable to discrimination. These characteristics must not be referred to unless relevant to the story. Moreover, Clause 4 also introduces an obligation not to incite to hatred.²²¹
- **The IPSO's Editors' Code of Practice (the ECP)** does not contain any provision specifically dealing with 'hate speech.' However, it includes provisions about accuracy²²² and non-discrimination,²²³ which maybe relevant to the regulation of 'hate speech.' These provisions are broadly similar to those of the IMPRESS code, with the exceptions on the provisions on incitement to hatred. Moreover, the ECP does not require the inaccuracies corrected with 'equal prominence' as in the Standards Code, which is a major issue for stakeholders and victims of 'hate speech.' In addition, IPSO has a page of its website dedicated to guidance to journalists and editors; it has thus far developed only one guidance, namely the *Guidance on researching and reporting stories involving transgender individuals*.²²⁴

There are different procedures regarding the enforcement of the code of conduct, depending on whether the relevant publication is regulated by IPSO or IMPRESS:

- IPSO hears complaints²²⁵ of any complainants where the complaint against the publication relates to a significant inaccuracy which has been published on a general point of fact under Clause 1 of the ECP. Where the complaint relates to other clauses of the ECP or the alleged inaccuracy is not on a general point of fact, IPSO can take forward a complaint from anyone directly affected by the article or journalistic conduct or their authorised representative. It also hears complaints from representative groups where the relevant group is in a position to explain (a) how the group it represents has been affected, (b) that the alleged breach is significant, and (c) that the public interest would be served by IPSO considering the complaint. If the Complaints Committee determines that the ECP has been breached, it can require the publication of its upheld adjudication and/or a correction. In cases where the Committee finds that arrangements for upholding standards and compliance were at fault, IPSO may also inform the publisher in writing that further remedial action is required.

Examples of recent complaints relevant to ‘hate speech’ demonstrate that while Clause 1 (accuracy) can be useful in countering ‘hate speech,’ the reach of Clause 12 (discrimination) is limited in that it only prevents pejorative or prejudicial reference to an individual’s race or religion as opposed to that of a group. The following examples where IPSO decided that the adjudication should be published illustrate this point:

- In *Versi v The Sun*, *The Sun* was found to be in breach of Clause 1 by publishing a commentary where it was alleged that “two out of three of those [asylum seekers] elbowing their way to the front of the queue are lying about their age,” where in fact out of 3,472 asylum applications received from those claiming to be children, 933 individuals had their ages checked, and 636 were found to be adults, which represented 18.3 per cent of the total;²²⁶
- In *Muslim Engagement and Development (MEND) v The Sun*, *The Sun* was found to be in breach of Clause 1 by publishing an article relating to a poll it had commissioned, headlined ‘1 in 5 Brit Muslims’ sympathy for jihadis’, and further coverage referring to ‘sympathy’ or ‘support’ for Islamic State and for Jihadi John, when neither the question (which referred to those “who leave the UK to join fighters in Syria”) nor the answers which referred to ‘sympathy’ made reference to IS. In respect of Clause 12, it was noted “in light of the large number of complaints raising concerns under this Clause, however, the Committee took this opportunity to note publicly that Clause 12 prevents pejorative or prejudicial reference “to an individual’s race or religion.” The article under complaint did not include pejorative or prejudicial reference to any individual. The terms of Clause 12 were therefore not engaged;”²²⁷

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- In *Trans Media Watch v The Sun*, *The Sun* was found in breach of Clause 12 by publishing a column reporting on the fact that Emily Brothers was running for MP in the following terms: “Emily Brothers is hoping to become Labour’s first blind transgendered MP. She’ll be standing at the next election in the constituency of Sutton and Cheam. Thing is though: being blind, how did she know she was the wrong sex?” The Committee found that the crude suggestion that Ms Brothers could only have become aware of her gender by seeing its physical manifestations was plainly wrong. It belittled Ms Brothers, her gender identity, and her disability, mocking her for no reason other than these perceived ‘differences.’ The comment did not contain any specific pejorative term, but its meaning was pejorative in relation to characteristics specifically protected by Clause 12. In this case, a representative group, Trans Media Watch, was acting with the consent of Emily Brothers on her behalf.²²⁸
 - In *Perkins v Kentish Gazette*, the *Kentish Gazette* was found in breach of Clause 1 by publishing an article headlined ‘Refugees spark pupil safety fears’ about asylum seekers in Kent, including a sub-headline which read “men in their 20s are lying about [their] age and going to schools,” but the article did not provide any material to corroborate this assertion.²²⁹
 - IMPRESS accepts complaints²³⁰ that a publication breached the Standards Code from individuals personally affected by a potential breach of the Code and by representative groups (e.g. charities or non-government organisations) where the relevant organisation represents a group affected by a potential breach of the Code and there is some public interest in the complaint. Furthermore, where the complaint is a matter of accuracy, third parties, including any individual or group, may bring the complaint before IMPRESS. IMPRESS also has the power to impose appropriate and proportionate sanctions.

Out of adjudications or determinations issued by IMPRESS so far, none of them relate to ‘hate speech’ cases. IMPRESS’s Guidance to Clause 12 (discrimination) makes it clear that the Clause applies only to the treatment of individuals, not groups.

As noted above, so far only the Standards Code partially addresses an important concern voiced by stakeholders on accuracy. Furthermore, stakeholders have made the following suggestions about the improvement of the press regulatory bodies:

- Increasing diversity in the constitution of the regulatory bodies by including members of minorities or other vulnerable groups in these bodies;
- Developing further guidelines on reporting on vulnerable groups;²³¹
- Facilitating the complaint process by providing that the regulator may contact the publication on behalf of the complainant once the complaint is filed during the first stage of the proceedings. Stakeholders highlighted that claims are very often discouraged at the stage when the complainant is required to contact the publication. Publications are often represented by Counsel or solicitors when complainants are unrepresented and are intimidated by letters emanating from

lawyers. IMPRESS and IPSO could thus contact the publication on behalf of the complainant in the same manner as OFCOM contacts the broadcasters.

For completeness, it should be noted that stakeholders have further suggested that rules should be developed that would allow groups of people discriminated against to bring complaints (as opposed to individuals). Ofcom introduced rules to this effect in its May 2016 Code.

Approaches to media convergence

Since 1 January 2016, Ofcom regulates on-demand programme services (ODPS), which includes the on-demand offer of numerous broadcast media it regulates.²³² The relevant rules and guidance are contained in the *Rules and guidance, statutory rules and non-binding guidance for providers of on-demand programme services*.²³³ Rule 10 prohibits “any material likely to incite hatred based on race, sex, religion or nationality.” The scope of this rule is more limited than that of Rules 3.1 to 3.3 in the Broadcasting Code, in that it does not explicitly refer to ‘hate speech’ or discrimination. It is nevertheless broader than the mere prohibition of ‘hate speech’ where it constitutes a crime of encouragement or incitement to the commission of a crime, in that it merely refers to incitement of hatred.

Ofcom has specific procedures for investigating breaches of rules for on-demand programme services. They are broadly similar to the proceedings in respect of broadcast media.

Online audio-visual contents in the online version of print media

IPSO makes it clear that it has jurisdiction to handle complaints regarding online-visual contents on the websites of print media it regulates.²³⁴ IMPRESS does not refer to it.

One question that is yet to be resolved is whether and to what extent audio-visual content on print media websites is covered by the Audio-visual Media Service Directive of 10 March 2010 (the AVMSD)²³⁵ and whether it should therefore be regulated in the same manner as ODPS.

