

September 2017

***'Balancing freedom of expression and online hate speech'***  
**The Law Society of England and Wales**

**1) *Freedom of expression***

**Human Rights Act 1998 and Article 10 European Convention of Human Rights**

Section 1 of the Human Rights Act 1998 incorporates Articles 2 to 12 and Article 14 into the law of the United Kingdom and sets them out in Schedule 1 to the Act. Article 10 of the Human Rights Act safeguards the right to free expression, which includes the freedom to hold opinions and to receive and impart information and ideas without State interference.

The right to free expression is, however, not absolute – it can be limited to protect the rights of others. Any limitations on the right must be necessary and proportionate.

Criminalising the incitement of violence or threats can be seen to be a justifiable limit on freedom of expression. What is controversial is the criminalisation of language (or behaviour) which may be unpleasant, may cause offence but which is not inciting violence, criminality etc.

**2) *Limitations of freedom of expression***

Limitations on freedom of expression comes from a variety of Acts. Many of those were drafted before the internet, or before the rise of social media.

Various governments have recognised the need to consolidate, rationalise, and bring clarity to this complex web of offences, guidelines, and codes of conduct.

The Acts that impose limitations on freedom of speech are listed below.

**Public Order Act 1986**

In England and Wales the Public Order Act 1986 prohibits, by its Part 3, expressions of racial hatred, which is defined as hatred against a group of persons by reason of the group's colour, race, nationality (including citizenship) or ethnic or national origins. Section 18 of the Act says:

A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

(a) they intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

Offences under Part 3 carry a maximum sentence of seven years imprisonment or a fine or both. Proceedings for this offence require the consent of the Attorney General.

## **Amendments to the Public Order Act 1986**

### *The Criminal Justice and Public Order Act 1994*

The Criminal Justice and Public Order Act 1994 inserted Section 4A into the Public Order Act 1986. That part prohibits anyone from causing alarm or distress. Section 4A states:

- (1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he— (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress.

A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale (currently £5000), or to both.

### *The Racial and Religious Hatred Act 2006*

The Racial and Religious Hatred Act 2006 amended the Public Order Act 1986 by adding Part 3A. That Part says, "A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred." The Part protects freedom of expression by stating in Section 29J:

'Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system. Subjective descriptions of a person's actions or behaviour, however abhorrent, crass or objectionable, may not be considered an attempt to spread hate unless the motive is clearly defined as such.'

Anyone convicted of an offence under this provision is liable to a maximum term of imprisonment of years, a fine or both.

### *The Criminal Justice and Immigration Act 2008*

The Criminal Justice and Immigration Act 2008 section 74 and Schedule 16 amended Part 3A of the Public Order Act 1986. The amended Part 3A adds, for England and Wales, the offence of inciting hatred on the ground of sexual orientation. All the offences in Part 3 attach to the following acts: the use of words or behaviour or display of written material, publishing or

distributing written material, the public performance of a play, distributing, showing or playing a recording, broadcasting or including a programme in a programme service, and possession of inflammatory material. In the circumstances of hatred based on religious belief or on sexual orientation, the relevant act (namely, words, behaviour, written material, or recordings, or programme) must be threatening and not just abusive or insulting.

### **Malicious Communications Act 1988**

Under the Malicious Communications Act 1988, it is an offence to send communications or other articles with intent to cause distress or anxiety. This covers all forms of communications such as email, faxes and telephone calls.

The offence is punishable by a maximum term of imprisonment of two years and or a fine.

### **The Communications Act 2003**

Section 127 of the Communications Act 2003 makes it an offence to send a message by means of a public electronic communications network which is grossly offensive, or of an indecent, obscene or menacing character. This offence is incredibly broad and has been used to address jovial, albeit misjudged communications – it carries huge implications for freedom of expression especially now that social media is so widely used.

It is punishable on summary conviction only and carries a maximum term of imprisonment of six months or to a maximum fine ,(currently). of £5000, or both.

### **The Terrorism Act 2006**

The Terrorism Act 2006 criminalises ‘encouragement of terrorism’ which includes making statements that glorify terrorist acts, punishable by up to seven years imprisonment. It is an offence even if the person or group making the statement did not intend to encourage terrorism, although there is a statutory defence available to the accused if he or she can show that the statement did not express his/her views or have his/her endorsement and that it was obvious from the circumstances in which publication of the statement took place.

As the definition of terrorism is so wide this could criminalise people speaking out against repressive regimes anywhere in the world.

The punishment for this offence is, on conviction on indictment, imprisonment for up to for a seven years or to a fine, or to both. Unusually, on summary conviction, the magistrates have the power to impose a prison sentence of up to twelve months or to a fine not exceeding the statutory maximum (now £5000), or both. It is worth mentioning, however, that a 12 month sentence at that level is rare in English sentencing law and practice.

