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SELECT COMMITTEE ON
RELIGIOUS OFFENCES IN ENGLAND
AND WALES

VOLUME I—REPORT

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The Report of the Committee is published in Volume I (HL Paper 95–I)
The oral evidence is published in Volume II (HL Paper 95–II)
The written evidence is published in Volume III (HL Paper 95–III)

FIRST REPORT

10 APRIL 2003

By the Select Committee on Religious Offences

ORDERED TO REPORT

RELIGIOUS OFFENCES IN ENGLAND AND WALES

CHAPTER 1: INTRODUCTION AND BACKGROUND

1. We were appointed “to consider and report on the law relating to religious offences” and in our Call for Evidence identified two main strands of our inquiry:

- Should existing religious offences (notably blasphemy) be amended or abolished?
- Should a new offence of incitement to religious hatred be created and, if so, how should the offence be defined?

2. At no time did we see these two strands as mutually exclusive, but the immediate history behind the appointment of the Committee (see Chapter 2) led some to believe this to be the case. Furthermore, while we did not specifically ask whether old laws such as blasphemy should be retained in their existing form, it was implicit in our thinking.

3. In moving the appointment of the Select Committee, the then Chairman of Committees (Lord Tordoff) said that the Liaison Committee had considered a proposal that the Religious Offences Bill (the RO Bill) introduced by Lord Avebury and given a second reading on 30 January 2002¹ should be committed to a Select Committee. But, he said, the Liaison Committee believed it would be better to refer the subject of religious offences to an ad hoc select committee “rather than limit the Select Committee to the terms of the Noble Lord’s Bill”. The Religious Offences Bill does however raise the two main issues concerning religious offences (deriving, respectively, from the Law Commission’s 1985 Report² and the “incitement” clause omitted from the Anti-terrorism Crime and Security Act 2001). These are, first, the proposal to abolish the common law offences of blasphemy and blasphemous libel as well as closely related common law and statutory offences; it also takes the opportunity to repeal some other 19th century statutory offences less closely connected. Second, it reproduces the Clause concerning incitement to religious hatred which was dropped from the Anti-terrorism, Crime and Security Act 2001 following disagreement between the two Houses. After the Select Committee invited comments on the Bill, many of those who responded did so, as said above, on the basis that the second element constitutes a replacement for the first. However, the offences have different targets: blasphemy concerns sacred entities or beliefs while incitement relates to people or groups who belong to a particular faith. Rather, it has been necessary to examine both elements in some detail; although the possible new offence of incitement to religious hatred has a relevance to blasphemy it cannot be considered without placing it in a modern statutory context, but there has been no aspiration necessarily to replace blasphemy and other related offences.

4. The Committee recognised that its deliberations would be seen by the varied, and individual, religious groups in the country in the light of their own perceptions of how they felt themselves to be treated both by the law and more generally by institutions of the state. Many non-Christians feel that they are to some extent marginalised by comparison to those who adhere to the Christian faith, while Christians feared that the Committee would undermine their interests in some way or another. We did not however view the complex of issues we had to consider as an either/or scenario in which there would be winners or losers. Our main objective throughout was to examine the relevance and utility of existing religious offences, many of which were enacted in the 19th century when values and perceptions were very different and British society less diverse than today. A number of factors had to be taken into consideration: the role of religion in society in the 21st century; the large increase in the number of adherents to non-Christian religions; a persistence of what might be described as “folk

¹ HL Bill 39, 2001/02

² “Offences against Religion and Public Worship” (Report: LAW COM. No. 145) of June 1985

religion” in all faiths including Christianity; and the position of those who adhere to no religion at all. What is the extent to which their interests were the same as or different from those of Christians, and should the same principles be applied to the legal protection of all their beliefs (or non belief)? Should they be the same as applied to Christianity? Is there, overall, a gap in the criminal law (the terms of reference relate to “offences”) where redress is needed?

5. The Committee received more than five hundred written submissions, many of them quite short letters from members of the general public, and also substantive contributions by the leading representatives of Christian churches and other, particularly Muslim, faiths. We also examined witnesses from the Home Office, the Police Service, the Council for Christians and Jews, the Inter Faith Network for the United Kingdom, Christian Churches, the Muslim, Sikh and Hindu communities as well as those of no faith who advocate a secular society. The Director of Public Prosecutions and the Attorney-General also gave oral evidence. The Committee met 24 times to take evidence and deliberate. We also visited the University of Cambridge to participate in a seminar arranged for us by Sir David Williams QC, emeritus Vice Chancellor.

6. The first three chapters of this report and the appendices contain factual material relating to the issues covered by our terms of reference. Thereafter, the report reflects different possible approaches to the main substantive issues, which are complex and controversial.

7. Members of the Committee have declared their interests as follows:

Lord Avebury	Lib-Dem	Buddhist
Lord Bhatia	Crossbench	Muslim
Lord Clarke of Hampstead	Labour	RC ³
Viscount Colville of Culross	Crossbench	C of E ⁴
<i>(Chairman)</i>		
Lord Grabiner	Labour	Jewish
Lord Griffiths of Fforestfach	Conservative	C of E
Earl of Mar and Kellie	Lib-Dem	Church of Scotland ⁵
Baroness Massey of Darwen	Labour	Humanist
Baroness Perry of Southwark	Conservative	C of E ⁶
Bishop of Portsmouth		C of E
Baroness Richardson of Calow	Crossbench	Methodist ⁷
Baroness Wilcox	Conservative	C of E

³ Holder of Papal knighthood

⁴ a) Brought up in the Episcopalian Church of Scotland; b) Church Warden

⁵ Presbyterian

⁶ Former Church Warden

⁷ Ordained Minister, ex Moderator of the Free Churches, currently Moderator of the Churches' Commission for Inter Faith relations

CHAPTER 2: THE CONTEXT

8. Although the Committee's remit concerns only criminal offences, this report must begin by focusing on the context in which it was set up. The Anti-Terrorism, Crime and Security Bill 2001 was a piece of emergency legislation, responding to the events in the United States of America on 11 September 2001. The part of this with which we have to deal directly is the incitement Clause which was eventually omitted and now reappears in the RO Bill. However, s.39 of the Anti-terrorism and Security Act 2001, as passed, is also relevant. This allows the courts to impose harsher penalties if it can be shown that an offence was aggravated by religious hatred, and builds on a system in the Crime and Disorder Act 1998 providing for increased sentences for some offences aggravated by racial hatred. Section 39 is beginning to be used in prosecutions.

9. The law is seen as only part of the remedy for prejudice and bigotry. From a selection of formulations, three may be of interest:

- “I would simply make the point that it is very difficult to encourage open and free dialogue, involving people of faith communities who may feel insecure and may actually have a sense of fear in relation to their own religious identity. Dialogue, and mutual understanding can be developed much more successfully in a society where it is absolutely clear that people of different faiths have a legitimate place, that their place is respected, and that they will not be subject to ill treatment and abuse (Inter Faith Network⁸).
- “Yet, for so many people in this world, the idea of sharing and celebrating other people's faiths and beliefs is something to fear. In recent months that fear has increased dramatically. Truly, we are at a crossroads: the choices that we make at this crucial time, as parliamentarians and as a nation, will determine the kind of world we leave our children” (Lord Alli)⁹.
- “The Commission for Racial Equality recognises that for many minority ethnic communities there is a close relationship between race and religion and that identity through faith is as important as identity through racial origin”¹⁰.

10. It was suggested to us at the Cambridge seminar that the essence of an eventual solution is tolerance; if this is to achieve harmony, it must be promoted as a pro-active attitude rather than a passive or complacent frame of mind. There are already working models and powerful advocates of peaceful resolution of age-old disputes. What is needed is an appropriate recognition of religion both in the law and in many other ways, for example education and community relations.

11. Any legislation on these complex social and religious issues would have to be flexible enough to endure. Today, it is the Muslim community which feels itself the least protected from hatred and most exposed to hostile attack, both verbal and physical, although there is no reason to think that they are the only likely victims. Tomorrow, the spotlight may be on another religious community. While there is no longer any formal discrimination against or general hostility towards Roman Catholics, Nonconformists or Jews, religious prejudice still exists. The Church of England is not exempt. The religiously aggravated offences in the Anti-terrorism etc Act were a step in the right direction, but the issues pre-date the passing of that Act. The hostility towards some religious communities will not easily be reduced while the international situation remains as it is, particularly if the media continue to talk up terrorist threats and directly or indirectly relate them to these communities.

12. The situation in other parts of the United Kingdom is summarised in Appendix 5. In Scotland, new law on religious hatred as an aggravating factor is awaiting Royal Assent. In Northern Ireland no change in existing law is anticipated. Meanwhile in the European Union negotiations are continuing on the text of a Council Framework Decision on combating Racism and Xenophobia, which is expected to require member states to create an offence of incitement to religious hatred.

13. We are a society in which no major religious group, including atheists, objects to the presence of others, and there is little friction between the leaders of various faiths. It is, however, important to recognise that continued tranquillity depends not only upon continued mutual tolerance but, equally, on equality of protection from intolerance on the basis of religion or belief or no belief. So long as the major religious communities can pursue their ideas, their beliefs and their practices, and so long as none of these cause any undue impact upon the secular segment of society, or on each other, a form of stability can be achieved. But this cannot be taken for granted.

⁸ Volume II, Q186 on page 51

⁹ HL Hansard 13 November 2002, col 10, seconding the Motion for an humble Address

¹⁰ Volume III, page 31

14. The more disturbing sources of animosity which may be encountered do not relate to a religious/secular divide. They are more likely to be created as a by-product of the communal, social and ethnic conditions in particular geographical areas of the country (referred to by one witness as “dynamics”¹¹). There is also sometimes an inability or unwillingness at the individual level to come to terms with those who are different from oneself, whether by reason of colour or other aspects of divergence, such as forms of dress.

15. The general complaint at present, and particularly from the Muslim community, is hostility which, while racist in origin, is often expressed in religious terms that are not at present illegal. This concern is increased by the perception of the fact that other faith groups are protected from hostility (by the blasphemy laws, race relations and public order legislation), while theirs is not. The 2001 census figures indicate that Muslims constitute over 3% of the population; other estimates suggest that about 700,000 are of Pakistani origin, 300,000 of Bangladeshi; there are groups of 240,000 from India and 375,000 from the Middle East and Africa; 200,000 from diverse countries such as Malaysia, Turkey, Iran and the Balkans; and about 10,000 who are Afro-Caribbean or white converts. Claims of discrimination and hatred towards them, in its legion of forms, have filled much of the evidence to the Committee. A key element of the Muslim perception of their marginalisation under the law¹² is that they do not enjoy the widening of the definition of “racial group” by case law, which some religions clearly, and in their view rightly, do. One result of this is that, when the Public Order Act 1986, Part III, created new criminal offences of incitement to racial hatred, it automatically applied to these groups, but not to Muslims and other faiths which draw support from more than one national or ethnic group. The same was true of the aggravated version of the offences introduced in 1998. The subsequent introduction of religiously aggravated offences in the Anti-terrorism etc Act did not resolve the incitement aspect of the issue. This is seen as a most damaging state into which the law has progressed. The Muslims certainly think so, and the Attorney-General¹³, the Home Office¹⁴, the Police¹⁵ and the DPP¹⁶ agreed that it is undesirable. If Sikhs and Jews are to be protected from incitement to religious hatred and if this is considered to be a legitimate restriction of free speech, the same standard should be applied to Muslims, Christians and other faith communities, otherwise there is clearly a breach of Article 9 combined with Article 14 of the European Convention on Human Rights.

16. The criminal law does apply in cases of violence or threats directed at members of the Muslim community, and there have been cases before the courts¹⁷. Many Muslims, nevertheless, believe that the law treats them as second-class citizens of British society due to the combination of a lack of remedy for religious discrimination in civil settings; the absence of powers to prosecute when the group (rather than its individual members) is the target for incitement to hatred, because of its multi-ethnic composition; and the absence of any proscription of incitement to religious hatred.

17. In this context, the draft Council Framework Decision would help to counteract the “pretext” device whereby extremist organisations are evading the racial offences under the Public Order Act 1986. They use religion as a surrogate for their real target of race, as the Police and the Home Office confirm (and we have seen a plethora of objectionable material in support of that view). There seem to have been problems, not least evidential, in bringing prosecutions under Part III of the 1986 Act, whether or not aggravated (according to the Commission for Racial Equality, there have only been 61 prosecutions since 1988¹⁸). If the Framework Decision were to be implemented in England and Wales, careful thought would have to be given to see how this new offence should be formulated in English law. The government continues to favour legislation to deal with religious hatred. The Attorney-General said as much in his evidence to the Committee¹⁹. In an interview with the Muslim News

¹¹ Volume II, Q191 on page 53

¹² The law was defined in 1983, when the House of Lords (in *Mandla v. Dowell Lee* [1983] 2 AC 548) held that the Sikh community could be described as having an “ethnic origin” under s. 3(1) of the Race Relations Act 1976 and that, therefore, in seeking to prevent a pupil from wearing his turban a school was acting contrary to the race relations legislation. The Jewish community have since been treated as having the same protection because the House of Lords, in seeking a meaning for “ethnic origin”, relied on a New Zealand decision on the same point under similar legislation, concerning a pamphlet published with the intent to incite ill-will against the Jews (*King-Ansell v. Police* [1979] 2 NZLR 531). Since then gypsies/travellers/Romanies (the Court of Appeal used these words inter-changeably) have obtained a similar status (*Commission for Racial Equality v. Dutton* [1989] 1 All ER 306)

¹³ Volume II, Q686 on pages 231 and 232

¹⁴ Volume II, Q50 on page 19

¹⁵ Volume II, QQ106, 138, and 159 on pages 32/33, 36, 40

¹⁶ Volume II, Q596 on page 216

¹⁷ Volume II, pages 28 and 29

¹⁸ Volume III, page 35

¹⁹ Volume II, Q686 on pages 231/2

(28 March 2003) the Home Secretary said “I can’t be anything else but sympathetic to [an offence of incitement to religious hatred] because it was my idea”. In its fifth report, the Select Committee on European Scrutiny quoted Lord Filkin’s reference to a declaration inserted into the proposed Council Framework Decision on Racism and Xenophobia which “explains how, although not treated as an offence in its own right, our courts must consider “religious” hostility as an aggravating factor when determining sentences for all offences.”

CHAPTER 3: THE LAW AS IT STANDS

COMMON LAW OFFENCES

Blasphemy

18. Blasphemy (and blasphemous libel) is a common law offence with an unlimited penalty. The content of the current law is obscure, but in Appendix 3 we endeavour to set it out in detail. In 1981 the Law Commission observed that it was “hardly an exaggeration to say that whether or not a publication is a blasphemous libel can only be judged *ex post facto*”.²⁰ In 1985 it recommended its repeal.²¹

19. Two elements of the law are clear. First, the offence is one of strict liability. That is to say, intent to commit an act of blasphemy is irrelevant; all that matters is whether the accused did in fact publish the material that is the subject of prosecution. Secondly, the offence protects only the Church of England. It was clear to us from the correspondence we received, however, that the law is perceived by many to have a much wider and more general application.

20. No blasphemy case has been prosecuted in England and Wales since the passage of the Human Rights Act 1998 (incorporating elements of the European Convention on Human Rights), but it is a reasonable speculation that as a consequence of that legislation any prosecution for blasphemy today—even one which met all the known criteria—would be likely to fail or, if a conviction were secured, would probably be overturned on appeal (if not by the House of Lords then by the European Court of Human Rights) on grounds either of discrimination, of denial of the right to freedom of expression, or of the absence of certainty. Such an outcome would, in effect, constitute the demise of the law of blasphemy.

Other Common Law Offences

21. The Religious Offences Bill proposed the repeal of “any distinct offence of disturbing a service” and “any religious offence of striking a person in a church or churchyard”. These proposals replicate the wording in the draft Bill proposed by the Law Commission in its 1985 report (p3.4), which also summarises the offences as follows: “The precise breadth of the common law is difficult to gauge. There are very broad statements in Hawkins’ Pleas of the Crown to the effect that ‘all irreverent behaviour’ in churches and churchyards has been regarded as criminal. More specifically there is authority, by no means strong, for the propositions that it is an offence at common law – (a) to disturb a priest of the established Church in the performance of divine worship, and also, it seems, to disturb Methodists and Dissenters when engaged in their “decent and quiet devotions”; and (b) to strike any person in a church or churchyard”. The Law Commission recommended the repeal of these offences, which have “not been used at all in modern times, and have been entirely superseded by statutory offences”.

OLD STATUTES

The Criminal Libel Act 1819

22. The Religious Offences Bill proposed the repeal of references to blasphemous libel in Section 1 of the Criminal Libel Act 1819. This law covers both publications that are a seditious libel and those that are a blasphemous libel. In the case of blasphemous libel, where material is judged to be a blasphemous libel “tending...to excite his Majesty’s subjects to attempt the alteration of any matter in the Church...by law established, otherwise than by lawful means”, the court making that judgement can order the seizure of that material. Since it applies only to publications that are likely to lead to an attack on the position of the Church of England, this part of the Act is probably in conflict with the provisions of the Human Rights Act 1998. In their supplementary evidence, the Home Office have said that the Act itself should not be repealed, because of the need to retain the provisions for seditious libel. They have also advised that if the law of blasphemy were itself repealed, the references to blasphemous libel would fall away²². The provision does not appear to have been used in modern times.

²⁰ “Offences Against Religion and Public Worship” (Law Commission Working Paper No. 79, 1981) para. 6.1.

²¹ “Offences against Religion and Public Worship” (Report: LAW COM. No. 145) para 2.57

²² Volume II, pages 24 and 31

The Law of Libel Amendment Act 1888

23. Section 3 of the Law of Libel Amendment Act was repealed by section 16 and Schedule 2 of the Defamation Act 1996. Section 4 of the Law of Libel Amendments Act 1888 was repealed, in relation to blasphemous libel, by sections 17(2) and 18(3) of the Defamation Act 1952.

The Cemeteries Clauses Act 1847

24. Section 59 of the Cemeteries Clauses Act 1847 makes it an offence to “play at any game or sport, or discharge firearms, save at a military funeral” in a cemetery or to “wilfully and unlawfully disturb any persons assembled in the cemetery for the purpose of burying any body” or to “commit any nuisance within” a cemetery. This provision, however, now only applies to privately run cemeteries. Cemeteries run by local authorities are governed by the Local Authorities’ Cemeteries Order 1977. Section 18 of this creates an analogous offence to section 59 of the 1847 Act. These offences are similar in effect to those created under section 2 of the Ecclesiastical Courts Jurisdiction Act 1860 (see below). However, there is one significant difference between these measures. Section 2 might be regarded by some as being objectionable because it specially protects religious as opposed to non-religious sites, but this argument does not extend to either the 1847 Act or the 1977 Order. Although most burials or cremations are religious in character the law neither requires that they be religious in a particular manner nor that they be religious at all. Thus the protection inherent in these offences is extended to all cremations and burials whatever their form. The 1977 Order should therefore allow for repeal of the 1847 Act.

The Ecclesiastical Courts Jurisdiction Act 1860 (“ECJA”)

25. Section 2 of the Ecclesiastical Courts Jurisdiction Act 1860 forbids “riotous, violent or indecent behaviour in any Cathedral Church, Parish or District Church or Chapel of the Church of England..., or in any Chapel of any Religious Denomination or ... in any Place of Religious Worship duly certified” under the Registered Places of Worship Act 1855, “whether during the celebration of divine service or at any other time”. Section 2 also makes it an offence to “molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any Preacher duly authorised to preach therein, or any Clergyman in Holy Orders ministering or celebrating any Sacrament, or any Divine Service, Rite, or Office, in any Cathedral, Church, or Chapel, or in any Churchyard or Burial Ground”.

26. Evidence to the Committee indicated that this offence is still in occasional use. According to statistics made available by the Home Office, there were 60 prosecutions under this Act in the six years 1997-2002, with 21 convictions. These figures need to be seen in the perspective of the totality of crimes against places of worship. According to “National Churchwatch” there were 6,829 such incidents in 12 (of 42) police areas in the year ending April 2002, 186 of them violent crimes (including 2 murders) and 2,866 incidents of criminal damage (most of the remainder were thefts or burglaries)²³. The Crown Prosecution Service has been unable to provide any details of the 60 ECJA cases, but in his evidence to the Committee the Director of Public Prosecutions said that: “We use it sufficiently often or have used it in the past for it obviously to be the right offence to use and a redrafted Section 2 would probably be a (albeit infrequently used) valuable offence”²⁴.

27. The Law Society of Scotland has indicated that in Scotland, to which the offence does not extend, the common law offence of breach of the peace provides all necessary protection²⁵. It is clear from the figures provided above that, as a proportion of the totality of crimes against places of worship, those prosecuted under the ECJA form a very small minority. From the information we have been able to ascertain about two cases brought in 2001, it is also apparent that some cases originally coded as ECJA result in convictions under some other statute. The assumption is that those of the remainder that are followed up are prosecuted under more general public order legislation. However, the Home Office, in supplementary evidence sent to the Committee²⁶, said that it believed the 1860 Act did cover situations not covered by other offences although they found it “difficult to cite any specific examples”. One example may be the well-documented case of the prosecution of Mr Peter Tatchell, under the ECJA, in 1998. He was found guilty under the ECJA of indecent behaviour (“indecent” being used not in the sense of intending to corrupt or deprave but in the context of the Act’s reference to “riotous, violent or indecent behaviour”). In his written submission²⁷ Mr Tatchell says it took the police six weeks to frame the charge against him. There may have been other incidents

²³ Volume III pages 63-66

²⁴ Volume II, Q631 on page 220

²⁵ Volume III, page 52

²⁶ Volume II, on page 28

²⁷ Volume III, page 73

or actions liable to or which actually caused offence in or around places of worship but which were not susceptible to prosecution under other legislation. The fact that prosecutions are triable by a magistrate only may also make its deployment attractive to the prosecuting authorities.

