Law Commission

Consultation Paper No 213

HATE CRIME: THE CASE FOR EXTENDING THE EXISTING OFFENCES

Appendix B: History of hate crime legislation

THE LAW COMMISSION

APPENDIX B: HISTORY OF HATE CRIME LEGISLATION

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APPENDIX B
HISTORY OF HATE CRIME LEGISLATION

INTRODUCTION

B.1 In this Appendix we give the history of three types of statutory provisions.

(1) Aggravated offences, consisting of the commission of a "basic" offence if motivated by, or while demonstrating, hostility against specified groups.

(2) Public order offences connected with the stirring up of hatred against specified groups.

(3) Provisions that, without creating new offences or altering the sentencing powers for existing offences, indicate that courts should, when determining sentence, take due account of the offender's motivation by or demonstration of hostility against a specified group and, if appropriate, pass an enhanced sentence within those powers.

Aggravated offences

B.2 There are aggravated forms of:

(1) assault (including assault occasioning actual bodily harm) and unlawful wounding or inflicting grievous bodily harm;[1]

(2) criminal damage;[2]

(3) the offences under sections 4, 4A and 5 of the Public Order Act 1986 ("POA 1986");[3]

(4) the offences under sections 2, 2A, 4 and 4A of the Protection from Harassment Act 1997.[4]

The offences are racially or religiously aggravated if motivated by hostility towards a racial or religious group or if such hostility is demonstrated at the time. There are no equivalent provisions for aggravation by hostility on the grounds of sexual orientation or disability or transgender identity.

Public order offences of stirring up hatred

B.3 The public order offences are as follows:

(1) Section 18 of the POA 1986 makes it an offence to use threatening, abusive or insulting words or display threatening, abusive or insulting written material, intending to stir up racial hatred or if racial hatred is likely to be stirred up. Section 19 addresses the publication of written material of a similar description and subsequent sections address plays, recordings, programme services and the possession of written materials.

[1] Crime and Disorder Act 1998 ("CDA 1998"), s 29.

[2] CDA 1998, s 30.

[3] CDA 1998, s 31.

[4] CDA 1998, s 32.

(2) Schedule 1 to the Racial and Religious Hatred Act 2006 amends the POA 1986 by inserting a new part 3A, providing a corresponding series of offences addressing the stirring up of religious hatred. They differ from the provisions for racial hatred in that:

(a) the behaviour or material must be "threatening", not abusive or insulting;

(b) the offence can only be committed intentionally (the fact that hatred was likely to be stirred up is insufficient on its own); and

(c) section 29J provides protection for "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".

(3) Schedule 16 to the Criminal Justice and Immigration Act 2008 inserts further provisions into part 3A, making corresponding provision for the stirring up of hatred on the ground of sexual orientation. Again, the material or behaviour must be "threatening", the offence requires intention, and there is protection for "discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices".[5]

There are no equivalent provisions for the stirring up of hatred against people with a disability or transgender people.

Enhanced sentencing provisions

B.4 The Criminal Justice Act 2003 ("CJA 2003") provides that any offence can be "aggravated" by hostility to particular groups. Where an offence is aggravated in this sense, that fact must be taken into account in sentencing, and can result in an enhanced sentence. However, unlike in the case of the specific offences described in the previous paragraph, these provisions do not increase the maximum sentence, but only influence the choice of sentence within the range set for the offence. Specifically:

(1) if the offence was racially or religiously aggravated, in the sense of being motivated by hostility to a racial or religious group or accompanied by demonstration of such hostility, that fact must be stated by the court and treated as an aggravating factor in sentencing;[6]

(2) the same applies if the offence was aggravated by hostility on the grounds of sexual orientation or disability or transgender identity.[7]

[5] POA 1986, s 29JA.

[6] CJA 2003, s 145.

[7] CJA 2003, s 146.

The provisions are separate because, in the case of racial or religious aggravation, the section does not apply where the offence charged is one of the aggravated offences under sections 29 to 32,[8] as that would result in duplication.

B.5 Schedule 21 to the CJA 2003, which concerns mandatory life sentences for murder, provides that, where a murder is racially or religiously aggravated or aggravated by sexual orientation, disability or transgender identity, the appropriate starting point, in determining the minimum term, is 30 years.[9]

Summary

B.6 Some of these provisions replace previous legislation. The evolution is best shown in tabular form: we show it first in the form of a timeline showing commencement dates, and then as a table organised by subject. Repealed provisions are shown in italics.

Timeline

8 December 1965: *Race Relations Act 1965 section 6: stirring up racial hatred*

13 June 1977: *Race Relations Act 1976 section 70, inserting new section 5A into Public Order Act 1936: stirring up racial hatred*

1 April 1987: Public Order Act 1986 sections 18 and following: stirring up racial hatred

30 September 1998: Crime and Disorder Act 1998: racially aggravated forms of certain offences (assault, criminal damage, public order, harassment); *enhanced sentences for racial aggravation*

25 August 2000: *Powers of Criminal Courts (Sentencing) Act 2000: repeals and replaces provisions for enhanced sentences for racial aggravation*

14 December 2001: Anti-terrorism, Crime and Security Act 2001: amends Crime and Disorder Act 1998 to include religiously aggravated forms *and enhanced sentences for religious aggravation*

4 April 2005: Criminal Justice Act 2003: enhanced sentences for racial or religious aggravation (replacing existing provisions), disability factors or sexual orientation (new); minimum term for murder aggravated by race, religion or sexual orientation

1 October 2007: Racial and Religious Hatred Act 2006: amends Public Order Act 1986 to include religious hatred

23 March 2010: Criminal Justice and Immigration Act 2008: further amends Public Order Act 1986 to include hatred on ground of sexual orientation

[8] CJA 2003, s 145(1).

[9] The whole scheme of judicially imposed minimum terms was created by the CJA 2003, and not based on anything in earlier legislation.

3 December 2012: Legal Aid, Sentencing and Punishment of Offenders Act 2012: amends Criminal Justice Act 2003 to include enhanced sentences for transgender aggravation and a minimum term for murder aggravated by disability or transgender identity

By subject

Ground of hostility	**Aggravated offences**	**Stirring up offences**	**Enhanced sentencing**
Racial	Crime and Disorder Act 1998, sections 28 to 32	*Race Relations Act 1965;* *Race Relations Act 1976;* Public Order Act 1986, sections 18 to 23	*Crime and Disorder Act 1998;* *Powers of Criminal Courts (Sentencing) Act 2000, section 153;* Criminal Justice Act 2003, section 145
Religious	Anti-terrorism, Crime and Security Act 2001	Racial and Religious Hatred Act 2006	*Anti-terrorism, Crime and Security Act 2001;* CJA 2003, section 145
Sexual orientation	None	Criminal Justice and Immigration Act 2008	Criminal Justice Act 2003, section 146
Disability	None	None	Criminal Justice Act 2003, section 146
Transgender	None	None	Legal Aid, Sentencing and Punishment of Offenders 2012

AGGRAVATED OFFENCES

B.7 As we have seen, there are aggravated forms of assault, criminal damage, public order offences and harassment offences, and the aggravation can be either racial or religious.[10] The racially aggravated offences were present in the Crime and Disorder Act 1998 ("CDA 1998") in its original form; the alternative of religious aggravation was added by the Anti-terrorism, Crime and Security Act 2001.

Racially aggravated offences

B.8 Before the CDA 1998, the courts had already acknowledged racial motivation as an aggravating factor in sentencing: see the discussion of *Ribbans, Duggan and Ridley*,[11] below.[12]

[10] For further discussion, see Ch 2 at para 2.5 and following.

[11] *Attorney General's References No 29, 30 and 31 of 1994* (1995) 16 Cr App R (S) 698.

[12] See para B.262 below.

B.9 In 1994, a report by the House of Commons Home Affairs Committee[13] stated that racial attacks and harassment were an increasingly prevalent problem; however, there were difficulties in assessing the scale, both because of the lack of an agreed definition of a racial incident and because of under-reporting to the police. The report recommended the creation of a new offence of racially motivated violence, which would add up to five years to the sentence for crimes of violence (common assault, assault occasioning actual bodily harm, wounding with intent, grievous bodily harm or manslaughter). Amendments to this effect were tabled in the Criminal Justice and Public Order Bill of that year, but were not passed: instead a new offence of intentionally causing harassment was inserted into the POA 1986 as section 4A.

B.10 Attempts to establish the scale of the problem were made in the British Crime Survey, by the Police Research Group,[14] the Crown Prosecution Service Racial Incident Monitoring Scheme[15] and the Home Office report on "Ethnic minorities, victimisation and racial harassment",[16] but there were considerable discrepancies between the figures found.[17]

B.11 The Labour Party manifesto for the 1997 general election contained a pledge to create offences of racial violence and harassment. Subsequently, the Home Office published a consultation paper, proposing:[18]

(1) racially aggravated forms of assault, occasioning actual bodily harm and malicious wounding, (but not those which carry a maximum sentence of life imprisonment) and harassment;

(2) that racial aggravation should mean either that a racial motivation can be shown or that the offender demonstrated racial hostility at or around the time of the basic offence;

(3) that explicit statutory expression should be given to the judgment in *Ribbans, Duggan and Ridley*.

It also sought views on whether criminal damage should be included among the offences capable of racial aggravation.

[13] Racial Attacks and Harassment, Report of the Home Affairs Committee (1993-94) HC 71, as cited in A Thorp, J Fiddick and E Wood, *The Crime and Disorder Bill [HL], Bill 167 of 1997-98: Anti-social Neighbours, Sex Offenders, Racially Motivated Offences and Drug-Dependent Offenders* (House of Commons Research Paper 98/44, Apr 1998) pp 44 to 50.

[14] A Thorp, J Fiddick and E Wood, *The Crime and Disorder Bill [HL], Bill 167 of 1997-98: Anti-social Neighbours, Sex Offenders, Racially Motivated Offences and Drug-Dependent Offenders* (House of Commons Research Paper 98/44, Apr 1998) p 48.

[15] A Thorp, J Fiddick and E Wood, *The Crime and Disorder Bill [HL], Bill 167 of 1997-98: Anti-social Neighbours, Sex Offenders, Racially Motivated Offences and Drug-Dependent Offenders* (House of Commons Research Paper 98/44, Apr 1998) p 47.

[16] M FitzGerald and C Hale, *Research Findings No 39* (Home Office Research and Statistics Directorate, Aug 1996).

[17] A Thorp, J Fiddick and E Wood, *The Crime and Disorder Bill [HL], Bill 167 of 1997-98: Anti-social Neighbours, Sex Offenders, Racially Motivated Offences and Drug-Dependent Offenders* (House of Commons Research Paper 98/44, Apr 1998) pp 44 to 49.

[18] Home Office, *Racial Violence and Harassment: A Consultation Document* (Sep 1997), http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/P2/RVAH.HTM (last visited 19 Jun 2013).

B.12 According to the summary of the responses to this consultation,[19] the proposals were broadly welcomed: some consultees variously advocated extension of the protection to religion, disability or sexual orientation.

B.13 The Crime and Disorder Bill, when introduced, contained a clause 68 confirming the result in *Ribbans, Duggan and Ridley*. This became section 82 of the Act, and is now represented by section 145 of the CJA 2003.[20] In its original form, it read:

> 68.—(1) This section applies where a court is considering the seriousness of an offence other than one under sections 23 to 26 above [racially aggravated offences].
>
> (2) If the offence was racially aggravated, the court—
>
> (a) shall treat that fact as an aggravating factor (that is to say, a factor that increases the seriousness of the offence); and
>
> (b) shall state in open court that the offence was so aggravated.
>
> (3) Section 22 above [meaning of "racially aggravated"] applies for the purposes of this section as it applies for the purposes of sections 23 to 26 above [racially aggravated offences].[21]

B.14 The Bill in its original form also contained racially aggravated forms of assault and of the offences under the POA 1986 and the Protection from Harassment Act 1997; it did not at that stage include criminal damage. Debate in both Houses focused on the following issues:

(1) Is an offence worse because it is racially motivated?

(2) How should a racial group be defined, and should the protection extend to other categories, such as religious groups and homosexuals?

(3) Is there any need for specific aggravated offences, or should a general provision on the lines of clause 68 be sufficient?

(4) Why those basic offences and not others?

The need to take account of racial motivation

B.15 On the first issue, Lord Mackay of Drumadoon quoted a speech by the Lord Justice General saying that there are crimes inspired by religious hatred and hatred of homosexuals. If Parliament were to single out racial motivation, that might be perceived as suggesting that it was downgrading the seriousness of these other motivations.[22]

B.16 Lord Monson argued that attacks motivated by racial prejudice are no worse than attacks motivated by other sorts of prejudice, such as regional or class prejudice,

[19] Home Office, *Responses to the Home Office Consultation Paper: racial violence and harassment*, (1997) Dep/3 5761.

[20] See para B.261 and following below.

[21] Words in square brackets our own. The wording in the Act as passed was the same, except for the renumbering of sections.

[22] *Hansard* (HL), 16 Dec 1997, vol 584, col 584.

which are also frequent: giving a special status to racial attacks is a form of positive discrimination. In particular, the limb of the offence based on demonstrating hostility during or after the attack is an attempt to police emotions.[23] He proposed an amendment to remove this limb.

B.17 Lord Desai answered that racial violence was a more serious problem in practice,[24] and Lord Falconer said that "one should not let the best be the enemy of the good", as one cannot protect everybody in one Bill.[25] Lord Renton pointed out that general law offences, such as those under the Offences Against the Person Act 1861, do protect everybody in one Act,[26] to which Lord Falconer replied that there were many laws protecting vulnerable groups such as children and people with a disability.[27] Following this debate, Lord Monson withdrew his amendment.

What groups should be protected?

B.18 The second issue is discussed below, under the heading of religious aggravation.[28]

Aggravated offences or enhanced sentencing?

B.19 On the third issue, the Earl of Mar observed:

> I am pleased that the approach taken is that of adding a racial harassment or motivation dimension to a substantive charge. This "add on" approach is preferable to a racially specific charge.[29]

B.20 Many speakers argued that, given the general provision in clause 68, there was no need for specific aggravated offences. Baroness Flather argued that there should be a blanket rule that any crime where racial motivation was proved in court would carry a higher penalty than other crimes, and said that she had proposed an amendment to that effect to the Criminal Justice Bill three years before. Lord Goodhart also questioned the need for specific aggravated offences, arguing that, if a person were charged with a racially aggravated offence but convicted of the basic offence, it would then be impossible to take any account of the racial factor in sentencing. It would be better to extend clause 68 (enhanced sentencing) across the board, increasing the maximum sentence for particular offences if necessary.

B.21 Lord Falconer, for the Government, answered that making racial motivation an ingredient of a substantive offence will mean that prosecutors will need to prove it; otherwise an attack might be racially motivated but evidence of that motivation might never emerge. Baroness Flather argued that, even where there are

[23] *Hansard* (HL), 12 Feb 1998, vol 585, col 1266.

[24] *Hansard* (HL), 12 Feb 1998, vol 585, cols 1270 to 1271.

[25] *Hansard* (HL), 12 Feb 1998, vol 585, cols 1272 to 1273.

[26] *Hansard* (HL), 12 Feb 1998, vol 585, col 1274.

[27] *Hansard* (HL), 12 Feb 1998, vol 585, col 1276.

[28] See para B.27 and following below.

[29] *Hansard* (HL), 16 Dec 1997, vol 584, cols 564 to 565.

offences of this kind, evidence of the racial element might be suppressed as part of a plea bargain, leaving the defendant to be convicted of the basic offence. There should be a legal requirement on the prosecution to present evidence of racial motivation where this exists, whatever the offence. She introduced an amendment to this effect, which was later withdrawn.[30]

Which offences can be aggravated?

B.22 On the fourth issue, many speakers argued that the choice of basic offences was arbitrary and that most of them were at the lower end of the scale. An amendment was proposed to include the offence under section 18 of the Offences Against the Person Act 1861,[31] and another to include the more serious offences under the POA 1986.[32] There was also discussion of criminal damage.

B.23 Lord Williams, for the Government, explained that the offences were chosen as being the most frequent forms of racist crime. The section 18 offence was not included as it carries a maximum sentence of life, which cannot be increased; while the other public order offences, such as riot, are not forms of violence aimed at individuals.[33]

B.24 Viscount Colville pointed out that, where the section 18 offence is charged, the jury can find the defendant guilty of the lesser section 20 offence. But if there is no aggravated section 18 offence, a jury trying a charge under section 18 where racial motives are present cannot find the defendant guilty of the aggravated section 20 offence, as the aggravation was not set out in the original charge. Lord Williams answered that in such a case the indictment should charge the section 18 offence and the aggravated section 20 offence together.[34]

B.25 At report stage in the Lords, an amendment was proposed to include an aggravated offence of criminal damage. Lord Dholakia explained that this, in the form of racist graffiti, was extremely common[35] and Lord Henley said that, though the sentencing limit for the basic offence of criminal damage, namely 10 years, might seem sufficient, it was important to get the message across:

> I accept that broadly speaking 10 years is enough for the most serious kinds of offences, short of arson where obviously a longer sentence can be imposed. However, the proposed amendments to clauses 22 to 24 do not simply create new maximum sentences but new offences in themselves. I take it that part of the reason for that is the importance of getting across the right message.[36]

[30] *Hansard* (HL), 19 Mar 1998, vol 587, cols 921 to 924.