The AVMSD is unclear in this respect, in that, on the one hand, it excludes electronic versions of newspapers and magazines from its scope²³⁶ and, on the other hand, it provides that ‘television like’ services are covered.²³⁷

In 2011, Ofcom quashed a decision of its now defunct co-regulator, the Authority for Television on Demand (ATVOD), that the video section of *The Sun* newspaper website constituted an ODPS.²³⁸ However, a recent decision of the European Court of Justice in Case C-347/14 – *New Media Online GmbH* - could question the approach taken by Ofcom. In this case, the Court found that short videos housed within a subdomain of a newspaper website are comparable to television broadcasting, and that the exclusion of electronic versions of newspapers and magazines from the scope of the directive

should not be interpreted as excluding such media from the directive's scope if they are embedded within a website operated by a publishing company.²³⁹

A new legislative proposal amending the AVMSD was adopted by the European Commission on 25 May 2016 following a consultation process. It is not yet in force and it is unclear whether and/or what effect it will have on regulation of video contents on print media websites in the UK, given the UK's intended exit from the EU.

Regulatory framework of online platforms for the distribution/publication of content

There is no general regulation relating to 'hate speech' on online platforms.²⁴⁰

The definition of 'online platforms' by the European Commission, which was relied on by the House of Lords select committee on European Union 2015-2016 report on *Online platforms and the digital single market* (House of Lords report) refers to "an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups."²⁴¹ This being said, only few types of online platforms covered by this definition distribute or publish content, namely, video-sharing platforms (e.g. YouTube) and social media (e.g. Facebook, LinkedIn, Twitter). The question is therefore whether those online platforms are subject to regulations or regulatory bodies in the UK. There appear to be no regulations applying to these types of online platforms and no examples of media, print, or broadcast regulatory bodies determining 'hate speech' cases against these platforms.

Furthermore, the UK government does not appear to be in favour of statutory regulation in respect of those platforms, as made clear in the House of Lords report; the government's response to the consultation on the AVMSD, where the UK government indicated that it considered the contents of the AVMSD in respect of user protection and prohibition of 'hate speech' and discrimination to be relevant, effective, and fair in their current form;²⁴² and Ofcom's response to the public consultation on 'Media pluralism and democracy,' where it indicated that, in respect of online services, it saw the regulator's role as working collaboratively with stakeholders to develop best practice guides, codes, and self-regulatory approaches.²⁴³

However, the calls for introducing dedicated legislation on content on social media are regularly called for by various politicians, including the Prime Minister. For example:

- In July 2016, Labour MP Anna Turley presented a bill entitled the Malicious Communications (Social Media) Bill 2017 to make provision about offences, penalties, and sentences in relation to communications containing threats transmitted or broadcast using online social media and for connected purposes. The bill has not been approved.²⁴⁴ The bill proposed *inter alia* to create a duty for operators of social media platforms to have in place reasonable means to prevent threatening contents²⁴⁵ from being received by users of their service in the UK when they access the platforms and have not requested the operator to allow them to use the service without filtering of the threatening content.²⁴⁶ The bill suggested that

Ofcom be the regulator of the social media platforms and that it be empowered to impose penalties in case of non-compliance by the social media platforms with their duties.²⁴⁷ Penalties that Ofcom may impose must not exceed whichever the greater - £2,000,000 or 5% of the operator's worldwide turnover.²⁴⁸

- In July 2016, the Home Office issued a report on hate crime, which included tackling online 'hate speech.' It suggested in the first instance a ministerial seminar on 'hate speech' on the Internet, that brings together victims' groups, stakeholders, and industry representatives.²⁴⁹
- In addition, in May 2016, a cross-party campaign, with Facebook's backing, called for contributions on how to reduce misogynist abuse online.²⁵⁰

Further, as for the liability of traditional media actors for hyperlinks, comments of third parties, and comments on the social media page, the approach adopted in the E-Commerce Directive (the ECD)²⁵¹ provides broad liability protection for Intermediary Service Providers. Ofcom has indicated that it supports the preservation of the current liability regime in the ECD with some improvement, in particular the conditions under which hosting intermediaries must take action against unlawful content.²⁵²

However, in a later document specifically discussing 'hate speech,' Ofcom explained that its preference was for online services to be self-regulated and to create and abide by industry codes of best practice. It gave the example of the Statement of Practice for Video-on-Demand by members of the Commercial Broadcasters Association in the UK (an industry body for digital, cable, and satellite broadcasters and on-demand services) which makes a clear set of commitments to providing child protection in line with broadcasting standards by the most popular on-demand services in the UK, and also covers 'hate speech.'²⁵³

Advertising self-regulation

The Advertising Standards Authority (the ASA) is the UK's independent regulator of advertising across all media, including broadcast and print media.

The ASA applies the Advertising Codes, which are written by the Committees of Advertising Practice. There are two key codes applying to advertising: the UK Code of Non-Broadcast Advertising and Direct & Promotional Marketing (the CAP Code), which applies to all non-broadcast media, including advertisement in newspapers; and the UK Code of Broadcast Advertising (the BCAP Code) which applies to broadcast media.

Both Codes contain provisions to minimise the risk of causing harm or serious or widespread offence. However, only the CAP Code specifically refers to protected characteristics:

- Rule 4.1 provides that marketing communications must not contain anything that is likely to cause serious or widespread offence and that particular care must be taken to avoid causing offence on the grounds of race, religion, gender, sexual orientation, disability or age. It makes it clear that compliance will be judged on the context,

medium, audience, product, and prevailing standards;

- Rule 4.4 provides that marketing communications must contain nothing that is likely to condone or encourage violence or anti-social behaviour;
- Rule 4.2 provides that advertisements must not cause serious or widespread offence against generally accepted moral, social, or cultural standards;
- Rule 4.8 provides that advertisements must not condone or encourage harmful discriminatory behaviour or treatment and must not prejudice respect for human dignity.

The ASA makes decisions relevant to 'hate speech' on this basis. For instance:

- On 21 September 2016, the ASA ordered that an advertisement for the Ginger Pop Shop seen in the Purbeck Gazette in June 2016, which included text stating 'Visit our shop and get the tea-towel!' and featuring an illustration of a 'golly' character holding a pint of ginger beer with text underneath stating 'ENGLISH FREEDOM,' must not appear in its current form. It found that it breached Rule 4.1 of the CAP Code, as many people were likely to view the character as representing negative racial stereotypes, and its prominent inclusion in a press advertisement was likely to cause serious or widespread offence. The inclusion of the words 'ENGLISH FREEDOM' in the advertisement was also considered to be likely to contribute to that offence, because in combination with the image it could be read as a negative reference to immigration or race.²⁵⁴
- On 19 February 2014, the ASA ordered that an advertisement featuring an image of a person in a full body costume with black skin, curly hair, a large striped bow tie, and red jacket, which had connotations of the 19th century 'Golliwog' character and negative racial stereotypes, should not appear again in its current form. The ASA found that the advertisement breached Rule 4.1 of the CAP Code, as it was likely to cause serious or widespread offence.²⁵⁵

Conclusions and recommendations

Whilst there have been and will no doubt continue to be prosecutions of individuals for incidents involving ‘hate speech,’ the criminal law has yet to be invoked against any media or social media outlet in this manner, and there seems little appetite on the part of the Police or prosecutors for exploring this avenue.

The criminal provisions relevant to ‘hate speech’ are myriad and complex and would benefit from some rationalisation.

In some cases, individuals have succeeded in suing media outlets for harassment in respect of publications involving ‘hate speech.’ Such actions are however reasonably rare, and are unlikely to act as a control on the media. Civil actions against the media are generally costly and uncertain.

The efficiency of the regulation of ‘hate speech’ on broadcast media by Ofcom is praised by stakeholders. Furthermore, two new rules seek to address ‘hate speech’ where it does not constitute a crime but may be a breach of the rights of minorities or vulnerable groups.