The Offences Against The Persons Act 1861

28. Section 36 of the Offences Against the Persons Act 1861 makes it an offence to, amongst other things, use “threats or force, obstruct or prevent or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting house, or other place of divine worship”. There is ample authority for the proposition that the phrase “divine worship” extends beyond the services conducted by the Church of England and, given the *Segerdal* test noted in para 55 in relation to the 1860 Act, it may probably be argued that the phrase extends to all theistic, including probably polytheistic, religions. However the phrase seems to exclude from the protection of the Act both non-theistic religions where there is no worship of the divine and also religions, such as the Religious Society of Friends, that do have divine worship but do not have persons who are, or who are analogous to, clergymen or ministers. The exclusion of non-theistic religions may be problematic following the implementation of the Human Rights Act 1998. Granting special protection to clergymen and ministers but not to those, such as people attending a Quaker meeting, who are engaged in ministering without being formally designated as ministers, may not be acceptable under the 1998 Act.

The Burial Laws Amendment Act 1880

29. Section 7 of the Burial Laws Amendment Act 1880 falls into two parts. First the section makes it an offence to indulge in “riotous, violent, or indecent behaviour” at any burial under the Act. The section also makes it an offence to obstruct a burial. This part of the section applies specifically to both religious and non-religious burials. The second part of the section makes it an offence to “bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or the members or any minister of any such church or denomination, or any other person”. The meaning of the final phrase in this part of the section, “any other person”, is somewhat obscure and might be interpreted to mean that it is an offence to bring into contempt or obloquy any person at a burial. However, leaving aside this argument, which does not seem to have been the subject of debate within the courts, the main import of this part of the section seems to be to create an offence that provides specific protection for the Christian faith. There are thus potential objections to the section under the provisions of the Human Rights Act 1998.

30. From this point onwards the report will reflect different possible approaches to the three main issues. On these the members of the Committee were not unanimous in their views; in any case we all agreed that, on matters of this complexity and controversy, recommendations by a Select Committee of the House would be unlikely to carry such weight as to oust further discussion and that it must be for Parliament as a whole to make the choices. We thus set out options for the next stage in the debate.

CHAPTER 4: BLASPHEMY: THE OPTIONS

Introduction

31. The law of blasphemy is described in detail in Appendix 3, including an assessment of the impact on it of the European Convention on Human Rights. In this chapter we examine the three main options that are available to Parliament:

- (i) The common laws of blasphemy and blasphemous libel should be left as they stand;
- (ii) They should be repealed without replacement (the view of the majority of the Law Commission in 1985);
- (iii) They should be repealed but replaced with a new Statute, which would cover all religious faiths and beliefs and the rejection of religion. The objects of the protection would be the faiths, beliefs etc., not the people or groups who hold to them.

The “leave blasphemy alone” option

32. Reform of the law of blasphemy has not been seen as a priority by any Government since the Law Commission reported in 1985. The Home Office has declared that the present Home Secretary is personally in favour of its repeal but that a constructive debate first needs to be held²⁸. This report could be seen as the start of that debate.

33. Our witnesses have reflected the many views of what the law should now express and protect in the kind of society all respondents believe we should be. Some believe with great sincerity that the time has come for this country to abandon its religious heritage and become overtly secular; others with equal sincerity believe that the law should continue to defend the Christian character of our historic and constitutional roots; and a large number, including many among these two groups, wish to see the multi-faith nature of our society reflected clearly in our law. This diversity in the evidence we have received reinforces the view that the nature of our society is indeed a balance between the religious, the agnostic, and those of no religion, and that no consensus seems to exist as to the direction in which the balance should be changed, if indeed change it must.

34. The problem for parliament, however, stems not from the legal detail, but in the need to respect the deeply held views of a large number of the members of our society. Many think that the law on blasphemy offers much more than legal protection; they believe it to be an expression of the fabric of our society, of the values on which our relationships with one another depend, of our constitutional heritage, and of the nature of our national identity. Church of England opinion however includes those who would argue for the extension of the blasphemy law to embrace other Christian Churches and other faith communities. For the secular reformers, this can all too easily be characterised as nationalism, sentimentality, or even denial of other faiths. To see it only as the expression of such views would however be to misunderstand the underlying sense of identity of the British people, their innate respect for the values of a fair and just society resting on the Christian teachings, and the ‘tissue of dynamic relationships’²⁹ which make up the British constitution.

35. In the recent census, 72% of the returns declared themselves to be part of the Christian tradition and identity. While not regular churchgoers, many still turn to the Christian churches at key times in the Christian year, and at important moments in their own life cycle, as well as occasions of local or national thanksgiving or tragedy. They are, in overwhelming majority, people who are tolerant of the practice of other religions and would wish to see that tolerance and protection reflected in our law and practice. They believe also in the hard-won heritage of free speech in our society. Many could feel a real sense of loss, which might easily be turned to anger, if the delicate balance of religious and secular, the ‘sacred canopy’³⁰ of our nation, were to be destroyed too roughly by legislation for which there has certainly been no public surge of demand, and for which the only justification would be either a complex legal argument about incompatibility with a European Convention, or a mindless move for the ‘modernisation’ of our ancient common law. It is worth noting, too, that most Muslim groups, while preferring that the law be extended to cover all faiths, are opposed to the repeal of the law of blasphemy. The Muslim Council of Britain, for example, said that “abolishing the law on blasphemy would mean so far as other faiths are concerned what we call negative equalisation”³¹; one

²⁸ Volume II, Q23 at page 16

²⁹ In “The British Constitution” (Cambridge University Press, 1941) Sir (William) Ivor Jennings describes the British Constitution as “not a framework of law, but a tissue of dynamic relationships”

³⁰ Attributed to Peter L Berger: “The sacred canopy: elements of a sociological theory of religion” (1967) Doubleday and Co

³¹ Volume II, Q332 at page 136

of the proforma letters we received said that “from a Muslim perspective, it is better for the law to protect at least one religious denomination from blasphemy, the Anglican Church, than no religion at all.”³² The Board of Deputies of British Jews believes that to extend the law to other faiths would “raise inherent contradictions” and that it should be retained as it is.³³

36. The lesson from these considerations seems to be that Parliament should reflect on the strong arguments for leaving the law as it stands, even though its use might become increasingly uncommon, but also seek urgently for ways of expressing in law the need for protection for all faiths, all objects of religious veneration, and all followers of faith. Such a law would need to recognise the overriding need for tolerance as well as protection; and for freedom of speech, one of our most cherished national freedoms, as well as for freedom of religion.

Repeal without replacement

37. The Law Commission’s starting point in its 1985 report³⁴ was that “if there is no argument which may properly be regarded as sufficiently powerful to justify the derogation from freedom of expression which any offence of blasphemy must occasion, that offence, whether it be the present common law or some statutory replacement of it, should have no place in the criminal law” (paragraph 2.20). They proceeded to examine the arguments as they related to protection of religion and religious beliefs; protection of public order; protection of society; and protection of religious feelings. To these they added the “opening of the floodgates” issue and the suggestion that, by abolishing blasphemy without replacement, Parliament would be seen as, in some sense, bestowing approval of the conduct currently penalised by the common law.

38. Although much has changed since 1985, we note that the Law Commission’s report on these matters is largely mirrored in the written and oral evidence which was presented to us in 2002. On the Law Commission’s last two points, there are certainly vociferous groups who take their stand on the Ten Commandments (especially the third), the Queen’s Title as Defender of the Faith, the Coronation Oath and the statement that the UK is a country whose national religion is Christianity. As for the floodgates, some think that “artists, comedians, the media and almost anyone”³⁵ are only held in check by the current blasphemy law and, on its repeal, would immediately take the opportunity to issue blasphemous material. It is hard to judge how representative these views are, but they are probably a small minority of the population at large. Those who favour this option would contend that it is manifestly untrue that exhibitionists and attention seekers are just waiting for the common law offence of blasphemy to be repealed before they launch offensive attacks on religion. If that was their objective, they could already have targeted any other religion than Christianity with impunity, and if they attacked the Church of England they would have gained the extra publicity of a court case, with the possibility of a small fine.

39. Perhaps the most important deficiency in the existing common law is that it imposes a strict liability on a person who intends to publish a document, or make a verbal statement on a Christian topic, but who cannot know at that stage whether or not he will be found to have blasphemed. In so far as it is a strict liability, it offends current perceptions of fairness and runs contrary to what Lord Edmund-Davies said (in *Whitehouse v. Lemon*³⁶ p 920) is the increasing tendency to move away from strict liability. He gave examples of instances where the courts have managed to evade such a situation both under statute and under common law.

40. The European Court of Human Rights³⁷ recognises that a legitimate ground for restricting freedom of expression under Article 10.2 may, in certain circumstances, be the need to protect people against insult to religious feelings³⁸. That does not however exempt them from the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. At the same time, any restriction of freedom of speech has to be ‘prescribed by law’ and ‘necessary in a democratic society’ for a legitimate purpose. It is not so much a question of whether or not the criminal offence of blasphemy is ‘prescribed by law’, but the fact that its discriminatory features (in only protecting Christians) could (and probably would) lead to a conclusion that it is not proportionate to a pressing social need (an essential element if it is to be seen as necessary in a democratic society). Thus, insofar

³² Volume III page 36

³³ Volume III, page 3

³⁴ “Offences against Religion and Public Worship”, Law Commission No. 145

³⁵ Volume II, Q 449 on page 190, see also Q 459 on page 191

³⁶ The “Gay news case”: see Appendix 3, para 5

³⁷ Appendix 4 summarises International and European Conventions on Human Rights

³⁸ “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such ... restrictions or penalties as are prescribed by law ... in the interests of ... the protection of the reputation or rights of others ...”

as the *Wingrove* case³⁹ accepts that the law does not breach the European Convention, it was based on (i) a misunderstanding of the law, and (ii) the margin of appreciation which, as noted in paragraph 47 below, would not operate in the same way in the UK courts.

41. The law of blasphemy is discriminatory. It prevents (say) a Muslim from speaking about the sacred entities of Christianity in ways that would not be criminal if a Christian were to speak in similar terms about Islam. This violates Article 14 (prohibition of discrimination) taken together with Article 10, unless an objective and rational justification for the difference in treatment can be shown. Furthermore, failure to protect a Muslim against abuse of his religion might also violate Article 14 taken together with Article 9. Although the European Commission rejected an application based on Article 14 taken together with 9 in the “Satanic Verses” case⁴⁰, that predated the heightened respect for protection against abuse shown by the Court in *Otto-Preminger Institut* (para 48 below), and might not be decided in the same way today.

42. Of the non-Christian faiths, the Muslims, as already noted (paragraph 35) prefer to retain the law of blasphemy. Buddhists⁴¹, Hindus⁴² and Sikhs⁴³, on the other hand, as well as some Christians, advocate its repeal, as do the secularists. The present Home Secretary has told Parliament: “I want to make it clear that there is no question of extending the blasphemy law to all other denominations and faiths. We do not want to do that; we want to find an accommodation and a sensitive way forward when few people believe that the current position can continue”⁴⁴.

43. Several witnesses believed that recent unwillingness to invoke this criminal law may, at least in part, derive from the tolerance of Christian communities towards those who strongly question, criticise or insult their faith. Muslim witnesses, too, have said that their community would follow the course of tolerance so far as possible. It is however probably unwise to rely on a policy of inactivity on the part of the authorities or a commitment by the Attorney-General to take over any private prosecution (so as to offer no evidence) and to ensure that the CPS brought no prosecutions either. In the case of the former, the police were unwilling to intervene in the absence of a breach of public order when the poem “The Love That Dare Not Speak Its Name” (the cause of the “Gay News” case) was read recently outside St Martin’s in the Fields⁴⁵. But a prosecution might follow later. Thus, sooner or later a prosecution will be attempted. It does not much matter whether this arises from a perceived affront to Christian tenets or an attempt to pursue a “Satanic Verses” type case. Even if a prosecution were successful, it is likely that it would eventually be overturned on appeal, either by the higher courts in the United Kingdom or by the European Court of Human Rights on one or more of the grounds that it is discriminatory, uncertain and a law of strict liability. If this analysis is correct, the repeal might as well occur now: that would at least save the expense of proceedings which led to Strasbourg.

Repeal and replacement by a broader-based Blasphemy Act

44. It is difficult to justify a law which protects the sacred entities of Christianity but does not offer similar protection to other faiths⁴⁶. This was the Law Commission’s minority opinion. The Church of England would support the proposition of replacing the blasphemy law if there were to be a consensus among all faiths, but considers that to be unlikely⁴⁷. Some Muslims would like an extension of the blasphemy law to other faiths⁴⁸. The minority of the Law Commission team saw the drafting of such a measure, while avoiding unacceptable limitations upon freedom of expression, as a task of particular difficulty, but nonetheless achievable. They envisaged a filter, that is, the Director of Public Prosecution’s (DPP) consent, so as to prevent private prosecutions and, particularly, litigation resulting from disputation within or between religious sects. They did not, it seems, see the DPP as the arbiter of freedom of expression. They envisaged the need for expert evidence in some cases. The new offence would penalise the publication (not verbal expression) of material proved to have been published with the “purpose” of causing outrage (“purpose” being designed to protect unintentional insult or outrage, which the blasphemy law does not). They envisaged a list of religions, variable by Ministerial order. This may be easier said than done.

³⁹ See Appendix 3, paras 12-14

⁴⁰ See Appendix 3, para 3

⁴¹ Volume III, pages 15-17,41,53

⁴² Volume II, page 203 and Q539 at page 205

⁴³ Volume II, Q504 at page 198

⁴⁴ HC Hansard 26 Nov. 2001, col. 708

⁴⁵ Volume II, Q 464 at page 192

⁴⁶ Volume II, Q176 at page 48

⁴⁷ Volume II, Q269 at page 103

⁴⁸ Volume II, Q359 at page 155; see also Q396 at page 176

45. In this area at least, there is a significant change since the Law Commission reported in 1985. Such a legal drafting exercise would now have to take full account of the Human Rights Act. For instance, the formulation of a proposed Bill submitted to the Committee by the Association of Muslim Lawyers ran into the problem that it defined the beliefs to be protected by reference to a deity but omitted to deal with non-theistic beliefs or those who reject religious belief⁴⁹. Separate legislation for them cannot be the answer, since the first Bill could not carry a Statement of Compatibility under s.19 of the Human Rights Act (if a Government Bill), whilst a Private Member's Bill would run into major difficulties at the Committee stage for the same reasons. However true it may be that the Humanists and Atheists are not under attack⁵⁰, they cannot be ignored. There will also be parallels in the future with doctrines such as Scientology, which has succeeded in some countries in establishing that it is a religion, whereas in others it has failed.

46. One advantage of any reformulation, however, may be that rights enshrined in Article 10 of the European Convention could be protected by borrowing the wording in section 12(4) of the Human Rights Act: "The Court must have particular regard to the importance of the Convention right to freedom of expression". Nevertheless, Parliament's task in selecting the religions, or beliefs rejecting religion, must be fraught with difficulty, as would be any amending Statutory Instrument.

47. One factor which may be seen as affecting a British court is the difference in jurisprudence between the Strasbourg court and tribunals within the UK. In a seminal case concerning the Scotland Act 1998, which came into force before the Human Rights Acts 1998, the Privy Council had to consider the constitutionality of a law which required a person to answer a question whether she had been the driver of the car on the particular occasion. The point concerned an interpretation of Article 6 of the European Convention about fair trial. This Convention does not prohibit a requirement to answer questions which would amount to self-incrimination, but the notion of fair trial may make this an implied right. Lord Steyn, in his judgement⁵¹, dealt with "what deference may be accorded to the legislature?" He said: "Under the [ECHR] system the primary duty is placed on domestic courts to secure and protect Convention rights. The Function of the European Court of Human Rights is essential but supervisory. In that capacity it accords to domestic courts a margin of appreciation, which recognises that national institutions are in principle better placed than an international court to evaluate local needs and conditions. That principle is logically not applicable to domestic courts. On the other hand, national courts may accord to the decisions of national legislatures some deference where the context allows it". He then referred to *R v. DPP ex parte Kebilene* [2000] AC 326, and two articles in legal publications, where the quotation from the second said: "Just as there are circumstances in which an international court will recognise that national institutions are better placed to assess the needs of society, and to make difficult choices between competing considerations, so national courts will accept that there are some circumstances in which the legislature and the executive are better able to perform these functions"⁵². This is one of the problems which must be faced in any future prosecution for blasphemy. The impact of Article 10.2 will be similar to its effect in an offence of hate crime, as to which see Chapter 8.

48. In relation to blasphemy, however, the question how this evolving domestic doctrine may affect the constraints imposed by Article 10.2 of the European Convention upon the limits, one way or another, of freedom of expression has still to be tested. In 1994⁵³ the Strasbourg court had to rule upon a prosecution under s.188 of the Austrian Penal Code, where the prosecutor argued that the film in question aroused justified indignation and disparaged an object of veneration of a church or religious community. The conviction was upheld on appeal. It then went to the European Court of Human Rights, which held that restricting freedom of expression was a legitimate aim for the protection of the rights of others under Article 10.2. As Professor Feldman says in his book "Civil Liberties and Human Rights" (Chapter 16): "this prevents the Court from exercising much control over the solutions adopted by a public authority faced by [these] kinds of arguments. Indeed, the Court's approach is potentially dangerous as it could sometimes serve simply to legitimate, rather than test rigorously, a regime of stringent censorship". But a British court would have to come to its own decision within stricter boundaries. The question would not, of course, arise if the common law offences were abolished. A replacement Act would have to be drafted so as to give effect to the principle set out in *Otto-Preminger Institut*, which is worth quoting at length:

⁴⁹ Volume II, QQ362 & 364 at pages 155 and 156

⁵⁰ Volume II, Q357 at page 154

⁵¹ *Brown v. Stott* [2001] 2 WLR 817 at 842

⁵² *Lester and Pannick, Human Rights Law and Practice 1999*. In *Kebilene* (see para 47), Lord Hope of Craighead considered that domestic courts may have to apply these principles when there are involved questions of balance between competing interests and issues of proportionality. This may be exemplified by issues occurring under Article 10.2

⁵³ *Otto-Preminger Institut v. Austria* (1995) 19 EHRR 34 at paras 47-48

“Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the state, notably in its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them. In the *Kokkinakis* judgement⁵⁴ the Court held, in the context of Article 9, that a state may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others ... The respect for the religious feelings of believers as guaranteed by Article 9 can legitimately be thought to have been violated by the provocative portrayal of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 in the present case must be in harmony with the logic of the Convention...”

49. The British Humanist Association has outlined⁵⁵ an alternative route. This would focus on the use of language or behaviour that, in the judgement of a reasonable person, was in all the circumstances likely to stir up hatred of a group of persons characterised by their religion or belief, or to inhibit the exercise of their rights under Article 9 of the European Convention. There ought then to be a defence of justification. This seems to be a hybrid between blasphemy (at least in the Indian context—see para 51 below) and incitement. So far as the incitement element is concerned, the formulation does not appear to present technical problems any more complex than those they would face under, for example, the Obscene Publications Act 1959. Juries deal with these successfully, and benefit from a statutory formula (which a judge is not allowed to embellish by interpretative directions) capable of being used flexibly as society’s attitude to moral issues of this sort changes or develops.

50. In their evidence to the Committee, the Home Office said that it does not advocate a definition of “religion”⁵⁶; it would leave it to the Courts. We feel that this evades the issue: laws that have religious implications should either define or at least describe what “religion” is. While the higher courts could be expected to deal with the issue, appeals occur on a haphazard basis and it could take years before the major faiths, let alone the minor or non-religious, received this sort of consideration. What appears to have been overlooked is the trial at first instance, before Magistrates or a jury. Formidable difficulties would be faced by the Clerk or the Crown Court judge in directing a correct approach to the decision on status of the religion, as well as the extent, beyond freedom of expression, of the alleged insult or vilification. What is more, the verdict would be based on an undisclosed (because by a jury) finding of fact so that, unless some error of law could be discerned in the summing up, the higher courts would have difficulty in giving the guidance which would evidently be desired of them.

51. At one stage in the Committee’s deliberations, it seemed promising to examine the Indian Criminal Code⁵⁷ (which has parallels in Sri Lanka). Both, of course, date from the Imperial past but are still in use. The attraction of the Indian Code lies, at least in part, in Lord Macaulay’s sponsorship. There are three areas which merit attention: (i) Part XV, which sets out a catalogue of offences to do with maliciously outraging the religious feelings of any “class” of Indian citizens, through a variety of means; (ii) the use of this as one of the methods of suppressing publications which are held to have that effect (under ss.99A-D of the Criminal Procedure Code); and (iii) in connection with electoral campaigns which are founded on such religious divisiveness, on which there are numerous very recent judicial decisions.