### **3) *The House of Commons Home Affairs Select Committee***

The House of Commons Home Affairs Select Committee began its probe into hate crime in July last year. Due to the decision to hold a general election on 8 June, the committee, in a report published on 1 May, said it did not have time to consider its conclusions on a 'wide range' of issues.

The committee nonetheless noted that relevant legislation for prosecuting online hate crime is spread across different acts of parliament, 'and each was passed before social media were mainstream tools, and some acts were passed even before the internet itself was widely used'. The committee recommended that the next government review the 'entire' legislative framework governing online hate speech, harassment and extremism, to ensure the law is up to date.

### **4) *The Crown Prosecution Service guidelines***

The Crown Prosecution Service has published guidelines to clarify the circumstances in which a criminal prosecution should be brought for hate crimes over social media. These guidelines state that prosecutors may only start a prosecution if a case satisfies the test set out in the Code for Crown Prosecutors. This test has two stages: the first is the requirement of evidential sufficiency and the second involves consideration of the public interest.

[http://www.cps.gov.uk/legal/a\\_to\\_c/communications\\_sent\\_via\\_social\\_media/](http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/)

### **5) *EU Law***

#### **Code of Conduct**

In 2016, the European Commission tried to deal with hateful online speech by agreeing a 'Code of conduct on countering illegal hate speech online' with four big players in speech platforms – Facebook, Microsoft, Twitter and YouTube.

The code of conduct's core duty is: 'Upon receipt of a valid removal notification, the IT companies to review such requests against their rules and community guidelines and where necessary national laws transposing the Framework Decision 2008/913/JHA' (on combating certain forms and expressions of racism and xenophobia).

The IT companies agree primarily to review reported hate material against their own terms of service – and only 'where necessary' against the law.

In other words, private companies are turned into enforcers of the law, but subject to certain conditions: first, only when breaches are reported to them; second, only when they are breaches as judged primarily against their private terms and not against the applicable law; third, without any commitment to remove hate speech, but only to review it; and fourth, this is all on a purely voluntary basis. The companies' terms are not uniform and are self-created.

[http://ec.europa.eu/justice/fundamental-rights/files/hate\\_speech\\_code\\_of\\_conduct\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf)

## **6) Future legislation?**

This has led the European Union to consider legislative measures to harmonise how online platforms like Facebook, Twitter and Google take down hate speech and incitement to violence. In a draft policy paper, the European Commission says there is a "high degree of variation in the approaches taken to removal of illegal content - be it incitement to terrorism, hate speech, child sexual abuse material, or infringements of intellectual property rights".

"Such divergences may be justified in some cases (e.g. for certain types of illegal content); but in other cases they reduce the effectiveness of the system (e.g. by delaying the removal of terrorist propaganda)."

The Commission says it may come forward with legislative and/or non-legislative instruments by the end of 2017 to address "legal fragmentation and uncertainty related to the removal of illegal content by online platforms".

## **7) What The Law Society of England and Wales has done about the issue**

### **Essex University – Tech & Human Rights**

#### Background

Tony Fisher, Chair of the Human Rights Committee, is also a fellow at Essex University. Tim Hill and Olivier Roth, policy advisers at the Law Society, attended a workshop there on the subject of privacy, on the 31<sup>st</sup> January 2017, where we discussed the possibility of working together on tech and human rights issues with professor Sheldon Leader. One such interface of tech and human rights mentioned was the use of data, and especially big data, to identify instances of extremism.

#### Themes

The broad themes being looked by Essex University are the business/state relationship in terms of data and policing content, the individual/state relationship and the meaning of consent, and the interface between tech and human rights in general.

These issues will be analysed through a series of events designed around the Essex University research.

#### Programme of work

The programme will start with a Breakfast Seminar, attended by selected, high ranking individuals within leading tech firms, human rights lawyers, and relevant government departments. We will work with the Whitehall & Industry Group, the Law Society's technology working group, the Law Society's Human Rights Committee, the Public Affairs team, and policy's contacts to promote the event and attract the right attendees. The purpose of this event will be to showcase the Essex University research, and introduce the broad themes to the audience.

Two Research Seminars will then focus on specific research questions, one based around the business/state relationship, and the other based on the individual/state relationship (consent). The culmination of these events will be a Public Lecture, perhaps to be held during human rights week in December. Essex University would be able to present their findings (even if preliminary), and other speakers will discuss some of the issues linked to the state/business/individual relationship when it comes to data and human rights.

The programme will last through 2017, and possibly into 2018.

The events will be held on the Law Society premises.

The aim of this programme of work for the Law Society is to develop a cutting-edge and coherent policy framework to guide the work of the Human Rights Committee and the Technology working group. It is designed to produce specific outcomes (podcasts, practice notes, guidance) for members and the general public. It will contribute to the development of important research in the fight against modern slavery. It will strengthen our stakeholder engagement with government departments, tech firms, and human rights organisations.