[31] *Hansard* (HL), 17 Mar 1998, vol 587, col 688.

[32] *Hansard* (HL), 17 Mar 1998, vol 587, col 698.

[33] *Hansard* (HL), 12 Feb 1998, vol 585, cols 1280 to 1284.

[34] *Hansard* (HL), 12 Feb 1998, vol 585, cols 1282 to 1283.

[35] *Hansard* (HL), 17 Mar 1998, vol 587, cols 694 to 696.

[36] *Hansard* (HL), 17 Mar 1998, vol 587, col 696.

B.26 The amendment was withdrawn on the Government undertaking to introduce a similar amendment on third reading,[37] and this was done.[38]

Religious aggravation

Crime and Disorder Act 1998

B.27 In the debates at the report stage of the Crime and Disorder Bill in the House of Lords, the Earl of Mar and Kellie moved an amendment to include religious hatred as an aggravating factor, and Lord Mackay of Drumadoon gave the example of sectarian fighting in Scotland. Lord Monson objected, saying that, if so, one would also have to protect non-religious philosophical beliefs. Lord Hardie, for the Government, expressed sympathy for the principle behind the amendment, but said that it was harder to identify attacks motivated by religious bigotry and that breach of the peace was usually a sufficient charge in such cases. The amendment was withdrawn.[39]

B.28 In the Commons, an amendment was again proposed to add "religion" after "race". James Clappison argued that attacks motivated by religion are every bit as evil as those motivated by race and that it was arbitrary to distinguish the two.[40] Fiona Mactaggart said that, in its present form, the Bill would bear unequally on a street fight between Sikhs and Muslims, given that Sikhs are a racial group and Muslims are not.[41] Eleanor Laing[42] and Richard Allen[43] said that conflict between Catholics and Protestants in Glasgow should be covered.

B.29 The Home Secretary, Jack Straw, replied that in many cases attacks motivated by religion (for example attacks on Muslims) also have a racial element and that these will be caught. He added:

> The test of what amounts to "racially aggravated" for the purposes of these offences requires that the racial hostility is "wholly or partly" a motivating factor. It follows that, even if there is religious hostility, provided part of the hostility is racist, the offence will be covered by the provisions.
>
> …
>
> We do not rule out the possibility of bringing forward legislation in due course to cover religiously motivated offences in the same way as we are covering racially motivated offences, even where the principal motivation is religious. However, this area requires careful consideration.

[37] *Hansard* (HL), 17 Mar 1998, vol 587, col 698.

[38] *Hansard* (HL), 31 Mar 1998, vol 588, col 201.

[39] *Hansard* (HL), 17 Mar 1998, vol 587, cols 705 to 706.

[40] *Hansard* (HC), 8 Apr 1998, vol 310, cols 443 to 444; see also *Hansard* (HC), 23 Jun 1998, vol 314, cols 895 to 898.

[41] *Hansard* (HC), 23 Jun 1998, vol 314, cols 898 to 899.

[42] *Hansard* (HC), 23 Jun 1998, vol 314, col 902.

[43] *Hansard* (HC), 23 Jun 1998, vol 314, cols 899 to 900.

One complication was that there might be greater difficulties in deciding whether someone belongs to a religious than a racial group.[44] The amendment was defeated on a vote.

Anti-terrorism, Crime and Security Act 2001

B.30 The extension of the aggravated offences under the CDA 1998 to religious aggravation was part of a package of measures introduced by the Anti-terrorism, Crime and Security Act 2001. The Bill also contained a clause inserting new provisions in the POA 1986 making it an offence to stir up hatred of religious groups, and most of the debate concerned those provisions.[45] Here we set out only arguments specific to the aggravated offences.

B.31 The main argument raised was the anomaly that some religious groups, such as Jews and Sikhs, which were also ethnic groups, had a protection which was denied to multi-ethnic religions, such as Islam. This was mentioned by Lord Rooker at second reading[46] and argued further by Lord Ahmed, who said that the British National Party evaded the law on racial hatred by targeting Islam as a religion.[47] Lord Desai argued that attacks on Muslims are almost always motivated by racism and that arguing from the existence of these attacks to support a proposal to protect religious groups generally is a fallacy.[48] Lord Harris replied that, since 11 September 2001, many incidents have been genuinely motivated by religious rather than racial hatred.[49]

B.32 The clause creating offences of stirring up religious hatred was removed from the Bill.[50] The clauses adding "or religious" after "racial" in the aggravated offences were passed, and these offences under the CDA 1988 have not since been amended.

[44] *Hansard* (HC), 23 Jun 1998, vol 314, cols 902 to 903.

[45] See para B.147 and following below.

[46] *Hansard* (HL), 27 Nov 2001, vol 629, col 150.

[47] *Hansard* (HL), 27 Nov 2001, vol 629, col 193.

[48] *Hansard* (HL), 27 Nov 2001, vol 629, col 246.

[49] *Hansard* (HL), 27 Nov 2001, vol 629, col 257.

[50] *Hansard* (HL), 10 Dec 2001, vol 629, col 1193. A similar provision later formed part of the Racial and Religious Hatred Act 2006. For the full history of attempts to create an offence of incitement to religious hatred, see para B.131 and following below.

Aggravated public order offences

B.33 Among the offences that can be racially or religiously aggravated are:

(1) threatening, abusive or insulting words or behaviour causing fear of violence under section 4 of the POA 1986;

(2) threatening, abusive or insulting words or behaviour intended to cause harassment, alarm or distress under section 4A of the POA 1986;

(3) threatening, abusive or insulting[51] words or behaviour causing harassment, alarm or distress under section 5 of the POA 1986.

These public order offences are not in themselves hate crimes, though the aggravated forms are. Changes to the basic offences carry through to their aggravated forms and are therefore relevant in establishing the boundaries of hate crime.

B.34 The Crime and Courts Act 2013 contains a provision removing the previous reference to "insulting" from the section 5 offence. This provision was not present in the original form of the Bill, and was added by way of amendment. A further amendment to remove that word from the other two offences was not proceeded with.

Before the Crime and Courts Act 2013

B.35 The proposal to remove the word "insulting" from section 5 has a long pre-history, and was originally made by the "Reform Section 5" campaign. It was supported both by the Christian Institute and by the National Secular Society, as they felt that the existing law could have an inhibiting effect on both Christian preaching and free debate about religion.

B.36 In 2009, the Joint Committee on Human Rights published a report entitled "Demonstrating respect for rights? A human rights approach to policing protest".[52] This dealt with many other issues, such as protests outside Parliament; on section 5 of the POA 1986 they concluded:

> Section 5 of the Public Order Act gives the police a wide discretion to decide what language or behaviour is "threatening, abusive or insulting". Whilst arresting a protestor for using "threatening or abusive" speech may, depending on the circumstances, be a proportionate response, we do not think that language or behaviour which is merely "insulting" should ever be criminalised in this way. Whilst we welcome the Minister's agreement to discuss the examples we raised with ACPO in order to see whether guidance or support to police officers would improve matters, we do not consider that improving guidance will be sufficient to address our concern. We

[51] Section 57 of the Crime and Courts Act 2013, when brought into force, will remove the word "insulting" from section 5 of the POA 1986. See P Strickland and D Douse, "*Insulting words or behaviour": Section 5 of the Public Order Act 1986* (Jan 2013) SN/HA/5760.

[52] Human Rights Joint Committee - Seventh Report Demonstrating respect for rights? A human rights approach to policing protest (2008-09) HL 47/HC 320, http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/4702.htm (last visited 19 Jun 2013).

> recommend that the Government amend section 5 of the Public Order Act 1986 so that it cannot be used inappropriately to suppress the right to free speech, by deleting the reference to language or behaviour that is merely "insulting". This amendment would provide proportionate protection to individuals' right to free speech, whilst continuing to protect people from threatening or abusive speech. We suggest such an amendment.[53]

B.37 The Government published a response, entitled "Joint Committee on Human Rights, Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-second Report of Session 2008-09 - Human Rights Joint Committee".[54] In this, they argued that it was almost impossible to distinguish "abuse" from "insult" and that issuing guidance to the police should be sufficient to avoid excessive policing.

B.38 In the course of the Coroners and Justice Bill,[55] Evan Harris proposed an amendment removing "insulting" from section 5 of the POA 1986. However, for reasons of Parliamentary management, this was never reached in debate and therefore lapsed.[56]

B.39 The issue was raised again by Edward Leigh in the debates on the Protection of Freedoms Bill.[57] He argued that the existing provision was draconian and had a chilling effect on freedom of speech. Examples of this chilling effect included police investigations of:

(1) hotel owners who had argued with a guest, saying that Mohammed was a war lord and Islamic dress oppressed women;

(2) a protestor holding a banner condemning Scientology as a dangerous cult;

(3) animal rights activists selling toy seals coloured with red dye;

(4) a man who growled and said "Woof" to two Labradors.

[53] Human Rights Joint Committee - Seventh Report Demonstrating respect for rights? A human rights approach to policing protest (2008-09) HL 47/HC: see para 5 in "Conclusions and Recommendations", http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/4702.htm (last visited 19 Jun 2013).

[54] Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-second Report of Session 2008–09: Sixth Report of Session 2009–10 (2009-10), HL 45/HC 328, http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/45/45.pdf (last visited 19 Jun 2013). See also, letter dated 13 Jan 2010 [misprinted as 2009 in the online version], http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/45/4506.htm (last visited 19 Jun 2013).

[55] Now the Coroners and Justice Act 2009.

[56] *Hansard* (HC), 23 Mar 2009, vol 490, col 52.

[57] Now the Protection of Freedoms Act 2012.

The distinction between "abusive" and "insulting" was no more difficult than other decisions courts had to make every day. The Government had argued that the way to avoid this kind of over-zealous behaviour, or prosecution in undeserving cases, was by issuing guidance: this argument was, Edward Leigh argued, "a classic cop-out for civil servants".[58]

B.40 John Glen agreed, and added the example of a Christian preacher who answered a question from a police community support officer by saying that the Bible regarded homosexual conduct as a sin.[59]

B.41 An amendment to remove the word "insulting" from section 5 of the POA 1986 was proposed at report stage, but not called for debate, as the Government was carrying out a public consultation.[60] This consultation was opened on 13 October 2011 and closed on 13 January 2012.[61] In their analysis of the responses,[62] the Home Office expressed the view that the word "insulting" should be removed.

B.42 The "Reform Section 5" campaign was re-launched in March 2012 under the slogan "Feel free to insult me". They commissioned two opinion polls of MPs, both of which showed a majority in favour of removing the word "insulting".[63]

The Crime and Courts Act 2013

B.43 The proposal to remove "insulting" from section 5 was not in the original Bill, but at second reading Baroness Hamwee expressed the hope that the matter could be dealt with. Ideally "insulting" should be removed from section 4A, while section 5 would be removed in its entirety.[64]

B.44 An amendment removing "insulting" from section 5 was moved by Lord Mawhinney in committee.[65] He cited an opinion of Lord Macdonald, a former DPP, to the effect that freedom of expression is essential to a democratic society and must extend to ideas that offend, shock or disturb. He mentioned the examples given before, of the man who said "Woof" to two Labradors and the street preacher with the banner saying "Stop homosexuality". The amendment was supported from such diverse quarters as the Peter Tatchell Foundation, the

58 *Hansard* (HC), 1 Mar 2011, vol 524, cols 225 to 251.

59 *Hansard* (HC), 1 Mar 2011, vol 524, cols 251 to 269.

60 Protection of Freedoms Bill, notices of amendments,17 May 2011 (2010-12), http://www.publications.parliament.uk/pa/bills/cbill/2010-2011/0146/amend/pbc1461705a.2205-2209.html (last visited 19 Jun 2013).

61 Home Office, *Consultation on police powers to promote and maintain public order (*Oct 2011), http://www.homeoffice.gov.uk/publications/about-us/consultations/police-powers/ (last visited 19 Jun 2013).

62 Home Office, *Police powers to promote and maintain public order, Section 5 of the Public Order Act 1986: Summary of consultation responses and Government response* (Jan 2013) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157871/consultation-responses-summary.pdf (last visited 19 Jun 2013).

63 The history is set out in a Commons Library Standard Note: P Strickland and D Douse, "*Insulting words or behaviour": Section 5 of the Public Order Act 1986* (Jan 2013) SN/HA/5760, www.parliament.uk/briefing-papers/SN05760.pdf (last visited 19 Jun 2013).

64 *Hansard* (HL), 28 May 2012, vol 737, cols 984 to 985.

65 *Hansard* (HL), 4 Jul 2012, vol 738, col 775 and following.

Christian Institute and the National Secular Society, and is official Liberal Democrat policy. Baroness Hamwee and Lord Dear also spoke in support of the amendment.

B.45 Lord Henley, for the Government, said that the case of *Percy v DPP*[66] made it clear that that section 5 "is proportionate and contains that necessary balance between the right of freedom of expression and the right of others to go about their business without being harassed, alarmed or distressed".[67] The Government needed to consider the position very carefully and come back to the question at report stage. On that understanding, the amendment was withdrawn.

B.46 A similar amendment was moved by Lord Dear at report stage.[68] He explained the history of the offence, since its introduction in its original form in the Public Order Act 1936, which was a reaction to Fascist marches. It had clearly been misapplied recently, as in the cases of the man who said that a police horse was "gay" and the man who displayed a poster in his window saying "Religions are fairy stories for adults". Lord Dear went on to say that there was very widespread support for the amendment, and the consultation had ended in January 2012, but the Government had still not expressed an opinion.

B.47 Many other speakers expressed similar sentiments and gave further examples. Baroness Smith of Basildon agreed that the law had sometimes been over-zealously applied, but argued that the omission of "insulting" would remove "a useful tool which currently enables the police to address homophobic and religiously offensive issues". There was still no hard evidence before the House of the need for it to be removed, and there were instances in which it had been applied correctly and proportionately. (Other speakers pointed out that these instances would all be covered by the term "abusive".)

B.48 Lord Taylor of Holbeach, for the Government, said that under the existing law it was not an offence simply to insult someone: the insult has to cause harassment, alarm or distress. The police believed that the offence was a "key early intervention tool" that "gives them the flexibility they need to respond to hate crime and to defuse tension quickly in public order situations". The Government were therefore against removing the reference to insult.

B.49 A vote was taken, and the majority were in favour of the amendment.

B.50 In the Commons, the Government accepted the result of the Lords debate and did not seek to reverse the amendment.[69] Many speakers spoke in support of the new clause and gave the same examples as had been mentioned in the Lords.

B.51 In committee,[70] an amendment was moved requiring the Government to publish an impact assessment of the effect of the clause within 12 months of its coming into force. Stella Creasy argued that section 5 was a useful protection against

66 [2001] EWHC Admin 1125, [2002] Criminal Law Review 835.

67 *Hansard* (HL), 4 Jul 2012, vol 738, cols 780 to 781.

68 *Hansard* (HL), 12 Dec 2012, vol 741, cols 1119 to 1121.

69 *Hansard* (HC), 14 Jan 2013, vol 556, col 642.

70 *Hansard* (HC), 13 Mar 2013, vol 560, col 391.

homophobic abuse, and incidents such as when the English Defence League proposed to screen "The Innocence of Muslims" in an area of high Muslim population as a deliberate provocation. It is not aimed at good-humoured and witty verbal insults of the kind sometimes exchanged by politicians. The other speakers mostly supported the clause and the amendment was withdrawn.

B.52 At report stage,[71] an amendment was proposed to remove the word "insulting" from sections 4 and 4A, to bring them into line with section 5. David Nuttall argued that the issue was the same in all cases and that it was wrong for any mention of "insulting" to remain on the statute book.[72] Jeremy Browne, for the Government, said that the offences under sections 4 and 4A were more serious.[73] Insults causing people to apprehend violence or that are intended to cause harassment, alarm or distress are a far more serious matter than anything addressed by section 5.

B.53 There was no further discussion of this amendment at third reading, and accordingly the Act as passed contains a section 57 removing "insulting" from section 5 but no amendment to section 4 or 4A.[74]

OFFENCES OF STIRRING UP HATRED

B.54 As explained above, there are offences of stirring up hatred on the grounds of race, religion or sexual orientation. The earliest of these offences was that of stirring up racial hatred, which was introduced by the Race Relations Act 1965.

B.55 Apart from these statutory offences, there were common law offences of sedition and seditious libel, which were abolished by the Coroners and Justice Act 2009. In Stephen's *Digest of the Criminal Law*,[75] seditious intention is defined as including "an intention to … raise discontent or disaffection among His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects". This definition was also used in Stephen's draft criminal code, and forms part of the codified criminal law of many Commonwealth countries.