52. It should not be forgotten that between the end of the First World War and the early 1930s a number of attempts were made in this country to replace the common law of blasphemy by some adaptation of the Indian Code. These received no support from the Home Office and came to nothing. The rationale underlying the Indian laws was neither antipathy to freedom of speech as such nor the protection of religious freedom, but the maintenance of public peace and tranquillity in a country

⁵⁴ *Kokkinakis v. Greece* (1994) 17 EHRR 397

⁵⁵ Volume II, page 73

⁵⁶ Volume II, Q6 at page 14

⁵⁷ See Appendix 5, paras 18-23

where religious passions were considered to be easily aroused and inflamed. A distinguished Indian commentator (Soli Sorabjee, the Attorney-General) has recently written⁵⁸ that the British did not want a religious riot on their hands and were not really concerned about the religious tenets of those who professed them. However, setting aside the culture gap, there seems little reason why the text should not form a starting point for a restatement of principles. After s.295A⁵⁹ was added to the Indian Code in 1927, with its component of deliberate intent and malice, its provisions were tested against the constitutional guarantees of freedom of religious belief and of expression and were found to be compatible⁶⁰. Thus it might be hoped that a formulation could be found which would also comply with the European Convention. If there is nothing technically wrong with the law, the problem may be the manner of its enforcement. In India, the offences have been used to found actions to suppress writings on political grounds, which are always brought by the Executive. In the UK every safeguard is in place to prevent politically based prosecutions. Mr Sorabjee concludes: “experience shows that criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unreasonable interference with freedom of expression. Fundamentalist Christians, religious Muslims and devout Hindus would then seek to invoke the criminal machinery against each other’s religion, tenets or practices. That is what is increasingly happening today in India. We need not more repressive laws but more free speech to combat bigotry and to promote tolerance”.

53. The National Secular Society, in a detailed commentary on the Indian Laws, points out that there is a major difficulty in attempting to protect people’s feelings as opposed to their beliefs. Beliefs are matters of fact, and were at one time reviewed by the courts under the Test Acts, which then required that undergraduates at Oxford and Cambridge had to be communicant members of the Church of England. Feelings, on the other hand, are subjective. “Given that religion itself is so difficult to define, then defining hurt to religious feelings is still more demanding”⁶¹.

⁵⁸ “Freedom of Expression in India” pp 129-142 of *Developing Human Rights Jurisprudence*, Volume 7, Commonwealth Secretariat 1999

⁵⁹ “Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or religious beliefs of that class, shall be punished with imprisonment...”

⁶⁰ *Ramji Lal Mody v. U.P. State* AIR (1957) SC 620

⁶¹ Volume II, page 89, para 29

CHAPTER 5: THE ECCLESIASTICAL COURTS JURISDICTION ACT, 1860

Introduction

54. Any consideration of legislative proposals following the publication of this report will need to deal with the Ecclesiastical Courts Jurisdiction Act 1860 (ECJA). This is said to convey a signal or message that Parliament deprecates the conduct in question. Much of this report is concerned with signals or messages which Parliament may, and may rightly, wish to convey. Neither the existing provision nor any modern reformulation of it would be likely to lead to more than a handful of criminal prosecutions. But those contemplating legislation—whether to repeal or replace existing offences—need to recognise that there are many devout people living in our country who take their religion very seriously and have a legitimate interest in seeking to preserve and protect the tenets, beliefs, rites and practices which are at the heart of their spiritual life, and to protect buildings and artefacts which are the symbols of their faith. The diversity of the United Kingdom’s population now makes it imperative that, if there is to be legal protection for faiths, it must embrace all faiths. Recent census statistics tend to confound those who say that religion does not much matter at the beginning of the 21st Century, even if attendance at services has dropped. In a recent debate in the House of Lords on Church and State the point was well made that in the event of any crisis in a community it is to a religious centre that people resort.⁶² The subject matter of this Chapter makes it unlikely that provision could be included for non-theistic beliefs or for those who reject religion. There remains the fervour with which Churches and, indeed, believers of all faiths, hope to protect what concerns them most. The question is whether this is achieved within the framework of the ordinary law, or whether some additional or specific protection such as the ECJA is needed for the ceremonies, sacred places and artefacts of religion

55. There is, however, some uncertainty as to the scope of the Act. In late 2002 we obtained a figure of 1,587 non-Christian places of worship registered under the Registration of Places of Worship Act 1855⁶³; but it is not clear whether all these are properly so registered or whether the figure is comprehensive of all those so entitled. It is, in any case, a moving target. In many countries there has been dispute about what is or is not a religious belief and, as an example, the Scientologists have received different treatment in different jurisdictions. The doubts are formulated in various contexts: charitable status, recognition in the prisons, relief from taxes, discrimination against members of certain “religions” in their applications for public sector employment, etc. In the UK, the law derives from Lord Denning’s judgement in the *Segerdal* case in 1970⁶⁴. He said that a place of religious worship has to be –

“a place of which the principal use is as a place where people come together as a congregation or assembly to do reverence to God. It need not be a God which Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity. There may be exceptions. For instance, Buddhist temples are properly defined as places for meeting for religious worship.”

This test (the “Segerdal” test) could cause problems for non-theistic religions if they wished to avail themselves of the protection afforded by the ECJA, though it would be for the courts to decide what additional exceptions there might be to the deity test apart from Buddhism.

56. The European Convention on Human Rights recognises the right to freedom of religious belief in conjunction with absence of discrimination (Articles 9 and 14). Under Article 1 of the Convention, the UK is under a duty in international law to secure the rights to everyone within its territory. Of course, under the Human Rights Act 1998 Parliament can still legislate in such a way as to be incompatible with the European Convention if it wishes to do so, and has no legal or constitutional duty to amend the law to avoid incompatibility; but the UK may face criticism if the law is not conducive to the enjoyment of the rights.

57. The question is whether this is achieved within the framework of the ordinary law, or whether some additional or specific protection such as the ECJA is needed for the ceremonies, sacred places and artefacts of religion.

⁶² HL Hansard 22 May 2002 Cols 785 & 792

⁶³ Office of National Statistics, Marriage series FM2 No 28, table 3.42

⁶⁴ *R v. Registrar General, ex p. Segerdal* [1970] 2 QB 697 at p 707

Repeal without replacement

58. In 1985 the Law Commission recommended repeal of the Act. Statistics for prosecutions under the ECJA are available, although these may have been combined with charges under other Acts and the method of collection may be unreliable. The figures given to us by the Home Office are:

Year	Prosecutions	Convictions
1997	11	4
1998	17	9
1999	12	1
2000	11	6
2001	3	0
2002	6	1

The facts upon the basis of which these prosecutions were brought, except in one or two recent cases, can no longer be discovered. The penalties were fines, community service orders or conditional/absolute discharge.

59. Many of the incidents which occur in religious buildings or in their vicinity are susceptible to prosecution under more recent statutes, provided of course that the CPS tests as to sufficiency of evidence and the public interest are satisfied. It may be useful to give some examples:

- We have not received any evidence of acts of desecration which did not constitute some other offences.
- Persons intent on opposition to a religion, or just wantonly, may cause damage to buildings or to the burial ground, tombstones or other parts of the surrounds of the church, mosque, synagogue, temple or other religious centre. Legislation on criminal damage would be broad enough to deal with such damage or any damage occasioned by forced entry (which may not be burglary, if none of the statutory intentions are present), in order to carry out some act of desecration, perhaps some aspects of the desecration itself and certainly actions such as breaking windows, daubing statues and spraying graffiti on the building itself or on tombstones.
- In turn, Public Order legislation can be used to prosecute for interruptions to ceremonies or burials or threats or harassment of officiants. Actual assaults, threats and harassment are all existing offences. If such offences were serious enough to fall within the ECJA, modern legislation would more than match its penalties, although it would still allow them to be tried in the Magistrates' Court. Yet there are features of the venue or ceremony which, because of their solemnity and the feelings of those in attendance, could emerge as aggravating factors for the sentencing tribunal. If that is not sufficiently evident as a general proposition, sentencing guidelines could be promulgated to accompany the demise of the ECJA. A fall-back position is available in bringing an offender before a court for a breach of the peace.

60. Other factors in concluding that the Act is no longer relevant are:

- Not a single instance has been drawn to the Committee's attention of the use of the ECJA in relation to non-Christian places of worship, even though synagogues, gurdwaras and mosques have been targeted by desecrators.
- In the case of Christian churches, despite considerable effort, the Committee was only able to unearth details of three convictions classified under the heading of the ECJA, and in two of them the defendants were finally convicted of a different offence. The third was the case of Mr Peter Tatchell (Chapter 3, paragraph 27 above).
- It should not constitute a criminal offence if a sacred object is temporarily purloined and used for a secular or profane purpose and then restored undamaged, resulting in no charge of criminal damage being brought; or where religious premises are used for some improper purpose.
- Some would say that the congregation or community offended in this way should exercise the tolerance (which witnesses say exists) among many faith communities: we presume that rituals or other means are available to purify premises, to eliminate the sacrilege or to reconsecrate a building or other artefact.

61. These considerations lead to the view that, should new legislation on religious offences be contemplated, the opportunity should be taken to rid the Statute Book of a criminal offence which has

been superseded by subsequent legislation, which is not familiar territory to all prosecutors (or indeed the public at large), and which does not appear to be of sufficient significance for any comprehensive statistics to be kept.

Retention or reformulation in modern language

62. That the ECJA is not obsolete may be seen from the statistics which show its use in 60 prosecutions between 1997 and 2002, proportionately greater than the number of prosecutions (although not of convictions) under Part III of the Public Order Act 1986. While its jurisdiction is limited to the Magistrates' Court and the maximum penalty is 2 months' imprisonment or a £200 fine, it nevertheless seems, as a means of dealing with offensive but superficially trivial actions, to retain some utility, while depending, perhaps, upon the erudition of the prosecutor. Furthermore, it is allied to the Places of Worship Registration Act 1855, and can therefore be invoked by non-Christian places of worship that have been properly registered. The Director of Public Prosecutions said⁶⁵ that a redrafted s.2 would probably be a (albeit infrequently used) valuable offence, but also said⁶⁶ that in 32 years practice he had never seen a case brought in his presence.

63. The relatively small number of prosecutions may be at least in part because of a lack of awareness that the Act can be invoked by all faiths, its archaic language and its unfamiliarity to prosecutors, as well as the ability to invoke other legislation instead. There remains however the possibility of some incident which, while causing serious offence to the congregation or the adherents of a faith, does not constitute one of the modern criminal offences, but is still currently susceptible to prosecution under the 1860 Act. This incident might take the form of some sacrilegious action taking place at a time when nobody was present to be insulted and in the course of which no actual damage was caused, but the impact of which affronted an entire religious community. Examples of such an affront would be the deposit, at a time when custodians and worshippers were absent, of pork in a mosque or synagogue, a dead cow in a Hindu temple, or excrement on a communion wafer in a Christian church.

64. Section 2 of the Act encompasses riotous, violent or indecent behaviour (in its meaning of improper or irreverent), during the celebration of divine service or at any other time. This problem will not beset some faiths and, plainly, has no relevance to those who believe in no faith at all. As for those it does affect, it has been drawn to our attention by National Churchwatch⁶⁷ that places of worship, except for those belonging to the Church of England, are not public places during any service. So a person entering such a place does so on a deemed licence; this can be withdrawn and somebody in authority can call the police. There are some churches and cathedrals which have prepared leaflets printing the text of s. 2 of the ECJA. This attempts to dissuade those who eat or smoke in the church; and others who come in improperly dressed. It could deal with youths skateboarding around the church or tourists who refuse to abide by church rules. Whether a similar leaflet quoting s. 4A of the Public Order Act⁶⁸ would be equally useful has not yet been put to the test.

65. The replacement of the ECJA in a modern form, perhaps as one ingredient in a new Bill, would demonstrate that Parliament does indeed care about religious beliefs and recognises that worshippers open their doors to all-comers in order that they may participate in, or at least observe, these religious ceremonies. It would recognise, most importantly, that religious ceremonies are hallowed, the source of spiritual sustenance and emblems of community coherence. The buildings, artefacts and surroundings are imbued with a similar significance. These are aspects of the freedom of thought, conscience and religion which, in their own right, deserve protection by law against desecration and mindless, or mindful, abuse. If Parliament is to turn its mind to religious hatred, it must not fail at the same time to think about a corresponding measure to include offences dealt with under the 1860 Act, and thereby demonstrate its recognition of and support for the sincere and profound religious convictions of many people of many faiths.

66. On the narrow point about creating an offence of those sacrilegious actions which do not fall within the scope of other modern offences, there is little room for argument that any such restrictions would be permitted under Articles 9 or 10 of the European Convention on Human Rights.

⁶⁵ Volume II, Q631 at page 220

⁶⁶ Volume II, Q636 at page 221

⁶⁷ Volume III, page 63

⁶⁸ This section makes it an offence (which can arise out of a single incident) if –“with intent to cause a person harassment, alarm or distress, a person – uses threatening, abusive or insulting words or behaviour, or disorderly behaviour; or displays any writing, sign or other visible representation which is threatening, abusive or insulting; thereby causing that or another person harassment, alarm or distress.”

67. Such an updated offence would not be difficult to devise and would fill any perceived gaps in the law should prosecutors see fit to pursue some offensive conduct. The Committee's researches are not the right source for drafting a new law, but one possible model could come from the Fijian Penal Code. This was closely based on Lord Macaulay's Indian Penal Code. In Chapter XVI of the Fijian Code ("Offences against religion") there are four misdemeanour offences: damaging, destroying or defiling a place of worship (s.145); disturbing a religious assembly (s.146); trespass to burial places (s.147); and writing or uttering words with intent to wound religious feelings (s.148). As with the Indian Code, the offences in Fiji are not limited to protection of the Christian religion. For example, s.145 reads (in full): "Any person who destroys, damages or defiles any place of worship or any object which is held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, is guilty of a misdemeanour".

68. It would be possible to build upon the first three, at least, of the Fijian formulations. But whatever the precise form, it would be the opportunity to reinforce the sense of importance accorded to revered ceremonies and objects, and to restate Parliament's firm view that it supports matters of faith. It would also emphasise the ratification of Article 9 of the European Convention and Article 18 of the International Covenant on Civil and Political Rights (ICCPR), and would reflect the Church of England's report in 1988, drawn up by the committee chaired by the then Bishop of London, which spoke of the need to protect all faiths. Legislation on these lines would have to be accompanied by an identification process which may well not accord exactly with either the Registration of Places of Worship 1855 Act's or the Charity Commissioners' demarcation lines. There could in consequence be litigation to establish the principles and boundaries, but this ought to be ephemeral: Lord Denning's judgement in *Segerdal* has now lasted for over 30 years.

CHAPTER 6: INCITEMENT

69. Section 2 of the Religious Offences Bill proposed the creation of a new criminal offence of incitement to religious hatred. This was to be achieved by amending Part III of the Public Order Act so as to extend the offence of incitement to racial hatred to include incitement to religious hatred. This proposal replicated a clause in the Anti-terrorism, Crime and Security Bill 2001, which was subsequently dropped. One of the objectives was to extend the protection provided to mono-ethnic religions under race relations legislation (for example Jews and Sikhs) to multi-ethnic religions like Christianity, Islam and Hinduism. The main argument for rejecting the original proposal was that it bore little or no relation to anti-terrorism legislation⁶⁹, and that there should be separate legislation aimed at protecting religious beliefs and their expression following a proper public debate and a careful weighing of the options⁷⁰.

70. Incitement is, in origin, a common law offence. However, it “is not widely used by prosecutors in England”.⁷¹ It is an offence to incite another person to commit a criminal offence even though that other offence has not been committed or even attempted⁷². At common law, for there to be incitement there has to be both some form of communication with a person whom it is intended to incite and, in that communication, some attempt to persuade or encourage that person to commit a criminal offence⁷³. However, for there to be incitement at common law it is not necessary to prove that the person who it was attempted to incite was in fact affected by the attempt, and incitement may exist even though the attempt was unsuccessful⁷⁴. Moreover the persuasion inherent in the incitement can be implicit⁷⁵. The incitement does not have to be directed towards a specified person or group of persons but, rather, may be general⁷⁶. To be guilty of incitement one must normally intend that the offence that is being incited will be committed, but sometimes recklessness as to whether or not the offence is committed will suffice.

71. Incitement has on occasion been used in instances where there has been an attempt to stir up hatred of a particular person or groups of persons. However in such instances the hatred incited has itself taken the form of a criminal offence. Thus in *R v Most*, the accused (Most) published in London in his German language newspaper, an article, “Die Freiheit”. In that article he was found to have incited his readership “to the murder of the Emperor Alexander, or the Emperor William, or, in the alternative, the crowned and uncrowned heads...from Constantinople to Washington” (p 252).

72. From time to time, specific forms of incitement have been made statutory criminal offences, often as a reaction to the perception that a novel social mischief has arisen or that an existing mischief has become particularly damaging to society. Thus, for example, following the mutinies at Spithead and Nore, which resulted from harsh discipline and low pay, it was made an offence, under the Incitement to Mutiny Act 1797, to seduce any member of the armed forces “from his duty and allegiance to His Majesty” or to incite them to commit an act of mutiny. During the first prosecution under the Act counsel described this statute as being “a temporary statute, and a measure of extraordinary vigour”.⁷⁷ The history of this and other similar statutes demonstrates some of the problems inherent in the creation of new statutory forms of incitement.

73. Despite the fact that the 1797 Act was said to be temporary in nature it remains in being to the present day. Prosecutions have been relatively rare and the higher courts have never had to consider the precise interpretation of the statute. Nevertheless, the use that has been made of the statute has frequently proved to be controversial and has often been accompanied by allegations of political partiality both in relation to who has and who has not been prosecuted under the Act. Thus, for example, in 1912 five people were prosecuted after they had been involved in the publication of “An Open Letter to British Soldiers” in “The Syndicalist”. The letter, published at a time when there was

⁶⁹ e.g. Lord Dholakia “We on these benches find it difficult to accept that the Bill is the right place for such legislation” November 28, col 211; Lord Campbell of Alloway “...what was agreed by the House was...that there was no or no sufficient connection with terrorism and that Part 5 should not be included in the Bill” November 28, 2001 col 421; Lord Dixon-Smith “I cannot find any linkage between this part of the Bill and anything to do with anti-terrorism” November 28, 2001 Col 430.

⁷⁰ HL Hansard 27 November 2001, Cols 140-289

⁷¹ A Ashworth “Principles of Criminal Law” (1999) p 482.

⁷² *R v Higgin* (1801) 2 East 5.

⁷³ *R v Fitzmaurice* [1983] 2 WLR 227 at p 231.

⁷⁴ *R v Krause* (1902) 18 LTR 238 at p 243

⁷⁵ *Invicta Plastics Ltd v Clare* [1976] Crim LR 131.

⁷⁶ *R v Most* (1881) 7 QBD 244 at p 252.

⁷⁷ D Williams “Keeping the Peace”, Hutchinson (1967) p 180. The Committee is grateful to Professor Sir David Williams QC for arranging a seminar for it at the University of Cambridge, when he outlined for it the history of statutory incitement offences. The Committee has relied heavily on this and other papers delivered at the seminar.

considerable industrial conflict, encouraged soldiers not to kill civilians, reminding those soldiers of their working-class roots. In the House of Commons in July 1912 Sir J D Rees commented that if “there be any crime which is a great crime, a crime against society, against the Constitution, against the country, against every British subject, it is the crime of urging troops not to shoot”. As a consequence of the public outcry that followed the convictions of the five who had been associated with “The Syndicalist”, the Home Secretary exercised the prerogative of mercy and reduced the sentences on all those convicted. There was, nevertheless, a persistent perception that prosecution under the Act was as much a political as a legal matter.

74. In the following year Bonar Law indicated his support for Ulster Protestants’ opposition to Home Rule and suggested that the Army should, if necessary, refuse to obey orders if ordered to quell this opposition. Neither Bonar Law nor Sir Edward Carson, who expressed similar sentiments, was prosecuted under the 1797 Act.

75. In 1931 a mutiny in Invergordon resulted from cuts in the pay to members of the Royal Navy. Prosecutions under the 1797 Act followed. That Act had made it an offence to seduce a serviceman from his “duty *and* allegiance to His Majesty”. The 1934 Incitement to Disaffection Act made it an offence to seduce a servicemen from his “duty *or* his allegiance”, thus expanding the ambit of the law. The Act was widely criticized as being an unnecessary restriction on freedom of speech. This perception remains to this day, Bradley and Ewing noting for example that the Act “does restrain certain forms of political propaganda”.⁷⁸ The 1934 Act eventually produced the only occasion on which the higher courts have had to pronounce on this form of legislation⁷⁹. In 1973 Pat Arrowsmith, a pacifist campaigner, and others distributed leaflets to the married quarters of soldiers living in the Warminster area. The leaflets, which were put out in the context of British involvement in Northern Ireland, contained quotations from soldiers who had deserted and gave advice about how to desert to either Sweden or the Republic of Ireland. The leaflets also contained information on Army regulations regarding discharge and argued that soldiers should refuse to serve in Northern Ireland. In judgement, the court described the leaflet as being “not only mischievous but...wicked” (p 684). Ms. Arrowsmith was convicted and the Court of Appeal subsequently upheld the conviction although it reduced her sentence because the Director of Public Prosecutions had on a previous occasion refused to prosecute her for distributing the same literature, arguably leading her to believe that she would never be prosecuted (p 691). However, an attempt to prosecute 14 pacifists who had distributed similar leaflets failed when the jury, seemingly on the basis of a perverse verdict, refused to convict.⁸⁰ It is necessary to obtain the consent of the Director of Public Prosecutions before there can be a prosecution under the 1934 Act—this necessity being specifically introduced because of the “uncertain scope of the Act” which had created an offence of “a political or possibly political flavour”.⁸¹ Nevertheless, some have seen prosecutions under the 1934 Act, as in the case of the 1797 Act (which does not have this requirement), as being motivated as much by political considerations as because of legal reasons. Thus, for example, Roberston has commented that:

“[the] most powerful incitement to disaffection was made in the 1987 election campaign by the Prime Minister, Mrs Thatcher, who announced that service chiefs should consider resigning in protest if the Labour party were elected and sought to implement its non-nuclear policy.”⁸²

76. Some but probably not all of the behaviour above would, irrespective of the provisions of the 1797 and 1934 Acts, be caught by more general public order legislation. In 1968, people handing out anti-Vietnam leaflets, which amongst other things called for American soldiers to desert, were convicted of conduct likely to cause a breach of the peace contrary to the then s 5(b) of the Public Order Act 1936⁸³.