In relation to print media, the regulatory framework is fragmented. The two main regulators, IPSO and IMPRESS, currently apply the same rules in respect of the regulation of ‘hate speech.’ Whilst IMPRESS developed their own rules, they are broadly similar to those of IPSO in this respect. One notable improvement is the requirement that inaccuracies be corrected with due prominence, which is said normally to mean equal prominence. Suggested further improvements include increasing the number of members of regulatory bodies from minorities and other vulnerable groups, developing guidelines on reporting on specific vulnerable groups, and streamlining the complaint process where it may discourage individuals from bringing claims.

There is no specific regulation relating to ‘hate speech’ on social media platforms. Whilst the legislative proposals in this area have not been adopted, a number of officials indicated that they were in favour of statutory regulation in respect of these platforms. The strong tone of the Home Affairs Select Committee’s recent report makes such regulation more likely.

In the light of this analysis, we make the following recommendations to the UK government to improve the existing legislation:

- All relevant legislation – in particular, the criminal law provisions – should be revised for their compliance with international human rights standards applicable to ‘hate speech;’
- The provisions on incitement to hatred should be reviewed with a view to making them more effective and usable;

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- The advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence should be prohibited in line with Articles 19(3) and 20(2) of the International Covenant on Civil and Political Rights (ICCPR), establishing a high threshold for limitations on free expression as set out in the Rabat Plan of Action, as well as prohibitions on direct and public incitement to genocide and incitement to crimes against humanity;
 - The protective scope of any measures to address 'hate speech' should encompass all protected characteristics recognised under international human rights law. In particular, the list of protected characteristics should be revised in light of the right to non-discrimination as provided under Article 2(1) and Article 26 of the ICCPR;
 - The government should develop a comprehensive plan on the implementation of the Rabat Plan of Action. In particular, it should adopt and implement a comprehensive plan for training law enforcement authorities, the judiciary, and those involved in the administration of justice on issues concerning the prohibition of incitement to hatred and 'hate speech.' A multi-stakeholder strategy to counter 'hate speech' in all its forms and in line with the international human rights obligations should be discussed and adopted in partnership with all relevant stakeholders, including state institutions, civil society organisations, broadcast and print media, as well as Internet platforms and operators;
 - Civil law remedies should be strengthened and made fully accessible to provide stronger remedies for victims of 'hate speech.' The government should also remove practical obstacles to ensure that victims of 'hate speech' and discrimination can rely on this law to seek protection of their rights; in particular, it should ensure that changes to the legal aid system do not undermine the right of access to courts and effective remedy for victims of 'hate speech';
 - Ofcom should continue its constructive review of 'hate speech' in the broadcast media and continue to develop policy guidance in the media;
 - Self-regulatory bodies for print media should increase diversity in their constitution and ensure that they include members from minorities and other vulnerable groups. They should also develop further guidelines on reporting on vulnerable groups and streamlining the complaint process where it may discourage individuals from bringing claims. Effective measures should be taken to address violation of the codes. They should also organise regular training courses and updates for professional and trainee journalists on the internationally binding human rights standards on 'hate speech' and freedom of expression and on relevant ethical codes of conduct;
 - Public officials, including politicians, should realise that they play a leading role in recognising and promptly speaking out against intolerance and discrimination, including instances of 'hate speech.' This requires recognising and rejecting the conduct itself, as well as the prejudices of which it is symptomatic, expressing sympathy and support to the targeted individuals or groups, and framing such incidents as harmful to the whole of society. These interventions are particularly important when intercommunal tensions are high, or are susceptible to being

escalated, and when political stakes are also high, for example in the run-up to elections;

- Media organisations and media outlets should recognise that they play an important role in combatting ‘hate speech’ and intolerance and prejudices in the media. They should intensify their efforts to provide adequate responses. They should ensure that they fully respect relevant ethical codes and ensure that ethical codes of conduct on ‘hate speech’ are effectively implemented and that effective measures are undertaken to address any violations. The ethical codes should be internalised by journalists and media outlets in order to ensure a full compliance with them.

End notes

- ¹ According to Amnesty International UK, there have been 3,192 hate crimes reported to police in England and Wales in the two weeks either side of the referendum, which represents a 42% increase from the same period in 2015. A further 3,001 hate crimes were reported between 1 and 14 July, mainly by members of minority ethnic and faith communities, new migrants, asylum seekers and refugees; see Amnesty International, Tackling hate crime in the UK, August 2016, available from <https://bit.ly/2rGbPhD>. See also, *The Independent*, Hate crimes surge by 42% in England and Wales since Brexit result, 8 July 2016, available from <https://ind.pn/211RjUD>; or *The Guardian*, One-quarter of Britons witnessed hate speech in past year, poll finds, 27 January 2018, available from <https://bit.ly/2IGKGn8>.
- ² See, e.g., D. Isaac & R. Hilsenrath, A letter to all political parties in Westminster, 25 November 2016, available from <https://bit.ly/2fnkZgL>.
- ³ See, e.g. BBC, Rise in hate crime in England and Wales, 17 October 2017, available from <https://bbc.in/2yOeT2c>.
- ⁴ *The Independent*, David Cameron description of migrant ‘swarm’ condemned as ‘irresponsible’ and ‘extremely inflammatory’ by human rights group, 30 July 2015, available from <https://ind.pn/2KMtBca>; Hate Crime and its Violent Consequences: the Muslim Council of Britain’s Supplementary Submission to the Home Affairs Committee, 2016, available from <https://bit.ly/2ICEOud>; or the European Commission against Racism and Intolerance, the Report on the United Kingdom (the 2016 ECRI Report on the UK), 5th monitoring cycle, adopted on 29 June 2016, available from <https://bit.ly/2d53lIc>.
- ⁵ See, e.g., the University of Birmingham, A review of the evidence relating to the representation of Muslims and Islam in the British media, 2012, available from <https://bit.ly/2IzSfQq>. See also the 2016 ECRI report on the UK, *op.cit.*
- ⁶ Demos, Brexit: the digital aftermath, 2016, available from <https://bit.ly/2ki45jK>. The report revealed that there were 2,413 reports of online hate speech and racial abuse following 24 June 2016, and 13,236 tweets sent in the UK between 24 June and 1 July which expressed xenophobic or anti-immigrant attitudes. See also, House of Commons Home Affairs Committee, Hate crime: abuse, hate and extremism online: fourteenth report of session 2016-17, April 2017, available from <https://bit.ly/2JOFsw4>; House of Commons Home Affairs Committee (2016), Antisemitism in the UK: tenth report of session 2016-17, 13 October 2016, available from <https://bit.ly/2jUOPxK>; or UK Government, Government response to Home Affairs Committee Report: Anti-Semitism in the UK, available from <https://bit.ly/2KO40j8>.
- ⁷ See, e.g. *The Guardian*, Police reveal extent of crimes against MPs since Jo Cox murder, 20 March 2017, available from <https://bit.ly/2GGaD4I>.
- ⁸ The report is based on the review of existing legislation and its application by relevant authorities, as well as on interviews with key stakeholders.
- ⁹ Through its adoption in a resolution of the UN General Assembly, the UDHR is not strictly binding on states. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).
- ¹⁰ The ICCPR has 167 States parties, including the UK.
- ¹¹ See HR Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 11.
- ¹² *Op cit.*, para 22.

¹³ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950.

¹⁴ Article 10 (1) of the European Convention reads: “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; Article 10 (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.”

¹⁵ Article 1 of the UDHR states: “All human beings are born free and equal in dignity and rights”; Article 2 provides for the equal enjoyment of the rights and freedoms contained in the declaration “without distinction of any kind”; and Article 7 requires protection from discrimination.

¹⁶ For a full explanation of ARTICLE 19’s policy on ‘hate speech’, see Hate Speech Explained: A Toolkit; available at <http://bit.ly/1UvUQ9t>.

¹⁷ General Comment 34, *op.cit.*, para 52.

¹⁸ The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, Appendix, adopted 5 October 2012; available at <http://bit.ly/2fTNMG6>.