B.56 This formulation has little support in the cases, and was largely derived from comments in *O'Connell*.[76] It is also subject to the reservation that, for sedition to exist, there must be incitement to violence.[77] For this reason, Arnold Leese was acquitted of seditious libel (but convicted of conspiracy to effect a public mischief)

[71] *Hansard* (HC), 13 Mar 2013, vol 560, col 380.

[72] *Hansard* (HC), 13 Mar 2013, vol 560, col 387.

[73] *Hansard* (HC), 13 Mar 2013, vol 560, col 394.

[74] See para B.35 and following above.

[75] J Stephen, *A Digest of the Criminal Law (Indictable Offences)* (9th ed 1950) p 92.

[76] (1844) 11 Clark and Finnelly's House of Lords Cases 155 at 157. The offence is discussed by Graham McBain, "Abolishing the crime of sedition" (2009) 83 *Australian Law Journal* 449.

[77] *Collins* (1839) 3 State Trials (New Series) 1149. See also the Canadian case of *Boucher* [1951] Supreme Court of Canada 265.

after publishing extreme anti-Semitic material.[78] The last, and unsuccessful, attempt to use seditious libel to punish racial incitement was *Caunt*.[79]

Racial hatred

Race Relations Act 1965

B.57 The Race Relations Act 1965 must be viewed against a background of African-Caribbean immigration in the 1950s and 1960s, the Notting Hill race riots in 1958[80] and the Bristol bus boycott in 1963.[81] The Act was mostly concerned with discrimination. Section 6 read:

> 6.—(1) A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins —
>
> (a) he publishes or distributes written matter which is threatening, abusive or insulting; or
>
> (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting
>
> being matter or words likely to stir up hatred against that section on grounds of colour, race, or ethnic or national origins.

In other words, the conduct must be both intended and likely to stir up racial hatred.

B.58 The other relevant provision of the Race Relations Act 1965 was section 7. Section 5 of the Public Order Act 1936 created an offence of threatening, abusive or insulting words or behaviour in a public place likely or intended to cause a breach of the peace. Section 7 amended it to make clear that the distribution of written matter in a public place was included.

B.59 Issues raised in the House of Commons debate were as follows:

(1) Is there any need for an offence where the consequence element is the stirring up of hatred, but not necessarily violence or a breach of the peace?

(2) Is such an offence an unacceptable limitation on free speech?

(3) Will it have a good or bad effect on race relations?

(4) Is the definition of a racial or ethnic group satisfactory, or should hatred on the ground of religion also be included?

[78] *The Times* 22 Sep 1936.

[79] James Caunt, *An Editor on Trial* (1947). The use of public mischief for this purpose was disapproved in *Joshua* [1955] AC 121: see B Hepple, "Race Relations Act 1965" (1966) *Modern Law Review* 306, 313. The offence of public mischief was held not to exist in *DPP v Withers* [1975] AC 842.

[80] A Ashworth, *Sentencing and Criminal Justice* (2010 5th ed) p 80.

[81] "Bus Boycott by West Indians: Company's Refusal to Employ Man", *The Times,* 3 May 1963.

THE NEED FOR THE OFFENCE

B.60 Sir Frank Soskice, the Home Secretary, explained that the new offence only covered conduct in public and not anything that members of an association may say or write to each other, and then only if deliberately aimed at stirring up hatred against a section of the population. This only differed from the existing law — for example the common law in *Caunt* and section 5 of the Public Order Act 1936 — in not being explicitly limited to conduct likely to cause violence or a breach of the peace. This may be hard to prove in the case of written matter, though "when hatred has been stirred up history, unfortunately, shows only too clearly that violence and disorder are probably not far away". The only liberty lost is the freedom to use outrageous language seeking to stir up actual hatred against groups of people for something they cannot help.[82]

FREEDOM OF EXPRESSION

B.61 Peter Thorneycroft argued that freedom of speech must include "allowing people whom the majority of their fellow citizens considered to be very evil, or, at any rate, very misguided, to say things which that majority thought were very wrong, or evil, or misguided". The only exception should be when it is likely or intended to cause a breach of the peace, and the existing law had been found adequate to convict racist speakers such as Colin Jordan.[83]

B.62 Sir Barnett Janner said that the Weimar Republic, under the plea that freedoms must be respected, had not stopped racist propaganda, such as *Der Stürmer*, and this led directly to the Holocaust. Propaganda of just the same kind was being distributed in England. The Universal Declaration of Human Rights requires freedom of thought and expression, but specifically excludes "any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein".[84]

B.63 Henry Brooke said that such propaganda could not bring about the same results here, as we had lived through the war and knew what Fascist oppression was.[85] Reginald Freeson said that this kind of propaganda might not lead to a Nazi takeover but certainly led to things like attempts to burn synagogues.[86]

B.64 Ronald Bell said that the expression of views should never be criminal unless they lead to a breach of the peace: blasphemy is the only current exception, and is not a desirable precedent to follow.[87]

B.65 Shirley Williams said that freedom to question a doctrine or an opinion or a belief is not the same as the freedom to attack someone for something to which he cannot conceivably make any difference, namely his origins. Britain would not be alone in enacting legislation of this kind: France, Scandinavian countries and,

[82] *Hansard* (HC), 3 May 1965, vol 711, col 938.

[83] *Hansard* (HC), 3 May 1965, vol 711, cols 953 to 955.

[84] *Hansard* (HC), 3 May 1965, vol 711, cols 955 to 960.

[85] *Hansard* (HC), 3 May 1965, vol 711, cols 962 to 968.

[86] *Hansard* (HC), 3 May 1965, vol 711, col 965 and cols 980 to 982.

[87] *Hansard* (HC), 3 May 1965, vol 711, cols 983 to 987.

above all, West Germany, all have stringent laws against defamation or incitement of hatred on the ground of race or creed.[88]

B.66 Selwyn Lloyd argued that the proposal would lead to censorship. A proposal to repatriate immigrants, or even to stop further immigration, might well lead to hatred without any intention to do so; but in law we are presumed to intend the natural and probable consequences of our acts. Is it right simply to close down all debate on such proposals?[89]

B.67 Donald Chapman argued that it is right, and normal, to curb individual liberty when the practice of it becomes licence and harms somebody else's liberty.[90]

EFFECT ON RACE RELATIONS

B.68 William Deedes said that he did not go all the way with those who said one could never legislate on a moral issue. But such legislation had to have "the reasonable man" on its side. In the present case, the reasonable man had not asked for this legislation and did not want it.[91]

B.69 Ronald Bell said that legislation might actually increase racial resentment, and had done so in America. It might lead to deliberate coat-trailing on the part of ethnic minorities.[92]

B.70 David Ennals said that, though there was no racial crisis now, it would be unwise to wait until there was.[93] Jeremy Thorpe said that the clause did not greatly extend the existing scope of sedition and criminal libel.[94] Peter Griffiths argued that some extremists might even court prosecution for the sake of publicity, and that one should not legislate for people's feelings.[95]

B.71 Monty Woodhouse said that one example of anti-incitement legislation that Shirley Williams had not mentioned was South Africa. There it is illegal to promote racial hatred, but South Africa cannot be held up as a shining example of equality. The whole proposal is a paternalistic belief by the dominant race that it knows best what is good for the other races; it is reverse discrimination, which in itself leads to a kind of apartheid.[96]

WHETHER RELIGION SHOULD BE INCLUDED

B.72 Barnet Janner argued that it was unfortunate that the clause did not also cover religious hatred[97] (many other speakers raised this point, arguing that Jews are

[88] *Hansard* (HC), 3 May 1965, vol 711, cols 1018 to 1019.

[89] *Hansard* (HC), 3 May 1965, vol 711, cols 1037 to 1039.

[90] *Hansard* (HC), 3 May 1965, vol 711, cols 1026 to 1028.

[91] *Hansard* (HC), 3 May 1965, vol 711, col 973.

[92] *Hansard* (HC), 3 May 1965, vol 711, cols 983 to 987.

[93] *Hansard* (HC), 3 May 1965, vol 711, cols 988 to 989.

[94] *Hansard* (HC), 3 May 1965, vol 711, cols 997 to 1003.

[95] *Hansard* (HC), 3 May 1965, vol 711, cols 1010 to 1012.

[96] *Hansard* (HC), 3 May 1965, vol 711, cols 1020 to 1024.

[97] *Hansard* (HC), 3 May 1965, vol 711, cols 955 to 962.

clearly a religious group but that it is uncertain whether they are a race or ethnic group).

B.73 Sir Dingle Foot, the Solicitor General, gave examples of extreme religious differences and controversy which should not be included. Attacks against Jews are not usually on the ground of religion, as they are equally directed against non-religious Jews. The removal of the requirement of likely breach of the peace is not problematic, and would simply bring us into line with most Commonwealth countries, in particular India, Nigeria and Kenya.[98]

HOUSE OF LORDS DEBATES

B.74 In the House of Lords, Lord Stonham explained that, in existing law, a wide range of racist activity, such as the stickers reading "if you want a nigger for a neighbour, vote Labour", and anti-Semitic and anti-black propaganda in Fascist newssheets, could produce a considerable effect without falling foul of the law. The Bill is limited, as it only covers behaviour in public and publicly distributed written material.[99]

B.75 Lord Derwent complained that the clause could cover things like an under-tipped cabman saying "you bloody Jew" to denote meanness, without any intention to refer to actual Jews.[100] Lord Elton said that, though the Bill was said to be aimed only at Fascists, in practice the effect could spread and inhibit the expression of legitimate concerns about the effects of mass immigration.[101]

B.76 Lord Brockway said that these fears are imaginary, as the offence was confined to cases where the stirring up of racial hatred is deliberate.[102] Lord Gardiner, the Lord Chancellor, similarly said that there was nothing to prevent discussion of immigration policy.[103]

B.77 In committee, Lord Derwent proposed an amendment to leave out the paragraph concerning words or behaviour in public: the existing public order powers are sufficient for this.[104] Lord Stonham answered that, usually, the existing public order offences would be used: the racial hatred provisions would be kept for extreme cases. The effect of a restriction to breach of the peace would be that an audience of Jews could only stop vile insults by an anti-Semitic speaker by showing signs of being provoked into a breach of the peace.[105] The amendment was withdrawn.[106]

[98] *Hansard* (HC), 3 May 1965, vol 711, cols 1042 to 48.

[99] *Hansard* (HL), 3 May 1965, vol 711, cols 1010 to 1012.

[100] *Hansard* (HL), 3 May 1965, vol 711, cols 1017 to 1019.

[101] *Hansard* (HL), 3 May 1965, vol 711, col 1037.

[102] *Hansard* (HL), 3 May 1965, vol 711, col 1048.

[103] *Hansard* (HL), 3 May 1965, vol 711, cols 1061 to 1064.

[104] *Hansard* (HL), 2 Aug 1965, vol 269, cols 80 to 81.

[105] *Hansard* (HL), 2 Aug 1965, vol 269, cols 83 to 85.

[106] *Hansard* (HL), 2 Aug 1965, vol 269, col 86.

Race Relations Act 1976

B.78 The Race Relations Act 1976 repealed section 6 of the Race Relations Act 1965 and inserted a new section into the Public Order Act 1936:

> 5A.—(1) A person commits an offence if—
>
> (a) he publishes or distributes written matter which is threatening, abusive or insulting; or
>
> (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting,
>
> in a case where, having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question.

B.79 This differs from the 1965 provision, in that the likelihood of stirring up racial hatred is sufficient: there is no requirement of intention to do so. However, subsection (3) provides that it is a defence that the accused was not aware of the content of the written matter in question and neither suspected nor had reason to suspect it of being threatening, abusive or insulting.

B.80 The Bill in its original form did not amend the Public Order Act 1936, but created a free-standing offence. Later amendments abandoned this approach and instead incorporated the new offence into the 1936 Act.

B.81 One event influencing the Bill was the report of Lord Scarman's enquiry into the Red Lion Square disorders,[107] which observed:

> The statute law does call for scrutiny. Section 6 of the Race Relations Act is merely an embarrassment to the police. Hedged about with restrictions (proof of intent, requirement of the Attorney-General's consent), it is unclear to the police on the street. The section needs radical amendment to make it an effective sanction, particularly … in relation to its formulation on the intent to be proved before an offence can be established.

B.82 The issues raised in the debates may be divided as follows:

(1) The principle of having laws against the incitement of racial hatred.

(2) Whether it is right to remove the requirement of intention.

(3) Whether the proposed offence is too stringent in its effects.

INCITEMENT OFFENCES IN PRINCIPLE

B.83 At second reading in the Commons, Ronald Bell drew attention to an argument in the White Paper, which said in effect that racialist propaganda had become more moderate in tone so as not to fall foul of the law, and that this made it all the more

[107] As quoted by Lord Harris: *Hansard* (HL), 4 Oct 1976, vol 374, cols 1049 to 1050. See also: The Red Lion Square Disorders of 15 June 1974 (1975), Cmnd 5919, para 182.

insidious.[108] Using this as a basis for criminalising moderately-toned expression of these views is an unacceptable infringement of free speech. Many people regard any expression of views with which they disagree as "threatening, abusive or insulting": the result would be to penalise serious geneticists, such as Eysenck who suggest that racial differences exist. He further noted, as more worryingly still, that the White Paper even canvassed the possibility of criminalising dissemination of ideas of racial superiority or inferiority as such and commented that while the Government is not *at this stage* proposing such laws, it may come.[109]

B.84 Paul Rose agreed that:

> Where there is a balance between freedom of speech and what appears to be a curb upon it, we ought to come down on the side of freedom of speech. But we do not permit freedom of expression when it endangers national security, when it is seditious, obscene, blasphemous or defamatory. The end product of racial hatred is not merely the hatred itself. It is the gas chamber and the racial war.

It was significant that it was precisely countries with experience of Nazism, namely Germany, Austria and Norway, that now had the most stringent laws against racial incitement. Ideally, the law should penalise the promotion of contempt, as well as hatred.[110]

B.85 In committee, Ronald Bell moved an amendment to remove clause 70 (as it had then become) from the Bill and to repeal section 6 of the 1965 Act. He repeated the argument that the clause infringed academic freedom. Honest expression of opinion in good literary English should never be penalised, unless it creates a danger of breach of the peace; and even then it should not always be presumed that if something you say provokes a violent reaction the fault is with you. Genuinely inflammatory speech is already covered by the law. This clause simply canonises the left wing consensus. The Left had equally used language inciting hatred of social groups, though not on a racial basis, and he would defend their right to do so, but there should not be a double standard.[111]

B.86 Sidney Bidwell said that, for example, the distribution of racialist propaganda to schoolchildren should always be criminal, even if it is not possible to point to a direct consequence in the form of racial hatred. He had experience of racism in disastrous forms, and was perhaps over-anxious about it. It should be a Labour government, and not demonstrators from fringe parties, who drive racism into the gutter where it belongs.[112]

[108] *Hansard* (HC), 4 Mar 1976, vol 906, cols 1624 to 1625.

[109] *Hansard* (HC), 4 Mar 1976, vol 906, cols 1621 to 1627.

[110] *Hansard* (HC), 4 Mar 1976, vol 906, col 1639.

[111] *Hansard* (HC), 8 Jul 1976, vol 914, cols 1937 to 1944.

[112] *Hansard* (HC), 8 Jul 1976, vol 914, col1949 and cols 1952 to 1953.

B.87 John Stokes said that the Bill was a disastrous blow to our historic liberties. It would be impossible to criticise politicians from countries from which immigrants come (such as Idi Amin) or to have a rational debate about immigration.[113]

B.88 Stanley Newens replied that Ronald Bell appeared to be defending freedom to incite racial hatred as a fundamental right. Equating this with left wing propaganda is fallacious, as the Left did not target people for anything they could not help. Nor would the clause prevent criticism of Idi Amin.[114]

B.89 At third reading in the Commons, an amendment was proposed to replace clause 70 (as it had then become) by an amendment to the Public Order Act 1936.[115] This amendment was passed[116] (the rest of the third reading debate, concerning the Bill as a whole, concerned discrimination rather than incitement and is not covered here).

B.90 In the Commons consideration of Lords amendments, John Stokes claimed that legitimate expressions of patriotic pride, such as "this is my own, my native land", could be taken as insulting by an immigrant. Englishmen should not be made to feel inferior and guilty in dealings with immigrants.[117]

B.91 Martin Flannery said that the recent "Open Door" programme, in which members of the National Front were invited to speak, was clearly racist and meant to promote racism; but it would be impossible to show that that was the producer's intention. The House of Lords and those who supported the amendment were trying to keep racialism going in this country.[118]

B.92 Ronald Bell argued that "racial hatred" was meaningless and that the test of "threatening, abusive or insulting" was not a sufficient safeguard. Like "obscene", it is simply a term of abuse for any expression of views to which one objects. The White Paper said that it did not go so far as to recommend banning all assertions of racial differences, but that was precisely what we were doing. It was Lysenkoism: the application of political dogma to what should be a factual scientific question.[119]

B.93 Brynmor John said that the clause did not privilege black people over white. Black Power spokesmen had also been prosecuted for racial incitement.[120]

REMOVAL OF THE REQUIREMENT OF INTENTION

B.94 In the second reading debate, the Home Secretary, Roy Jenkins, explained that the reason for the removal of the requirement of intention was that section 8 of the Criminal Justice Act 1967 abolished the presumption that a person intends

[113] *Hansard* (HC), 8 Jul 1976, vol 914, cols 1950 to 1952.