77. Incitement to racial hatred was first made a criminal offence under the Race Relations Act 1965. The relevant legislation is now found in Part III of the Public Order Act 1986. The legislation extends beyond the realm of that which ordinarily would be called public in that it is an offence, under sections 18(1) and 18(2), to use threatening, abusive or insulting words or behaviour or display written material which is threatening, abusive or insulting and which is intended to or is likely to stir up racial hatred in private premises as much as in public. The only exception to this is that, under section 18(2), no offence is committed if the words or behaviour are used or the written material is displayed in a dwelling and are not seen or heard by others than those in the dwelling. Under section 27(1),

⁷⁸ A Bradley and K Ewing “Constitutional and Administrative Law”, Longman (1997, 12th ed) p 586.

⁷⁹ *R v Arrowsmith* [1975] QB 678.

⁸⁰ G Robertson “Freedom, the Individual and the Law”, Penguin Books (1993, 7th ed) p 209.

⁸¹ S 3(2) Incitement to Disaffection Act 1934; Williams op cit p 190.

⁸² Robertson op cit p 210.

⁸³ *Williams v Director of Public Prosecutions* (1968) 112 Solicitors Journal 599

proceedings for a prosecution can only be instituted with the consent of the Attorney-General. Prosecutions under the Act, as in the case of incitement at common law and the statutory forms of incitement in the 1797 and 1934 Acts, have been relatively rare. Unsuccessful prosecutions can be counter-productive:

“When members of the Racial Preservation Society were acquitted for publishing a newspaper claimed to be ‘innocently informative’ rather than ‘intentionally inflammatory’ they derived benefit from the publicity surrounding the trial and reissued the edition, overprinted ‘Souvenir Edition—the paper the Government tried to suppress’.”⁸⁴

78. As a consequence, it has been argued that laws against inciting racial hatred create more expectations than can be fulfilled by prosecuting authorities anxious to avoid giving racist utterances the publicity of a trial and the endorsement of an acquittal.

⁸⁴ Robertson *op cit* pp 98-99.

CHAPTER 7: FREEDOM OF EXPRESSION

79. The European Convention on Human Rights gives equal status, in Articles 9 and 10, to, respectively, freedom of thought, conscience and religion and freedom of expression. Both are, however, qualified rights: they may be restricted by the state in certain circumstances, for example, on grounds of public safety, order, morals or to protect the rights of others. These Articles have been a major preoccupation in our deliberations, and have exercised the minds of many witnesses. References to them occur throughout this report. In Chapter 6 we considered incitement legislation generally, but there may be value in separate consideration of freedom of expression in the context of religious offences.

80. The “incitement” Clause (Clause 2) of the Religious Offences Bill, like its predecessor dropped from the 2001 Bill, is intended to fill a gap, treating religious incitement the same as racial incitement as it is dealt with in part III of the Public Order Act 1986. In the view of the British Humanist Association there are “essential differences between race and religion which affect the degree to which freedom of expression can legitimately and proportionately be restricted. Restrictions are far more easily defended in the case of race (and to a large extent of gender, sexual orientation and other common grounds of unwarranted discrimination and prejudice), since race is in a sense without content: it has no ideology, teachings or dogma; organisations are rarely based on racial or ethnic groups and when they are they exercise little power in the world. What is at issue when people are characterised by or criticised for their race is their irrevocable identity as individuals or groups of persons”⁸⁵.

81. On the other hand, religion is closely bound up with race or nationality in many communities, and is inextricably part of their identities. The Sikhs, Jews, and others have ethnic identities, but they also belong to discrete religions. It cannot be right that incitement to hatred of Sikhs is against the law if incitement to hatred of Christians or Muslims is still permissible. This could lead to court cases under Article 14, read together with Article 9 of the convention, in that freedom of expression has to be exercised without religious discrimination.

82. For his part, the DPP said: “... we are very wedded to the idea that people can say what they like within reason, and a good thing too. I am quite sure that prosecutors who have grown up over the last 20, 30, even 40 years will have seen the way that what we see on television is very different from what we saw a few years ago and that generally we are much freer to say, show whatever things than we were a long time ago. That must inform, for instance, our attitude (to change the subject completely but I think it relevant) to obscenity. When we get things in now for the possibility of prosecution ... we attempt ... to move reasonably in scale with what we as citizens experience before we walk into the office. Therefore, taking the ECHR on board, which reinforces our right to say what we like within reason, and speaking as a citizen rather than as a prosecutor, I agree [with your reservations about turning it into a crime, going round saying that you hate things]. The legislation is drafted so that it is not just the intention but the likelihood that hatred will be stirred up; [that] does move the law quite far in the other direction because you do not even have to intend that racial hatred be stirred up, under the current law. It just has to be an objective fact that it is likely to be stirred up by what you have to say, and I suspect that that is the bit of the Act which the police and prosecutors would have the most difficulty with”⁸⁶. The police did say that in their discussions about community relations they welcomed the addition of incitement to religious hatred, to add to their armoury⁸⁷. There are however even more problems about incitement to religious hatred than to the racial variety. In addition to the difficulty of proving intent (against a defence of fair comment⁸⁸) is the implication for society in general. This has been described as the “chilling effect”, or self censorship motivated by fear that robust expressions of opinion may be judged to have overstepped an undefined boundary and become the subject of prosecution.

83. The gap between criminal incitement and permissible freedom of expression is narrow, perhaps even more so in the case of religion than of race. There is no difficulty in recognising substantive criminal acts such as those of violence, threats or harassment, or even inchoate offences such as incitement to violence (of any type) or conspiracy, aiding and abetting. But it is more difficult to define the point at which a particular expression takes on characteristics that can reasonably be proscribed in the spirit of Article 10.2 of the European Convention. Trenchant and even hostile criticism of religious tenets and beliefs has to be accepted as part of the currency of a democratic society, and that is not at issue. The words used would have to be directed at the members of a

⁸⁵ Volume II, page 72 (para 5)

⁸⁶ Volume II, QQ594/5 at pages 215/216

⁸⁷ Volume II, Q159 at page 40

⁸⁸ Volume II, Q160 at page 40

religious group and not at their beliefs or customs to make them criminal, but they would have to fall short of calling for specific criminal acts against those members to be caught by a pure incitement offence. So there is only a limited area in between which seems to deserve attention. It has been identified as vilification of the foundations of a faith⁸⁹. This is a difficult area. The dividing line between criticism, though assertive and hostile, and vilification will be varied and subjectively defined; the dividing line has not yet been pronounced on by any UK court. It is unlikely to retain permanence as society's attitudes and those of the faith communities develop and evolve.

84. One other factor is clear from the evidence: those who wish to promote religious or racial hatred, whether or not masquerading behind some pretext, are well advised as to their criminal liabilities. Here it is probably best to concentrate on published material: the spoken insult seems to be conveyed in a context where the point at issue is probably a public order or harassment offence, and so susceptible to prosecution. Although many of the examples given to us by witnesses consisted of offensive conduct or remarks made to individual persons, it is the slogans and inflammatory publications which are at the core of the perceived problem. If such a degree of ill will really exists, even though limited in its extent, the question must be asked whether it is worthwhile for Parliament to legislate to convey a message to those who are well able to avoid the pitfalls. It would cause nothing but dissatisfaction to those who are maligned to discover that, yet again, the message has had no effect other than to indicate a new way to propagate hate speech or publications without incurring criminal liability. On the other hand it might be said that it is important for Parliament and the Government to make clear that they did not expect a large number of additional cases to be prosecuted, but they did expect that publication of some of the most inflammatory material could be deterred by extremists' fear of the risk of prosecution. It is more likely that a defence would be run under the European Convention's Article 10. Certainly this would be the case if Parliament failed to spell out the need for proportionality and its reason for restricting freedom of expression—that is, the necessity of preventing disorder or crime arising from deliberately provoked hatred of particular religious groups, and the protection of the rights of those groups. Even if that were done, it would not be an easy test for judges and juries to apply, let alone apply consistently.

85. In summary, there are certain to be problems in bringing prosecutions, just as there are with incitement to racial hatred: success rates are impossible to forecast, and only the superior courts, on individual appeals—which will almost certainly not cover the whole range of problems—will be able to clarify demarcation lines. Whether the signal or message which is to be transmitted warrants new legislation within the boundaries of the criminal law as it has been patched and elaborated, and whether this is likely to lead to many successful prosecutions, are contentious matters which only Parliament can decide.

A prosecuting filter

86. Under Part III of the Public Order Act 1986, supplemented by the provision for aggravated offences in the 1998 Act, prosecutions for incitement to racial hatred may only proceed if the Attorney-General gives his consent. This is part of a system whereby the CPS Code criteria for bringing a prosecution—the evidential test; and the public interest test (para. 6 of the CPS Code, comprising a range of indications which includes aggravating factors)—are subject to an overview. This would take place at several levels in the CPS, by the Director of Public Prosecutions if necessary, as head of the CPS. Sometimes, as in this case, Parliament places an extra constraint, by sanctioning a prosecution only if the Attorney-General consents. This duty is no sinecure; in the present context the issue is that any offence of incitement to religious hatred would have to receive the Attorney-General's consent under the RO Bill. Some witnesses have remarked that the number of prosecutions brought under Part III of the 1986 Act is not very high. For example, the Board of Deputies of British Jews say that they are generally satisfied with existing legislation but are increasingly concerned by “the systematic failure of the CPS to prosecute the offences of incitement to racial hatred”⁹⁰. They quote the figures and say that much, but by no means all, inflammatory matter is produced by Islamist individuals and groups. They say that this concern is shared by the Hindu and Sikh communities. “Failure to prosecute literature inciting hatred inevitably results in violence against our community”. They therefore fear that a new offence of incitement to religious hatred might be similarly limited in effect by a reluctance to prosecute. On the other hand, Muslim witnesses have stated⁹¹ that the immediate problems to be addressed are a) the BNP and NF websites, posters, etc; b) Combat 18, who tend to target converts to Islam; and c) Kahane Chai (Jewish Defence League)—all of whom are well versed in the fact that the current race legislation does not protect Muslims. The Muslim Council of

⁸⁹ Volume II, Q338 at page 138

⁹⁰ Volume III, page 3 (para 5)

⁹¹ Volume II, QQ306 & 308, 342, 370 and 395 at pages 128, 138, 157 and 175

Britain says that, if the Attorney-General's role is to be preserved, he should be required to publish the criteria used in forming his decisions⁹².

87. Because of the small number of prosecutions where the offence has concerned incitement to racial hatred, the credibility of proposed new legislation extending this safeguard to religious hatred has been cast in doubt. In suggesting a similar filter for religious incitement cases, the case for so doing may be stronger: there is room for dispute as opposed to dialogue between religious communities of different faiths, as indeed between constituent parts of the same faith. The Committee would have no difficulty in allowing for a veto on prosecutions, not least private ones, based on what might be described as vexatious litigation. The Attorney-General could sift out such cases—if they had not been stopped already by the CPS—and avoid the undesirable confrontations⁹³. Of course, the outcome could be that a small number of prosecutions would be brought: the facts would be straightforward and a conviction (or acquittal) uncontroversial.

88. However, a number of witnesses made a further point, exemplified in the submission by JUSTICE⁹⁴. They note the 'delicate balance' to be struck between incitement to hatred and protection of freedom of expression; they thus support the view that prosecutions should only go forward with the Attorney-General's authority. They recommend other safeguards, including a note of guidance for the Attorney-General and regular parliamentary scrutiny through the publication by him of an annual report, which should include a racial/religious breakdown of the figures. Other evidence seeks to ensure that the Attorney-General gives reasons when he refuses to allow a prosecution to proceed.

89. Both the DPP and the Attorney-General were asked to comment, in their oral evidence, on these propositions. The DPP explained why, in his opinion, there has been a dearth of prosecutions under Part III of the Public Order Act 1986. Police forces have their own policies about only reacting to complaints. Other evidence confirms this. There are, for instance, practical difficulties in collecting information about religiously motivated crimes. Pressures on the police make them reluctant to record more data⁹⁵, and so far only the Metropolitan Police have been recording this information⁹⁶. Nevertheless, much depends upon members of the public reporting incidents to the police. The Home Office evidence accepts that there has been underreporting of cases⁹⁷. The DPP said that the other method is to go out to obtain intelligence and thus catch offenders. The concept of "hatred" is novel to criminal law and, certainly for the aggravated offences under the 1998 Act, has to be "something very extreme". Thus "any attempt to stifle what many people think of as legitimate debate" does not find its way into the criminal courts. Then there is the evidential problem of identifying the author of, at least, the written word⁹⁸. In fact the DPP said that the vast majority of cases brought to them by the police had been put up to the Attorney-General by the CPS. He doubted whether a list of the cases which the Attorney-General had considered would give the public a very complete picture. It would place an extra burden on his staff, diverting them from other tasks⁹⁹.

90. The DPP suggested as a more constructive approach that the Attorney-General ask the inspectorates—of the police, CPS and Courts—to look into how well the legislation has been working. The Attorney-General accepted the practical impediments to prosecution, about the person(s) responsible for producing the material and in what jurisdiction it has been produced. So he has instigated discussions between the Association of Chief Police Officers and the CPS to diagnose these problems. It is not that the cases are coming to him and he refuses consent; the cases are not reaching him because the evidence is not available¹⁰⁰. The Committee also recognises that there must be cases where, as the Legal Officer with overall (and not only in incitement to hatred cases) responsibility for the public interest element in prosecutions, the Attorney-General has to withhold his consent on grounds where the public interest itself dictates a denial of the publication of reasons.

91. In 1986, one reason for interposing the Attorney-General's fiat was to prevent vexatious prosecutions. In the religious context this would be essential in order to minimise litigation over disputes, for example, between (or within) sections of a particular religion or to protect those who, quite unknowingly, stray into remarks (perhaps when proselytising) which turn out to be religiously offensive to someone. This, however, is not all: in 1986 the Home Office minister in charge of the

⁹² Volume II, page 134 (para 3.8)

⁹³ Volume II, Q651 at page 226

⁹⁴ Volume III, page 51 (para 3)

⁹⁵ Volume II, Q131 at page 35

⁹⁶ Volume II, Q123 at page 35

⁹⁷ Volume II, QQ 74/75 at page 21

⁹⁸ Volume II, Q584 at page 214

⁹⁹ Volume II, Q614 at page 218

¹⁰⁰ Volume II, QQ653, 676 at pages 226 and 230

Public Order Bill said: “The Crown prosecutors will provide an important and formidable legal check, but, as these criminal offences give rise to major issues of principle regarding freedom of speech and the freedom of the press, the Attorney–General’s fiat is appropriate. Offences involving such tricky issues should be properly and professionally assessed. The balance between freedom of expression and a criminal act is a highly sensitive issue”¹⁰¹.

92. As to his role in this respect, either under the existing racial legislation or what is proposed in connection with religious aggravation and, specifically, incitement to religious hatred, the present Attorney–General said: “the starting point is that Parliament itself has decided where the balance should be struck between freedom of expression and unlawful conduct¹⁰² ... When I exercise my power to consent, whether it is to this sort of offence or indeed in any of the other cases where I have a duty or the statutory power to consent to consider, I do so of course independently from government, that is clear ... It is important as well that it is not just independent but quasi judicial, and that is what I am attempting to do ... So I regard personally the requirement for my consent as an entirely appropriate safeguard against unmeritorious cases going forward, against the wrong cases going forward”¹⁰³. If a prosecution is not permitted, the question of whether that decision is subject to judicial review arises. In his evidence, the Attorney–General referred to the *Gouriet* case,¹⁰⁴ in which the House of Lords ruled that the Attorney–General was only answerable to Parliament. But in 2001 Lord Woolf said that, notwithstanding that judgement, if the Attorney–General gave his consent in a case where it was perverse to do so this decision, today, would probably be subject to judicial review¹⁰⁵. Thus it is at present difficult to know whether the Attorney–General’s refusal to consent can be tested. If the filter were to be the DPP (through whom any such decision would have been considered, in the process of being passed upwards to the Attorney–General), there is no dispute that a refusal to prosecute would be subject to judicial review. It may be, therefore, that the level at which consent must be given is such that, though appropriate in 1986, it should now be reduced to the DPP. At least there would then be some certainty that the boundary of Article 10.2 could be tested in the courts.

93. There does not appear to be any case law from the European Court in Strasbourg about a member of the Executive (however impartial) taking this sort of decision. The Attorney–General said in evidence that his duty to consider giving consent was much more empirical¹⁰⁶, and is also quite independent from the Government of the day: he quoted the example of the fall of a Government in the 1920s, the *Campbell* case, as a warning about the necessity for political impartiality. His responsibility is to Parliament¹⁰⁷. It must be recognised, however, that this is part of the UK constitutional arrangements and is not proof against criticism in Strasbourg.

94. What has never yet been considered, however, is the question whether English legislation can encapsulate the distinctions, which arise jointly under the European Convention’s Articles 9 and 10, so as to be susceptible to a decision, after proper directions, by a jury. Similar considerations would almost certainly be necessary in order to implement the proposed Council Framework Decision on Xenophobia and Racism (see Hate Crime, paragraph 107); the same would hold good if something like the present proposals for incitement to religious hatred were enacted. It may be that a form of words can be distilled from the judgement in *Otto-Preminger Institut* (see paragraph 48 above), but we have no doubt that a test would have to be devised. The Attorney–General saw no problem: it was his stance that once Parliament has decided that incitement to hatred—a strong word—is an offence the line has then been drawn¹⁰⁸. It is hardly a matter for the prevention of disorder (other offences are quite good enough to attend to that). Both proportionality and the protection of the rights and freedoms of others seem to indicate a test based on vilification of a community or its faith. The threshold would have to be quite high, so as to allow for critical—even hostile—opposition. But the ceiling would need to be low enough to ensure that those who abide by the beliefs under attack are not discouraged from exercising their freedom to hold and express them. We find this a difficult issue.

¹⁰¹ HC Hansard Standing Committee G, 25 March 1986, col. 887

¹⁰² Volume II, Q641 at page 224

¹⁰³ Volume II, Q650 at page 225

¹⁰⁴ *Gouriet v. Union of Post Office Workers* [1978] AC 435

¹⁰⁵ *R v. Shayler* [2001] 1 WLR 2206 at p 2216

¹⁰⁶ Volume II, Q650/651 at pages 225 & 226

¹⁰⁷ Volume II, Q683 at page 231

¹⁰⁸ Volume II, QQ661-664 at pages 227 & 228

CHAPTER 8: HATE CRIME

95. It follows from Chapter 6 that incitement to commit a recognised crime is in itself an offence; but hatred as such is not a crime, whether it is racial, religious or any other form of hatred¹⁰⁹. This was the genesis for Part III of the Public Order Act 1986, to which have been added provisions in the Crime and Disorder Act 1998 and the Anti-Terrorism etc Act 2001 that offences may be aggravated by either racial or religious hatred. The proposal in the Anti-Terrorism etc Bill to make incitement to religious hatred an offence was dropped. The latter proceeded from threats to the Muslim communities and their members, following the events of 11th September 2001 in New York, and other acts of terrorism elsewhere. There should be no difficulty for the police or prosecution service in pursuing a criminal charge, where an individual of any community, whether from an ethnic, religious or any other minority, is subjected to threats, abuse or worse. In an extreme case even incitement to murder, without a specific target, can be subject to prosecution, as has just been demonstrated by the conviction of Abdullah El-Faisal at the Central Criminal Court in February 2003, under s.4 of the Offences against the Person Act, 1861¹¹⁰. This provides that: "...whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person...shall be guilty of a misdemeanour, and being convicted thereof shall be liable to imprisonment for life...". The more usual case brought under this section is against those who hire contract killers, but it is not confined to this situation.

96. Article 20.2 of the International Covenant on Civil and Political Rights (ICCPR) states that:

"Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".

When the United Kingdom ratified the Convention in 1976 it made a reservation saying that this provision must be taken to reflect no more than the law as it then stood. At that time, the law on this subject consisted of the common law offence of incitement and the Race Relations Act 1976. This provided a civil remedy for discrimination and a criminal law element which comprised the offences of using, displaying or distributing words (or using behaviour) which is threatening, abusive or insulting and is intended to or is likely to incite racial hatred. These offences, originating in the Race Relations Act 1965, have passed, via the 1976 Act, into ss. 18 and 19 of the Public Order Act 1986 (within Part III).

97. In 2001 the United Nations Human Rights Committee, which is charged with examining the record of States parties which have ratified the ICCPR as to their compliance with its terms, recommended that this reservation should be withdrawn. They said that they were concerned at reports that persons have been the subject of attack and harassment on the basis of their religious beliefs and that religion has been utilised to incite the commission of criminal acts. They called on the UK "to extend criminal legislation to cover offences motivated by religious hatred" and to "take other steps to ensure that all persons are protected from discrimination on account of their religious beliefs"¹¹¹. This criticism overlooks the fact that incitement to commit a criminal act is already an offence, and it is also met by the religiously aggravated offences in the Anti-Terrorism etc Act. The only conduct not covered now is pure incitement to religious hatred, without calling for specific criminal acts.