¹⁹ The Rabat Plan of Action has been endorsed by a wide range of special procedures of the UN Human Rights Council; see, e.g. the Report of the Special Rapporteur on FOE on hate speech and incitement to hatred, A/67/357, 7 September 2012; Report of the

Special Rapporteur on freedom of religion or belief on the need to tackle manifestations of collective religious hatred, A/HRC/25/58, 26 December 2013; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism on the Internet and social media, A/HRC/26/49, 6 May 2014; and the contribution of the UN Special Advisor on the Prevention of Genocide to the expert seminar on ways to curb incitement to violence on ethnic, religious, or racial grounds in situations with imminent risk of atrocity crimes, Geneva, 22 February 2013.

²⁰ HR Committee, General Comment 11: prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983, para 2.

²¹ UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 35: Combating racist hate speech, 26 September 2013, paras 15 - 16. The CERD Committee specifies that five contextual factors should be taken into account: the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; and the objectives of the speech. The CERD Committee also specifies that States must also consider the intent of the speaker and the imminence and likelihood of harm.

²² European Court, *Erbakan v. Turkey*, App. No. 59405/00 (2006), para 56; or *Gündüz v. Turkey*, App.No. 35071/97 (2004), para 22.

²³ European Court, *Jersild v. Denmark*, App. No 15890/89 (1992), para 35.

²⁴ Council Framework Decision [2008/913/JHA](http://bit.ly/208/913/JHA) of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law; available at <http://bit.ly/2nTmRAi>.

²⁵ For a full analysis, see ARTICLE 19, Submission to the Consultations on the EU Justice Policy, December 2013; available at <http://bit.ly/2APKRZ9>.

²⁶ HRC Resolution 20/8 on the Internet and Human Rights, A/HRC/RES/20/8, June 2012.

²⁷ General Comment No. 34, *op cit.*, para 43.

²⁸ Guiding Principles on Business and Human Rights: Implementing the UN “Protect, Respect and Remedy” Framework (The Ruggie Principles), A/HRC/17/31, 21 March 2011, Annex. The HRC endorsed the guiding principles in HRC resolution 17/4, A/HRC/RES/17/14, 16 June 2011.

²⁹ Report of the Special Rapporteur on FOE, 16 May 2011, A/HRC/17/27, paras 75-76.

³⁰ Report of the Special Rapporteur on FOE, 11 May 2016, A/HRC/32/38; para 40 – 44,

³¹ *Ibid.*

³² *Ibid.*, para 43.

³³ *Ibid.*

³⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Article 14(1).

³⁵ *Ibid.*, Article 5.

³⁶ Grand Chamber of the European Court, *Delfi AS v. Estonia*, No. 64569/09, 16 June 2015.

³⁷ *Ibid.*, Judges Sajó and Tsotsoria’s Joint Dissent Opinion. See also ARTICLE 19, *Delfi AS v Estonia* Case Comment: Strasbourg Undermines Freedom of Expression, 1 October 2015; available at <http://bit.ly/2zQTEur>.

³⁸ For example, in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, No. 22947/13, 2 February 2016, the European Court found a violation of Article 10 of the European Convention where a self-regulatory body of Internet content providers and an owner of an online news portal were held liable for defamatory comments posted by a third party, which the parties removed on receipt of notice.

³⁹ European Court, *Pihl v. Sweden*, No. 74742/13, 9 March 2017.

⁴⁰ For further analysis, see: Dirk Voorhoof, *Pihl v. Sweden*: non-profit blog operator is not liable for defamatory users’ comments in case of prompt removal upon notice, Strasbourg Observers, 20 March 2017; available at <http://bit.ly/2zMUQB8>.

⁴¹ European Commission, Code of Conduct on Countering Illegal Hate Speech, signed on 31 May 2016; available at <http://bit.ly/1XLcJVo>.

⁴² Council Framework, Decision *op.cit.*

⁴³ For the criticism of the Code of Conduct, see ARTICLE 19, EU Commission Code of Conduct for Countering Illegal Hate Speech Online and the Framework Decision, June 2016; available at <http://bit.ly/29BVUJh>.

⁴⁴ Human Rights Act 1998, 2 October 2000.

⁴⁵ Article 9 of the Bill of Rights provides: “That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”

⁴⁶ See, e.g. *James v Commonwealth of Australia* [1936] AC 578 at 627: “‘Free’ in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech: it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth. It means freedom governed by law.”

⁴⁷ It expressly protected only “the great men of the realm.”

⁴⁸ In 1557, the Stationers’ Company was empowered by Royal Charter to imprison unlicensed printers, and the position of Master of the Revels, created by Henry VIII to control the output of British theatres, was not abolished until 1968.

⁴⁹ The most recent of which, the Obscene Publications Act 1959 and the Obscene Publications Act 1964, remain in force. The Acts are designed to penalise purveyors of obscene material and to prevent such articles from reaching the market. The examples cited

by the CPS Guidance for these offences are all of the publication of the portrayal of extreme sexual practices.

⁵⁰ Human Rights Act, 1998, c. 42. § 3(1).

⁵¹ *Ibid.*, c. 42, § 6(1).

⁵² The Education (No. 2) Act 1986, Section 43: Freedom of speech in universities, polytechnics and colleges.

⁵³ *Ibid.*, Sub-section (3).

⁵⁴ *R(Ben Dor & Ors) v University of Southampton* [2016] EWHC 953 (Admin) and *R(Calver) v Adjudication Panel for Wales and Anor* [2012] EWHC 1172 (Admin).

⁵⁵ See, for example, Index on Censorship's *Free Speech on Campus* project, available from <https://bit.ly/2IF97Bc>.

⁵⁶ Although the UK had become part of the European Community in 1972, the then government opted out of the 'Social Chapter' of the treaty that would have made mandatory many of the European law anti-discrimination provisions.

⁵⁷ The relevant sections of the Act came into force on 5 April 2011. The PSED replaced and unified similar duties in other legislation, for example the race equality duty which emerged from the Macpherson Report into the Metropolitan Police's investigation of the murder of South London teenager Stephen Lawrence.

⁵⁸ For a more detailed exposition of the purpose of the duty and its application, see Equality and Human Rights Commission, Public Sector Equality Duty, available from <https://bit.ly/2cG0PeE>.

⁵⁹ Public Order Act 1986, available from <https://bit.ly/2GFtcG1>.

⁶⁰ *Ibid.*, Section 18. Additionally, "stirring up" or incitement offences also include: Publishing or distributing written material (section 19); Public performance of play (section 20); Distributing, showing or playing a recording (section 21); Broadcasting or including programme in

cable programme service (section 22); and Possession of racially inflammatory material (section 23).

⁶¹ *Ibid.*, Section 7.

⁶² *Ibid.* It states that "it is essential in a free, democratic and tolerant society that people are able robustly to 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."

⁶³ *Ibid.* It states that "when people hate others because of race, such hatred may become manifest in the commission of crimes motivated by hate, or in abuse, discrimination or prejudice. Such reactions will vary from person to person, but all hatred has a detrimental effect on both individual victims and society, and this is a relevant factor to take into account when considering whether a prosecution is appropriate."

⁶⁴ CPS, Racist and religious crime – CPS prosecution policy, Legal Guidance, Hate crime, available from <https://bit.ly/2E6vxsk>.

⁶⁵ It was being widely believed that Islam forbids the visual representation of the Prophet, and the cartoons having caused widespread offence amongst Muslims.

⁶⁶ Those slogans included: 'Massacre Those who Insult Islam'; 'Be Prepared for the Real Holocaust'; 'Osama is on His Way'; 'Bomb, bomb Denmark'; 'Europe, you must pay!'; 'With your blood, with your blood!'; and '7/7 on its way.'

⁶⁷ *R v Umran Javed and Others* [2007] EWCA Cr. App. R. (S.) 12.