[114] *Hansard* (HC), 8 Jul 1976, vol 914, col 1954.

[115] *Hansard* (HC), 8 Jul 1976, vol 914, cols 1937 to 1969.

[116] *Hansard* (HC), 8 Jul 1976, vol 914, col 1955.

[117] *Hansard* (HC), 27 Oct 1976, vol 918, col 636.

[118] *Hansard* (HC), 27 Oct 1976, vol 918, cols 637 to 638.

[119] *Hansard* (HC), 27 Oct 1976, vol 918, cols 640 to 644.

[120] *Hansard* (HC), 27 Oct 1976, vol 918, col 649 to 652.

the natural and probable consequences of his act. Lord Scarman's report had observed that section 6 of the 1965 Act was too restrictively defined to be an effective sanction. The change also brought the offence more closely into line with the offences under the Public Order Act 1936. Some would wish to extend it further, to penalise the dissemination of ideas of racial superiority or inferiority, but that is better dealt with by education and debate.[121]

B.95 Ivor Stanbrook said that:

> Even the meanest criminal in this country is entitled to rely on the fact that his accusers must prove his intention to commit the crime before he can be convicted … What justification is there for an exemption for race relations?[122]

Roy Jenkins answered that "a different point of view was taken by a Government of a different complexion as long ago as 1936 on this issue".[123]

B.96 William Whitelaw argued that the clause would lead to a spate of frivolous prosecutions, or time-wasting applications to the Attorney General, and bring the law into disrepute.[124] Thomas Torney said that this argument would only encourage hard-core racists and Fascists, who are already extremely active.[125]

B.97 Michael Alison said that the removal of any requirement of intention is worrying. Normally the only crimes not needing intention were those connected with health and safety. If the clause is to be moved to the Public Order Act 1936, some sort of intention should be incorporated.[126]

B.98 Roy Jenkins replied that the existing law had been found to be ineffective. If a person publicly indulges in threatening, abusive or insulting language, it is reasonable to have an objective test for its likely effect.[127]

B.99 At second reading in the House of Lords, Lord Hailsham argued that it was unacceptable that the new offence did not contain a requirement of intention like most other offences.[128] Viscount Massereene argued that the test of what is "insulting" is subjective and can extend to some very trivial incidents.[129] Lord Wells-Peston reaffirmed that there was no intention of criminalising the expression of racialist views as such: that is more effectively defeated by public education and debate than by prosecution.[130]

[121] *Hansard* (HC), 4 Mar 1976, vol 906, col 1563 to 1566.

[122] *Hansard* (HC), 4 Mar 1976, vol 906, col 1565.

[123] *Hansard* (HC), 4 Mar 1976, vol 906, col 1566.

[124] *Hansard* (HC), 4 Mar 1976, vol 906, cols 1576 to 1577.

[125] *Hansard* (HC), 4 Mar 1976, vol 906, cols 1618 to 1620.

[126] *Hansard* (HC), 8 Jul 1976, vol 914, cols 1944 to 1946.

[127] *Hansard* (HC), 8 Jul 1976, vol 914, cols 1946 to 1950.

[128] *Hansard* (HL), 20 Jul 1976, vol 373, col 742.

[129] *Hansard* (HL), 20 Jul 1976, vol 373, cols 816 to 817.

[130] *Hansard* (HL), 20 Jul 1976, vol 373, col 826.

B.100 In committee, Lord Hailsham moved an amendment to incorporate a requirement of intention.[131] Lord Scarman may have recommended that the requirement of intention be reformulated, but the current Bill removes it altogether.[132] This is contrary to basic principles of English criminal law; and in the eighteenth century the offences of sedition and criminal libel had become distorted in much the same way, and brought the administration into disrepute. The argument that the change simply brings the offence into line with section 5 is fallacious: the section 5 offence is summary, but the new offence is a serious indictable offence. Nor should the onus be on the defendant to prove innocent dissemination.

B.101 Lord Harris answered that, before the question of consequences arises, the language or conduct must already have been shown to be threatening, abusive or insulting. It is not unreasonable to say that, once that is established, a person is answerable for the likely consequences.[133] A vote was taken and Lord Hailsham's amendment was passed.

B.102 In the Commons consideration of Lords amendments, Brynmor John explained that the clause as originally drafted did not make the offence one of strict liability: there had to be the intention to engage in the threatening, abusive or insulting words or conduct, it was only the consequence of racial hatred that had an objective test. Nor was the section 5 offence summary: it was triable either way.[134]

B.103 Nick Budgen said that the offence was unnecessary anyway, unless there is a risk of violence, and this was covered by the previous law. Many reasonable criticisms of Government policy might carry the risk of causing resentment against groups that benefit from that policy; for example arguing that there should not be an automatic right of entry for fiancés of immigrants. Removing the requirement of intention makes it worse. It is no good trying to bottle up resentments by stifling freedom of speech.[135]

B.104 Paul Rose replied that, in these particular cases, intent is almost impossible to prove: any defendant can claim that he was merely reckless. The penal codes of other countries, especially Austria and Germany, look only to the result. The point is that the citizen has the right to be protected against vilification as well as against violence.[136]

B.105 Edward Lyons said that that kind of test is not unusual. For hundreds of years there has been a test of whether conduct is likely to lead to a breach of the peace, with no question of intention.[137]

[131] *Hansard* (HL), 4 Oct 1976, vol 374, col 1046.

[132] *Hansard* (HL), 4 Oct 1976, vol 374, col 1050.

[133] *Hansard* (HL), 4 Oct 1976, vol 374, col 1050.

[134] *Hansard* (HC), 27 Oct 1976, vol 918, cols 625 to 626.

[135] *Hansard* (HC), 27 Oct 1976, vol 918, cols 627 to 630.

[136] *Hansard* (HC), 27 Oct 1976, vol 918, cols 630 to 633.

[137] *Hansard* (HC), 27 Oct 1976, vol 918, col 635.

B.106 Bruce Douglas-Mann argued that the test of intent should be reformulated rather than removed: for example, it should be possible to infer intention from previous conduct.[138]

B.107 Michael Alison said that it was wrong to punish people who had no criminal intent. Particularly for uneducated people, it is easy to say things that are insulting without really meaning to. The effect will be to cause more resentment than it solves.[139]

B.108 On a vote, the Lords amendment was rejected. The Bill was therefore passed into law without any requirement of intention to stir up racial hatred.

IS THE OFFENCE TOO STRINGENT?

B.109 Lord Monson moved an amendment in committee inserting the word "grossly" before "insulting".[140] Lord Harris answered that this was unnecessary, as the clause already excluded trivial incidents by being confined to conduct likely to stir up racial hatred, and the amendment was withdrawn.

B.110 Lord Monson further proposed an amendment whereby subsection (2), which contained an exemption for the "fair and accurate" reporting of Parliamentary proceedings, should be reworded as "reasonably fair or factual".[141] The existing wording was too stringent: it allowed only verbatim reporting, and not Parliamentary sketches as commonly used. Lord Harris answered that, in his experience as a journalist, the existing test was reasonable, and that it was right to make the exemption a narrow one in view of the extreme nature of the conduct criminalised. The amendment was withdrawn.[142]

Public Order Act 1986

BACKGROUND TO THE BILL

B.111 The present provisions on stirring up hatred are contained in the POA 1986. This was the product of a comprehensive reconsideration of the Public Order Act 1936, not confined to questions of racial hatred. The main body of the Act followed the recommendations in our public order report,[143] which did not address hatred offences.

B.112 The review started with a Green Paper.[144] This said that the existing provision (section 5A of the Public Order Act 1936, as inserted by the Race Relations Act 1976) was regarded as ineffective, as there was still material circulating which was highly offensive to ethnic minority communities but just within the law. Some suggestions had been made to widen the offence: for example the Ealing

[138] *Hansard* (HC), 27 Oct 1976, vol 918, cols 644 to 645.

[139] *Hansard* (HC), 27 Oct 1976, vol 918, cols 646 to 649.

[140] *Hansard* (HL), 4 Oct 1976, vol 374, col 1043.

[141] *Hansard* (HL), 4 Oct 1976, vol 374, cols 1051 to 1053.

[142] *Hansard* (HL), 4 Oct 1976, vol 374, cols 1053 to 1054.

[143] Criminal Law: Offences Relating to Public Order (1983) Law Com 123.

[144] Review of the Public Order Act 1936 and related legislation (1980) Cmnd 7891 paras 104 to 112.

Community Relations Council, with some support from other bodies, recommended a provision reading:

> A person commits an offence if, having regard to all the circumstances, he either stirs up hatred against, or advocates any discriminatory policy or course of action against any ethnic group in the United Kingdom through the publication or distribution of any written or printed matter, in any public place, or at any public meeting. It is an offence to advocate the expulsion of any ethnic group from the United Kingdom.

The Green Paper rejected this on civil liberties grounds, but invited comments on how the section 5A offence could be redrafted: for example, whether it should concentrate on the prospect of disorder or of racial disharmony, and what safeguards there should be for fair comment and academic research.

B.113 The Home Affairs Committee of the House of Commons published a report in August 1980.[145] The Council for Racial Equality had proposed an offence of "uttering at a public meeting or the publishing of words, which, having regard to all the circumstances, expose any racial group in Great Britain to hatred, ridicule or contempt". The CRE argued that the existing offence was inadequate:

> Acquittals have been secured by arguing that an audience was already so corrupted that hatred could not be stirred up, and also by the production of witnesses to show that the words spoken were so extreme as to be counter-productive and to produce sympathy rather than hatred.[146]

However, the Home Affairs Committee took the view that the case had not been made out. The removal of the element of intent was already controversial enough and a further extension could be risky. The offence should stay as it is, but should be extended to broadcasting.[147]

B.114 In a House of Lords debate on the dissemination of extremist literature,[148] Lord Belstead noted that some considered the existing provisions to be an infringement of freedom of expression. However, the object was to catch only literature which is so extreme that it carries with it the seeds of racial violence, and the Attorney General's consent was required for prosecution. Others suggested that the offence is drawn too narrowly, and permits the circulation of seriously damaging racialist literature. Parliament would have to consider whether the balance was right, and proponents of both points of view can put their arguments to the Government in its review of public order law.

[145] The Law Relating to Public Order, Fifth report from the Home Affairs Committee (1979-80), HC 756 paras 94 to 100.

[146] The Law Relating to Public Order, Fifth report from the Home Affairs Committee (1979-80), HC 756 para 95.

[147] This was to address the concerns raised by the "Open Door" programme: para B.91 above.

[148] *Hansard* (HL), 22 Oct 1981, vol 424, cols 888 to 892.

B.115 The White Paper[149] reaffirmed that the law should not punish the expression of offensive views simply as such, and should continue to be based on considerations of public order. It acknowledged the point about the effect of material on different audiences, but pointed out that:

(1) material originally aimed at audiences unlikely to be inflamed, such as clergy and Members of Parliament, could find its way to other audiences; and

(2) even audiences already holding racialist views can be incited to further hatred and acts of violence.

The section should be recast to penalise conduct which is either likely or intended to stir up racial hatred: the formula is the same as in section 5 of the 1936 Act. The existing exemption for material circulated within an association should be removed. The White Paper noted that cable operators could be liable for transmitting speech of this kind, but did not recommend extending liability to broadcasters.

B.116 Leon Brittan introduced the White Paper in a debate on 16 May 1985.[150] He explained that the law on incitement to racial hatred would be tightened up, but that he did not intend to introduce a power to ban marches on this ground, as there is already power to ban them on the ground of serious public disorder.[151]

THE BILL

B.117 The Bill in its original form made some changes to the offence in section 5A of the 1936 Act. The details of this were not discussed in the second reading debate in the House of Commons,[152] though several members welcomed this part of the Bill as "tightening up" the existing offence.

B.118 During its passage through committee in the House of Commons, the Bill was extensively amended.[153] The existing offences under the Theatres Act 1968 and the Cable and Broadcasting Act 1984 were incorporated into the Bill, and amendments were accepted importing into these the test that either the defendant intends to stir up racial hatred or racial hatred is likely to be stirred up.[154] The police were given a power of immediate arrest,[155] and the scope of the words and behaviour offence was extended to private as well as public places.[156] A new offence of possession of racially inflammatory material was introduced.

[149] Review of Public Order Law (1985) Cmnd 9510 paras 6.5 to 6.12.

[150] *Hansard* (HC), 16 May 1985, vol 79, cols 506 to 521.

[151] Under POA 1986, s 14.

[152] *Hansard* (HC), 13 Jan 1986, vol 89, cols 792 to 869.

[153] A T H Smith, *Offences Against Public Order* (1st ed 1987) para 9-01. The effect of these amendments was summed up in the third reading debate, *Hansard* (HC) 30 Apr 1986, vol 96, col 1064.

[154] *Hansard* (HC), 30 Apr 1986, vol 96, cols 1050 and 1053.

[155] *Hansard* (HC), 30 Apr 1986, vol 96, cols 1054 to 1056.

[156] *Hansard* (HC), 30 Apr 1986, vol 96, cols 1053 to 1054.

B.119 The cumulative result of these amendments is that, in the Act as it exists today:

(1) it is sufficient if *either* the defendant intends to stir up hatred *or* hatred is likely to be stirred up;[157] but in the second case there is a defence if the defendant did not intend the words or material to be, and was not aware that they might be, threatening, abusive or insulting;[158]

(2) the words or behaviour need not be in public, but there is a defence if they were in a private dwelling house and the defendant had no reason to believe that they would be seen or heard from outside.[159]

B.120 The following issues were raised in the debates:

(1) The fault element of the offence: is a test of intention *or* likelihood appropriate?

(2) The extension of the offences to further media.

(3) The extension of the offences to words and behaviour in private places, such as clubs.

(4) The clarification of what is meant by racial and ethnic groups, in particular the position of gypsies.

INTENTION OR LIKELIHOOD

B.121 In the second reading debate in the House of Lords,[160] Lord Glenarthur explained the test of intention or likelihood and the effect of the amendments so far. Lord Elwyn-Jones said that it might be hard to prove intention, and Lord Monson argued that several perfectly legitimate acts, such as demonstrations in favour of a Sikh homeland or protests about immigration policy, might have the unintended effect of causing racial unrest.

OTHER MEDIA

B.122 In the second reading debate in the House of Lords, Lord Glenarthur undertook to extend the offences to include media, such as video and sound tapes and films.

B.123 Amendments were proposed and accepted in House of Lords committee[161] without debate. These included revised clauses introducing the present wording of the stirring up offences, covering:

(1) words or behaviour or the display of written material;[162]

(2) publications;[163]

[157] Amendment made 30 Apr 1986: *Hansard* (HC), 30 Apr 1986, vol 96, col 1050.

[158] POA 1986, s 18(5).

[159] POA 1986, s 18(4).

[160] *Hansard* (HL), 13 Jun 1986, vol 476, cols 513 to 586.

[161] *Hansard* (HL), 6 Oct 1986, vol 480, cols 9 to 109.

[162] POA 1986, s 18.

[163] POA 1986, s 19.

(3) the performance of plays;[164]

(4) recordings;[165]

(5) programme services;[166]

(6) the possession of racially inflammatory material.[167]

B.124 At report stage, there was some discussion of the clause concerning plays: it was pointed out that if the clause were too widely drawn it could have the effect of banning *The Merchant of Venice* or *Othello*. It was explained that the clause was taken from the existing Theatres Act 1968, which had not in practice had any such effect. At third reading, there was a further amendment to the clause relating to theatres.[168]

WORDS AND BEHAVIOUR IN PRIVATE PLACES

B.125 In committee in the House of Lords, amendments were proposed to insert "seriously" before "insulting" in the definition of the offences[169] and to restore the exemption for statements made in a private place.[170]

(1) Lord Monson argued that the insertion of "seriously" would discourage over-zealous enforcement in trivial cases. The Earl of Caithness explained that the words "threatening, abusive or insulting" had been used in other public order offences and had not given rise to problems of that kind. Lord Monson said that he was to some extent reassured, and that frivolous prosecutions might be discouraged by the fact that Lord Caithness's remarks were now on the record.[171]

(2) Lord Monson also argued that the offence would be oppressive if it covered remarks made in private houses and clubs. Lord Caithness said that the offence did not cover remarks in private homes, but that in other private places, where those attending are not necessarily personal friends, things may be done with the intention of stirring up racial hatred. Lord Monson asked to withdraw his amendment on Lord Caithness' undertaking to look into the matter.[172]

Both amendments were withdrawn.

B.126 At House of Lords report stage,[173] an amendment was again proposed to restore the exemption for statements made in a private place, provided that no more than

[164] POA 1986, s 20.

[165] POA 1986, s 21.

[166] POA 1986, s 22.