98. In its General Policy Recommendation No. 7 on National Legislation to combat Racism and Racial Discrimination (adopted by the Council of Europe on 13 December 2002), the European Commission against Racism and Intolerance ("ECRI") dwelt upon discrimination on, among other things, religious grounds. It makes many recommendations to the States within the Council of Europe. So far as concerns criminal law, it says the law should penalise the following acts when committed intentionally:

- (a) public incitement to violence, hatred or discrimination;
- (b) public insults and defamation ; or
- (c) threats

against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality or ethnic origin. The criminal law is to include dissemination of this criminal material by every sort of electronic means. Much of the explanatory notes is concerned with racial and racist behaviour, but in general the contents are consistent with the draft Council Framework Decision on

¹⁰⁹ Volume II, Q76 at page 21

¹¹⁰ "Cahal Milmo, Imam gets nine years' jail for race-hate speeches": The Independent, March 8, 2003; and "Hate preaching cleric jailed": news.bbc.co.uk/2/hi/uk_news/england/2829059.stm

¹¹¹ UN Human Rights Committee, 73rd session, CCPR/CO/73/UK;CCPR/CO/73/UKOT 6 December 2001

Racism and Xenophobia mentioned below (paragraph 107). In fact, again, almost all of the proposed offences are already contained in English criminal law, but incitement to religious hatred is not.

99. These conclusions by the bodies charged with upholding both International and European Human Rights law can be supplemented by some more detailed arguments. The UK took a leading role in operations in Bosnia and Kosovo in order to protect people who were being persecuted solely for their religious beliefs. Those populations may provide an example of the connection, or perhaps the disconnection, between race and religion which is not always so apparent in England.

100. It is not true that a distinction between race and religion will depend on characteristics which cannot be changed as a matter of choice: it is of course true that people cannot alter their racial origin, but there are communities in the UK where it is inconceivable that anyone could change their professed religion and continue to live within the community concerned.

101. Parliament, supported where they can by the courts, has been sending out a message (see Chapter 9 below). It is true that only 61 prosecutions for incitement to racial hatred have been brought under Part III of the 1986 Act, of which 42 have resulted in convictions, but the question is whether the numbers are significant. Some police forces may not have pursued complaints as vigorously as they might in the past, and the CPS may have been particularly cautious about approving charges in view of the perceived encouragement given to racists by failed prosecutions. Still, it may be that the mere existence of the law has had its deterrent effect. Why, otherwise, would the BNP and other extremists have taken so much trouble and advice to ensure that their campaigns do not fall foul of the offences in Part III? Therefore, if this area of criminal law were to be extended to encompass incitement to religious, as well as racial, hatred, and not many additional prosecutions ensued the effort would not have failed: a few convictions would be good enough to convey the clear message that such behaviour is no longer acceptable in the community but has been held by a court to be criminal. A condign sentence would have been imposed.

102. There is no need for a statutory definition of religion in this context. This is no more difficult a jury point than is “race” under existing law: the facts should give guidance enough. There may be evidential problems but they should not be insuperable, even though that is one of the CPS’ main criteria before they embark upon a prosecution¹¹².

103. Nor should there be any difficulty in finding an accommodation between an offence of incitement to religious hatred and freedom of expression: those who drafted the ICCPR had no compunction in placing Article 20.2 alongside Article 19 (freedom of expression). There is some jurisprudence on the juxtaposition, for example *Faurisson v France* (a Holocaust denial case), before the UN Human Rights Committee.

104. All this is now compounded by the internet. The High Court of Australia has allowed civil litigation to be brought for defamation in the country, or jurisdiction, where the offending material has been down-loaded. It is a matter for speculation whether other judicial systems, including the UK, will follow. It cannot be assumed that in the field of criminal law such a transition can be easily achieved. The extent of criminal jurisdiction for potential offences committed outside the UK but having an impact here is continually developing, but in the end there must be a defendant who can be charged and tried within the UK—or who can be extradited for the purpose. The Home Office position is that although the 1986 Act was not written with e-mails and the Internet in mind, “it does cover [it] quite usefully, because it refers to text and signs and images ... The principle that the Government follows is that what is illegal off-line should be illegal on-line provided it falls within the United Kingdom’s jurisdiction”¹¹³.

105. Since purveyors of religiously offensive material are very well advised, consideration should be given to the likely defence in a case concerning a website belonging to an extreme political party. On the issue of intent, the organisers would doubtless defend themselves on the basis that they did not intend—or possibly expect—people to be activated to hatred by these messages because the website was only intended to explain the stance of a political party. Even if the charge is framed on the likelihood of racial hatred being incited, a number of lines of defence can be imagined.

106. Our terms of reference do not enjoin us to examine in any detail the civil jurisdiction, but a number of witnesses emphasised that our deliberations should not overlook the background of discrimination against members of, currently, the Muslim community. They said, indeed, that measures to prevent such discrimination and remedies where it occurs might have much more effect than the criminal law. It is only necessary to draw attention to the EU Directive on Discrimination in Employment (2000/78/EC), which includes within its scope discrimination based on religious belief or

¹¹² Volume II, Q676 at page 230

¹¹³ Volume II, Q86 at page 22

non-religious persuasion. Draft Employment Equality (Religion or Belief) Regulations are at the consultation stage, although it must be recognised that they will not cover the whole sphere of grievances.

107. Of immediate relevance to the Committee's work is the draft Council Framework Decision on Racism and Xenophobia, currently being debated in the Justice and Home Affairs Council, which will call for criminal legislation. It has been under discussion since 1996, but the current situation (at the end of March 2003) is that the draft requires, in Article 1, that public incitement to discrimination, violence or hatred shall be punishable when directed against groups or individuals "defined by reference to race, colour, religion, descent or national or ethnic origin". A draft Preambular paragraph states that "religion broadly refers to persons defined by reference to their religious convictions or beliefs". Draft Article 8 permits Member States to exclude from criminal liability conduct which is directed against a group or individuals defined by reference to religion where this is not a pretext for incitement to racial hatred. In earlier versions of the draft, incitement to religious hatred would only have been criminalised when it was being used as a pretext for incitement to race hatred. It may be that witnesses who support a law criminalising incitement only to religious hatred are correct in seeing the present deliberations as a partial solution¹¹⁴: they hope for wider legislation on equality as well as this small extension of the criminal law.

108. The countervailing argument against the creation of a new offence of incitement to religious hatred draws upon the current proposals to address religious intolerance and discrimination through the civil law and the requirement, which will no doubt soon be placed upon Government, to implement the Council Framework Decision. In so doing, a Decision leading to such a requirement must be presumed to have taken into account the potential conflict between a law to turn incitement to religious and other brands of hatred into criminal offences, as against the right, under the European Convention's Article 10, to freedom of expression. There is, in English law, only a small gap between incitement, in various forms, which encourage the commission of an existing criminal offence and are thus themselves an offence, and the publication of material which may be thought by some to constitute incitement to religious hatred but by others to be the sort of fair comment which the Strasbourg Court said in the *Otto-Preminger Institut* case (see para 48 above) must be tolerated and accepted. The police witnesses said that "The Attorney-General would need to consider what guidelines there should be around the issue of fair comment, which would be more problematic than it is under racial discrimination"¹¹⁵. One Evangelical Alliance witness agreed that there is "a world of difference" between incitement to racial and to religious hatred¹¹⁶. This issue has not been resolved: when asked about his input into a decision whether or not to prosecute, because of Article 10.2 considerations, the Attorney-General said that his decision does not pre-empt anything; the court receives the case and it is tried¹¹⁷.

109. But if the Attorney-General does not give his consent—and it must be accepted that he acts in quasi-judicial role—no court will ever consider the matter at all. A refusal to consent to a prosecution is not, in the present state of the law, subject to judicial review¹¹⁸. The Attorney-General is responsible to Parliament alone. So his refusal of a fiat for a prosecution under legislation making criminal any incitement to religious hatred could have the effect that a "fair comment" argument would never reach any court at all. This does not, of course, imply any motive other than total propriety. The Attorney-General has said that, in the event of his withholding his consent to a prosecution, he would inform the CPS of the reasons and, if asked by others, such as Members of Parliament, he would be as helpful as possible. The fact remains that there could be cases where complainants about incitement to religious hatred would never be able to have their complaint tested, as against some extremist publication, in the context of what is or is not permissible as a matter of freedom of expression. This would not arise if there were not built in a requirement for the Attorney-General's consent; but, then, there can be little dispute that consent at a suitable level in the prosecuting authorities is essential in order to exclude the vexatious cases.

110. The crux of the matter is that it is hard to see how the extent of freedom of expression can be comprehensively justiciable, so that Article 10 rights and their restriction under Article 10.2 may be tested in the English courts, so long as the Attorney-General's consent is a prerequisite to any prosecution. Nor is it easy to see how this block might be overridden by an appeal to Strasbourg, except through the argument that domestic law fails to provide any remedy at all. This is because the

¹¹⁴ Volume II, Q564 at page 210

¹¹⁵ Volume II, Q160 at page 40

¹¹⁶ Volume II, Q490 at page 196

¹¹⁷ Volume II, Q651 at page 225

¹¹⁸ *R v Solicitor-General ex parte Taylor* (1995) 8 Admin LR 206

Human Rights Act 1998 did not include, within UK jurisdictions, the Article 13 requirement to provide domestic remedies for breaches of the Convention.

111. In terms of Article 10, this is not a theoretical point. There are religious cults whose doctrines seek to influence new adherents to isolate themselves from their families, or to extract from them all their possessions, or both. Such a religion is all too likely to attract trenchant and hostile criticism, and this would evidently be permissible within Article 10.1 of the European Convention. What, then, is the difference between a publication condemning such practices and the propaganda of an extremist political party directed, generally, at the tenets and adherents of one of the major religions? It is hard to see how anything beyond propaganda can be at stake: if the publication incited its readers to violence, harassment or public disorder the authors or publishers would be liable to criminal proceedings as the law now stands. Under a new law about incitement to religious hatred, it is inevitable that the defence would seek to persuade the jury that the words in the publication, poster etc. were not sufficiently serious to override the right to freedom of expression.

112. One possible formulation, complete with safeguards, was put forward in a supplementary written submission by the British Humanist Association¹¹⁹:

“1. It is an offence for a person publicly to use words or behaviour or to display any material:–

- (a) by which he incites or intends to incite hatred against persons based on their membership (or presumed membership) of a religious group, or
- (b) in such a manner and circumstances that a reasonable person would think such hatred is likely to be stirred up.

For the purpose of section 1:–

- a) “religious group” means a group defined by reference to religion or belief or the absence of any, or any particular, religion or belief
- b) “presumed” means presumed by the offender
- c) “membership” in relation to a religious group includes association with members of that group.”

113. They comment that “in section 1, there are three factors: intention, likelihood, and achievement. Logically, each can appear alone, with either or with both the others, making seven possible combinations. Our draft covers all combinations except that where hatred results without either intention or likelihood, which would not seem culpable. This structure could, we believe, be applied to the other activities in which incitement of religious hatred could occur, e.g., publishing or distributing written material, possession of written material, broadcasting etc., as specified in the current Public Order Act and the present [Religious Offences] Bill”. The British Humanist Association’s wording follows s.18 of the Public Order Act except in four respects: it does not apply in any private place, whereas s.18 does but for dwellings; it introduces the concept of presumption by the offender of the target groups religious belief; it interposes a ‘reasonable person’ between the words themselves and the jury; it also introduces the concept of membership of the group, and it challenges the definition in s.39(5) of the Anti-Terrorism etc Act 2001, of “a group of persons defined by reference to religious belief or lack of religious belief” to include persons associated with the group. For these reasons we find difficulties with the proposed draft.

114. Although strictly outside our terms of reference, the extension of incitement to hatred from racial to religious groups invited further consideration of other target groups, such as those covered by the Employment Directive. If discrimination is practised against any of the groups covered by that Directive, then in extreme cases the same groups may be targets for incitement to hatred, and society should logically prohibit incitement to hatred of all readily identifiable groups within the population which are manifestly suffering from discrimination. The website Media Hatewatch has recently been collecting and publishing items which might be said to amount to vilification of asylum-seekers. As stated by the DPP¹²⁰, the CPS, in conjunction with the police, is paying particular attention to hate crimes against the gay community. There is nothing to prevent the UK, or any jurisdiction within the UK, from building on the proposed Council Framework Decision to make it more comprehensive, or even to add other categories of target groups by secondary legislation.

¹¹⁹ Volume II, page 74 (paras 18 & 19)

¹²⁰ Volume II, Q601 at page 217

115. Since it appears that the device of requiring the Attorney-General's consent will have the effect that no higher court will have the opportunity of deciding whether he has, in refusing consent, drawn the dividing line correctly to reflect Article 10.2, the issue will only emerge if he does consent to prosecution. If he does not, he will not necessarily give his reasons. If such a case is allowed to proceed, it is probable that the defence will argue the point and it will be left as an issue for the jury to decide. The limits would therefore be decided on a case-by-case basis, without any reasoning being available from the lower courts, though a conviction could lead to an appeal at which Article 10 considerations would be dealt with in the judgement. In much the same way as has been discussed in connection with blasphemy, a person proposing to publish, in any medium, severe criticism of the adherents of a religion will only know, *ex post facto*, whether he has committed an offence. The problem, under Article 10.2 read with Article 7, about lawfulness of the restriction will be the same, but probably much more immediate. Indeed, it already arises in cases of incitement to racial hatred.

116. To summarise, the introduction of a new offence of incitement to religious hatred could be part of a much more comprehensive approach, the opportunity for which should occur when consideration is given to implementing the proposed Council Framework Decision. There is nothing to prevent the UK from going further than the list of hate targets in that text. All pure incitement offences would deal with only a limited area of conduct, bounded by the ordinary law against incitement to commit particular offences on one side, and Article 10.2 on the other.

CHAPTER 9: AGGRAVATION

117. In recent years two superstructures have been (or sought to be) erected on the foundation of Part III of the Public Order Act 1986. In its original form, it created offences of inciting racial hatred through a variety of means, oral, written, broadcast etc. In 1998, the Crime and Disorder Act selected certain “ordinary” offences, including Part III of the 1986 Act, not so much for amendment of their substance as for a statutory provision for aggravation and an increase in the maximum penalties which a court could impose where it is alleged and proved that there is an element of racial aggravation in the defendant’s conduct.

118. While the purpose is laudable, this technique raises some problems:

- (i) Because this has been achieved by the means of drafting by reference, it is necessary to look up a number of other criminal statutes in order to understand what has been changed and what the law really is;
- (ii) when that has been done it will become apparent that the 1998 Act did not affect sentencing in the most serious cases, such as inflicting grievous bodily harm or wounding under s.18 of the Offences against the Person Act 1861, or causing criminal damage (arson, usually) with intent to endanger life under s. 1 of the Criminal Damage Act 1981. This was because these offences already carry a maximum sentence of life imprisonment so that no increase for aggravating circumstances could, statutorily, make any difference to the judge’s powers;
- (iii) where an indictment is brought under Part III of the 1986 Act, it is one of the issues of fact for the jury whether they are satisfied that a racial motive was involved (but see paragraph 124 below);
- (iv) whether or not the sentencing powers have been increased, for the aggravated offence the jury is automatically entitled—and should be so directed—to bring in a verdict of guilty on the unaggravated offence if they are not satisfied that the aggravating element has been proved, but are so satisfied as to the basic offence.

119. The second superstructural addition appeared in the 2001 Anti-Terrorism, Crime and Security Bill and Act when the same offences as had been identified in the 1998 Act were given aggravated status, this time if the aggravation was religiously motivated. Some of this took effect as s.39 of the 2001 Act. There have been some convictions under these offences but not so far for activities resulting in severe sentences.

120. The inclusion of aggravation as part of the offence does not, in itself, assist the prosecution or its presentation. On the face of it, it just complicates matters, particularly for the prosecution. No reason was advanced in 1998 or 2001 why this element should form part of the issues of fact on which a jury must decide, rather than simply take its place among the aggravating (or mitigating) factors which must be considered by the sentencer. The whole sphere of correct sentencing is deeply important in all criminal law. Any excess can be corrected on appeal and, in some cases, inadequate sentences referred for review. Both Magistrates and Crown Court judges now receive extensive training, with refresher courses at regular intervals. The Court of Appeal deals with appeals against sentence. Most matters concerning sentencing are reflected in a large Encyclopaedia of Sentencing, frequently updated and available in every Crown Court. The Magistrates’ Courts maintain their own Sentencing Guidelines, which are also frequently updated.

121. There is nothing unique about racial or religious aggravation except what the two Acts have created. As already noted, legislation has not sought to intervene in offences which carry a life sentence, since the Crown courts are already equipped to pass sentences which reflect any aggravating factor, whether it be race, religion or anything else. Many other aspects of any offence whatsoever, and not just the 1998/2001 Acts’ lists, are capable of containing aggravating factors which, on conviction, will lead to a possible enhancement in the sentence. Aggravating circumstances vary considerably, will have appeared in the material before the court and, subject to a social inquiry report, may lead to a higher than normal sentence. The victim may have been an elderly person, a child or in some other way vulnerable: the defendant may have been in a position of trust of which he took advantage. These factors enter into sentencing decisions day by day; they are the reverse of mitigating factors of every variety which are urged on a court by defence counsel and in reports of all sorts on the particular defendant. Such distortions as these affect the Statute Law when one particular aggravating factor is picked out by Parliament. In the Powers of Criminal Courts (Sentencing) Act 2000, s. 153 deals with increases in sentence for racial aggravation. It has been amended already to include such increases to take account of s.39 of the Anti-Terrorism Act 2001. It does not, of course, mean that

other aggravating factors are to be disregarded but it may be thought undesirable to give statutory force to some of the list of factors while omitting mention of any others.

122. Recent examples of the guidelines issued by the Court of Appeal, in conjunction with the Sentencing Advisory Panel, appeared in the decision on *R v. Milberry and others*.¹²¹ It concerned sentencing for rape, an offence which carries a maximum of life imprisonment. There was already guidance on the starting points in the sentencing scale within this maximum, but the Court, with the Panel's advice, has now updated and clarified these, and in particular has set out the aggravating factors which might be relevant. These specifically, among six others, include "racially aggravated rape and other cases where the victim has been targeted because of his or her membership of a vulnerable community, for example, homophobic rape". Later in 2002¹²², a similar exercise was carried out by the Court of Appeal in relation to burglary. Whilst the guidance was designed to reduce the number of short sentences for this offence, one of the listed aggravating factors which could counteract this advice is a racial motivation. A third example is an initiative by the DPP to treat all homophobically-based crimes as carrying aggravating implications which should be addressed in the presentation of evidence, with a view to alerting the sentencer to the possibility of enhancing the sentence on a conviction¹²³.

123. We note that the Criminal Justice Bill, currently before Parliament, proposes, in Part 12, to establish a Sentencing Guidelines Council, in addition to the Panel, to set sentencing guidelines for all criminal courts.

124. We believe that the enactment of these laws creating aggravated offences has positive disadvantages. Since the racial or religious motivation is part of the prosecution case on which the jury must be satisfied so as to be sure, they are entitled to bring in an alternative conviction of the lesser, unaggravated, offence. This applies to s. 39 of the 2001 Act which concerns religious aggravation, but is equally applicable to aggravated offences under the 1998 Act (albeit that this is outside our terms of reference). Even if approval is given to current proposals to allow a defendant's bad character, in the form of previous convictions, to be disclosed to the jury, it seems most improbable that, in a trial for this type of offence, the judge would permit material of this sort to be put in evidence: the prejudicial effect of previous convictions for racially or religiously motivated crime must be greater than its probative value, since such motivation is at the heart of the issues in the trial. Evidence of a predisposition to this sort of behaviour must be most damaging to the defence. The judge, of course, knows the defendant's record but, if the jury only convict of the unaggravated offence, the one factor which then cannot be taken into account in sentencing is the motivation.

125. In both the Crime and Disorder Act 1998 and the Anti-Terrorism etc Act 2001 maximum penalties were increased for convictions in aggravated cases. This was done to mark the heinous nature of the offences when racially or religiously aggravated, but in effect it ignores the system of Sentencing Guidelines. It would be feasible, and much simpler, to increase the maximum sentences for all offences in Part III of the 1986 Act. Now that sentencing guidelines are well established and understood, there cannot be objection to an increase in the maximum sentences for the whole gamut of offences or, at least, of violence, public order, criminal damage, abuse, harassment and threats. Excessive penalties can be corrected on appeal and the Attorney-General has, or could be given, the power to refer inadequate sentences to the Court of Appeal. Such References have often, in recent times, provided the opportunity for guidelines to be spelt out even if the particular defendant does not have his sentence increased.

A message

126. The racial hatred provisions of Part III of the 1986 Act do not seem to have been used against more than a few of the perceived offenders. It may be that, as the Bishop of Oxford said in relation to the 2001 legislation¹²⁴, the 1986 Act was intended to have a declaratory purpose and a deterrent effect. There have, however, been only 61 prosecutions, leading to 42 convictions since 1988. Evidence presented to us suggests that not much credibility is given to this Act. To the extent that members of Muslim communities are protected under it—and there must be factual circumstances where they are—the Home Office witnesses thought there is under-reporting¹²⁵. The DPP said the same¹²⁶. The Act may have been successful in deterring far more offences than were actually prosecuted.