⁶⁸ *Ibid.*

⁶⁹ As amended by the Racial and Religious Hatred Act 2006.

⁷⁰ See, e.g. BBC, Government beaten on hatred bill, 25 October 2005, available from <https://bbc.in/2s6mjYK>.

⁷¹ CPS, Racist and Religious Hate Crime - Prosecution Guidance, Revised 27 March 2018, available from <https://bit.ly/2J3I2lu>.

⁷² *Ibid.*

⁷³ The Stephen Lawrence Inquiry, Report of an inquiry by Sir William Macpherson, published 24 February 1999, available from <https://bit.ly/2s61xbM>.

⁷⁴ CPS, Sexual Orientation: CPS Guidance on stirring up hatred on the grounds of sexual orientation, last revised on 17 March 2010, available from <https://bit.ly/2Lqfqw>.

⁷⁵ CPS, Social Media: Guidelines on prosecuting cases involving communications sent via social media, available from <https://bit.ly/2BF68Z3>.

⁷⁶ The Stephen Lawrence Inquiry, Report of an inquiry by Sir William Macpherson, published 24 February 1999, available from <https://bit.ly/2s61xbM>.

⁷⁷ CPS Guidance, *op.cit.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Offences Against the Person Act 1861, available from <https://bit.ly/2GzAKih>.

⁸⁴ Protection from Harassment Act 1997, available from <https://bit.ly/2kiDiE2>.

⁸⁵ *Ibid.*, Section 7(2). It is a defence (by section 1(3) for the person accused of harassment to show that the course of conduct in question was (a) pursued for the purpose of preventing or detecting crime; (b) required by law; or (c) in the particular circumstances reasonable.

⁸⁶ *Ibid.*, Section 7(3).

⁸⁷ *Lau v DPP* (2000), *R v Hills* (2000).

⁸⁸ *Law Society v Kordowski* [2004] EMLR 2 at H11.

⁸⁹ Stalking includes: (a) following a person, (b) contacting, or attempting to contact, a person by any means, (c) publishing any statement or other material (i) relating or purporting to relate to a person, or (ii) purporting to originate from a person, (d) monitoring the use by a person of the Internet, email or any other form of electronic communication, (e) loitering in any place (whether public or private), (f) interfering with any property in the possession of a person, (g) watching or spying on a person.

⁹⁰ Section 2(2) of the Protection from Harassment Act 1997.

⁹¹ Section 32 of the Crime and Disorder Act 1998.

⁹² Section 7(4) expressly provides that 'conduct' includes speech.

⁹³ *Thomas v News Group Newspapers Ltd* [2002] EMLR 4.

⁹⁴ The victim had a severe speech impediment and some physical difficulties caused by a childhood accident. In a personal statement to the court, the victim said the abuse was "destroying his life" and affecting his relationship. See, e.g. the Manchester Evening News, Facebook troll who subjected disabled man to 'tirade' of online abuse is jailed, 28 January 2016, available from <https://bit.ly/2IFPMA6>.

⁹⁵ *Op.cit.*

⁹⁶ *Ibid.*, subsection (3).

⁹⁷ *Ibid.*, section 6(4).

⁹⁸ See *Norwood vs Director of Public Prosecutions* [2003] EWHC 1564 (Admin), Times 30 July 2003. See also European Court, *Norwood v United Kingdom*, Application No. 23131/03 (2005) 40 EHRR SE11.

⁹⁹ Malicious Communications Act 1988, available from <https://bit.ly/2s0llwR>.

¹⁰⁰ Communications Act 2003, available from <https://bit.ly/2x5v7Uz>.

¹⁰¹ The Football (Offences) Act 1991, section 3, available from <https://bit.ly/2iBkJJq>. Under

the Act, “designated football match” means an association football match designated by the Secretary of State which for present purposes includes a match between teams from the Premier League, the Football League, or the Conference League.

¹⁰² *R v Rogers* [2007] 2 AC 62.

¹⁰³ *R v Joshua Bonehill-Paine (harassment of Luciana Berger MP)*, Central Criminal Court, 8 December 2016, available from <https://bit.ly/2KN1Sle>. On 7 December 2016, Mr Bonehill-Paine was sentenced to two years in prison for the offence, which was ordered to be served consecutively to a sentence of 40 months that Bonehill-Paine was already serving for sending malicious communications contrary to section 127 of the Communications Act 2003.

¹⁰⁴ *Ibid.*

¹⁰⁵ Terrorism Act 2006, available from <https://bit.ly/2IH3pPq>.

¹⁰⁶ The CPS, Full Code Test, Section 4.12(c).

¹⁰⁷ See CPS, Annual reports and business plans, available from <https://bit.ly/2s5TPhV>. See also the 2014 Hate Crime Operational Guidance issued by the College of Policing, the professional body for policing.

¹⁰⁸ Commons Select Committee, Inquiry into hate crime and its violent consequences launched, 4 July 2016, available from <https://bit.ly/2LouJ6H>.

¹⁰⁹ House of Commons Home Affairs Committee, Hate crime: abuse, hate and extremism online, Fourteenth Report of Session 2016–17, Session on 25 April 2017, available from <https://bit.ly/2JOFsw4>.

¹¹⁰ For instance, it quoted Carl Miller, a Research Director at Demos who said, “We have not had a proper law passed on this since social media became in widespread use. If you talk to lawyers about this, most of them will say they don’t even know which Act really applies here. Some of it is the Communications Act, as I said; some of it is the Protection from Harassment Act. Some people say that it is the public order legislation; others say

that counter-terrorism or incitement of racial hatred legislation applies here;” see House of Commons Home Affairs Select Committee, Fourteenth Report of Session, p.18.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, p. 24.

¹¹³ *Op.cit.*

¹¹⁴ Since *Levi v Bates* [2015] EWCA Civ 206 the person targeted need not be the claimant. In that case the target was Mr Bates but Mrs Bates was a successful second claimant because the conduct targeted at her husband was likely to cause (and in fact did cause) her alarm and/or distress.

¹¹⁵ See for example *Dowson v Chief Constable of Northumbria* [2010] EWHC 2612 at [142].

¹¹⁶ Section 1 of the 1997 Act; the test is objective according to a reasonable person in possession of the same information as the defendant.

¹¹⁷ Section 3 of the 1997 Act.

¹¹⁸ See *Majrowski v Guy’s and St Thomas’s NHS Trust* [2007] 1 AC 224.

¹¹⁹ Section 1(3) of the 1997 Act stipulates that a prohibition against harassment does not apply if the person who pursued it shows: (a) that it was pursued for the purpose of preventing or protecting crime; (b) that it was pursued by reason of any law; or (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

¹²⁰ Section 7 of the 1997 Act.

¹²¹ *Thomas v News Group Newspapers Ltd* [2001] EMLR 78.

¹²² *Ibid.*, para 37.

¹²³ *Trimmingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB).

¹²⁴ This was confirmed by the House of Lords in the important case of *Mojrowski v Guy’s and St Thomas’s NHS Trust* [2006] UKHL 34; [2006] ICR 1199.

¹²⁵ This was the test preferred by the Supreme Court in the decision of *Mohamud v WM Morrison Supermarkets* [2016] UKSC 11.

¹²⁶ Primarily through the Data Protection Act 1998.

¹²⁷ Having been in development since the late 1990s, most notably by the House of Lords in *Campbell v MGN* [2004] UKHL 22.

¹²⁸ See for example *Gulati v MGN* [2017] QB 149 (the judgment on damages in a phone hacking case against the *Mirror* newspaper which was affirmed by the Court of Appeal but is now being appealed to the Supreme Court).

¹²⁹ Data Protection Act 1998, available from <https://bit.ly/2kV9S1T>.

¹³⁰ *Ibid.* Section 2 defines “sensitive personal data” as personal data (which is to say data from which an individual may be identified) relating to “(a) the racial or ethnic origin of the data subject, ... (c) his political opinions, ... (e) his physical or mental health condition, (f) his sexual life.”