[167] POA 1986, s 23.

[168] *Hansard* (HL), 29 Oct 1986, vol 481, cols 745 to 757.

[169] *Hansard* (HL), 21 Oct 1986, vol 481, cols 174 to 175.

[170] *Hansard* (HL), 21 Oct 1986, vol 481, col 190.

[171] *Hansard* (HL), 21 Oct 1986, vol 481, cols 190 to 191.

[172] *Hansard* (HL), 21 Oct 1986, vol 481, cols 190 to 192.

[173] *Hansard* (HL), 23 Oct 1986, vol 481, col 464.

25 persons were present: the arguments were the same as those in committee. The amendment concerning statements made in private was defeated on a vote.

MEANING OF ETHNIC GROUP

B.127 An amendment creating a definition of racial hatred was accepted in House of Lords committee without debate.[174] Later in committee, an amendment was proposed to declare that gypsies are an ethnic group.[175] Lord Elwyn-Jones said that, according to the Commission for Racial Equality, a disproportionate amount of hate literature was about gypsies. However, there was still disagreement whether they were a racial group or not. Other speakers observed that, even if the law were clarified so that gypsies were certainly a racial group, there would still be the question of who is a gypsy: Romany gypsies only, or all groups with a travelling lifestyle? The amendment was withdrawn.[176]

B.128 At report stage,[177] an amendment was again proposed to address the position of gypsies: the arguments were the same as those in committee. This amendment was withdrawn, on the assurance that the authorities always considered Romany gypsies to be a genuine ethnic group.

LATER STAGES

B.129 At third reading in the Lords there was no debate on the relevant clauses, except for the amendment to the clause about theatres.[178]

B.130 The House of Commons accepted the Lord amendments on theatres, broadcasting and the meaning of racial hatred.[179]

Religious hatred

B.131 A Law Commission report in 1985[180] recommended the abolition of the offence of blasphemy without replacement. A dissent attached to that report recommended the creation of an offence of publishing grossly abusive or insulting material relating to a religion with the purpose of outraging religious feelings: this would cover all recognised religions. This would not be a hate crime as normally understood, as the proposed offence was one of insulting religion rather than religious groups or people. Neither the report nor the dissent was implemented, until the abolition of blasphemy and blasphemous libel by the Criminal Justice and Immigration Act 2008.

B.132 Incitement to religious hatred was added to the POA 1986 by the Racial and Religious Hatred Act 2006. The possibility of such an offence was canvassed in

[174] *Hansard* (HL), 6 Oct 1986, vol 480, col 68.

[175] *Hansard* (HL), 21 Oct 1986, vol 481, cols 167 to 173.

[176] *Hansard* (HL), 21 Oct 1986, vol 481, col 173.

[177] *Hansard* (HL), 23 Oct 1986, vol 481, cols 459 to 464.

[178] *Hansard* (HL), 29 Oct 1986, vol 481, cols 745 to 757.

[179] *Hansard* (HC), 4 Nov 1986, vol 103, cols 821 to 828.

[180] Criminal Law: Offences against Religion and Public Worship (1985) Law Com No 145.

the debates on the earlier Bills relating to racial hatred. We consider each Bill in turn below.[181]

Race Relations Act 1965

B.133 In the second reading debate,[182] Sir Bernard Braine pointed out that, as religion was not included as a ground of discrimination or incitement, it was questionable whether Jews were protected.[183] Sir Frank Soskice, the Home Secretary, replied that Jews were certainly an ethnic group, even if they were not a race.[184]

B.134 Norman St John-Stevas argued that it would be desirable to include religion as a ground, and to make the Act extend to Northern Ireland, even though this was contrary to the conventional usage.[185] It was doubtful whether the Bill in its present form would protect Jews; and if it was interpreted as doing so, it would have the undesirable effect of labelling them as a racial and ethnic minority.[186]

B.135 Peter Thorneycroft said that abuse was equally detestable whether it was on the grounds of race or religion, though he agreed that it would be very difficult to extend the law to deal with religion.[187] However, there had to be freedom for speech however repugnant, and the existing law was adequate to deal with cases where there is a prospect of violence.[188]

B.136 Sir Barnet Janner, in his argument comparing the position in Weimar Germany,[189] said that it would be desirable to cover religion as well as race.[190]

B.137 Bernard Floud said that, if religion is not covered, it could be used as a loophole for people whose real motivation is racism; not only against Jews, but also against Muslims or Hindus.[191]

B.138 Shirley Williams said that in some countries, such as the Netherlands, Scandinavia and France, there were already laws against religious incitement or religious defamation.[192]

[181] We identify each Bill by the name of the Act which it became, except in the case of Lord Avebury's Religious Offences Bill which was never passed.

[182] *Hansard* (HC), 3 May 1965, vol 711, cols 926 to 1059.

[183] *Hansard* (HC), 3 May 1965, vol 711, cols 932 to 933.

[184] *Hansard* (HC), 3 May 1965, vol 711, cols 932 to 933.

[185] *Hansard* (HC), 3 May 1965, vol 711, cols 941 to 942 and 1001 to 1002. It was pointed out by other speakers that in Northern Ireland there were already laws against religious discrimination.

[186] *Hansard* (HC), 3 May 1965, vol 711, col 959.

[187] *Hansard* (HC), 3 May 1965, vol 711, col 952.

[188] *Hansard* (HC), 3 May 1965, vol 711, cols 953 to 954.

[189] See para B.62 above.

[190] In fact, in the Weimar republic there were laws against attacks on religion, and publications such as *Der Stürmer* advanced the defence that they did not fall within these laws because their attacks were against Jews as a race.

[191] *Hansard* (HC), 3 May 1965, vol 711, col 970.

[192] *Hansard* (HC), 3 May 1965, vol 711, col 1019.

B.139 The Solicitor General said that the question had been considered very carefully, and listed many examples of religious controversy in which it would be undesirable to intervene. In almost every case, it would be found that attacks on Jews were on racial rather than religious grounds. It was both unnecessary and undesirable to include references to religion in the relevant clause.[193]

Race Relations Act 1976

B.140 In the second reading debate in the House of Commons, Paul Rose said that he would like to see a provision about religion added to the Bill. It is easy to concentrate on Sikhs, Hindus, Jews or Muslims, but the same issues could equally arise between Protestants and Catholics.[194]

B.141 In the second reading debate in the House of Lords, Lord Hailsham pointed out that, at common law, "deliberate incitement to class hatred, religious hatred or any other sort of hatred between groups of British subjects is, and always has been, a crime at common law — and, more specifically, the crime which used to be called sedition".[195]

B.142 At third reading, Baroness Vickers said that she hoped the proposed Commission for Racial Equality would keep in mind the question of religion: as she understood, a provision could not be put into the Bill because it would mean too much redrafting.[196]

Public Order Act 1986

B.143 In the second reading debate in the Commons,[197] Alex Carlile said:[198]

> Religious groups have not been included. Some of the worst oppression and harassment this century in Britain and the world has been against various religious groups. I ask the Home Secretary to consider whether, by a simple drafting amendment, religious groups can be included in part III.

This was not answered or addressed by any of the other speakers.

B.144 In committee in the Lords, Lord Monson, in proposing the amendment to insert the word "seriously" before insulting, said:[199]

> Any deliberate stirring up of hatred is abhorrent, whether it be racial hatred, religious hatred, class hatred, hatred directed against non-striking miners or print workers or hatred against doctors, scientists and laboratory technicians engaged in medical research through the use of animals.

[193] *Hansard* (HC), 3 May 1965, vol 711, cols 1042 to 1043.

[194] *Hansard* (HC), 4 Mar 1976, vol 906, col 1638.

[195] *Hansard* (HL), 20 Jul 1976, vol 373, col 742.

[196] *Hansard* (HL), 15 Oct 1976, vol 375, cols 739 to 740.

[197] *Hansard* (HC), 13 Jan 1986, vol 89, cols 792 to 869.

[198] *Hansard* (HC), 13 Jan 1986, vol 89, cols 851 to 852.

[199] *Hansard* (HL), 21 Oct 1986, vol 481, col 174.

B.145 In the Commons consideration of Lords amendments,[200] there was debate on the new clause defining racial hatred. Jonathan Sayeed[201] regretted that the new clause did not deal with incitement to religious hatred. *Mandla v Dowell Lee* clarified that, as a shared religion is one mark of an ethnic group, religious hatred can sometimes be construed as racial hatred. Douglas Hogg[202] answered that:

> Religious hatred is a difficult and important matter. The Government have decided not to include religious hatred in part III of the Bill because we came to the conclusion that attempts at control would be unenforceable. It would open up too many concepts and too many circumstances in which the law would be required to intervene.

Crime and Disorder Act 1998

B.146 As explained in the earlier parts of this Appendix, the Bill addressed aggravated offences and enhanced sentencing and was not concerned with offences of stirring up hatred. In the debate to consider committee amendments,[203] the question of whether to include religious hostility as an aggravating factor was discussed,[204] and Jack Straw said:

> We of course recognise the case for laws dealing with religious discrimination and hatred. We are giving it active consideration, but we need to give such offences the same careful consideration that we have given to these offences.

Anti-terrorism, Crime and Security Act 2001

B.147 The Bill, as introduced following the attacks of 11 September 2001, originally contained a clause 5, adding religious hatred to the incitement offences in the POA 1986, as well as provisions for religious hostility as an aggravating factor in sentencing and in the specific aggravated offences. Following debate, however, the religious incitement offence was dropped from the Bill and the Act as passed addressed only religiously aggravated offences and religious aggravation in sentencing.

[200] *Hansard* (HC), 4 Nov 1986, vol 103, cols 821 to 828.

[201] *Hansard* (HC), 4 Nov 1986, vol 103, col 827.

[202] *Hansard* (HC), 4 Nov 1986, vol 103, col 828.

[203] *Hansard* (HC), 23 Jun 1998, vol 314, cols 892 to 906.

[204] See paras B.28 and B.29 above.

B.148 The issues raised in debate were as follows:

(1) The need to give the same protection to religious groups and their members as that currently given to racial groups.

(2) The need to preserve freedom to criticise religious beliefs and practices.

(3) Whether the current proposals achieved the right balance between these or further consideration was required.

PROTECTION FOR RELIGIOUS GROUPS

B.149 In the second reading debate in the Commons,[205] the Home Secretary, David Blunkett, explained that Muslim leaders had requested the incitement offence, and that it is fair and reasonable to give the same protection to Muslims as to Jews and Sikhs.[206]

B.150 In the Ways and Means debate,[207] Gerald Kaufman argued that religion can be an unalterable facet of identity. A person may have abandoned Jewish, Hindu or Muslim beliefs and still be perceived as a Jew, Hindu or Muslim. There have been attacks on Jewish cemeteries and on mosques.[208]

B.151 At second reading in the House of Lords,[209] Lord Rooker explained that the current international situation had been used to abuse people and that it is right to extend the laws to protect citizens from hatred based on religious belief. Lord Dixon-Smith said that the relevant part of the Bill contained an enormous potential conflict between the right of freedom of speech and the potential for religious incitement.

B.152 Lord Waddington, in a continuation of that debate,[210] said that the proposals had little to do with the events of 11 September, except in the sense that they were being offered as a sop to the Muslim community in return for support in the war against terror. In fact, they were as likely to be used against Muslims as in their favour, as Muslims sometimes attack others on the basis of their religion. Baroness Buscombe said that confusing the protection of any minority with counter-terrorism creates undesirable associations in the public mind.

B.153 Several speakers made the point that the legislation did not protect religion, but only religious groups in the same way as racial groups. Others said that this might be desirable in principle but the present Bill was not the place for it. In particular, any proposal to abolish the offence of blasphemy should be for another time.

B.154 Lord Dholakia said that the Muslim community would find the proposals patronising; in particular they would object to the implication that there is a

[205] *Hansard (*HC), 19 Nov 2001, vol 375, cols 21 to 118.

[206] *Hansard (*HC), 19 Nov 2001, vol 375, col 34.

[207] *Hansard* (HC), 26 Nov 2001, vol 375, cols 673 to 718.

[208] *Hansard* (HC), 26 Nov 2001, vol 375, cols 683 to 689.

[209] *Hansard* (HL), 27 Nov 2001, vol 629, cols 142 to 162.

[210] *Hansard* (HL), 27 Nov 2001, vol 629, col183 to 290. See, in particular, col 189.

special link between the protection of their religion and the events of 11 September.

B.155 Lord Parekh said that the clause had the balance about right. Very often ethnic prejudice starts as religious prejudice, as in the case of anti-Semitism.

FREEDOM OF CRITICISM

B.156 In the Ways and Means debate,[211] Simon Hughes argued that a Bill on terrorism was not the place to deal with sensitive religious issues, and that the Evangelical Alliance and several other religious representatives agreed with him. There was also pressure to create incitement offences for other forms of hatred, such as gender and sexual orientation, and all these issues should be considered together.[212]

B.157 Several speakers made the point that the law should not punish the *Satanic Verses* or the *Last Temptation of Christ*, or be used to fetter religious debate. Nor should a preacher be put in prison for calling the Pope an anti-Christ. There are sometimes rational reasons for attacking religious groups, or more precisely those who justify unacceptable acts in the name of God. It may be morally wrong to incite hatred against the Moonies for what they do to children, but it should not be a criminal offence. Another speaker gave the example of a group called the "Children of God", whose activities amounted to thinly-veiled prostitution.

B.158 David Blunkett gave an assurance that the new offence would not catch energetic proselytising, or humour, such as the film *Monty Python's Life of Brian*. It is about attacks on religious groups as people.

B.159 At second reading in the House of Lords,[213] Lord Onslow said that it should not be criminal to attack the Hindu caste system or what the Quran says about Jews.[214] Lord Desai said that attacks on Muslims were almost always racially motivated, and the proposals were based on a fallacy.[215]

B.160 Lord Alton argued that the legislation would do nothing to alleviate existing community tensions; it might have a chilling effect on discussion of cultural practices, such as female circumcision and forced marriages. Muslim bodies had also expressed concern about the chilling effect on their legitimate free speech.

CONCLUSION

B.161 In the committee debates in the Lords,[216] it was argued that one cannot simply tack "or religious" after "racial". If there are to be provisions for religious hatred at all, they would have to be drafted very differently, to allow for legitimate criticism of religious beliefs and practices. However, the Bishop of Southwark said that if these provisions were removed from the Bill, they would not appear in another

[211] *Hansard* (HC), 26 Nov 2001, vol 375, cols 673 to 718.

[212] *Hansard* (HC), 26 Nov 2001, vol 375, col 675.

[213] *Hansard* (HL), 27 Nov 2001, vol 629, cols 142 to 162 and cols 183 to 290.

[214] *Hansard* (HL), 27 Nov 2001, vol 629, col 244.

[215] *Hansard* (HL), 27 Nov 2001, vol 629, col 245.

[216] *Hansard* (HL), 28 Nov 2001, vol 629, cols 385 to 446.

form in the foreseeable future: they would not appear at all. On a vote, both clause 39 (incitement) and clause 40 (enhanced sentencing) were agreed to.

B.162 At report stage,[217] Lord Lester argued that it did not make sense to deal with incitement of religious hatred in the context of this Bill. It should be dealt with together with religious discrimination and the abolition of blasphemy; and preferably with hatred against gay men and lesbians.[218]

B.163 An amendment was proposed, and passed, leaving clause 39, on religious incitement, out of the Bill. The Act as passed therefore contained no provision creating an offence of incitement to religious hatred.

Religious Offences Bill

B.164 In 2002, Lord Avebury introduced a private member's Bill to abolish the offence of blasphemy and introduce a religious hatred offence.

B.165 The offences in this Bill were closely modelled on those for racial hatred. Lord Avebury argued that, as the law in Northern Ireland already followed this model, it would be intolerable to have different provisions in the rest of the United Kingdom. The offence targeted hatred against groups of people defined by reference to religion. It was not a replacement for blasphemy: for example, the poem in *Gay News* was blasphemous but was not calculated to cause religious hatred.[219]

B.166 Lord Ahmed, welcoming the Bill, gave instances of Islamophobic behaviour and sentiment, against which at present there was no protection. Lord Campbell of Alloway argued that the religiously aggravated offences under the Anti-Terrorism, Crime and Security Act 2001 were sufficient for the purpose.

B.167 Lord Desai argued that religious hatred is usually based on communalism rather than on theology. The example of Northern Ireland shows that the existence of stirring up offences does not prevent sectarian violence.

B.168 Lord Lucas argued that there are times when it is justified to hate particular groups, such as the Taliban, which are certainly defined by reference to religion. There must be freedom to challenge the tenets or practices of a religion.

B.169 Baroness Whitaker said that the United Nations Human Rights Committee had recommended that the United Kingdom should extend its own criminal legislation to cover offences motivated by religious hatred.

B.170 The Bill was committed to a select committee on religious offences,[220] which produced a report on Religious Offences in England and Wales.[221] This set out the history of religious offences and the issues to be considered in any future legislation, but did not make recommendations.

[217] *Hansard* (HL), 10 Dec 2001, vol 629, cols 1141 to 1208.