¹²¹ The Times 11 December 2002

¹²² The Times 20 December 2002

¹²³ Volume II, QQ601–3 at page 217

¹²⁴ HL Hansard, 21 Nov. 2001, col. 1229

¹²⁵ Volume II, QQ 74/75 at page 21

127. Parliament and the courts—in the latter case assisted by the prosecuting authorities in their selection of cases to prosecute—have for some time been in the process of sending out messages. The Home Office minister in charge of the Public Order Bill 1986 said: “We wish Part III to be effective and an important safeguard against racial hatred”.¹²⁷ In relation to the same Act, with its amendments in 1998, the DPP said to us in evidence: “...the sending of a very strong message by the legislature to get through to a lot of people is very important and hopefully will lessen the number of offences”.¹²⁸ For its part, the Court of Appeal sends out its message in the form of judgements containing guidelines (see above for examples), sometimes reaching the front pages of the national newspapers. As noted earlier, the DPP referred to the dozen or twenty cases on incitement to racial hatred brought in a year. He said “... all of these will be reported at the very least locally probably on the front page of the local paper... It must assist in sending a pretty strong message if the magistrates or the Crown Court judge attach some fairly strong words to their sentencing remarks about this sort of behaviour in this particular city.” Evidence submitted to us makes it plain that the message has indeed been received: some extremists with racial hatred as their agenda have been keeping to the right side of the line by presenting their views as being based on religious grounds. It should however be added that the Home Secretary has said “I do not want gesturism”.¹²⁹

128. So far as concerns incitement to racial or religious hatred, however, the message transmitted by Parliament is far from transparent. In relation to aggravated offences, the racially or religiously motivated assailant has been told that, if he restricts himself to some less serious form of the offences listed above, he should realise that he faces the prospect of a more severe sentence on conviction. He has heard nothing from Parliament about the most serious offences and he may not read the Sentencing Guidelines. The “signal” for which several witnesses asked is far from clear and is certainly not comprehensive. We repeat that there are now, and may arise in the future, more categories of victim in addition to racial and religious minorities who would welcome a more comprehensive approach to the identification of the vulnerable, and recognition that the courts have the power to punish offences against such persons with a more severe penalty. Such victims might then be encouraged more frequently to report incidents to the police.

129. The police have said that they have some difficulty in deciding whether a crime appears to have been committed and, if so, whether they need to make investigations which might lead to a charge of an aggravated offence. One expressed concern relates to identifying what is or is not fair comment.¹³⁰ The other problem which they face is that, upon receipt of a complaint about some extremist material attacking the complainant’s faith, there might well be a route to prosecute under public order legislation, but the maximum penalty does not reflect the level of hurt inflicted.¹³¹ One approach, therefore, might be as set out in paragraph 125 above, simply to increase the maximum sentences for a wide range of offences in this area.

130. As the law now stands there would then have to be consequential amendments to Powers of Criminal Courts (Sentencing) Act 2000 and to the list of arrestable offences in the Police and Criminal Evidence Act 1984. In their oral evidence, the Home Office drew attention to the need to “make the distinction ... between incitement to violence, which is a crime in itself, and the specific area of incitement to hatred, hatred not being a crime, so it is a very specific, narrower range of behaviour that we are talking about which falls between on one side incitement to crime and on the other aggravated offences”.¹³² That is exactly the point made above: we do not think it has received anything like the attention it deserves.

¹²⁶ Volume II, QQ 584 & 585 at pages 214 & 215

¹²⁷ HC Hansard, Standing Committee G, 25 March 1986, col.887

¹²⁸ Volume II, Q596 at page 216

¹²⁹ HC Hansard 19 November 2001, Col 35

¹³⁰ Volume II, Q173 at page 42

¹³¹ Volume II, Q147 at page 37

¹³² Volume II, Q76 at page 21

CHAPTER 10: CONCLUSIONS

131. As we have already commented in Chapter 1, the Committee's appointment had its origins in the Anti-Terrorism, Crime and Security Act 2001, in particular parliament's decision not to agree to a proposed offence of incitement to religious hatred. Our deliberations have, however, gone much wider than the merits of such an offence, or even the proposals in the Religious Offences Bill to repeal a number of old common and statute laws. They have included consideration of the nature of religion in today's society and the changes in that society over the last half century, both in the numbers who follow other than the Christian faith, those who reject religious belief, and those whose religious faith is usually expressed privately. The census results show that Christianity, in its many forms, is still the faith followed by the large majority of the population. But memberships of other faiths constitute a significant minority, and it is beyond doubt that Britain's is now a multi-faith society. Intrinsic to our deliberation was consideration of the question of whether these changes to society have been reflected in the role played by religion in the formulation of morals and values and the way these continue to affect community life, and whether the transition to multi-faith was in effect a transformation to a secular society.

132. The constitution of the United Kingdom is rooted in faith—specifically the Christian faith exemplified by the established status of the Church of England. We did not however see it as our task, in discharging our remit to “consider” the law on religious offences, to challenge the constitution or question the Church's part in it, although there is little doubt that the pre-eminent role enjoyed by the established church is probably outdated. But our own researches, and the evidence we heard, reinforce a view that religious belief continues to be a significant component, or even determinant, of social values, and plays a major role in the lives of a large number of the population. The United Kingdom is not a secular state.

133. The question nevertheless arises as to whether the protections afforded by law to religions and their adherents continue to have relevance in the 21st century and, if they do, how they might be adapted to meet the interests of all faiths (and those of no faith), rather than discriminate in favour of some. We believe there should be a degree of protection of faith, but there is no consensus among us on the precise form that it might take. We also agree that in any further legislation the protection should be equally available to all faiths, through both the civil and the criminal law.

134. That equality will be reinforced under civil law with the introduction in December 2003 of the Employment Equality (Religion or Belief) Regulations, which are drawn from European Council Directive 2000/78/EC. As this report demonstrates, the criminal law is less comprehensive. The law of blasphemy only provides protection for the Church of England, although members of other Christian Churches draw comfort from it. Race relations legislation has the effect of protecting Jews and Sikhs from incitement to religious hatred, but not Christians, Muslims (at 3%, the second largest faith community in the population) nor others, because they are not regarded as coming from a common ethnic origin. The rarely used Ecclesiastical Courts Jurisdiction Act 1860 can be invoked to provide protection for properly certified places of worship of all religions, but is archaic in its construction and carries minimal penalties that cannot be categorised as having deterrent value. Finally, section 39 of the Anti-Terrorism etc Act also provides for all religions, but provides a statutory aggravating factor in sentencing rather than an offence in itself.

135. The starting point for legislation may be the requirement on Government to enact legislation to implement the draft Council Framework Decision on Racism and Xenophobia, which would not be confined to incitement to hatred in the two areas so far selected: race and religion. It is impossible to forecast how this might be transplanted into UK law, but the occasion might be ripe to include incitement to hatred across the range of targets of hate crime, even beyond the list currently under debate in connection with the Decision, for example the gay community, asylum seekers or whoever incurs the opprobrium of some branches of public opinion.

136. Since this would take the form of primary legislation, the opportunity could be seized to take account of the other two matters which have preoccupied the Committee: that is, the two aspects whereby Parliamentary “statements” could be made about matters of faith itself as opposed to the protection of those who profess the faiths. What is to happen to the common law offences of blasphemy may not depend upon legislation but upon the contemporary climate, both social and legal, which could lead to a decision to take no action at all. Whether places of worship, of all faiths, need a modern protection in criminal law is something which has become increasingly marginal. Other offences cover the majority of incidents which are seen to be offensive, but there remains a modest area still only covered by the Ecclesiastical Courts Jurisdiction Act 1860. Evidently this Act is not obsolete.

137. We support the protection of everyone's right to freedom of thought, conscience and religion, and the freedom to manifest one's religion or beliefs, under Article 9 of the European Convention on Human Rights, and we consider that the ordinary law gives that protection. We agree however that there is a gap in the law as it stands. We have examined whether there needs to be any additional protection either for believers as a class, or for the objects connected with their beliefs. There is no consensus as to whether such protections should exist and, if so, the precise forms they should take, but we do agree that the civil and criminal law should afford the same protection to people of all faiths, and of none.

138. These are matters of profound concern in the community, or communities. There exists a series of subjects on which Parliament alone can reach decision: the debate will be intense. What the proceedings of the Select Committee have made clear is that it is perfectly possible to conduct this debate, among witnesses and members of all persuasions, with equanimity and understanding. There is recognition that the differences need to be resolved, and there is much good will on which to draw in so doing.

APPENDIX 1

Select Committee on Religious Offences

The members of the Select Committee were:

Lord Avebury

Lord Bhatia

Lord Clarke of Hampstead

Viscount Colville of Culross (Chairman)

Lord Grabiner

Lord Griffiths of Fforestfach

The Earl of Mar and Kellie

Baroness Massey of Darwen

Baroness Perry of Southwark

The Bishop of Portsmouth

Baroness Richardson of Calow

Baroness Wilcox

APPENDIX 2

Evidence

The evidence of the following witnesses has been printed. Those marked * also gave oral evidence, and their submissions can be found in Volume II. The remainder are in Volume III.

- Al Khoei Foundation
- Anderson, Mr J R and Mr K W Birch (Brethren)
- * Association of Muslim Lawyers UK
- * Attorney-General
- Board of Deputies of British Jews
- Bobbers Mill Community Centre
- Bradley Evangelical Church
- British Board of Film Classification
- * British Humanist Association
- British-Israel World Federation
- Buddhist Society, The
- Catholic Bishops Conference
- Caversham Hill Chapel, Reading
- Centre for Justice and Liberty
- Christian Institute, The
- Christian Peoples Alliance
- Christian Voice
- Christian Watch
- Churches' Commission for Inter Faith Relations
- * Church of England Archbishops' Council
- Church of Jesus Christ of Latter-Day Saints
- Church of Scientology
- Cleethorpes Christian Centre
- Commission for Racial Equality
- * Council for Christians and Jews
- Currie, Mr M A
- Dereham Road Baptist Church, Norwich
- Eatons Evangelical Church, Cambridge
- Elim Way Fellowship, Plaistow
- European Monitoring Centre on Racism and Xenophobia
- * Evangelical Alliance
- Evangelicals Now Limited
- Eynsford Christian Fellowship
- Fellowship of Independent Churches
- * Forum Against Islamophobia and Racism
- Friends of the Western Buddhist Order
- Gay and Lesbian Humanist Association
- General Assembly of Unitarian and Free Christian Churches
- Glenfall Fellowship (Anglican), Cheltenham
- Gospel Magazine, The
- Gospel Standard Strict Baptist Societies, The
- Harston Baptist Church
- * Hindu community - representatives
- * Home Office, The
- Hounslow Jamia Masjid and Islamic Centre
- * Inter Faith Network for the UK
- Inverness Free Church of Scotland, Inverness
- Islamic Human Rights Commission
- Islamic Institute, Liverpool
- Islamic Society of Britain
- Jehovah's Witnesses
- Jubilee Campaign
- Justice

Law Society of Scotland, The
 Libertarian Alliance
 London Buddhist Vihara, The
 Manchester Buddhist Centre
 Maranatha Community, The
 Masjid-e-Iraan, Blackburn
 Mediawatch-UK
 Methodist Church, The
 Missionary Training Service, The
 Muslim Cemetery Trust
 * Muslim College
 * Muslim Council of Britain
 Muslim Council for Religious and Racial Harmony
 * Muslim News, The
 Muslim Women's Group
 Muslim Women's Welfare Organisation
 National Churchwatch
 * National Secular Society
 National Spiritual Assembly of the Baha'is of the UK
 Oakington, Cambridgeshire, Strict Baptist Church
 Old Baptist Church, Chippenham
 Open-Air Mission, The
 Overseas Pakistanis Education Foundation
 * Police Service
 Preston Muslim Society
 Protestant Alliance
 Representatives of various faith communities
 Searchlight Information Services
 Seventh Day Adventist Church
 * Sikh community – representatives
 St Neots Evangelical Church, Cambridgeshire
 St Peter's, Eaton Square, London
 Strict Baptist Chapel, Croydon
 Strict Baptist Chapel, Cranbrook, Kent
 Tatchell, Mr Peter
 Tireh Particular Baptist Church, Nuneaton
 Trinitarian Bible Society
 United Religions Initiative
 Westoning Baptist Church, Bedfordshire
 West Worthing Evangelical Church, West Sussex
 Zion Baptist Chapel, Prestwood, Bucks

The following written evidence has not been printed, but is available for inspection at the House of Lords Record Office (020 7219 5314). A large proportion consists of short letters from members of the public, and many of the letters are couched in similar terms. A large majority of them (86%) were opposed to any change; 70% stressed the importance of retaining the law on blasphemy; a smaller proportion of the total (32%) also stated opposition to the introduction of an offence of incitement to religious hatred.

Ahmed, Mr Shouiab
 Ali, M Akbar
 al-Karmi, Dr H A
 Allen, Helena
 Anderson, Alex
 Ashton, David
 Atkin, Mrs C M
 Ayton, Martin
 Baldwin, Mr & Mrs P
 Bamber, David

Band, Mr G and Mrs W R
 Barber, Mrs P A
 Barker, Jason and Jean
 Barnaby, Wendy
 Bayliss, Vernon
 Beadstock, Mrs K
 Bending, Mr M & Mrs
 Benton, Dr J E
 Beresford, Joan
 Bingham, George
 Birtwistle, Hugh

Bishop, J
 Bond, Anthony
 Bowles, Mrs J
 Bright, Julie
 Brooks, Revd P
 Browning, Matthew J
 Budden, Keith
 Bull, Mr & Mrs A D
 Burton, Mrs Lois
 Butt, Mohammad Asshar
 Campbell, Michael
 Campbell, Mr & Mrs N & D
 Cansell, Sarah
 Carpenter, E C
 Carpenter, Mrs S
 Cawte, Terry C
 Chapman, Steven
 Charlesworth, Martin
 Charter, P
 Chumbley, S C
 Clark, Michael A
 Cleal, Mrs Mary
 Cole, Chris
 Coleman, D A
 Cooke, Miss S E
 Cozens, Rev G
 Craig, Mr K
 Crowter, Mr D
 Cummins, Mrs J P
 Cunningham, Gerald
 Currie, Ms Elma
 Dancer, A J
 Davidson, Derek
 Davidson, Dr Tian
 Davies, Miss K, Mr Peter, and
 Mr and Mrs
 Davies, Mrs Catherine
 Davis, Peter
 Dawson, Mr & Mrs P
 Dendy, Jon
 Docherty, Mr & Mrs W T
 Drury, P O
 Duck, Miss Anne
 Dumbleton, Owen
 Dyer, Colin
 Dyson, Mr R L and Mrs K
 Edwards-Clarke, Douglas
 Elks, David
 Ellis, Anna
 Ellis, Mark
 Everett, M G
 Everett, Mrs J V
 Farley, Howard
 Faulks, Mrs S M
 Findlay, Dr John S
 Foster, Alan
 Foster, Roy
 Fraser, M
 Gammage, Mrs A
 Gammage, R W
 Garcia, Mrs S
 Gelder, J M
 Gilderson, D J
 Gill, Mr Brian
 Gilmour, Mrs R D
 Glenny, Patrick
 Goldschmied, Asa
 Goodson, Elisabeth
 Gordon, Toni
 Gordon-Clarke Mr S W, and
 Clarke, Mrs C N
 Gower, Jill
 Grassham, Rev Roger
 Green, Brian & Celia
 Green, Mrs Jan
 Grunwald-Spier, Agnes
 Gubbins, Mrs E A
 Hadaway, W G H
 Halliwell, Ms S R
 Hammond, Mr M
 Hammond, Mrs C
 Harper, Mrs L
 Harvey, Neil
 Hayden, Dr P
 Hayden, F
 Hayward, Mrs V
 Heath, Dr M J
 Herdan, Ralph
 Hewinson, Mrs Ann
 Hillas, Councillor Deryck
 Hinderwell, Pam
 Hocking, Mr M R
 Holt, A C
 Hope, Mrs D E
 House, Mr T Peter
 Humphrey, John
 Hydon, Mike
 Iliffe, Mrs B W
 Ireland, G
 Jones, Carol
 Jones, Mr S K
 Jones, Mrs M E
 Joy, Ms J
 Keep, D J
 Kennard, Mrs L R
 Kennedy, S P
 Kenney, Mrs B-June
 Kozbaw, M
 L R, Ms
 Laidley, Herbert-Angus
 Lake, Mrs J A
 Land, Ms Sheila
 Lawrence, Miss J P
 Laws, Mr Bruce
 Lewis, Mrs R & Family
 Longman, Judith
 Lovering, Celia
 Lush, F J & K
 MacGregor, Miss I K

Mackenzie, Mr & Mrs R
Macmillan, Terence
MacRae, David
MacRae, Mrs M
Malik, Hussain
Matheson, Mr P B
Matyjaszek, Edmund
McAndrew, Sean
McDawe, Mr & Mrs G
McIlroy, W J
McKay, P
McKnight, Lisa
McQueer, I and WL
McTeer, Rashid
Mears, Idris
Melhuish, S
Milne, John & Jean
Mitchell, Elizabeth
Moghal, Manzoor
Monkings, Ms Margaret
Moore, Dr D M and Mrs S C
Moore, Stephen J
Morrison, Mrs S A
Mottistone Lord
Munro, Miss J
Murray, Joann
Mutton, Ian
Myers, Susan
Nash James M
Neil, Chris
New, Ray
Nickless, David
Odgers, J & H
Osborn, Beryl C & Cynthia M
Osmond, Miss Rowena J
Owler, Miss D M
Oyelowo, David
Pack, J E
Packer, Ms S
Page, Norman
Palmer, Mrs Anne
Patrick, John
Patterson, Mark
Pattison, Mrs M A
Payton, D
Perrin, Dudley
Plumpton, Allan
Pocock, T J
Potten, Mavis
Price, Colin
Prickett, Mrs E R
Proom, T J
Pull, Inspector Robert
Purkiss, David S
Purkiss, Peter & Muriel
Purves, Allan
Pym, The Revd Francis
Quigley, Alistair
Quinn, Mr Joe
Ramsan, M
Randall, Petula
Repper, Keith and Dawn
Ritchie, James
Robertson, Andrew
Romilly, Adrian L
Ross, Alexander
Rowan Family
Sampson, John
Sattar, A
Seddon, Ms L M
Shepherd, Miss J A
Sheriff, Sarah
Siddiqui, Afsar
Sleep, Mrs J A
Smith, M & K
Smith, William
Sookhdeo, Rev Canon Dr
Patrick
Spencer-Smith, Harry
Spreadbury, Mr David
Stephenson, Mr D A & Mrs J R
Stephens, Mrs H K D
Stevens, Mrs K
Stevens, Steve
Strange, G W
Stubbs, Tony and Rebecca
Sutton, Tim
Taj, Farouq
Tann, Mark
Taylor, Mrs Mabel
Tebbitt, Rt Hon the Lord
Thomas, Mr J Rod
Thompson, Mr J and Mrs A
Tindall, Mr & Mrs A
Tomlinson, Peter
Tostevin, Ray
Trimby, Andrew R
Tuck, Ralph
Tucker, Joan
Turner, Gordon
Vellacott, Miss Bethany
Viccars, Andy
Vince, Mrs L
Vizinczey, Stephen
Voong, Peng
Voysey, Miss J
Wager, Austin T
Wainwright, John
Walkes, Miss Margaret
Ward, Beryl R
Ward, Mr R I
Warren, Mr P L
Watts, Mr K A
Weatherhogg, Deborah
Weatherhogg, Dr J J
Weatherhogg, Nick
Wednesday Afternoon Church
House Group, Members of the
Weeden, Mark
Weekes, Mr & Mrs N

Wheatley, R K
Wheatley, Rowland
Whitaker, Miss A
White, Stuart
Whiteside, B & J
Whyman, Mr J B
Wickens, Martin
Wilks, Mr F R
Williams, Kenneth C
Wills, D I

Wilson, Graeme
Wilson, Liz
Wilson, Sonia
Witts, Miss C Eve
Woolgar, T L
Worsley, E J
Worsley, Peter
Wright, G
Yearwood, Pedro

5 In addition, individual members of the Committee received numerous letters, at their private addresses, after the deadline for written submissions had passed. All were similarly phrased and appeared to be part of a write-in campaign organised by “Christian Voice” (whose evidence has been published).

The Report of the Committee is published in Volume I

The oral evidence is published in Volume II

10 The written evidence is published in Volume III

APPENDIX 3

Blasphemy*(a) Until 1998*

1. Blasphemy (and blasphemous libel) is a common law offence with an unlimited penalty. The content of the current law is obscure and, from the evidence that the Committee has received, is widely misunderstood. In 1981 the Law Commission observed that it was “hardly an exaggeration to say that whether or not a publication is a blasphemous libel can only be judged *ex post facto*”¹. It should be added that more recent academic opinion has shared the view that the law of blasphemy is uncertain:

- “A general criticism of the law of blasphemy is its uncertainty, given the vagueness of deciding what does constitute the Christian religion.”²
- “To say precisely what constitutes the law of blasphemy is difficult if not impossible.”³
- “In fact, the *actus reus* of the crime of blasphemy has been expressed in so many different ways that it is hard to know what conduct is or is not caught by it.”⁴

2. The legal notion of blasphemy dates back many centuries. Faith was seen to be the root of society’s political and moral behaviour. Therefore, to challenge that faith or to offend against it was to seriously threaten the very fabric of political and moral society and had to be punished severely. Clearly, that is no longer the case. Some might regret that, but it does not alter the fact that the law is now concerned with the preservation of the peace of the realm, and the concern is not so much with views of the deity as with the satisfactory state of society.