¹³¹ *Vidal-Hall v Google Inc* [2014] 1 WLR 4155.

¹³² *Vidal-Hall v Google Inc* [2016] QB 1003.

¹³³ Equalities Act 2010, available from <https://bit.ly/2kriKfA>. Such conduct was previously dealt with in the piecemeal collection of anti-discrimination legislation that was from time to time in force prior to the 2010 Act, for example the Race Relations Act 1976. “Direct discrimination” is defined, in section 13 of the 2010 Act, as: “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

¹³⁴ Giving employees an option to sue in harassment either under the Protection from Harassment Act 1996 or under section 26 of the Equality Act 2010. There are some advantages to suing under the 2010 Act: harassment is defined more favourably to the alleged harassee, and such actions must be brought in the Employment Tribunal, which is generally a no costs tribunal, rather than in the County Court.

¹³⁵ *Davies v Remploy Ltd* ET/2407487/09.

¹³⁶ *Morgan v Halls of Gloucester* ET/1400498/09.

¹³⁷ Defamation Act 2013, available from <https://bit.ly/1hci1Wf>. The law of defamation protects the reputation rights of the claimant by awarding a remedy in damages and/or an injunction when those rights are unlawfully infringed.

¹³⁸ Section 1 of the Defamation Act 2013 adds the requirement that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. “Serious harm” has been taken to be harm that is more than notional or trivial, but need not be so serious as to be grave; see *Monroe v Hopkins*[2017] EWHC 433 (QB). Nevertheless the courts have been clear when addressing section 1 that it is not concerned with injury to feelings, only to damage to reputation; see, e.g., per *Dingemans J in Sobrinho v Impresa SA* [2016] EWHC 66 (QB) at [46]. No matter how hurtful a statement may be to its intended target, it will not meet the Section 1 threshold and be actionable as defamation unless it also damages his or her reputation. Such damage is an objective factor.

¹³⁹ It is a defence under Section 2 of the Defamation Act 2013 for a defendant to prove that the imputation conveyed by the statement complained of is substantially true.

¹⁴⁰ See, e.g. J. Aston, D. Hill & N. Tackey, *The Experience of Claimants in Race Discrimination Employment Tribunal Cases*, Department of Trade and Industry, Employment Relations Research Series, ERRS55, 2006.

¹⁴¹ The statute of limitation is 3 months for employment-related cases and 6 months in the county/sheriff court, though the court or tribunal may consider an application submitted outside these time limits if in all of the circumstances it considers that it is just and equitable to do so. The time limit for harassment under the Protection from Harassment Act, however, is 6 years.

¹⁴² Since July 2013 claimants in employment tribunals have been required to pay fees of

£250 to file discrimination cases and a further £950 in advance of hearing.

¹⁴³ See Home Affairs Committee hearing on Tuesday 14 March 2017, available from <https://bit.ly/2J1k9Ep>.

¹⁴⁴ *Ibid.*

¹⁴⁵ The EHRC is the UK National Human Rights Institution accredited by the United Nations. In addition, the UN have accredited the Scottish Human Rights Commission in Scotland and the Northern Ireland Human Rights Commission in Northern Ireland.

¹⁴⁶ EHRC, Research report 102: Causes and motivations of hate crime, 29 July 2016, pp. 39-41, available from <https://bit.ly/2am17H6>.

¹⁴⁷ EHRC, *Research Report 101 : Prejudice and unlawful behaviour, exploring levers for change*, 29 July 2016, pp. 76-77, available from <https://bit.ly/2avZuG4>.

¹⁴⁸ EHRC, Freedom of Expression Legal Framework, 1 February 2015, pp. 11-15, 18-19 and 24-26, available from <https://bit.ly/2qcBOZw>.

¹⁴⁹ *Ibid.*, pp. 24-25.

¹⁵⁰ *Ibid.*, p. 25.

¹⁵¹ See, EHRC, You can report hate speech online, available from <https://bit.ly/2GlbMsV>.

¹⁵² See, EHRC, Freedom of Expression Legal Framework, 1 February 2015, pp. 25-26, available from <https://bit.ly/2qcBOZw>. The public sector equality duty is defined by section 149 of the Equality Act, 2010. In summary, the public sector equality duty is a duty to have regard to the need to (i) eliminate discrimination, harassment, victimisation and other conduct that is prohibited by the Equality Act, 2010, (ii) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it, and (iii) 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.

¹⁵³ *Ibid.*, at p. 25.

¹⁵⁴ Unlike what is suggested in the Freedom of Expression Legal Framework, in relation to the EHRC's powers which are specifically aimed at public bodies, the Equality Act, 2006 only refers to the duty to comply with the public sector duty (i.e. it does not refer separately to the commission of unlawful acts by public bodies).

¹⁵⁵ Schedule 19 of the Equality Act, 2010 provides that this duty does not affect the BBC's functions, "relating to the provision of a content service" within the meaning given under section 32(7) of the Communications Act, 2003.

¹⁵⁶ EHRC, Gypsy Travellers in Scotland - a resource for the media, Spring 2013, available from <https://bit.ly/2qkQYlp>.

¹⁵⁷ Department for Culture, Media and Sport, 2010 to 2015 government policy: media and creative industries, last updated 8 May 2015, available from <https://bit.ly/2Lkfv2G>.

¹⁵⁸ DBIS, Skills Minister announces multi-million pound drive to boost diversity in creative industries, 14 July 2014, available from <https://bit.ly/1qXThV3>.

¹⁵⁹ Department for Culture, Media and Sport, Boost of up to £60m for new TV, Radio and Online programming, 20 December 2016, available from <https://bit.ly/2s6CYvg>.

¹⁶⁰ Communications Act 2003, available from <https://bit.ly/2x5v7Uz>.

¹⁶¹ The Enterprise Act 2002, available from <https://bit.ly/2IlvQMO>.

¹⁶² In respect to plurality, Ofcom must a) ensure the maintenance of a sufficient plurality of providers of different television and radio services (section 3(d) of the Communications Act, 2003); b) conduct a "public interest test" in relation to certain media mergers and issue a report in this respect when required to do so by the Secretary of State (sections 44A and 45 of the Enterprise Act, 2002); and c) review the operation of the

media ownership rules for television, radio and newspapers and makes recommendations to the Secretary of State in this respect (section 391 of the Communications Act, 2003).

¹⁶³ Regarding diversity and inclusion of minorities, Ofcom, a) in carrying out its role, must have regard to the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas (section 3(4)(l) of the Communications Act, 2003); b) must make arrangements to carry out research in matters relating to, or connected with, the prevention of unjust or unfair treatment in programmes (section 14(6)(d) of the Communications Act, 2003); and c) take such steps as it considers appropriate to promote the development of opportunities and equality of opportunity between men and women and persons of different racial groups in relation to employment by broadcasters and the training and retraining of persons for such employment, and to promote the equalisation of opportunities for disabled persons in relation to such employment, training and retraining (section 27 of the Communications Act, 2003).

¹⁶⁴ EHRC & Ofcom, Thinking outside the box, 26 August 2015, available from <https://bit.ly/29Et6xz>.

¹⁶⁵ Ofcom, Diversity and Equality Hub, available from <https://bit.ly/2qniUVD>.

¹⁶⁶ Section 337 of the Communications Act, 2003. These obligations only affect broadcasters or groups of companies who employ more than twenty people in connection with the provision of the licensed service, and operate for more than 31 days a year.

¹⁶⁷ Ofcom, *Guidance on Arrangements for the promotion of equal opportunities in the broadcasting industry*, November 2006, available from <https://bit.ly/2GHcExk>. These include (a) a written policy statement (b) that broadcasters should communicate their policy statement to their staff and (c) the collection of statistics to monitor the race, gender and disability of persons employed.