[218] *Hansard* (HL), 10 Dec 2001, vol 629, cols 1169 to 1172.

[219] Second Reading debate: *Hansard* (HL), 30 Jan 2002, vol 631, cols 314 to 340.

[220] *Hansard* (HL), 11 Mar 2002, vol 632, cols 530 to 531.

[221] Religious Offences in England and Wales - First Report (2002-03) HL 95.

B.171 The House of Lords held one further debate to consider that report.[222] The Government minister responsible, Baroness Scotland, promised to take the report into account in considering the way forward. There were no further proceedings on the Bill.

Serious Organised Crime and Police Act 2005

B.172 A provision extending the incitement offences to religious hatred was contained in the Serious Organised Crime and Police Bill. Again we consider the arguments under three headings:

(1) The need to give the same protection to religious groups and their members as that currently given to racial groups.

(2) The need to preserve freedom to criticise religious beliefs and practices.

(3) Whether the current proposals achieved the right balance between these or further consideration was required.

PROTECTION FOR RELIGIOUS GROUPS

B.173 Baroness Scotland, introducing the Bill, explained that the purpose was to stop those who seek to whip up community tensions by inciting hatred against those who hold a particular religious faith. There was no question of protecting any particular faith, only people who hold that faith. It has been argued that the Bill will backfire by creating unjustified expectations that minority faiths will be protected by something like a blasphemy law. This is untrue: the Bill will not stop people being rude or insulting about Islam, and the Muslim Council of Britain does not expect that it will.[223]

B.174 Lord Mackay of Clashfern argued that it was not anomalous that Jews and Sikhs were protected as races while Muslims were not. That is because Jews and Sikhs are races: purely religious attacks on them are not caught any more than attacks on Muslims. Religion is something one can choose.[224]

B.175 Lord Alli said that it was right that the protection should extend to religion as well as race. He believed it should extend to sexual orientation as well.

B.176 Lord Sutherland said that the problem was that "insulting" is defined by the reaction of the hearer, and offence is often taken when not intended.

B.177 Lord Bhatia said that Muslims did not want the existing blasphemy laws to be abolished or Sikhs and Jews to lose the protection they now have. They just wanted similar protection for themselves.

B.178 Baroness Flather said that such legislation would send entirely the wrong message. Religious and ethnic groups should be encouraged to integrate, not be marked out by yet another offence of religious hatred. Lord Desai said that the legislation would increase the tension by encouraging faith communities to feel insulted.

[222] *Hansard* (HL), 22 Apr 2004, vol 660, cols 443 to 480.

[223] *Hansard* (HL), 14 Mar 2005, vol 670, cols 1077 to 1084 and cols 1106 to 1198.

[224] *Hansard* (HL), 14 Mar 2005, vol 670, cols 1111 to 1112.

FREEDOM OF CRITICISM

B.179 Baroness Ramsay said that some Christian groups had expressed concern that it would impair their freedom of expression. That is unfounded: there will be full freedom to proselytise for or against particular religions. All it stops is the activity of extremist organisations. The Board of Deputies reported that the amount of anti-Semitic literature has reduced following the racial incitement laws, and this is designed to achieve the same for Muslims and others.

B.180 Lord Lester argued that there are better ways of helping Muslim communities. The proposed law would simply bolster intolerance within the community and make it harder to criticise attitudes to women's rights. In India, fundamentalists in each religion had used the incitement laws to attack the other religions. An attack, however extreme and intemperate, on a religious group — except in the case where it is a cover for racism — is not an attack on the common humanity of its members but an attack on its beliefs and practices. Banning it raises free speech issues that do not arise in the case of racism. Given the public order offences, in both their basic and their religiously aggravated forms, there is no need for a new incitement offence.

B.181 Lord Baker argued that the distinction between attacks on religion and attacks on religious groups does not hold up. Devout Muslims regard insults to Mohammed as insults against them personally, and it is the same with other religious groups.

B.182 Lord Chan said that, even under the existing law, the police were sometimes overzealous about proselytising literature, however sensitively written. Under the proposed law it would be worse. Baroness Cox agreed, giving further examples. The executive director of the Australian Muslim Public Affairs Committee had said:

> It is obvious that criticism of one's religion is likely to offend, but just as Muslims should be entitled to aggressively criticise other faiths, likewise those same faiths should be afforded the right to voice their concerns about Islam … . Who, after all, would give credence to a religion that appears so fragile it can only exist if protected by a bodyguard of lawyers.

CONCLUSION

B.183 Baroness O'Cathain proposed an amendment whereby the clause and schedule creating the incitement offence should be removed from the Bill. Baroness Scotland, for the Government, announced that the Government had reluctantly decided not to oppose this amendment, as the election had been called and it was important to get the rest of the Bill through. The amendment was duly passed.[225]

B.184 When the Bill reached the House of Commons, Caroline Flint, for the Government, explained that the Government would accept the Lords amendment removing the provision for a religious incitement offence from the Bill, in order to allow the main body of the Bill to be passed before the General Election in

[225] *Hansard* (HL), 5 Apr 2005, vol 671, col 595.

2005.[226] The Labour Party manifesto for that election contained a commitment to introduce such an offence.

Racial and Religious Hatred Act 2006

B.185 This Bill was introduced in accordance with the Labour Party's manifesto commitment, and substantially reproduced the clause that had been dropped from the Serious Organised Crime and Police Bill. Again we consider the arguments under three headings:

(1) Protection for groups.

(2) Freedom of expression.

(3) Questions of handling, about how to secure the balance.

PROTECTION FOR RELIGIOUS GROUPS

B.186 Charles Clarke, at second reading in the Commons, explained the history and emphasised that the offence was there to protect people, not beliefs.[227]

B.187 Frank Dobson said that the evil that the proposal was there to prevent was things like Muslim mothers with head coverings being attacked on the way to school. The argument that religion is voluntary is fallacious: often one is born into a particular religion, and to argue that one can avoid persecution by changing it is to legitimise intimidation.

B.188 Sadiq Khan argued that when race relations legislation was first introduced, there were plenty of voices saying that it fettered free speech and was political correctness gone mad, but that no one said that now. The effect of the Bill is to give Muslims the same protection as Jews and Sikhs. Is anyone saying that, because religion is voluntary, the Muslims should avoid persecution by becoming Christians or atheists?

B.189 In the House of Lords, the debates were extremely lengthy, but most of the points made coincide with those made in the debates on earlier Bills. Arguments in favour of the Bill advanced in the second reading debate[228] were as follows:

(1) The Bill extends to multi-ethnic religious groups, such as Muslims, the same protections that are already enjoyed by ethnically-based religious groups, such as Jews and Sikhs.[229] A Muslim preacher was sentenced for incitement to kill unbelievers, Americans, Jews and Hindus. He was sentenced to nine years' imprisonment; it would have been two years less if he had said "Christians" and not "Jews", as there would have been no count of incitement to racial hatred.[230]

[226] *Hansard* (HC), 7 Apr 2005, vol 432, col 1582.

[227] *Hansard* (HC), 21 Jun 2005, vol 435, col 668.

[228] *Hansard* (HL), 11 Oct 2005, vol 674, cols 161 to 176 and 189 to 280.

[229] Lord Falconer, *Hansard* (HL), 11 Oct 2005, vol 674, col 164; Baroness Ramsay, *Hansard* (HL), 11 Oct 2005, vol 674 cols 207 to 209; Lord Ahmed, *Hansard* (HL), 11 Oct 2005, vol 674 cols 229 to 230.

[230] Lord Avebury, *Hansard* (HL), 11 Oct 2005, vol 674, cols 218 to 219.

(2) The purpose of the Bill is not to prevent the giving of offence. It is to prevent the kind of systematic persecution that puts people in fear. The law may be little used but it will define a cultural norm.[231]

(3) At least one Muslim Member of Parliament has received death threats, quite clearly based on the fact that he was Muslim.[232] Many of the victims of Islamophobic abuse are white converts, where racism is not an issue.[233]

(4) One merit of the Bill is that it is even-handed. It prevents both attacks on Muslims and incitement by Muslim extremists; it will therefore encourage responsible Muslims to work with us. Religious terrorism is by no means an exclusively Muslim problem.[234]

B.190 The following arguments were advanced against the Bill:

(1) Special measures to deal with alleged Islamophobia will encourage separatism.[235]

(2) The laws about racially and religiously aggravated harassment and threatening behaviour are an adequate protection.[236]

(3) The existing law does not protect Judaism and Sikhism as religions any more than it protects Islam; conversely it does penalise abuse of Muslims when the motivation is racial. There is therefore no discrimination that needs to be corrected.[237] For example, there was no prosecution in respect of the play *Behzti*, which was highly critical of Sikh religious communities.[238]

FREEDOM OF EXPRESSION

B.191 Andrew Selous said that, in Australia, a similar provision had sometimes led to the prosecution of evangelical preachers. Charles Clarke explained that the Australian provision was materially different, as it includes contempt and ridicule as well as hatred.

B.192 Several speakers pointed out that religion was unlike race in that it was voluntary, and that in some cases, such as Satanism and Scientology, there could be rational grounds for dislike.

B.193 David Davies said that minority groups will expect the new law to function as a replacement blasphemy law, and then be disappointed when it does not.

[231] Baroness Whitaker, *Hansard* (HL), 11 Oct 2005, vol 674, col 214.

[232] Lord Foulkes of Cumnock, *Hansard* (HL), 11 Oct 2005, vol 674, cols 191 to 192.

[233] Lord Falconer, *Hansard* (HL), 11 Oct 2005, vol 674, col 162.

[234] Lord Hannay, *Hansard* (HL), 11 Oct 2005, vol 674, cols 256 to 257.

[235] Baroness Flather, *Hansard* (HL), 11 Oct 2005, vol 674, cols 215 to 217.

[236] Lords Skidelsky and Lester, *Hansard* (HL), 11 Oct 2005, vol 674, col 233.

[237] Lord Lester of Herne Hill, *Hansard* (HL), 11 Oct 2005, vol 674, col 174; Lord Desai, *Hansard* (HL), 11 Oct 2005, vol 674, col 235.

[238] Lord Falconer, *Hansard* (HL), 11 Oct 2005, vol 674, col 166.

B.194 Graham Allen said that the Bill would allow religious extremists to silence dissent, and repeated the point about disappointed expectations. Gary Streeter said that, as a committed Christian, he entirely agreed.

B.195 John Baron argued that the Bill was a sop to the Muslim community to compensate for the illegal war in Iraq.

B.196 At second reading in the House of Lords, the following arguments were advanced to the effect that the Bill did not unduly restrict freedom of expression:

(1) The existing protection for Jews and Sikhs, and the religious incitement laws in Northern Ireland, had not had a chilling effect on religious debate.[239]

(2) The fear that the Bill would inhibit the telling of religious jokes is ill-founded. Such jokes cannot possibly incite hatred.[240]

B.197 The following arguments were advanced to show that the Bill did restrict freedom of expression:

(1) Extremist groups within religions are themselves "religious groups" and the Bill would prevent criticism of them.[241] There are good reasons for dislike of many religious groups.[242] The Bill could inhibit internal debate within the Muslim community about the position of women.[243]

(2) The proposed law damages both freedom of expression and the mainstream religions themselves.[244] Preferably it should be dropped; if it cannot be, there needs to be a very strong free speech defence.[245]

(3) The distinction between inciting hatred of religious groups and inciting hatred of religion is not watertight and the police would find it extremely hard to operate.[246]

(4) The Bill will raise false expectations that it will operate like a blasphemy law.[247]

[239] Lord Dubs, *Hansard* (HL), 11 Oct 2005, vol 674, col 222.

[240] Baroness Corston, *Hansard* (HL), 11 Oct 2005, vol 674, col 197. Lord Avebury, *Hansard* (HL), 11 Oct 2005, vol 674, col 219.

[241] Lord Mackay of Clashfern, *Hansard* (HL), 11 Oct 2005, vol 674 col 171; Lord Chan, *Hansard* (HL), 11 Oct 2005, vol 674, cols 220 to 221; Lord Haskell, *Hansard* (HL), 11 Oct 2005, vol 674, col 249.

[242] The Earl of Onslow, *Hansard* (HL), 11 Oct 2005, vol 674, cols 236 to 238.

[243] Baroness Turner, *Hansard* (HL), 11 Oct 2005, vol 674, cols 201 to 203; Baroness Kennedy *Hansard* (HL), 11 Oct 2005, vol 674, col 246.

[244] Lord Peston, *Hansard* (HL), 11 Oct 2005, vol 674, cols 225 to 227; Lord Skidelsky, *Hansard* (HL), 11 Oct 2005, vol 674, col 232.

[245] Lord Peston, *Hansard* (HL), 11 Oct 2005, vol 674, cols 225 to 227.

[246] Lord Lucas, *Hansard* (HL), 11 Oct 2005, vol 674, cols 203 to 204 and Lord Lester of Herne Hill, *Hansard* (HL), 11 Oct 2005, vol 674, cols 173 to 175.

[247] Lord Lester of Herne Hill, *Hansard* (HL), 11 Oct 2005, vol 674, col 172; Lord Chan, *Hansard* (HL), 11 Oct 2005, vol 674, col 220; Lady Kennedy, *Hansard* (HL), 11 Oct 2005, vol 674, col 246.

(5) The Bill threatens civil liberties. Lord Carey had once expressed concerns about the lack of democracy in Muslim countries and about failure to condemn suicide bombings. For this he (together with Polly Toynbee) was labelled as "Islamophobe of the Year".[248]

(6) In Australia, vilification laws have been found to undermine the very religious freedoms they are designed to protect.[249] In England, not only the National Secular Society but also a large cross-section of religious groups are opposed to the Bill.[250]

HOW TO GET THE BALANCE RIGHT: QUESTIONS OF HANDLING

B.198 Tony Wright said that the question is how to protect believers without protecting beliefs.[251] The current Bill does not do that, and they would need to consider amendments to get the balance right. It is claimed that the requirement of the Attorney General's consent to prosecution is a sufficient safeguard. In fact, whether he gives or withholds this consent there will be resentment and accusations of discrimination.[252]

B.199 Following the second reading debate in the House of Lords, the Joint Committee on Human Rights published a report[253] saying that they had concerns about freedom of expression. The Bill should be amended to make specific reference to advocacy of religious hatred that constitutes incitement to hostility, violence and discrimination.

B.200 In committee in the House of Lords,[254] Lord Lester proposed three amendments to remove the words "abusive and insulting" from the wording of the new offence, to restrict the offence to the intentional stirring up of hatred and to incorporate a new clause safeguarding freedom of expression. In the debates, these were collectively referred to as the "Lester amendment". He argued that the amendments would simply make the new law in the way that ministerial assurances say it should.[255] Most speakers supported the principles behind the amendments, and Baroness Scotland, for the Government, undertook to consider the matter and present any necessary amendments at report stage.[256] On a vote,

[248] Lord Carey, *Hansard* (HL), 11 Oct 2005, vol 674, cols 192 to 194.

[249] Baroness Cox, *Hansard* (HL), 11 Oct 2005, vol 674, col199.

[250] Baroness Cox, *Hansard* (HL), 11 Oct 2005, vol 674, col199; Bishop of Southwell, *Hansard* (HL), 11 Oct 2005, vol 674, col 223.

[251] *Hansard* (HC) 31 Jan 2006, vol 442, col 229.

[252] Lord Lester of Herne Hill, *Hansard* (HL), 11 Oct 2005, vol 674, col 174; Baroness O'Cathain, *Hansard* (HL), 11 Oct 2005, vol 674, col 211.

[253] Legislative Scrutiny: First Progress Report, Joint Committee on Human Rights (2005-2006) HL 48, HC 560. See paras 5.1 and 5.2.

[254] *Hansard* (HL), 25 Oct 2005, vol 674, cols 1070 to 1101 and cols 1123 to 1139.

[255] *Hansard* (HL), 25 Oct 2005, vol 674, cols 1073 to 1077.

[256] *Hansard* (HL), 25 Oct 2005, vol 674, col 1100.

the first two amendments were approved,[257] and the Government undertook not to oppose the third.[258]

B.201 The next part of the committee debate was devoted to further amendments, which were withdrawn, and Lord Lester's third amendment was passed.[259] This amendment was the substantial one of the three, and substantially changed the scheme of the Bill. Instead of adding "religious" to "racial" in the existing offences under part 3 of the POA 1986, it inserted a part 3A (hatred against persons on religious grounds) with a parallel set of offences, together with a saving clause for freedom of expression.

B.202 At report stage,[260] further amendments were proposed, to abolish blasphemy and kindred offences, to include the desecration of sacred objects within the definition of religious hatred and to incorporate a definition of religion. None of these was passed. At third reading[261] an amendment was proposed to clarify that reading from the scripture of any major religion could not constitute incitement to religious hatred. This was not passed either.