3. The present state of the law of blasphemy rests, in the main, on decisions made by courts in the nineteenth century. In the twentieth century there were only four reported judgements. One, *Whitehouse v Lemon* (the “Gay News” case)⁵, has the authority of the House of Lords but concerns only the question of the *mens rea* (the mental element or guilty mind), necessary for the commission of the offence. Some remarks about the *actus reus* (the criminal act or the substantive content of the offence) were made in passing in the speeches in this case, but the court did not hear full argument on these matters and the remarks are thus merely of persuasive significance. Another case⁶, reaffirming that the protection of the blasphemy law extended only to the beliefs of the Church of England and that Salman Rushdie’s “Satanic Verses” book could not be prosecuted for blasphemy against Islam, was decided by the Divisional Court and is thus a comparatively low level authority. *Bowman v. Secular Society Ltd* [1917] AC 406, a House of Lords case, affirms earlier rulings that held that for there to be blasphemy there must be intemperate or scurrilous language. *R v Gott* (1922) 16 Cr App R 87 is only two paragraphs long and merely rejects an appeal against conviction and sentence. Many of the nineteenth century decisions that are central to the law are, by modern standards, badly reported. Many reports are very brief. This, amongst other things, makes describing the law of blasphemy very difficult.

4. In the 1917 case mentioned above, Lord Sumner observed that “the gist of the offence of blasphemy is a supposed tendency...to shake the fabric of society generally” (p. 459). Historically, English law took the view that “to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the Laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law”⁷. Blasphemy and sedition were seen as interlinked crimes involving the subversion of the state. By the nineteenth century, however, the law became more specific. In *Gathercole’s Case* ((1838) 2 Lewin 237) the court held that a

“person may, without being liable for prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian Religion (save the established religion of the country)”.

The courts held, more generally, that it was “no longer true that ‘Christianity is part of the law of the land’”⁸. The law of blasphemy was thus restricted to protecting the tenets and beliefs of the Church of

¹ “Offences Against Religion and Public Worship” (Law Commission Working Paper No. 79, 1981) para. 6.1.

² St. John Robbilliard, “Religion and the Law” Manchester University Press (1984) p.37

³ A Bradney “Religions, Rights and the Law” Leicester University Press 1993 p.82

⁴ D. Feldman “Civil Liberties and Human Rights in England and Wales” OUP (2002) p.913

⁵ *Whitehouse v Lemon* [1979] 2 WLR 281

⁶ *R v Chief Metropolitan Magistrate, ex parte Choudhury* [1991] 1 QB 429: the “Satanic Verses” case

⁷ *Taylor’s Case* (1676) 1 Vent. 293

⁸ *R v Ramsay and Foote* (1883) 15 Cox CC 231 at p 235

England, other religions being protected only to the extent that their beliefs overlapped with those of the Church of England.

5. Some elements of the law are clear. First, the House of Lords decided in *Whitehouse v Lemon* that the offence is one of strict liability. That is to say, whether one intended to commit an act of blasphemy is immaterial; all that matters is whether or not one did in fact publish the material that is the subject of prosecution. Secondly, as noted above, the offence protects only the Church of England. This latter point is a matter on which the Committee received much evidence, with many seeking to argue that the law as it is currently stated extends to protect the Christian faith in general. It is clear, however, that this is not the case. In the “Satanic Verses” case, the court held that “extending the law of blasphemy would pose insuperable problems and would be likely to do more harm than good” (p 452). Although some judgements have sometimes suggested that it might be better if the law were more widely stated (most notably Lord Scarman in *Whitehouse v Lemon* (at p 308)), it is settled law that at present it extends only to protect the Church of England.

6. As to what precisely constitutes a blasphemy, the matter is obscure, and it is this that justifies the Law Commission’s view quoted in paragraph 1 above. Even among Christian communities there is considerable disagreement about the extent of the offence. The Select Committee asked Professor D J Feldman, Legal Adviser to the Joint Committee on Human Rights, to construct as best he could a modern definition of the elements of the common law offence as it stands today. From the decided cases it would seem that blasphemy is committed “by anyone who makes public words, pictures or conduct whereby the doctrines, beliefs, institutions, or sacred objects and rituals of the Church of England by law established are denied or scurrilously vilified or there is objectively contumelious, violent or ribald conduct or abuse directed towards the sacred subject in question, likely to shock and outrage the feelings of the general body of Church of England believers in the community”. As the Law Commission’s view indicates, quite what this means when it comes to applying the law to any given set of facts is difficult to say.

7. It must be appreciated that the definition has developed historically to meet various, primarily political rather than religious, perceptions of a need for the law to protect institutions, originally the State itself. This is acknowledged by the Church of England, although not welcomed by them. But there is a profound objection to it from the Evangelical witnesses and organisations such as Christian Voice. Their position is that the law prohibits “anything that contains contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the formularies of the Church of England as by law established”. The objectors place heavy reliance on Lord Scarman’s opinion in the “Gay News” case, and on the quotation by him and other Law Lords of Stephens’ Digest of the Criminal Law. However, these passages do not form part of the ratio of the House of Lords judgement and therefore carry limited weight. It should be added that it is also the case that, on the authority of *R v Hetherington*, material is not blasphemous if it is presented “in a sober and temperate and decent style”, even when it questions the doctrines and beliefs of the Church of England. However, the line between that which is sober etc. and that which is not has not been subject to extensive examination by the courts. Equally, it would be difficult to determine what constitutes scurrilous, contumelious etc.

(b) Since the Human Rights Act 1998

8. The body of English law has moved on since *Whitehouse v. Lemon*, not least through the passage of the Human Rights Act 1998. This does not exactly incorporate the European Convention on Human Rights (ECHR) as part of the domestic law of the UK, but it does require courts and tribunals, as public bodies (among many others) to interpret the law (henceforth “English” law, which includes Wales; the same applies in Scotland and Northern Ireland but this is not relevant to our deliberations) in such a way as to be consistent with the Convention. When the courts are considering statute law or subordinate legislation, there is a system (s.10) which enables the higher courts to certify that they cannot interpret the Act etc. in question so as to be compatible with the ECHR. In such an event there is a streamlined process whereby Parliament is able to make the requisite amendment. Nothing, however, is said about amending the common law, so if it is found to be inconsistent with the ECHR, however hard the court may try to interpret it so as to be compatible, it remains at present a matter for speculation how the problem might be resolved. In the case of a criminal conviction under a common law offence which contains elements incompatible with the ECHR, the appellate courts may well be left with no option but to quash the conviction. It would be possible for the court to invite Parliament to consider the terms of the offence, but the fast-stream procedure is not available and normal legislation would be required.

9. There are four Articles of the Convention which have a bearing on the matters before the Committee: 7, 9, 10 and 14. One aspect of the jurisprudence which has developed in the Strasbourg court is that the Convention has to be applied as a whole. This means that it may not be sufficient to

look at one Article alone: it may interlock with another, with complex results. This legal innovation formed no part of the Law Commission's report but today it has overwhelming implications. The main problem which is likely to arise in the context of blasphemy derives from Articles 7 and 10. Article 7 appears to impose a prohibition on the creation of a retrospective offence. That is to say, nobody can be convicted or punished for acting in a manner which was not a criminal offence at the time of the action. In *Sunday Times v. UK* (1979) 2 EHRR 245 the Court said "...the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee...the consequences which a given action may entail". The subsidiary meaning of Article 7 may have a damaging effect on the common law of blasphemy because a criminal offence will violate Article 7 (or valid 'prescription by law' under other Articles) if its ingredients are unclear: a person must be able to foresee whether or not his proposed action is lawful.

10. Although no blasphemy case has been prosecuted in England and Wales since the passage of the Human Rights Act, and what follows is therefore necessarily speculative, it is our view that any prosecution for blasphemy today—even one which met all the criteria described in paragraphs 5-7 above—is likely to fail on grounds either of discrimination or denial of the right to freedom of expression. As long ago as 1980 Lord Diplock noted in relation to the criminal offence of defamatory libel that under Article 10.2 of the European Convention on Human Rights "freedom of expression may be subject to restrictions or penalties...only to the extent that those restrictions or penalties are necessary in a democratic society for the protection of what generically may be described as the public interest"⁹. His words apply with even more emphasis to the crimes of blasphemy and blasphemous libel. European law also requires that restrictions placed on Article 10.1 rights must be prescribed by law, and that this means that the law must be certain, as to what is or is not permitted. This is part of the interpretation of Article 10.2 read in conjunction with Article 7.

11. The 1998 Act gives effect to the rights and freedoms guaranteed under the European Convention. Article 9 guarantees the freedom of thought, conscience and religion. Article 10 confers the right of freedom of expression. Article 14 prohibits discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". It is doubtful that an objective and rational justification could be provided for the difference in treatment of different religions and their beliefs, so there is a significant risk of the law of blasphemy violating Article 14 taken together with Articles 9 and 10. It should be noted that Articles 9 and 10 of the European Convention have equal status, in contrast to the United States of America, where freedom of expression is paramount.

12. In 1997 the European Court of Human Rights held that the English law of blasphemy was not in contravention of Article 10 (freedom of expression) of the European Convention¹⁰. However the ruling was not unequivocal. The Court said the law of blasphemy lay within the "margin of appreciation". This gives individual countries a degree of discretion in deciding what law is appropriate where there is insufficient common accord amongst Member States for the European Court of Human Rights itself to give a definitive ruling. The extent of the margin of appreciation in any given case is not fixed, and is affected by the changing social and legal climate within the Member States. For example, in a succession of decisions over the past two decades the European Court held that the United Kingdom's refusal to allow transsexuals to change their declared sex on official forms, marry on the basis of their changed sex and so forth was within the margin of appreciation. But in 2002 the Court reversed its earlier stance and decided that in the light of changes in social, legal and scientific circumstances the United Kingdom's position now put it in breach of both Article 8 and Article 12 of the Convention¹¹. Thus, the Court's decision in *Wingrove* that there was not "as yet...sufficient common accord" to mean that the English law of blasphemy was in breach of the European Convention does not mean that it will not rule otherwise in the future.

13. The requirement to read the law of blasphemy in the light of the Human Rights Act 1998 provides a particular difficulty for the English courts. It is clear that the law discriminates between religions and between denominations of the same religion. It infringes notions of freedom of expression. Whilst the European Convention provides for the restriction of freedom of expression by

⁹ *R v. Wells St Magistrate* [1980] AC 477, p483

¹⁰ *Wingrove v the United Kingdom* (1997) 24 EHRR 1. This case resulted from a refusal in 1989 by the British Board of Film Classification to issue a video classification certificate to a short film, "Visions of Ecstasy", on the grounds that it infringed the law of blasphemy. On appeal, the filmmaker claimed this violated his rights to freedom of expression (Volume III, pages 4 & 5).

¹¹ *Goodwin v United Kingdom* (2002) 35 EHRR 447

State action in pursuit of legitimate aims such as the prevention of disorder, the Court has held that any restriction of freedom of speech must be proportionate to the legitimate aim that is being pursued¹². The courts by themselves would have difficulty in redrawing the law, not least because the retrospective creation of criminal offences is contrary to Article 7 of the European Convention. Partially because of this, in the “Satanic Verses” case the Divisional Court felt itself unable to extend the law to cover non-Christian religions. This, however, was before the Human Rights Act had given the courts new powers and duties, not least the responsibility, under section 6(3)(a) of the Act, to ensure their judgements were compatible with the Convention. They would face formidable difficulties in either extending the law to other religions or in clarifying what the exact ambit of the law might be. Equally, however, they could not simply ignore the clear discrepancies between the state of the current law and the requirements of the Act.

14. In the *Wingrove* case, the British Board of Film Classification adopted a definition of blasphemy along the same lines as *Whitehouse v. Lemon*, but omitting any reference to the Church of England. When this case came before the European Court of Human Rights the Court held (at para. 43) that “There appears to be no general uncertainty or disagreement between those appearing before the Court as to the definition in English law of the offence of blasphemy, as formulated by the House of Lords in the case of *Whitehouse v. Gay News and Lemon*... The Court is satisfied that the applicant could reasonably have foreseen that the film could fall within the scope of the offence of blasphemy”. It is clear that both before the Commission and the Court, counsel for both sides presented a united front that Lord Scarman’s speech in the *Gay News* case had defined the *actus reus* of blasphemy in common law (see para 47 of the Commission’s opinion and para 43 of the Court’s judgement). There must however be considerable doubt whether that view would have prevailed if the extent of the law of blasphemy had been fully argued and if it had not been wrongly assumed that the House of Lords had formulated it clearly in the “Gay News” case.

15. There are in prospect other problems about the common law offences: the disproportionality of an unlimited penalty; discrimination in favour of Christianity alone; and no mechanism to take account of the proper balance to be struck under Article 10 of the Convention. What may be even more difficult for an English court, performing its duty under s.6(3)(a) of the Human Rights Act, is that a domestic court is not allowed the comfort of the “margin of appreciation” on which the Strasbourg Court can rely, so as to reach decisions which take account of the very diverse backgrounds from which domestic law originated, and thereby produce decisions which will not prove unacceptable to the State from which the appeal came. The State itself possesses a margin of appreciation in legislating for its own problems and the European Court will take cognisance of this; but the extent to which a parallel jurisdiction is available to the domestic courts in the UK is at an early stage of development.

¹² *Handyside v. United Kingdom* (1979) 1 EHRR 737, p 754

APPENDIX 4

International and European Law

1. There are two main provisions of international law to which the United Kingdom has acceded that are relevant to any consideration of the law on religious offences. These are the European Convention on Human Rights and the International Covenant on Civil and Political Rights. They, together with provisions that are being introduced into the European Union's political and legal structure, create obligations for the United Kingdom and form part of the background to the Committee's work. In addition, the principles contained in the United Nations Charter and the Universal Declaration of Human Rights are also relevant.

The European Convention on Human Rights

2. Article 9 of the Convention provides that

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

The European Court of Human Rights has said that freedom of thought, conscience and religion is one of the foundations of a democratic society and that pluralism in beliefs is “indissociable” from a democratic society.¹ The Court, together with the European Commission of Human Rights, has developed a considerable jurisprudence in relation to this Article.² British courts are now required to take account of this jurisprudence when considering the application of the Human Rights Act 1998.³ However, it is important to note that United Kingdom courts are not bound to apply this jurisprudence in domestic courts. It is equally important to note that the individual right to make an application to the European Court of Human Rights is not affected by the implementation of the Human Rights Act 1998.

3. Article 9 of the European Convention on Human Rights has to be read in conjunction with the other Articles in the Convention. In particular it has to be read in the light of Article 10. Article 10 states that

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

Like Article 9, Article 10 is a qualified right. It holds that

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Again as with Article 9, Article 10 is regarded by the European Court of Human Rights as being one of the essential foundations of democratic society⁴. Neither Article 9 nor Article 10 has any priority over the other. Thus, in applying them to the facts of any individual case, the Court is faced with a complex balancing job. In relation to this, in the context of our work, one passage in the Court's

¹ *Kokkinakis v Greece* (1994) 17 EHRR 397 at p 418.

² In November 1998 the old system under the European Convention whereby the Commission considered the admissibility of an application and, if the application was admissible, issued a report expressing an opinion on whether or not there had been a violation of the Convention and the Court then determined the substantive merits of the cases was replaced by one where the Court was charged with both functions.

³ S 2 Human Rights Act 1998.

⁴ *Handyside v United Kingdom* (1979-80) 1 EHRR 737 at p 754.

decision in *Otto-Preminger Institut v Austria* is of particular importance. In the course of discussing Article 10 the Court said

“Those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to them. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to holders of those beliefs and doctrines”⁵.

4. Since Article 9 is not an unqualified right it is permissible, under the convention, for national states to act in ways that restrict rights under the Article. However, if a state does seek to restrict a right under Article 9 the restriction must come within the limits set by Article 9(2) and must also comply with the more general requirement that the restriction is proportionate to the need that justifies its introduction⁶.

5. The jurisprudence under the European Convention is commonly said to have taken a fairly liberal approach to the question of what constitutes a religion for the purposes of Article 9⁷. It is certainly true to say that either the Commission or the Court have considered applications by groups as various as Druids and the Church of Scientology⁸. However, in some instances applications have been heard from religious groups without there being a need for there to be a determination as to the religious status of the group. The liberality of the Convention’s jurisprudence has therefore not been put to a final test in some cases. Nevertheless it is clear that both the Court and the Commission have been happy to entertain applications under the Convention from a wide variety of sources.

6. The jurisprudence that relates to Article 9 is relatively underdeveloped. The case load for the Commission and the Court has been comparatively small. The first major case, *Kokkinakis v Greece*, was not decided until 1993. In *Kokkinakis* the applicants were Jehovah’s Witnesses who had called at a house to persuade the occupants to join their religion. The occupant, the wife of a Greek Orthodox priest, called the police because, under Greek law, proselytism that involves an attempt to convert Orthodox believers is a criminal attempt. The Court held that there was no breach of Article 9 because there was no evidence that there had been any attempt to convert the occupant by improper means. Bearing Christian witness was said by the Court to be acceptable within a democratic state. Moreover there was no evidence that there was any pressing social need that justified the conviction of the applicants. However, in other cases the court has accepted that the right to bear witness is counter-balanced by the circumstances of those to whom witness is made. Thus in *Larissis and other v Greece* officers who had attempted to convert soldiers under their command, and who had been prosecuted for this, were held not to have had their Article 9 rights violated because the hierarchical nature of the situation made it difficult for the soldiers to resist their approaches⁹.

7. Article 9 is largely concerned with the sphere of personal religious creeds, i.e. the *forum internum*. It also protects individuals from being compelled to be involved in religious activities against their will. However, these propositions raise difficult questions about the dividing line between the *forum internum* and the *forum externum* and what will constitute forcing somebody to do something against their will. It is with these difficulties that the Court and the Commission have struggled in applying Article 9.

8. The jurisprudence relating to the Convention in relation to Article 9 is further limited by the general notion developed by the Court of the margin of appreciation. The Court has taken the view that international judges, by virtue of their situation, have a poorer grasp of the precise details of the situation in a state than do the judges of that state. Those judges are therefore in a better position to determine whether or not local circumstances justify restrictions on rights given under the Convention where the Convention allows of such restriction¹⁰. This discretion given to state courts and state authorities is not unlimited and the Court reserves to itself the right to hold that states have acted outside the boundaries of the margin of appreciation. Nevertheless the doctrine places limits on the ability of individuals to make successful applications under Article 9.

9. The Convention makes further specific references to religion other than that made in Article 9. In Article 2 of the First Protocol the Convention lays down that

⁵ (1995) 19 EHRR 34 at p 56.

⁶ *Silver v United Kingdom* (1983) 5 EHRR 347 at p 377.

⁷ See, for example, C Evans “Freedom of Religion under the European Convention on Human Rights” OUP (2001) p 53.

⁸ *Chappell v United Kingdom* (1990) 12 EHRR 1.

⁹ (1999) 27 EHRR 329.

¹⁰ *Handyside v United Kingdom* (1979-80) 1 EHRR 737

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the state shall respect the rights of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions.”

The Court has held that respect for the rights of parents involves more than mere acknowledgement of those rights¹¹. However, what is required by way of acknowledgement in terms of educational provision is not as yet clear. The doctrine of the margin of appreciation may be important here in granting states a wide discretion in their application of this provision.

10. Article 14 of the Convention provides that

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a notional minority, property, birth or social status.”

The Court has held that there is discrimination in treatment if there is a difference in treatment that has no objective or reasonable justification or does not pursue a legitimate aim¹².

The International Covenant on Civil and Political Rights

11. Article 2 of the International Covenant on Civil and Political Rights contains the general provision that:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.”

12. More particularly, Article 18 of the International Covenant provides that

“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others”.

This Article has to be read in conjunction with Article 19 that provides that:

- “1. Everyone shall have the right to hold opinions without interference.
- 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

¹¹ *Valsamis v Greece* (1997) 24 EHRR 294.

¹² *Lithgow and others v United Kingdom* (1986) 8 EHRR 329.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a) For respect of the rights or reputations of others;
- b) For the protection of national security or of public order (ordre public), or of public health or morals”.

13. There are obvious similarities between these Articles and the provisions of the European Convention. However there are ambiguities in Article 18. For example, the Article permits both of a reading that gives individuals the right to abandon their religion and one that allows individuals to adopt a faith but not to abandon it. Difficulties that the European Court of Human Rights has struggled with in applying Article 9 are mirrored in the application of Article 18 of the International Covenant on Civil and Political Rights. Thus, for example, the question of what constitutes a manifestation of belief is a complex one that admits of no certain answer.

14. Article 20(2) of the International Covenant on Civil and Political Rights provides that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

However, the United Kingdom has entered a reservation with respect to this Article:

“The Government of the United Kingdom interpret article 20 consistently with the rights conferred by articles 19 and 21 of the Covenant and having legislated in matters of practical concern in the interests of public order (ordre public) reserve the right not to introduce any further legislation. The United Kingdom also reserve a similar right in regard to each of its dependent territories.”

Finally, Article 26 of the International Covenant provides that

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Whether the current English law of blasphemy, with its special protection for the Church of England, is in accord with this provision must be open to question.

The Law of the European Union

15. In December 2000 the Nice European Council Summit approved the Charter of Fundamental Rights for the European Union. This Charter was drafted as though it were to have full legal effect, but at present it does not have that legal status, with a decision on the matter having been postponed until the Inter-Governmental Conference in 2004. Nevertheless the Charter has already had a considerable impact on the European Union and has been referred to by, amongst others, the Advocates-General of the Court of Justice, the Court of First Instance and the European Ombudsman. It is already therefore influential in the definition of the law and legislation of the European Union. The Charter contains a number of provisions that are relevant to religious groups, the most important of which is Article 10 which provides that

“Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.”

