

# Boundaries to expression – hate and obscenity

## Chapter summary

Freedom of expression has boundaries. One boundary is that making or publishing some kinds of threatening statement is a crime. As this chapter explains, it is illegal to stir up hatred against people because of their race or religious beliefs or their sexual orientation. Such offences can be committed in speech, or in printed, broadcast or online material. This chapter also briefly examines law banning publication of obscene material.

## 39.1 Stirring up racial hatred

Sections 18 to 22 of the Public Order Act 1986 make it an offence for a person:

- to use – for example, in the street or in a public speech – threatening, abusive or insulting words or behaviour with intent to stir up racial hatred, or
- to display, publish, or distribute written material which is threatening, abusive, or insulting, or to broadcast a programme of visual images or sounds of such content, or stage a play featuring it, with intent to stir up racial hatred.

Even if there is no such intent, all of the above types of conduct are offences, if, having regard to all the circumstances, they are likely to stir up such hatred. The offences can be committed in an online posting, as can the other ‘stirring up’ offences referred to in this chapter.

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

The Crown Prosecution Service guidance (see Useful Websites, below), says: ‘The courts have said that the term “race” should not be interpreted in a narrow or strictly legalistic sense. In one case the court said that the term ‘African’ is a racial group and in others that it could include the term ‘foreigners’ and ‘immigrants’.’

The CPS guidance says of the term ‘hatred’: ‘As a minimum this connotes the idea of hostility and it has been taken to be regarded as a strong concept, going beyond dislike, ridicule, causing offence or bringing distaste.’

### Case study

In February 2022 Tahra Ahmed, 51, a ‘conspiracy theorist’, was jailed for 11 months after being found guilty at the Old Bailey of two offences of publishing threatening, abusive or insulting material with intent to stir up racial hatred contrary to section 19(1) of the 1986 act. Ahmed had posted a video on Facebook in June 2019, four days after the Grenfell Tower disaster, in which she referred to the blaze as a “Jewish sacrifice” and went on to link Grenfell to an antisemitic conspiracy theory about the 9/11 terror attacks in New York. A police investigation revealed a history of antisemitic posts, including one in January 2017 which set out an antisemitic conspiracy theory. The prosecutor at her trial said the published posts were ‘virulently antisemitic and significantly crossed the line as to what is acceptable in a liberal democracy’ (*PA Media*, 11 February 2022).

#### 39.1.1 – No intent necessary

The fact that such an offence can be committed even without intent means that a media organisation reporting with direct or indirect quotes an inflammatory speech or election manifesto (such as that of an extremist politician) or other expression of anti-immigrant propaganda could conceivably be prosecuted. But the phrase ‘having regard to all the circumstances’ was inserted into the 1986 Act as a response to lobbying by the Guild of Editors (now the Society of Editors) because its inclusion in earlier legislation had been seen as a protection for bona fide news reports of, for example, a racist rally.

In 1987 the then Attorney General gave a general warning that a newspaper which published an inflammatory racist letter from a reader would not necessarily escape prosecution merely by publishing, in the same edition, an editorial or letters expressing an anti-racist view.

But it remains true that this law is used against extremists rather than against mainstream media. There is some frustration among anti-racism campaign groups that prosecutions are not more frequent.

The ‘Regulation 19’ defence could protect a website operator, such as a media organisation, from being prosecuted under the 1986 Act for a racist comment posted by a reader – see *McNae’s*, 22.11. See also section 39.4 Common elements in this chapter.

## 39.2 Stirring up religious hatred

The Racial and Religious Hatred Act 2006 created a new offence specifically outlawing intentionally stirring up hatred against people on religious grounds. It did so by amending the Public Order Act 1986 (sections 29A - 29F). The crime occurs if a person uses threatening words or behaviour, or displays, publishes, distributes or broadcasts any material which is threatening, if he/she intends thereby to stir up religious hatred.

The Act says religious hatred is hatred against a group of persons defined by their religious belief or lack of religious belief. It does not seek to define what amounts to a religion or a religious belief. It will be for the courts to determine this in each case. However, the definition would include religions widely recognised – for example, Christianity, Islam, Hinduism, Judaism, Buddhism, Sikhism, and Rastafarianism. Equally, branches or sects within a religion can be considered as religious beliefs in their own right.