¹⁶⁸ The BBC, the Welsh Authority, the providers of the licensed public service channels and the public teletext provider.

¹⁶⁹ Section 264 of the Communication Act 2003.

¹⁷⁰ Section 264 of the Communications Act, 2003.

¹⁷¹ Ofcom, Public Service Broadcasting in the Internet Age Ofcom's Third Review of Public Service Broadcasting, 2 July 2015, available from <https://bit.ly/2KMshWF>.

¹⁷² Royal Charter for the continuance of the British Broadcasting Corporation, December 2016, available from <https://bbc.in/2FqxX67>.

¹⁷³ *Ibid.*, Article 6(4).

¹⁷⁴ An Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation Presented to Parliament by the Secretary of State for Culture, Media and Sport by Command of Her Majesty December 2016, Article 6(4), available from <https://bbc.in/2pVXVHg>.

¹⁷⁵ *Ibid.*, Article 12.

¹⁷⁶ Pursuant to section 319 of the Communications Act, 2003 and the Broadcasting Act, 1996 (as amended), Ofcom is required to draw up a code for television and radio, covering standards in programmes, sponsorship, product placement in television programmes, fairness and privacy.

¹⁷⁷ Article 3(1).

¹⁷⁸ Equivalent to what is provided for by Article 20(2) of the ICCPR.

¹⁷⁹ Ofcom Broadcasting Code, July 2015, available from <https://bit.ly/2IYwtp8>. Rule 3.1 of Section 3 (Crime) of the prior version of the Broadcasting Code provided: "[m]aterial likely to encourage or incite the commission of crime or to lead to disorder must not be included in television or radio services."

¹⁸⁰ Ofcom, Broadcasting Code Review: Section Three Crime, Disorder, Hatred and Abuse, para. 1.4, 4 May 2016, available from <https://bit.ly/2kg5YNL>.

¹⁸¹ *Ibid.*, Guidance under Rule 3.1.

¹⁸² *Ibid.*, Guidance under Rule 2, Harm and Offence.

¹⁸³ *Ibid.*, Rule 2.1.

¹⁸⁴ *Ibid.*, Rule 2.3.

¹⁸⁵ Ofcom, Procedures for investigating breaches of content standards for television and radio, 1 June 2011, paras 1.10 to 1.36. available from <https://bit.ly/2AHFTxo>. In summary, the procedure comprises the following stages:

Complaint stage: Complaints must be submitted to Ofcom on a complaint form (containing details of the programme complained of, the nature of the complaint, the details of the complainant and whether the complainant has already submitted a claim to the broadcaster) within 20 working days of the broadcast of the relevant programme or the occurrence of the matter complained of (if it is submitted later than 20 working dates, complainants must explain the reason for the delay);

Initial assessment and investigation: Based on an initial assessment of the complaint and a review of the relevant broadcast, Ofcom will consider whether there may have been a breach of the Code. It aims to complete this phase within 15 working days. If it finds that a broadcaster may have failed to comply with the Code, Ofcom will write to the broadcaster to give the opportunity to provide comments. This is the investigation phase which Ofcom aims to complete within 50 working days;

Preliminary view: Once the broadcaster's comments are received, Ofcom will prepare its preliminary view on the substance of the complaint. This may be subject to change depending on the comments of the broadcaster on the preliminary view;

Final decision: Following the comments of the broadcaster, Ofcom will reach its final decision;

Directions: After it has made a decision, Ofcom may issue a direction in any case it considers appropriate (this does not apply to BBC and S4C). For example, a direction that the broadcaster has committed a serious breach of the Code but that this does not justify consideration of a sanction

against the broadcaster;

Sanctions.

¹⁸⁶ *Ibid.*, at paras. 1.28 to 1.30.

¹⁸⁷ Sanctions available to Ofcom include (i) issuing a direction not to repeat a programme, (ii) issuing a direction to broadcast a correction or a statement of Ofcom's findings (iii) imposing a financial penalty (iv) shortening or suspending a licence (v) revoking a licence (not applicable to the BBC, S4C or Channel 4).

¹⁸⁸ Ofcom, Review of Section Three of the Broadcasting Code, 13 January 2016, available from <https://bit.ly/2Lksu4m>.

¹⁸⁹ *Ibid.*, pp. 28-29.

¹⁹⁰ Ofcom Broadcast and On Demand Bulletin 299, 22 February 2016, pp. 5-12, available from <https://bit.ly/2wkdK08>.

¹⁹¹ Ofcom Broadcast and On Demand Bulletin 318, 5 December 2016, pp. 6-15, available from <https://bit.ly/2ww2X4i>.

¹⁹² Ofcom Broadcast and On Demand Bulletin 319, 12 December 2016, pp. 7-17, available from: <https://bit.ly/2vVJcl3>.

¹⁹³ Ofcom Broadcast and On Demand Bulletin 333, 17 July 2017, pp 8-17, available from <https://bit.ly/2x8Tgpe>.

¹⁹⁴ Ofcom, Decision and Revocation - Iman FM, 27 July 2017, available from <https://bit.ly/2keEtnM>.

¹⁹⁵ Ofcom Broadcast and On Demand Bulletin 349, 5 March 2018, p. 5-6, available from <https://bit.ly/2H3EI3Q>.

¹⁹⁶ Ofcom Broadcast and On Demand Bulletin 350, 19 March 2018, available from <https://bit.ly/2HIAyjM>.

¹⁹⁷ NUJ, NUJ race reporting guidelines, 7 September 2014, available from <https://bit.ly/2Lj65Ex>.

¹⁹⁸ Forum against Islamophobia & Racism, The British Muslim Media Guide, available from <https://bit.ly/2IGPqgN>.

¹⁹⁹ The Ethical Journalism Initiative, Reporting Ethnicity & Religion, available from <https://bit.ly/2IGPqgN>.

²⁰⁰ ARTICLE 19, Getting the facts right: Reporting ethnicity and religion, available from <https://bit.ly/1002KWB>.

²⁰¹ BBC, *Diversity and Inclusion Strategy for 2016 to 2020*, available from <https://bbc.in/2xKG2IV>.

²⁰² BAME refers to “black, Asian, and minority ethnic.”

²⁰³ Channel 4, *360° Diversity Charter, 1 January 2015*, available from <https://bit.ly/1yZc8oJ>.

²⁰⁴ Channel 4, *360° Diversity Charter : One Year On, January 2016*, available from <https://bit.ly/2IGTARF>.

²⁰⁵ See online at <https://bit.ly/2KNeoYm>.

²⁰⁶ See Sky website at <https://bit.ly/2KNexLo>.

²⁰⁷ See Sky website at <https://bit.ly/2LoC4mU>.

²⁰⁸ Save that the Newspaper Libel and Registration Act 1881 remains in force and requires newspapers to submit an annual return to a register.

²⁰⁹ For the information about the Independent Monitor of the Press, see <https://impress.press>.

²¹⁰ For the information about the Independent Press Standards Organisation, see <https://www.ipso.co.uk/>.

²¹¹ The Royal Charter on self-regulation of the press ,13th July 2011, available from <https://bit.ly/2s3luQE>. The Royal Charter was approved on 30 October 2013 by the Privy Council following a public judge-led report, the Leveson Inquiry, into the hacking of thousands of celebrities and families by the newspaper *The News of the World*.

²¹² The Press Recognition Panel was created on 3 November 2014.

²¹³ Under this scheme, a self-regulator can only be recognised if it, itself, has an independent board, “appointed in a genuinely open, transparent and independent way, without any influence from industry or Government.” The Chair and members of the Board are to be appointed by an independent appointment

panel. The Board should comprise a majority of people who are independent of the press, but no serving editor, national politician or minister (see Schedule 3 of the Royal Charter).