As with the European Convention on Human Rights and the International Covenant on Civil and Political Rights, this has to be read in conjunction with provisions dealing with freedom of speech. Article 11 provides that

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The freedom and pluralism of the media shall be respected.”

16. Although the precise impact of Article 10 is impossible to gauge because it is so new, it demonstrates the continuing interest in human rights in general in the European Union, and the rights of religious groups in particular. Even whilst it remains a political declaration, member states of the European Union cannot ignore its provisions. Moreover other developments, such as the draft Framework decision on Combating Racism and Xenophobia, also suggest that religious groups and matters of concern to religious groups are likely to have a higher place on the agenda of the European Union than they have done in the past.

The United Nations

17. The United Nations Charter makes a number of references to human rights in general and the rights of religious groups in particular in its Articles. Article 1(3) notes that one of the purposes of the United Nations is

“To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

Article 55 provides that the United Nations shall promote, amongst other things, “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”, whilst Article 56 states that:

“All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55”.

18. On December 10 1948 the General Assembly of the United Nations adopted, without a dissenting vote, the Universal Declaration of Human Rights. Whilst the Universal Declaration is not a legally binding document, the principles it establishes plainly cannot be ignored. Article 18 provides that

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”.

Other Articles in the Universal Declaration also refer to religion. Thus Article 2 provides that

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”.

Article 16(1) provides that

“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution”.

Article 26(2) provides that

“Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace”.

19. Other Articles do not specifically refer to religion but do make general statements that apply to religious groups. Most importantly, Article 7 provides that

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

At the same time the Universal Declaration pronouncements on religion have to be read in conjunction with the other rights in the Declaration. Thus a reading of Article 18 has to be balanced with a reading of Article 19:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

APPENDIX 5

Religious Offences in other Jurisdictions

1. As part of its work the Committee looked at religious offences in a number of other jurisdictions. We treated this information with some caution. Whilst it is possible to describe offences that exist in different jurisdictions with some accuracy, assessing their efficacy is much more difficult. It is usually hard to gather material on how offences are implemented. Even where that material is available, opinions often vary on how effective that implementation is, depending in part on the commentator's view about the desirability of the offence. Thus it is one thing to say what an offence is; but to say whether it works, even within its own jurisdiction, is another. Finally, even if an offence has proved effective within one jurisdiction it does not follow that it will be equally effective elsewhere. Legal transplants are usually likely to be more effective if they focus upon matters within the commercial sphere. Successful transplant is more problematic where, as in the case of religiously related offences, they touch upon the mores and culture of a community. Even countries that appear to be superficially similar on closer examination prove to be different in ways that are relevant to the implementation of the law. Thus, the models that follow are offered not as examples of working laws that would prove to be effective within the British context but, rather, as ideas that the Committee was able to reflect on in considering the law in England and Wales.

2. A number of attempts have been made to survey the law relating to religious offences in other jurisdictions. Article 19 and Interights submitted material about the law in jurisdictions outside the United Kingdom to the European Court of Human Rights in both the *Otto-Preminger Institut v Austria* and the *Wingrove v United Kingdom* cases. Article 19 supplied us with copies of this evidence. The Home Office also supplied evidence about the law in a range of other jurisdictions, as did Professor Feldman, Legal Adviser to the Joint Committee on Human Rights. In addition to this, the Committee carried out some research of its own. The information in this appendix is taken from these various sources.

3. The two jurisdictions that are most similar to that in England and Wales are those in Northern Ireland and in Scotland. It is therefore to those two jurisdictions that we turned first.

Northern Ireland

4. Blasphemy was part of the common law of Ireland. In an 1842 judgement Sir Edward Sugden¹ refers to the successful prosecution in 1703 of Thomas Emlyn, a Unitarian minister who had written a book arguing that Jesus Christ was not the equal of God the Father. This appears to have been the first reported blasphemy prosecution in Irish law. The law would seem to have protected the beliefs of the Church of Ireland². It is therefore arguable that the crime did not survive the disestablishment of the Church of Ireland by the Irish Church Act 1869. There was no reported blasphemy prosecution in the period between 1855 and the creation of the independent state of Ireland. In Northern Ireland, which inherited Irish common law, there has, to date, been no prosecution for blasphemy. However, in Northern Ireland incitement to religious hatred is a criminal offence under the Public Order (NI) Order 1987, although it is rarely prosecuted. From enquiries we made, it would seem that this might be due to the fact that it was difficult to show the necessary intention to incite religious hatred, a disinclination to prosecute sectarian cases, or a feeling that the number of cases that could potentially be prosecuted was so large as to make individual prosecutions potentially invidious—or a combination of all three.

Scotland

5. The last reported prosecution for blasphemy in Scotland was in 1843³. Some writers have argued that blasphemy may no longer be a crime in Scotland (see, for example, G. Gordon, *The Criminal Law of Scotland*, W. Green (2nd ed., 1978) p. 998). In any event, since Scottish law, unlike English law, requires a personal interest in a matter before there can be any private prosecution, and since the state is unlikely to want to prosecute for blasphemy, a prosecution, even if technically possible, is unlikely to occur⁴. At present Scotland has no special provisions to deal with religious offences that are not found in English law. Indeed some extant English provisions, such as section 2 of the Ecclesiastical Courts Jurisdiction Act 1860, have no counterpart in Scotland. However, concern over sectarianism in Scotland has led to calls for new legislation. On 20 February 2003 the Scottish parliament passed a

¹ *A.G. v Drummond* (1842) 1 Or. and War. 353 (at p. 384)

² *R v Petcherine* (1855) 7 Cox CC 79 at p 84

³ *Henry v. Robinson* 1843 1 Brown 643

⁴ G. Maher 'Blasphemy in Scots Law' (1977) Scots Law Times 257 at p 260

Criminal Justice (Scotland) Bill which included a section on religious prejudice, originally introduced by Donald Gorrie MSP. The section reads as follows:

“59A Offences aggravated by religious prejudice

- (1) This section applies where it is –
- (a) libelled in an indictment; or
 - (b) specified in a complaint,
 - and, in either case, proved that an offence has been aggravated by religious prejudice.
- (2) For the purposes of this section, an offence is aggravated by religious prejudice if –
- (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice or ill-will based on the victim’s membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation: or
 - (b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a religious group, or of a social or cultural group with a perceived religious affiliation, based on membership of that group.
- (3) Where this section applies, the court must take the aggravation into account in determining the appropriate sentence.
- (4) Where the sentence or disposal in respect of the offence is different from that which the court would have imposed had the offence not been aggravated by religious prejudice, the court must state the extent of and the reasons for that difference.
- (5) For the purposes of this section, evidence from a single source is sufficient to prove that an offence is aggravated by religious prejudice.
- (6) In subsection (2)(a)-
- “membership” in relation to a group includes association with members of that group: and
 - “presumed” means presumed by the offender.
- (7) In this section, “religious group” means a group of persons defined by reference to their-
- (a) religious belief or lack of religious belief;
 - (b) membership of or adherence to a church or religious organisation;
 - (c) support for the culture and traditions of a church or religious organisation; or
 - (d) participation in activities associated with such a culture or such traditions”

The law in other European jurisdictions

6. *Austria*: Under Section 188 of the Penal Code “disparaging religious doctrines” is a criminal offence.

7. *Belgium*: There is no longer a law criminalising blasphemy in general. Article 4 of the Decree of 23 September 1814, which penalised writings and images offensive to religion, was abrogated by the Fundamental Law of 1815 (Constitution of the “Kingdom of the United Netherlands”). Incitement to discrimination, hatred or violence vis-à-vis a group or community is a criminal offence. Article 144 of the Penal Code makes it an offence to insult religions at either places of religious worship or during public religious celebrations. Other articles of the Penal Code may be applied to writings, images, paintings, or films defaming religion, in particular, Articles 443-452 which penalize defamation, and Articles 383-386(bis), which penalize public offence to morals and sexuality. These articles have been applied to religious offences. Courts in Belgium are less likely to prohibit the showing of pornographic or blasphemous materials where only consenting and well-informed adults are to be exposed to the material.

8. *Denmark*: It is a criminal offence for local and satellite broadcasting to incite racial or religious hatred. While a law prohibiting blasphemy exists under Section 140 of the Danish Penal Code, it has not been used since 1938. The Danish Penal Code also contains a provision (Section 266b) against expressions that threaten, deride or degrade on the grounds of race, colour, national or ethnic origin, belief or sexual orientation. That provision, however, has never been used against statements offensive to religion. In 1984 a local art club asked an artist, Jens Jørgen Thorsen, to create a “happening” on the wall of the local railway station. The work displayed a naked Jesus with an erect penis. The work

caused considerable controversy, and was eventually removed, but no legal charges were ever brought. In 1992, a film made by the same artist was shown in cinemas all over Denmark. The film portrayed Jesus as sexually active and the clergy as corrupt. Though the film caused debate, no legal measures were taken and no charges were laid.

9. *France*: In France, while there is no law against blasphemy, Article 283 of the Penal Law proscribes the showing of a film contrary to good morals, ("*contraires aux bonnes moeurs*"). In a 1988 case, several groups asked the court to ban the showing of Martin Scorsese's "The Last Temptation of Christ". The court rejected this application, noting that the right to respect for beliefs should not interfere in an unjustified manner with artistic creativity. In upholding the lower court's decision, the Court of Appeal ordered that all advertisements for the film should include an announcement that the film was based on a novel and not upon the Gospel⁵. Incitement to racial discrimination, hatred or violence because of origin or membership of a race or religion is a criminal offence. In October 2002 the novelist Michel Houellebecq was found not guilty of inciting hatred by calling Islam "the stupidest religion".

10. *Germany*: In Germany, Section 166 of the Criminal Code forbids insults to a religion or "Weltanschauung", publicly or by dissemination of publications. For an insult to be punishable under this law "the manner and content" of the insult must be such that an objective onlooker could reasonably apprehend that the insult would disturb the peace of those who share the insulted belief⁶. Moreover, to be convicted, an offender must intend or at least be aware that his or her action constituted an offence. In applying Section 166 to a work of art, the freedom of art as guaranteed by Article 5(3) of the Basic Law must be taken into account. Article 130(1) of the German Criminal Code makes it an offence, punishable with imprisonment for between three months and five years to incite hatred against segments of the population or to call for violent or arbitrary measures against them, or to attack the human dignity of others by insulting, maliciously maligning, or defaming segments of the population. Under Article 130(2), it is an offence, punishable with imprisonment for up to three years, for a person to disseminate, publicly display, post, present (including presentation by radio), produce, obtain, supply, stock, offer, announce, commend, or undertake to import or export, or otherwise make accessible, writings which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, if the writings call for violent or arbitrary measures against them, or assault the human dignity of others by insulting, maliciously maligning or defaming such a group or segments of the population.

11. *Greece*: Any person who promotes acts liable to provoke discrimination or violence towards individuals or groups because of their racial, ethnic or religious origin is guilty of a criminal offence.

12. *Ireland*: In Article 40.6.i of the Bunreacht na hÉireann (Constitution of Ireland), the State guarantees the liberty (subject to public order and morality) to express freely their convictions and opinions, but provides that "The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law." However, in 1999⁷ the Irish Supreme Court held that it was impossible to say, from the previously decided case law, what the different elements of the crime of blasphemy were. It is thus now impossible to bring a blasphemy prosecution in Ireland.

13. *Italy*: Articles 402-406 of the Penal code forbid offence to religion, including offence to religion during a performance, even where the offending performance is objectively aimed at arousing amusement. There is considerable debate in Italy about whether laws against causing offence to religion apply only to Catholicism. A lesser offence of "bestemmia" (words insulting to religion) is contained in Article 724. The use of these provisions has been declining in recent years.

14. *The Netherlands*: Blasphemy is a criminal offence under the Penal Code Article 147 (introduction and sub 1 Wetboek van Strefrecht), but this provision only covers expressions concerning God, and not saints and other revered religious figures ("godalaatering"). Further, the criminal offence of blasphemy has been interpreted to require that the person who makes the expression must have had the intention to be "scornful" ("smalend"). This is a stricter test than normally is applied to the intent of the defendant. Thus, even if it was objectively foreseeable that people would be aggrieved, and those people actually were aggrieved, there is no offence if the speaker did not have the intent to be scornful. This intent requirement was confirmed in one of the very few blasphemy cases in the Netherlands. An established Dutch writer, Gerard Kornells van het Reve, represented God in a novel as a donkey. Moreover, the storyteller contemplated having sexual

⁵ Cour d' appel de Paris, 28 September 1988

⁶ Court of Appeal of Celle, Neue Juristische Wochenschrift, 1986, p. 1275

⁷ *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484

intercourse with the animal. In 1968, the Hoge Raad (the highest appellate court) acquitted the author because it was not proven that his aim was to be scornful⁸.

15. *Spain*: The crime of blasphemy was abolished in 1988. The Constitutional Court has ruled that the right to freedom of expression, broadly protected by Article 20 of the Constitution, can be subject to restrictions aimed both at the protection of the rights of others or at the protection of other constitutionally protected interests. The extent to which “rights of others” may justify a restriction is construed narrowly by the Court; generally speaking, the other must be an identified individual whose fundamental rights have been directly affected by the expression. Although there is no case-law from the Constitutional Court regarding the extent to which the right of freedom of religion could be posited as a ground for restricting freedom of speech, it can be assumed on the basis of prior case-law that another ground, such as the protection of morals, would have to be relied upon to justify a restriction of freedom of expression. The fact that only interested adults are likely to be the audience of a work of art is also a relevant consideration under Spanish law.

16. *Switzerland*: Article 261 of the Penal Code makes it an offence publicly and maliciously to offend or ridicule another person’s convictions in a matter of belief, or to profane a religion’s objects of veneration, place of worship or religious article or act guaranteed by the Constitution. It is also an offence maliciously to interfere with the celebration of, or publicly ridicule, any religious act guaranteed by the Constitution. The penalty is imprisonment for up to six months and/or a fine. In addition, Article 261 *bis* of the Penal Code, inserted by the law of 18 June 1993 with effect from 1 January 1995, provides that it is an offence for anyone publicly to incite to hatred or discrimination against a person or group of persons on account of their racial, ethnic or religious characteristics; publicly to propagate an ideology which systematically degrades or denigrates the members of a race, ethnic group or religion, or to organize or to encourage such propaganda activities; or publicly to degrade or discriminate against a person or group by reason of their race, ethnic group or religion, by words, writing, image, gesture, action or otherwise, in a way which attacks their human dignity; or in the same way to deny, grossly minimize, or seek to justify a genocide or other crimes against humanity. The penalty is an unlimited period of imprisonment or a fine.

JURISDICTIONS OUTSIDE EUROPE

17. *Australia*: Australia is of some interest because it has a common law legal system and has experienced a relatively recent case involving an allegation of blasphemy. In 1998⁹ the Roman Catholic Archbishop of Melbourne, the Most Reverend Dr. George Pell, sought an injunction to restrain the National Gallery of Victoria from showing a photograph by Andres Serrano entitled “Piss Christ”. The photograph showed the crucified figure of Christ immersed in excrement. The state Supreme Court accepted that the photograph would be extremely offensive to many Christians. One of the grounds for seeking the injunction that underpinned the Archbishop’s case was the argument that showing the photograph would constitute the crime of blasphemous libel. The defence argued that the crime of blasphemous libel did not exist in the state of Victoria and that, if it did exist, it did not justify the injunction sought. The Supreme Court rehearsed both the argument for saying that blasphemous libel was not an offence known to the law of the state of Victoria (the fact that it had not been used in the twentieth century) and also the argument that a multi-faith society might be better served by a law that protected differing faiths from scurrility, vilification, ridicule and contempt. The judgement of the court failed to clearly take one view or the other. However, the court held that if the crime of blasphemous libel did exist it was necessary to show that publication of the matter complained of would cause unrest of some sort. In the absence of such evidence the court declined to grant the injunction sought. This case is illustrative of many of the problems for a law of blasphemy in the modern world. However the court’s judgement does not provide any clear answer to these problems or even to the question of whether or not the law of blasphemy has been received into Victorian state law from the common law of England.

18. *India*: The law of India has often been used as a comparator when discussing the law relating to religious offences in England and Wales. A number of witnesses raised it in evidence that was submitted to the Committee, some seeing it as a successful model and others finding severe limitations and difficulties in the law. The Indian Penal Code of 1860, as it is presently constituted, now lays down a number of offences that relate to the areas of blasphemy and incitement to religious hatred¹⁰. Section 153-A reads:

⁸ Hoge Raad 2 April 1968, NJ 1968 no 373

⁹ *Pell v The Council of Trustees of the National Gallery of Victoria* [1998] 2 VR 391

¹⁰ The offences should be read in the legal context of a Code that both makes reference to a range of other offences relating to religion and to other offences relating to communal violence.

“Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.

Whoever –

- (a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or
- (b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, or
- (c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity, for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,
- (d) shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Offence committed in place of worship, etc. –

(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine”.

19. Nariman has commented that this “virtually extended by legislation the English Common Law of Blasphemy to all religions practiced in India”¹¹. However, the character of this provision of the Penal Code seems rather different from the English law of blasphemy not least in its focus on public order. Section 295-A reads:

“Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.

“Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or visible representations or otherwise, insults or attempts to insult the religion or religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with a fine, or with both.”

20. Ratanlal and Dhirajlal’s “Law of Crimes”, a commentary on the Indian Penal Code, notes that “[the] prosecution must establish that the intention of the accused to outrage was malicious as well as deliberate, and directed to a class of persons and not merely to an individual”¹². They further note that the legislative intent in introducing the provision was that “the essence of the offence...[was] that the insult to religion or the outrage to religious feelings must be the sole, or primary, or at least the deliberate and conscious intention.”¹³ Moreover Kumar notes

“The Supreme Court in its judgement of 1952 stated that ‘the general effect which the *whole* composition would have on the mind of the public [is relevant]’. The public cannot be the general mass who may not have the remotest connection with the book [in question]. The public in this context has to consist of the thinking public capable of reading, reviewing and criticizing the book...”. Chief Justice Hidayatullah, speaking for the unanimous Court, observed ‘[our] standards must be so framed that we are not reduced to a land where the protection of *the least capable* and *the most depraved* amongst us must determine what the morally healthy cannot view or read. The standards that we set for our censors must make a

¹¹ F Nariman “Law in a Pluralist Society” (1990) p 6.

¹² “Ratanlal and Dhirajlal’s Law of Crimes: A Commentary on the Indian Penal Code, 1860” (1997) p 1151

¹³ “Ratanlal and Dhirajlal” op cit p 1152.

substantial allowance in favour of freedom.”¹⁴ However, where such a charge is brought it is no defence simply to show that the words complained of are in fact true¹⁵.

21. Under s 298 of the Code

“Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description or a term which may extend to one year, or with fine, or with both.”

The scope of this section is much wider than s 295-A. However Ratanlal and Dhirajlal note that “[a] mere likelihood that the religious feelings of other persons may be wounded would not suffice nor a mere intention to wound such feelings would suffice unless that intention was deliberate. Where the intention to wound was not conceived suddenly in the course of discussion, but premeditated, deliberate intention may be inferred”¹⁶.

22. Speculating on the ambit of these offences is clearly difficult and possibly contentious. Thus whilst Nariman has argued of “The Satanic Verses” that “had Rushdie been prosecuted in the country of his birth, his right to freedom of expression (though painful and hurtful to the religious feelings of others) would have been upheld in the absence of proof of his deliberate or malicious intent”¹⁷, some State governments have taken a different view and have banned the book (see further below). The fact that both Amnesty International¹⁸ and the Indian National Human Rights Commission have called for the laws to be more rigorously applied suggests that their application is at best spasmodic. Whether it would be politically possible to apply the laws on a regular basis is an open question.

23. Coupled with these provisions for prosecuting offenders is a provision whereby a State Government may “notify” a newspaper, book, or any document (which includes any painting, drawing or photograph or other visible representation), under s.99A-D of the Criminal Procedure Code on the grounds that it contains matter punishable under s.153-A or s 295-A. Following such notification any book or other document that is the subject of the notification is forfeit to the government. Kumar observes of the application of this procedure

“[the] advantage of decentralized authority is that restrictive action by a local authority in one area may not make any impact on other parts of the country. A book whose sale has been banned in one state can continue to circulate freely in other parts of the country. Since there is considerable laxity in enforcing such bans, the censored material can travel back to the areas where censorship is in force through mail and from hand-to-hand circulation. The ban or censorship of a particular item can be nullified in actual practice...Another factor that helps in nullifying the restriction is the general inefficiency from which enforcing authorities suffer in this country...Several hundred copies of censored books like *Lady Chatterley’s Lover* and *The Satanic Verses* may be accessed in public libraries, personal collections and bookshops.”¹⁹

However, he also notes that a number of books have been banned because of their alleged impact on religious feelings, including Arthur Koestler’s “*The Lotus and the Robot*” and Salman Rushdie’s “*The Satanic Verses*”.

¹⁴ G Kumar “Censorship in India” Hai-Anand Publications in association with Vikas Publishing House PVT Ltd (1990) p 33.

¹⁵ “Ratanlal and Dhirajlal” op cit p 1153.

¹⁶ “Ratanlal and Dhirajlal” op cit p 1166.

¹⁷ F Nariman “Freedom of Speech and Blasphemy: The laws in India and UK” (1989) 42 The Review 53 at p 53

¹⁸ Amnesty International Press Release “Hate Speeches on the Violence in Gujarat Must be Stopped” 16th October 2002

¹⁹ G Kumar “Censorship in India” (1990) p 168.