B.203 In the Commons debate on the House of Lords amendments,[262] Paul Goggins, for the Government, invited the House to disagree with the amendments, saying that they narrowed the offence to the point where it was virtually impossible to bring a successful prosecution. As a compromise, he proposed Government amendments. The differences were as follows:

(1) The Bill as originally drafted added "or religious" to "racial" in the existing offences. The Government amendments, like the Lords amendments, provided for a set of religiously aggravated offences independent of the existing racially aggravated offences.

(2) The Bill as originally drafted covered words or behaviour that were "threatening, abusive or insulting". The Lords amendments would reduce this to "threatening". The Government amendments would reinstate "threatening, abusive or insulting".

(3) In the Bill as originally drafted the offences covered words or behaviour either intended or likely to stir up religious hatred; the Lords amendments would remove the "likely" limb leaving intention only; the proposed Government amendments would make the test one of intention or recklessness.

(4) The Lords amendments included a freedom of expression defence. The Government amendments provided that it is not criminal to criticise, express antipathy towards, abuse, insult or ridicule (or seek to ridicule) any religion, religious belief or religious practice unless there is an intention to stir up religious hatred.

[257] *Hansard* (HL), 25 Oct 2005, vol 674, cols 1101 to 1104.

[258] *Hansard* (HL), 25 Oct 2005, vol 674, col 1104.

[259] *Hansard* (HL), 25 Oct 2005, vol 674, cols 1135 to 1139.

[260] *Hansard* (HL), 8 Nov 2005, vol 675, cols 509 to 557.

[261] *Hansard* (HL), 24 Jan 2006, vol 677, cols 1067 to 1078.

[262] *Hansard* (HC), 31 Jan 2006, vol 442, cols 189 to 244.

B.204 Many of the arguments and examples given in the debate related to the principle of a religious incitement offence, and coincided with those given in previous debates. Here we give only the arguments relevant to the amendments:

(1) Dominic Grieve argued that a recklessness test is acceptable if the offence is confined to threatening behaviour; but a combination of recklessness with abusive or insulting behaviour makes the offence too wide.[263] Conversely, Alistair Carmichael said that he could live with "threatening, abusive or insulting" provided the offence was one of intent.[264]

(2) Several speakers argued that the free speech defence in the Government amendments were tautologous, and amounted to saying that abuse, insult or ridicule is not an offence unless it is an offence.[265]

(3) Gordon Prentice said that the Danish cartoons about Mohammed might well fall within the "abusive or insulting" limb.[266] Stewart Hosie added that their publication could very well be "reckless" as to the prospect of stirring up religious hatred.[267]

(4) Paul Goggins said that the phrase "threatening, abusive or insulting" was used in the other public order offences and had an established meaning.[268] Anything less would leave the anomaly that one can be abusive or insulting towards Muslims but not Sikhs.

B.205 A vote was taken: the Government amendments were rejected and the Lords amendments were accepted. The Act as passed therefore contained the "Lester amendment".

Hatred on the ground of sexual orientation

B.206 Offences of stirring up hatred on the ground of sexual orientation were inserted into the POA 1986 by the Criminal Justice and Immigration Act 2008. The possibility of such offences was mentioned in the debates on previous Bills concerning stirring up offences, and we consider each below.[269]

Anti-Terrorism, Crime and Security Act 2001

B.207 As noted, the Anti-Terrorism, Crime and Security Bill in its original form contained a provision adding religious hatred to the existing stirring up offences.

B.208 An amendment was proposed (but later withdrawn) to extend the offences to "hatred against a group of persons or individuals defined by reference to their

[263] *Hansard* (HC), 31 Jan 2006, vol 442, col 195.

[264] *Hansard* (HC), 31 Jan 2006, vol 442, col 217.

[265] Angela Watkinson, *Hansard* (HC), 31 Jan 2006, vol 442, col 197, citing the Christian Institute; Dominic Grieve, *Hansard* (HC), 31 Jan 2006, vol 442, col 209; Alistair Carmichael, *Hansard* (HC), 31 Jan 2006, vol 442, col 219.

[266] *Hansard* (HC), 31 Jan 2006, vol 442, col 199.

[267] *Hansard* (HC), 31 Jan 2006, vol 442, cols 204 and 233. The same point was made by Robert Marshall-Andrews, *Hansard* (HC), 31 Jan 2006, vol 442, cols 215 and 232.

[268] *Hansard* (HC), 31 Jan 2006, vol 442, col 202.

[269] As before, we identify each Bill by the name of the Act which it became.

age, disability, gender, race, religion or sexuality".[270] Lord Lester, at report stage, argued that the Bill was not the right place to be dealing with religious hatred, and that there should be a separate Bill, also addressing religious discrimination and the abolition of blasphemy, and preferably hatred against gay men and lesbians.[271]

Racial and Religious Hatred Act 2006

B.209 In the debates on the Racial and Religious Hatred Bill, Lynne Jones asked if the Government would consider extending the provision to take into account hatred against people on the ground of their sexual orientation.[272] Charles Clarke said that that Bill was not the place to consider the issue, as they should be considered narrowly and one at a time.

B.210 Celia Barlow accepted that the Bill did not cover gays and lesbians, but sought an assurance that gays and lesbians would be free vigorously to rebut criticisms by groups that were covered by the Bill. This assurance was given.

B.211 John Bercow said that there were many rap and reggae songs with lyrics clearly inciting the murder of gays and lesbians: this Bill might not be the place for it, but clearly this is something which should be prosecuted.

B.212 The issue did not arise in the House of Lords or subsequent debates, except that, at one point, Lord Onslow proposed an amendment saying that the religious hatred offences do not apply to "the condemnation of, or protest against, the justification on religious grounds of … discrimination between people on the grounds of gender or sexual orientation".[273] The amendment was later withdrawn.

Criminal Justice and Immigration Act 2008

B.213 Briefly, the history of the Bill was as follows:

(1) The Bill as introduced contained no provision relating to stirring up hatred on the ground of sexual orientation, though the Government undertook to introduce an amendment to this effect at a later stage.

(2) The Government duly introduced such an amendment in committee in the House of Commons.

(3) Later in committee a further amendment was introduced, to provide an exemption for legitimate debate about sexual practices. This was withdrawn in the Commons, but a similar amendment was introduced (twice) in the House of Lords, and was passed at report stage.

[270] *Hansard* (HC), 26 Nov 2001, vol 375, cols 673 to 718.

[271] *Hansard* (HL), 10 Dec 2001, vol 629, col 1169.

[272] Second reading, Lynne Jones, *Hansard* (HC), 21 Jun 2005, vol 435, col 669.

[273] *Hansard* (HL), 25 Oct 2005, vol 674, col 1123.

THE BILL AS INTRODUCED

B.214 At second reading in the Commons,[274] Jack Straw introduced the Bill, saying that, in committee, the Government would table an amendment to extend the offence of incitement to racial hatred to cover hatred against persons on the basis of their sexuality. John Redwood supported the intention of suppressing violence and abuse, but said that it was important to preserve freedom of speech for those expressing Christian views. Evan Harris said that the provisions about inciting religious hatred were a suitable model, which struck "the right balance between freedom of speech, ensuring that the offence must be intentional, and covering threatening language only".

B.215 In committee, oral evidence was taken from the Police Federation, Stonewall, Liberty and the Evangelical Alliance.[275] The committee also considered a large volume of written evidence:

(1) Jan Berry of the Police Federation expressed no view about the principle of the proposed offence, but asked for it to be made as clear as possible so that the police knew when to apply it. On the whole, the racial incitement provisions, though not completely clear, had been applied cautiously and sensitively.

(2) Ben Summerskill of Stonewall said that the volume of homophobic violence and abuse had increased, and quoted from a number of rap lyrics calling for the murder of gays and lesbians. There was also literature from the British National Party implying that homosexuals were paedophiles. Temperate expression of religious views should not be penalised, and Stonewall had no wish to prohibit the kind of statements made by Iqbal Sacranie and the Bishop of Chester, however much they disagree with them. By contrast, inflammatory websites saying "burn in hell" and demonstrations with children holding banners saying "don't corrupt us" are clearly incitement. Existing laws about incitement to murder are not adequate, as one cannot always link a specific utterance with a specific crime. The standard should be intent or recklessness.

(3) Gareth Crossman of Liberty said that it was wrong to keep extending the law in this piecemeal manner: there should be a moratorium on all further speech offences. There should be a review of how effective the existing laws are: otherwise there will be no logical stopping place until everything covered by discrimination law is also covered by an incitement offence. If there must be an offence, it should be modelled on the religious incitement offence: intent, and the free speech defence. There are dangers of a chilling effect, where people will just shut up rather than be in breach of the law, and of some people feeling they are not getting the same protection as others.

(4) Don Horrocks, of the Evangelical Alliance, agreed that it was wrong to incite any kind of hatred. The existing law is adequate but is not being used: the rap lyrics certainly amount to incitement to murder. The

[274] *Hansard* (HC), 8 Oct 2007, vol 464, cols 59 to 140.

[275] Public Bill Committee, *Hansard* (HC), 16 Oct 2007, cols 59 to 158, http://www.publications.parliament.uk/pa/cm200607/cmpublic/criminal/071016/pm/71016s01.htm (last visited 19 Jun 2013).

demonstrations mentioned were good-humoured and certainly did not amount to incitement to hatred: it has been said that Stonewall does not want to ban hatred, but to ban dissent. The Evangelical Alliance was equally opposed to the incitement offence for religious hatred, again on free speech grounds. Peter Tatchell was against this proposal as well. Nor should the criterion be whether the expression of religious beliefs is "temperate": that puts the bar too low. If there must be an offence, there should be a free speech defence equivalent to that for the religious incitement offences.

(5) Louise Brown, also of the Evangelical Alliance, said that there was already an attitude in which any criticism of homosexual people, however justified, risked accusations of homophobia. There was a case in Wakefield where social workers did not investigate sexual abuse by homosexual foster parents as early as they should. The proposed law would make this worse.

THE AMENDMENT CREATING THE OFFENCE

B.216 At a later committee debate,[276] the Government proposed an amendment introducing offences of stirring up hatred on the ground of sexual orientation. They were created by inserting "or hatred on the ground of sexual orientation" after "religious hatred" whenever those words occurred in part 3A of the POA 1986. Accordingly, as with the religious hatred offences, the words or behaviour had to be threatening (not abusive or insulting), and there had to be intent. However, there was no equivalent to section 29J, the free speech defence.

B.217 Maria Eagle explained that the offences were deliberately pitched at the highest level, requiring intent, in order to take account of concerns about freedom of expression. Preaching and jokes will not normally be in danger of falling within the offence. The evidence of Stonewall clearly showed a lacuna in the law.

B.218 There was some discussion of whether the demonstration outside Parliament, with the children holding up banners, would amount to incitement under the proposed law. Maria Eagle said that it would depend on the intention of the person engaging in it.

B.219 Several opposition speakers mentioned instances in which the police had acted in a heavy-handed manner, including cases such as:

(1) Joe and Helen Roberts, who had enquired about the local council's gay rights policy;

(2) the Bishop of Chester, for suggesting that re-orientation therapy is possible;

(3) the Cambridge Christian Union, for hosting a meeting in which the Dean of Sydney put forward a traditional Christian view on homosexuality;

(4) Lynette Burrows, for saying that homosexual men were not suitable for raising children;

[276] Public Bill Committee, *Hansard* (HC), 29 Nov 2007, cols 681 to 710, http://www.publications.parliament.uk/pa/cm200708/cmpublic/criminal/071129/pm/71129s01.htm (last visited 19 Jun 2013).

(5) the Oxford student who said that a police horse was gay;

(6) the Roman Catholic Archbishop of Glasgow, reported to the police for a sermon saying that civil partnerships undermined marriage.

Conversely, the police had been inactive about incidents such as the dissemination of violently homophobic lyrics, though those would clearly fall within the existing law.

B.220 Maria Eagle said that these instances were unlikely to be caught by the new offences, given that these were worded as "threatening", without "abusive or insulting".

B.221 Philip Hollobone noted that several people, including some gay rights activists, were opposed to the proposals. For example, Peter Tatchell had said that one should penalise all incitements to hatred or none: singling out particular victim groups created resentment. Matthew Paris had said that gay people were not so weak and fragile as to need special protection. Rowan Atkinson had said that society was already working things out without legislative help, and feared that the legislation might in future be extended to "people with big ears". The churches had pointed out that uncertainty in the law has the effect of inhibiting behaviour which may not in fact be illegal.

B.222 The amendments inserting the section and schedule creating the new offences were agreed to.[277]

B.223 At second reading in the House of Lords,[278] Lord Stoddart said that he agreed with equality for the gay and lesbian community, but that the new offence, as advocated by Stonewall, was not equality but privilege. He again cited the instances of police overreaction and the argument about the chilling effect. Stonewall are prepared to allow religious beliefs about homosexuality to be stated, provided they were expressed in a temperate way. Who is going to judge what is temperate?

B.224 Lord Waddington said that serious cases were already covered by the general public order offence of causing harassment, alarm or distress.[279] He cited further examples of police overreaction, in particular the case of Hammond, the preacher with the "Stop Homosexuality" banners.

B.225 Lord Stoddart, in committee, said that there had already been talk of a similar offence about hatred on the ground of disability: "Where will it stop? Never, apparently, because all sorts of special pleading is going on".

[277] Public Bill Committee, *Hansard* (HC), 29 Nov 2007, col 692, http://www.publications.parliament.uk/pa/cm200708/cmpublic/criminal/071129/pm/71129s01.htm (last visited 19 Jun 2013).

[278] *Hansard* (HL), 22 Jan 2008, vol 698, cols 127 to 203.

[279] *Hansard* (HL), 22 Jan 2008, vol 698, cols 169 to 170.

B.226 At report stage,[280] Lord Thomas of Gresford introduced an amendment inserting a provision to the effect that associating homosexuality with paedophilia is "threatening". After a short debate this was withdrawn.

B.227 Baroness Turner said that the creation of the new offences was not intended to be anti-Christian. Not all Christians held the same views on homosexuality: she had been to a commitment ceremony involving two devout gay Christians.[281]

THE AMENDMENT INTRODUCING A PROTECTION FOR FREEDOM OF EXPRESSION

B.228 In a later committee debate, an amendment was proposed to incorporate a clause protecting freedom of expression on the lines of section 29J:

> Nothing in this part shall be read or given effect in a way which prohibits or restricts discussion of, criticism of or expressions of antipathy towards, conduct relating to a particular sexual orientation, or urging persons of a particular sexual orientation to refrain from or modify conduct related to that orientation.[282]

B.229 Jim Dobbin explained that this amendment had been drawn up in consultation with the Church of England and the Roman Catholic Church. It is important to maintain a distinction between protection of people from personal attack, which is agreed to be desirable, and protection of their beliefs and practices from criticism or satire. A similar distinction should be maintained in the field of sexuality.[283]

B.230 Chris Bryant argued that this amounted to saying that people of faith should be allowed to use threatening words, and that their mere expression of them as faith should let them off under the clause. Jim Dobbin answered that he was not saying that at all: the clause was there for reassurance.

B.231 John Bercow said that, given how narrow the offence was, the clause creating the free speech defence was unnecessary. Maria Eagle agreed.[284] The amendment containing the free speech defence was withdrawn.[285]

B.232 At second reading in the House of Lords,[286] the Bishop of Manchester explained the thinking behind the amendment that had been rejected in the Commons: it was to put it beyond doubt that the churches could maintain their traditional teachings.

B.233 Lord Hunt said that there was a difference between the POA 1986, which protects individuals from harm, and the clause, which deals with incitement to hatred of people as a group on the basis of their sexual orientation. The

[280] *Hansard* (HL), 21 Apr 2008, vol 700, col 1363.

[281] *Hansard* (HL), 21 Apr 2008, vol 700, col 1369.

[282] *Hansard* (HC), 9 Jan 2008, vol 470, col 441.

[283] *Hansard* (HC), 9 Jan 2008, vol 470, col 449.

[284] *Hansard* (HC), 9 Jan 2008, vol 470, col 454.

[285] *Hansard* (HC), 9 Jan 2008, vol 470, col 455.

[286] *Hansard* (HL), 22 Jan 2008, vol 698, cols 127 to 203.

Government would not be prepared to accept an amendment introducing a free speech defence.

B.234 In committee in the House of Lords, Lord Waddington moved an amendment similar to that in the Commons.[287] The police had not shown themselves very good at spotting the difference between stirring up hatred and legitimate comment, for example, in the Hammond case or in that of the Bishop of Chester (the Bishop of Chester added that, while there had been a police investigation, he himself had never been questioned: the police simply acted on media reports).

B.235 Lord Clarke said that the Government argued that the defence was unnecessary. However, the incidents cited showed that there was confusion about the boundaries, and this should be resolved by statute rather than in Government guidelines.

B.236 Baroness Turner opposed the amendment. Allowing threatening words urging people to refrain from homosexual conduct, which is what the clause appears to allow, is unacceptable and runs against the principle of civil partnerships. It is unlike the case of religious belief, in that people cannot choose their sexual orientation.[288]

B.237 Lord Dear said that Lord Waddington was a little harsh on the police, as the current law is confusing. Had they not acted in those cases, they would no doubt be getting complaints from Stonewall and others. That is exactly why clarity is needed.