²¹⁴ The additional features include (a) a standards code – the responsibility of the board but drawn up by a committee which can include serving editors - that must take into account the importance of freedom of speech, the public interest and the protection of sources and must cover standards of conduct, respect for privacy and accuracy, (b) a “whistleblowing hotline” for journalists, (c) an adequate and speedy complaints handling mechanism (d) a simple and credible investigations capability with the power to impose appropriate and proportionate sanctions, including financial sanctions limited to 1% of turnover, with a maximum of £1 million, (e) the power to require the publication of corrections or apologies and if necessary, specify their size and prominence, (f) an arbitral process for civil legal claims against members of a recognised regulator that is free for complainants to use and is, overall, inexpensive (see Schedule 3 of the Royal Charter).

²¹⁵ These are a) the Appointments Panel which appoints or reappoints IPSO’s Chairman and Board and the independent members of the Editors’ Code of Practice Committee (it consists of 5 men and one woman); b) the Board, which is responsible for the oversight, vision and strategic direction of IPSO. It consists of 12 members including IPSO’s Chairman who is a man (it consist of 4 women out of the 12 members); c) the Complaints Committee which judges complaints relating to potential breaches of the Editors’ Code and decides what a newspaper or magazine should do if the Code has been breached (out of 12 members, six are women; d) the Independent Reviewer (a woman) which undertakes reviews of handling of investigated complaints to ensure the process has been fair and transparent.

²¹⁶ IMPRESS has two key bodies: a) the Appointment Panel which is responsible for appointing Board members. It is also responsible for setting the rates of remuneration for the IMPRESS Chair and Board members (out of seven members, one is a woman);

and b) the Board - a key governing institution with the ultimate responsibility for handling complaints (out of its 8 members, 3 are women).

²¹⁷ This situation may change. If the government decides that section 40 of the Criminal and Court Act, 2013 should enter into force. Section 40 would expose the publications which have not joined IMPRESS, the only recognised regulator, in most cases to pay the legal costs against them regardless of the merits of the complaint.

²¹⁸ See e.g. BBC News, First UK Press Regulator, IMPRESS, approved, 25 October 2016, available from <https://bbc.in/2dFP2L2>.

²¹⁹ The IMPRESS Standards Code, available from <https://bit.ly/2KIMqgj>. Clause 1 provides that publishers have obligations (a) to take all reasonable steps to ensure accuracy (b) to correct any inaccuracy with due prominence, which should normally be equal prominence, at the earliest opportunity (c) to distinguish clearly between statement of fact, conjecture and opinion (c) whilst free to be partisan, not to misrepresent or distort the facts.

²²⁰ For instance, Mr Miqdaad Versi of the Muslim Council of Britain who regularly brings claims relating to media's treatment of the Muslim community indicated that he considered equal prominence would be an improvement from the current system under the ECP.

²²¹ *Op.cit.* Clause 4 c) provides for obligations "not incite hatred against any group on the basis of that group's age, disability, mental health, gender reassignment or identity, marital or civil partnership status, pregnancy, race, religion, sex or sexual orientation or another characteristic which makes that group vulnerable to discrimination."

²²² The IPSO, Editors' Code of Practice, available from <https://bit.ly/2KIMqgj>. Clause 1 relates to accuracy and provides for obligations (a) not to publish inaccurate, misleading or distorted information or images, including headlines not supported by the text, (b) to

correct promptly a significant inaccuracy, misleading statement or distortion and — where appropriate — to publish an apology, (c) to give a fair opportunity to reply to significant inaccuracies when reasonably called for, (d) to distinguish clearly between comment, conjecture and fact and (e) to report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

²²³ *Ibid.* Clause 12 relates to discrimination and provides for obligations (a) to avoid prejudicial or pejorative reference to an individual's, race, colour, religion, sex, gender identity, sexual orientation or to any physical or mental illness or disability and (b) to avoid unless genuinely relevant to the story details of an individual's race, colour, religion, gender identity, sexual orientation, physical or mental illness or disability.

²²⁴ IPSO Guidance on researching and reporting stories involving transgender individuals, October 2016, available from <https://bit.ly/2vSTBvR>.

²²⁵ Information on IPSO's complaint procedure is available at <https://bit.ly/2KOKFOB>.

²²⁶ The ruling of 2 February 2017, available from <https://bit.ly/2LjMCY>.

²²⁷ The ruling of 17 February 2016, available from <https://bit.ly/2ICA10F>.

²²⁸ The ruling of 5 May 2015, available from <https://bit.ly/2J1bYYA>.

²²⁹ The ruling of 10 February 2017, available from <https://bit.ly/2kIA9mZ>.

²³⁰ Information on the IMPRESS complaint procedure is available from <https://bit.ly/2J4mTRH>.

²³¹ IPSO has only developed one guidance on researching and reporting stories involving transgender individuals, *op. cit.*, and IMPRESS none.

²³² Prior to that ODPS was regulated by the Authority for Television on Demand (ATVOD).

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- ²³³ Ofcom, Rules and Guidance Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services (ODPS), 20 May 2016
- ²³⁴ IPSO Regulations, Rule 1.2.
- ²³⁵ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services.
- ²³⁶ *Ibid.*, Recital 28.
- ²³⁷ *Ibid.*, Recital 24.
- ²³⁸ Ofcom Appeal Decision Good News for Periodicals, 21 December 2011, available from <https://bit.ly/2LkWH8e>.
- ²³⁹ ECJ, Case C-347/14, *New Media Online GmbH v Bundeskommunikationssenat*, 21 October 2015.
- ²⁴⁰ The definition of “online platforms” by the European Commission relied on by the House of Lords Select Committee on European Union, Report on Online Platforms and the Digital Single Market, 2015-2016, refers to “an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups.”
- ²⁴¹ Committee on Industry, Research and Energy, Committee on the Internal Market and Consumer Protection, Report on online platforms and the digital single market, (2016/2276(INI), 31 May 2017.
- ²⁴² HM Government, UK Government response to the European Commission consultation on the review of the Audio-visual Media Services Directive (AVMSD), available from <https://bit.ly/2J2QFWS>.
- ²⁴³ Ofcom, Public consultation on “Media Pluralism and Democracy,” available from <https://bit.ly/2LkG6NO>.
- ²⁴⁴ Details regarding this bill are available on the parliament’s website, see <https://bit.ly/2s3DPNq>.
- ²⁴⁵ Section 1 of the Bill, threatening content was defined as “a message, image or other matter that (a) is a threat of violence against a person (b) intimidates or is intended to intimidate, or (c) is grossly offensive or of an indecent or obscene character and which is menacing in nature.”
- ²⁴⁶ Section 1 of the bill.
- ²⁴⁷ *Ibid.*, Section 3 and of the bill.
- ²⁴⁸ *Ibid.*, Section 4 of the bill.
- ²⁴⁹ Home Office, Action Against Hate The UK Government’s plan for tackling hate crime, July 2016, available from <https://bit.ly/2vzsRo6>.
- ²⁵⁰ See *The Guardian*, Research reveals huge scale of social media misogyny, 26 May 2016, available from <https://bit.ly/1qK7yYT>.
- ²⁵¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.
- ²⁵² Ofcom, Response to the European Commission’s Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data, Cloud Computing and the Collaborative Economy, December 2015, available from <https://bit.ly/2KNAZUm>.
- ²⁵³ Ofcom, 2016 Annual Colloquium on fundamental rights Public consultation on “Media Pluralism And Democracy” Response from UK Office of Communications (Ofcom), 13 July 2016, available from <https://bit.ly/2LkG6NO>.
- ²⁵⁴ ASA Ruling on Ginger Pop Ltd, 21 September 2016, available from <https://bit.ly/2s73Yep>.
- ²⁵⁵ ASA Ruling on Abscissa.Com Ltd t/a Jokers Masquerade, 19 February 2014, available from <https://bit.ly/2s0rxWU>.