By use of the term ‘lack of religious belief’ the Act prohibits such stirring up hatred against a group of people defined by reference to atheism or humanism.

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### Case study

In January 2022, Paul Shelton was jailed after admitting two counts of publishing written material which was threatening, intending to stir up religious hatred. Shelton, 51, of Buxton Road, Furness Vale, posted extreme right-wing views on Facebook in October 2018 using an alias, including two coded messages that called for the burning of mosques. He initially denied the charges but later changed his pleas to guilty and was jailed for 10 months, with an extra 10 months on licence and a five-year criminal behaviour order which means he must provide police with details of any electronic devices he owns and any passwords to the devices, and he is also banned from creating any social media profiles using any name other than his own. Detective Inspector Graham Prince, head of the Derbyshire team at Counter-Terrorism Policing East Midlands, said after the sentence: ‘The language used by Paul Shelton in his posts were nothing short of horrifying.’ He added: ‘We have seen on an all too frequent basis the way in which online postings such as this can be taken into the physical world with absolutely devastating consequences – and it is clear from the sentence imposed that the courts have taken this matter very seriously. This is not a victimless crime, or one that is any less serious simply because it was posted on Facebook.’ (*Derbyshire Constabulary News* and *BBC online news*, 19 January 2022).

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## 39.2.1 Protection for criticism

This ‘stirring up’ offence as regards religious hatred applies only to the use of words that are threatening, but not to those which are merely ‘abusive or insulting’. It differs in this respect from the offence of stirring up race hatred.

Indeed, one of the amendments made by the 2006 Act to the 1986 Act was to insert sections 29J – referred to as the ‘free speech section’ – to safeguard robust criticism of groups for their religious (or non-religious) beliefs. It says that the offence of stirring up religious hatred is not intended to prohibit or restrict ‘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’.

To constitute the offence, the relevant words must be intended to stir up religious hatred – it is not sufficient that they have this effect as a result of recklessness. See also section 39.4 Common elements in this chapter.

### 39.3 Stirring up hatred on grounds of sexual orientation

In 2010 gay people gained greater protection against homophobic material, because a specific offence – intentionally stirring up hatred on the grounds of sexual orientation – became law, created in the Criminal Justice and Immigration Act 2008 as an amendment to the 1986 Act (sections 29A - 29F). This hatred is defined as ‘hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both)’. The definition means that heterosexuals are protected by this law, but its *raison d’être* was to protect homosexual and bisexual people.

This crime occurs if a person uses threatening words or behaviour, or displays, publishes or distributes any written material or broadcasts any programme which is threatening, if he/she intends thereby to stir up such hatred. The crime does not occur if the words have this effect merely as a result of recklessness.

The Act states, in what is known as the ‘free speech’ section (29JA), that discussion or criticism of sexual conduct or practices ‘or the urging of people to refrain from or modify such conduct or practices’ is not in itself illegal.

### 39.4 Common elements

For the offences outlined above, in respect of broadcast material the service provider, producer, director and the person uttering the offending words can be prosecuted.

None of the offences applies to the publication/broadcast of what is said in Parliamentary proceedings, including in the Scottish Parliament, or in the National Assembly for Wales, or to contemporaneous, lawful reports of court cases or of other judicial proceedings.

Penalties for any of these offences are up to six months’ imprisonment or a fine or both on summary conviction, and up to seven years’ imprisonment or a fine or both on conviction on indictment.

### 39.5 Obscenity law

It is an offence to publish obscene material—the test is whether the words or material published would tend to deprave and corrupt those likely to read them/it.

The Obscene Publications Act 1959 introduced a defence that the publication was ‘for the public good ... in the interests of science, literature, art, or learning, or of other objects of public concern’. The Obscene Publications Act 1964 made it an offence to possess an obscene article for publication for gain.

## Recap of major points

- It is an offence to publish/broadcast material that is threatening, abusive or insulting if the intention is to stir up racial hatred or if, having regard to all the circumstances, racial hatred is likely to be stirred up thereby.
- It is an offence to publish/broadcast material which is threatening if the intention is to stir up religious hatred or hatred on grounds of sexual orientation.
- It is an offence to publish material which is obscene, the test being whether the material would 'tend to deprave and corrupt' those likely to view it.

## Useful Website

<https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance>

Crown Prosecution guidance on racist and religious hate crime