B.238 The Bishop of Chester said that, logically, the amendment should not be necessary. The requirement of intent, combined with threatening, and the need for the Attorney General's consent, already puts the bar pretty high. The concern of the church is not free speech about homosexuality, but free speech about Christian marriage.

B.239 Lord Hunt, summing up, said that words or behaviour which are threatening or intended to stir up hatred can never be justified by the need for freedom of speech. The balance in the offence as drafted was about right.[289]

B.240 The amendment was withdrawn, and the schedule containing the new offences was agreed to.[290]

[287] *Hansard* (HL), 3 Mar 2008, vol 699, col 923.

[288] *Hansard* (HL), 3 Mar 2008, vol 699, col 930.

[289] *Hansard* (HL), 3 Mar 2008, vol 699, cols 940 to 941.

[290] *Hansard* (HL), 3 Mar 2008, vol 699, col 943.

B.241 At report stage,[291] Lord Waddington again introduced an amendment inserting a clause protecting freedom of expression.[292] This read:

> For the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening.

Unlike the previous versions, this wording made it clear that the clause was only designed to clarify the meaning of "threatening" and not to provide a defence for any instances of words or conduct that had already been found to be threatening.

B.242 Most of the arguments were the same as those in committee, and are not reproduced here. Lord Waddington explained that the new wording was designed to clarify rather than to narrow the scope of the offence, and to provide no possible encouragement for homophobic attitudes and behaviour. It might be thought so platitudinous as to be unnecessary; but the incidents many times cited showed that there was considerable misunderstanding of the scope of homophobic hate crime.

B.243 Lord Monson said that at times there was a duty to urge people to refrain from certain lawful sexual practices, for example, unsafe sex involving people under 18.[293] Lord Smith said that the amendment was unnecessary, and could be used to drive a coach and horses through the intention of the clause.[294]

B.244 The Bishop of Newcastle said that the clause was logically unnecessary. Nevertheless, it might do some good, first in deterring over-zealous police officers and secondly in avoiding a "chilling effect" on expression.[295]

B.245 Lord Thomas of Gresford said that there was no real ambiguity about the scope of the offence, and if there were it would be resolved by the Human Rights Act:

> Freedom of speech is not derived from clauses inserted into every statute for the avoidance of doubt. Freedom of speech is derived from our common law heritage and, if necessary, we can go to the European convention to see it all set out.

B.246 Lord Hunt again said that, as the words or behaviour had to be threatening and intended to stir up hatred, it was hard to see what doubt needs to be avoided or what effect the proposed clause would have. There was a concern that the police might think that as the homophobic offence, unlike the religious hatred offence, contains no free speech defence, they need not bother about it, but that can be solved by adequate guidance.

[291] *Hansard* (HL), 21 Apr 2008, vol 700, cols 1363 to 1377.

[292] *Hansard* (HL), 21 Apr 2008, vol 700, col 1365.

[293] *Hansard* (HL), 21 Apr 2008, vol 700, col 1370.

[294] *Hansard* (HL), 21 Apr 2008, vol 700, col 1371.

[295] *Hansard* (HL), 21 Apr 2008, vol 700, col 1372.

B.247 Lord Waddington said that Lord Thomas' point was correct in law, and adequate when it comes to directing a jury. But the point was more about how the police would react.

B.248 On a vote, the amendment was passed. The House of Commons disagreed with the Lords' amendment,[296] but the House of Lords insisted on it.[297] Many points were repeated from the previous debates: here we only set out ones that were new.

B.249 In the Commons debate, Evan Harris said that in certain circumstances, urging people to refrain from conduct can be threatening because of the unspoken implication "or else", for example, if uttered by a gang of skinheads.[298] Nick Herbert and Anne Widdecombe both agreed that context was important, but argued that that was covered by the words "shall not be taken *of itself* to be threatening". Alan Beith asked whether only "temperate" language was protected, or whether preaching in emotive language about eternal punishment was threatening.[299]

B.250 Evan Harris argued that, in establishing the proper degree of protection, sexual orientation comes somewhere between race and religion. Like race, it is not something chosen; but like religion and unlike race, it is possible to criticise it without intending hatred towards individuals.[300]

B.251 In the Lords debate, Lord Waddington said that it was not sufficient to rely on guidance to the police. There is already plenty of guidance, and it has not stopped incidents such as that involving the Bishop of Chester.

B.252 Lord Lester said that he was the architect of the free speech clause in the religious incitement offences. It was right to follow the religious model so far as the "threatening" formulation and the requirement of intent are concerned: the racial provisions are arguably too wide. But there is no equivalent to the need for utmost freedom of religious controversy; he therefore did not support the Waddington amendment.

B.253 Lord Alli said that, even without the amendment, the new offences would not stop good, decent law-abiding citizens expressing the deeply held views that homosexuality is wrong and sinful. The amendment merely provides a figleaf for bigots and homophobes.

B.254 Viscount Bledisloe argued that, following the rules of statutory construction, if the exclusion is present for the religious offences and absent from the homophobic ones, it will be presumed that the difference is intentional.[301] Lord Lester said that, in any case, the statutes had to be construed compatibly with the Human

[296] *Hansard* (HC), 6 May 2008, vol 475, cols 599 to 625. See col 599.

[297] *Hansard* (HL), 7 May 2008, vol 701, cols 594 to 613.

[298] *Hansard* (HC), 6 May 2008, vol 475, col 607.

[299] *Hansard* (HC), 6 May 2008, vol 475, cols 609 to 610.

[300] *Hansard* (HC), 6 May 2008, vol 475, col 617.

[301] *Hansard* (HL), 7 May 2008, vol 701, cols 602 to 603.

Rights Act.[302] Lord Waddington pointed out that the reservation in his proposed clause was far less far-reaching than that in the corresponding provision about religion.[303]

B.255 On a vote, the House of Lords maintained their amendment and Lord Waddington's wording is now contained in section 29JA of the POA 1986.

Hatred on the ground of disability

B.256 On 28 February 2008, Lord Morris asked a Parliamentary question about making the incitement of hatred on grounds of disability a criminal offence. Lord Hunt answered that the Government had not yet seen compelling evidence that there was a gap in the law but that they would continue to consider this carefully.[304]

Hatred on the ground of transgender status

B.257 In the Commons committee debates on the Criminal Justice and Immigration Act 2008, an amendment was proposed adding offences stirring up hatred on the ground of transgender status.[305] This was not debated and was withdrawn.

B.258 At third reading in the Commons,[306] Lynne Jones said that it was illogical to introduce the measures about incitement to hatred on the ground of sexual orientation without also including transgender status. David Hanson sympathised, and said that the Lord Chancellor and Under-Secretary would be happy to meet her to discuss it.

B.259 In committee in the Lords, the Bishop of Chester said:

> I do rather agree with the question of where we stop if we go on from here. It has been said, for example, that there is no reference here to transsexuals or to age or whatever. That may be for another day. I hope that we can stop here. Given the state of the law elsewhere in this area, I understand why this offence has been introduced.[307]

B.260 In the Commons consideration of Lords amendments, Evan Harris expressed concern that the Bill did not cover transphobic hatred: bigots using threatening language about gay people do not usually distinguish between them and transgender people.[308]

ENHANCED SENTENCING

B.261 The sentencing provisions in the CJA 2003 do not create new offences, or increase the maximum sentence for any offence to reflect aggravation on the ground of hostility. They simply state that hostility against specified groups is an

[302] *Hansard* (HL), 7 May 2008, vol 701, col 603.

[303] *Hansard* (HL), 7 May 2008, vol 701, cols 611 to 612.

[304] Written Answer, *Hansard* (HL), 28 Feb 2008, vol 699, col WA131.

[305] *Hansard* (HC), 9 Jan 2008, vol 470, col 437.

[306] *Hansard* (HC), 9 Jan 2008, vol 470, cols 484 to 485.

[307] *Hansard* (HL), 3 Mar 2008, vol 699, col 937.

[308] *Hansard* (HC), 6 May 2008, vol 475, col 617.

aggravating factor to be taken into account in setting sentences within the normal range applicable for the offence in question. This applies to the sentencing for all offences, with a saving to avoid duplication in the case of the racially and religiously aggravated offences under the CDA 1998.[309]

B.262 Before the CDA 1998, the courts had already acknowledged racial motivation as an aggravating factor in sentencing. In *Attorney General's Reference (Nos 29, 30 and 31 of 1994)*, also known as *Ribbans, Duggan and Ridley*,[310] three men who had stabbed and deliberately run over a black man while shouting racial abuse were convicted of causing grievous bodily harm with intent.[311] They were sentenced to five years and three years respectively; the Attorney General successfully applied for review of the sentences, and the sentences were increased to seven years and five years (the maximum sentence for the offence is life imprisonment). The court observed that, even without the racial element, the circumstances of the attack were horrific, and stated:

> It cannot be too strongly emphasised by this court that where there is a racial element in an offence of violence, that is a gravely aggravating feature. There is no specific offence of racial violence, although it has been suggested that there should be one. We take the view that it is perfectly possible for the court to deal with any offence of violence which has a proven racial element in it, in a way which makes clear that that aspect invests the offence with added gravity and therefore must be regarded as an aggravating feature.[312]

B.263 The Crime and Disorder Bill, when introduced, contained a clause 68 confirming this result. This became section 82 of the Act. Section 82 was repealed and re-enacted as section 153 of the Powers of Criminal Courts (Sentencing) Act 2000, which was a consolidating statute.

B.264 The Anti-terrorism, Crime and Security Act 2001 added the words "or religious" to section 153 at the same time as making the same amendment to the specific aggravated offences. The CJA 2003 repealed and re-enacted that section as section 145. The 2003 Act also included a new section 146, making similar provision for hostility on the ground of sexual orientation or disability.

B.265 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 amended section 146 to include hostility to transgender people. The regime of enhanced sentencing is therefore the most comprehensive of the three sets of provisions (aggravated offences, enhanced sentencing and stirring up offences), as it includes hostility on five grounds.

Enhanced sentences for racial hostility

B.266 The CDA 1998 introduced enhanced sentencing for offences attended by racial aggravation at the same time as the specific racially aggravated forms of assault,

[309] Para B.4 above.

[310] (1995) 16 Cr App R (S) 698.

[311] Offences Against the Person Act 1861, s 18.

[312] (1995) 16 Cr App R (S) 698, 702.

wounding/grievous bodily harm, criminal damage, harassment and public order offences. There was very little debate on this aspect of the proposals.

B.267 As mentioned above,[313] Baroness Flather, in opposing the introduction of specific racially aggravated offences, argued that there should be a blanket rule that any crime where racial motivation was proved in court would carry a higher penalty than other crimes. She did not specify whether by this she meant that the maximum sentence should be increased or only that the penalty should be higher than if the motivation were not present, but still within the normal range. Lord Goodhart, in questioning the need for specific aggravated offences, said that he wholly supported clause 68 (on enhanced sentencing).

B.268 Lord Falconer said that it would not be practical to attach racial aggravation to every crime, but that clause 68 went some way towards meeting Baroness Flather's wishes.[314]

Special provision for murder

B.269 Schedule 21 to the CJA 2003 introduced a scheme whereby, when sentencing a person to a mandatory life sentence for murder, a court would set a minimum term to be served. Paragraph 5 of that schedule provided that, where the murder is racially or religiously aggravated or aggravated by sexual orientation, the appropriate starting point for determining the minimum term should be 30 years. This is still in force, except that aggravation by disability or transgender identity has now been added to the list.[315]

Religious hostility

B.270 The Anti-terrorism, Crime and Security Act 2001 added religious hostility to the enhanced sentencing provisions at the same time as to the specific aggravated offences, and the debates made no distinction between these two clauses. In fact, very little attention was devoted to either, as the debates mostly concerned the proposal to create an offence of stirring up religious hatred.

Sexual orientation and disability

B.271 The CJA 2003 introduced for the first time provisions for enhanced sentencing where an offence is aggravated by hostility on the ground of sexual orientation or disability.[316] These have not been replaced or amended, except for the recent addition of transgender status to the list.

[313] See para B.20 above.

[314] *Hansard* (HL), 16 Dec 1997, vol 584, col 598.

[315] CJA 2003, sch 21, para 5(2)(g). Disability and transgender identity were added by section 65(9) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, effective from 3 Dec 2012. The meaning of aggravation on grounds of sexual orientation, disability or transgender identity is to be taken from s 146 of the CJA 2003: see sch 21, para 3 of the CJA 2003. See para B.282 below.

[316] CJA 2003, s 146.

B.272 The Bill did not originally contain this provision, which was added by way of amendment at report stage in the House of Lords.[317]

B.273 Viscount Colville proposed an amendment allowing an increase in sentence for any offence on the ground of aggravation, and adding "or other identifiable characteristic" to the list of protected characteristics. He argued that otherwise it would be necessary to amend the Act every year as further characteristics requiring protection are identified. Baroness Warnock agreed, giving the example of attacks against people working in laboratories where tests on animals are carried out.

B.274 Both Viscount Colville and Lord Avebury pointed out the fragmented state of hate crime law: the specific aggravated offences only covered race, the enhanced sentencing provisions covered race and religion and in some cases, such as harassment and criminal damage, the legislature, instead of providing specific aggravated forms of the offence, had simply increased the maximum sentence for the basic offence. The Government amendment would add a fourth regime, to cover hatred on grounds of sexual orientation or disability. As a result, an offence such as assault, for which there is an aggravated form, will be treated more severely if motivated by racism than if motivated by homophobia.

B.275 Lord Waddington expressed concern about churchmen who preached that homosexual practices are wrong. They could be exposed to proceedings for an aggravated form of the harassment offence under section 4A of the POA 1986.[318]

B.276 Lord Monson said that the very idea of a hate crime was ridiculous and misleading, and tended to the importation of a transatlantic idea of group rights. If a man kills his wife's lover, it should not be a "hate crime" because the lover happens to be a lesbian rather than a man. The list of protected groups was arbitrary: at least the amendment proposed by Lords Colville and Avebury, which protected all identifiable groups, was consistent. Giving extra protection for minority sexual orientations would also protect paedophiles and more bizarre orientations.

B.277 Lord Thomas of Gresford replied that there is a clear distinction between hate crime and other crimes. Hate crime involves deliberately targeting inoffensive people simply because they are different. He supported the Colville and Avebury amendment: for example, venting one's aggression on the police was a hate crime.

B.278 Baroness Scotland said that there was clear evidence that both homophobic and disability-related violence and abuse were on the increase. Thirty per cent of those questioned in a Stonewall survey had experienced homophobic violence in the last five years. A Mencap survey found that 90% of people with a learning disability suffer from bullying on a regular basis, and a quarter reported physical assault. It was necessary to send a clear message about both homophobic and disability-related violence. Any other groups should be added only when there

[317] *Hansard* (HL), 5 Nov 2003, vol 654, cols 800 to 864.

[318] This would only be true if, without the amendment, they would have been guilty of the basic offence. Allowing enhanced sentencing does not increase the scope of the basic offence.

was clear evidence. The activity targeted was not the offending of tender susceptibilities but clear acts of violence that make people's lives miserable.

B.279 The Government amendment was passed, and Lord Colville withdrew his amendment.

Special provision for murder

B.280 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 amended schedule 21 to the CJA 2003 by adding murders aggravated by disability or transgender identity to the list of murders for which the starting point should be 30 years. This amendment is discussed under the transgender heading, in the paragraphs immediately following.

Transgender

B.281 The Legal Aid, Sentencing and Punishment of Offenders Bill in its original form contained no reference to enhanced sentencing. The first mention came at report stage in the House of Commons, where Kate Green tabled an amendment adding murders aggravated by disability to the list of murders in schedule 21 to the CJA 2003. The then Lord Chancellor, Kenneth Clarke, pointed out that the drafting was defective and promised to introduce an amendment at a later stage dealing with both disability and transgender identity.[319] Kate Green's amendment was withdrawn.

B.282 The promised amendment was moved by Lord McNally in the House of Lords in committee.[320] It amended paragraph 5 of schedule 21 to include both disability and transgender status; it also amended section 146 of the CJA 2003 to include transgender status (section 146 already included disability). Lord McNally explained that:

> "Transgender" is an umbrella term that includes, but is not restricted to, being transsexual. It will be for the courts to determine in individual cases whether or not the words or behaviour of the offender constitute hostility based on the victim's transgender identity or presumed transgender identity.[321]

In his view, all five strands (race, religion, orientation, disability, transgender) should be treated equally under these particular provisions.

B.283 Lord Ramsbotham agreed, citing the example of hostility shown to prisoners with gender dysphoria hoping to change gender while in prison. Lord Beecham quoted an article in the Guardian of the day before showing how much people with a disability were singled out for victimisation.

B.284 No dissenting views were expressed, and the amendment was passed after a very short debate.

[319] *Hansard* (HC), 1 Nov 2011, vol 534, col 800.

[320] *Hansard* (HL), 7 Feb 2012, vol 735, col 152.

[321] *Hansard* (HL), 7 Feb 2012, vol 735, col 153.