Sense and Sensitivity

Restoring free speech in the United Kingdom

By Preston J. Byrne

BRIEFING PAPER

EXECUTIVE SUMMARY

- Freedom of expression is fundamental to life in a free and democratic society. This includes the freedom to express ideas that others find loathsome and hateful. There should be no right to not be offended, no right to prevent others from expressing ideas that one finds uncomfortable or dislikes, in positive law.
- The UK's protection of freedom of expression, revolving around Article 10 of the European Convention, is woefully inadequate. Existing laws, as applied, have created categories of "speech crimes" for offensive but otherwise benign political speech.
- Britain already has numerous laws that infringe on freedom of expression, including the Public Order Act 1986, Communications Act 2003, Terrorism Act 2000 and 2006, the Malicious Communications Act 1988.
- There is mounting evidence that existing law is capable of being applied, and is actually applied, in an overbroad fashion which was not contemplated by its drafters. See e.g. the treatment of Darren Grimes in June of this year compared to the treatment of offensive speech in the landmark 1999 case of *Redmond-Bate v. DPP*. The poor drafting of existing law means that as social attitudes shift, broader categories of speech are criminalized as "offensive," "distressing" or "hateful."
- The United Kingdom has placed public discourse in the hands of the easily offended, who have the power to threaten fellow citizens with fines and imprisonment for expressing unpopular opinions or having uncomfortable conversations.
- There are also emerging threats to freedom of expression posed by the Law Commission and "Online Harms" proposals, as well as the Hate Crime (Public Order) (Scotland) Bill. Each proposes broad new categories of speech crime or speech regulation not known to law before today. These include new offences where the drafting of private correspondence containing offensive thoughts between consenting adults, even before the correspondence was sent, would be an act to which criminal liability attaches.
- To resolve the growing threats to freedom of expression, Parliament should immediately:
    - remove all references to "abusive" or "insulting" words and behaviour from Parts I and III of the Public Order Act 1986;
    - replace the Section 127 of the Communications Act 2003 with (a) a provision that limits the scope of the existing rule to "threatening" only and

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(b) a new rule that addresses meaningful stalking and cyberstalking threats which cause or intend to cause substantial emotional distress, modelled after 18 U.S. Code § 2261A;

- repeal the Malicious Communications Act 1988 and replace it with aforementioned stalking statute; and
- introduce a United Kingdom Free Speech Act.

- The UK Free Speech Act should be modelled on the First Amendment of the Constitution of the United States and relevant jurisprudence that protects all political speech from state interference unless it is part of longstanding categories of low value speech which are not protected anywhere in the world (such as criminal threatening, harassment, malicious defamation, perverting the course of justice, or perjury) or is direct incitement, i.e. a statement which is directed towards inciting or producing imminent lawless action and is likely to incite or produce such action.

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INTRODUCTION

Freedom of expression is fundamental to life in a free and democratic society.

It reflects our underlying moral right to think and express ourselves, even when it offends, disrespects or annoys others. It is what allow us to be individuals.

Freedom of expression also serves an important structural function in a democracy. The ability to express contrarian ideas allows us to explore controversial and important topics and strive for better understanding of the challenges we face and ascertain the underlying truth of the world. Censorship impedes this process.

The following paper addresses how existing law undermines freedom of expression in the United Kingdom and should be reformed.

The first section outlines how existing laws are susceptible to abuse as the confines of acceptable debate are narrowed in some circles; the second section contains a specific discussion of the Public Order Act 1986, Communications Act 2003, Section 127 and Malicious Communications Act 1988, Section 1, as well as the emerging threats posed by Law Commission proposals, Hate Crime (Public Order) (Scotland) Bill, and 'Online Harms'; and the final section proposes a UK Free Speech Act.

THE GROWTH OF CENSORIAL LAWS

Britain's existing speech laws becoming increasingly restrictive as social attitudes, among some, have shifted to consider more views to be "offensive," "distressing" or "hateful."

British speech code is designed to protect the heckler, not the speaker. It protects the offended, not those who would cause offence. It does this by creating subjective standards for speech regulation which are determined by the hearer, not the speaker or an objective third party observer, and as such are impossible to divine in advance. Speech which would be legal among friends, like-minded individuals, or simply people with a higher tolerance for ideas with which they disagree becomes unlawful in the United Kingdom upon first contact with a person who objects to its content. This is a deeply unsatisfactory state of affairs.

UK and European jurisprudence on free speech revolves around Article 10 of the European Convention, a woefully inadequate, faux-constitutional, and weakly implemented rule of law which has, in the form of Article 10(2), more often than not been used to restrict freedom of speech than expand it. The continued existence of this rule has allowed the boundaries of legal speech to shift with prevailing cultural currents instead of any objective, permanent principle.

Older precedents in English law tell us that "freedom of expression…is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inof-

fensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."[1]

The older precedents tell us that offensive speech must be protected as a "[demand] of that pluralism, tolerance, and broadmindedness without which there is no 'democratic society.'"[2] See, also, by way of example, Sedley LJ's opinion in *Redmond-Bate v. DPP*[3]:

> "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. **Freedom only to speak inoffensively is not worth having**." (Emphasis added.)

This view no longer prevails among the English judiciary or, accordingly, English law enforcement. This becomes a problem in an environment where social attitudes are shifting rapidly — one where offensive words, or even silence itself, is equated to "violence,"[4] in some cases justifying a violent response.

This change in approach by the judiciary creates a situation where those who would carry out that violence in response to speech are given a license to determine the boundaries of acceptable expression. This is not a new phenomenon: since shortly after *Redmond-Bate* was decided (and, notably, after the Human Rights Act entered into force), English magistrates have routinely and consistently ruled that ordinary political speech, including straightforward expressions of traditional Christian morality, is "insulting" and goes "beyond legitimate protest" due to the fact that such speech's expression to sensitive listeners was capable of "provoking violence and disorder and interfered with the rights of others" to not be offended.[5]

Dramatic action is required if the UK's rapidly-evolving statutory speech regime is to avoid being used as a sledgehammer to crush dissent. The scope of the necessary reforms are broad, even sweeping, and would require Parliament to do something that has never done before in eight hundred years of English legislative history: it must create an inviolable liberty that protects political expression of any type that falls short of direct incitement from state interference, and if it wishes for these rules to persist amid shifting political winds, these rules must be expressed to be immune from interference by Parliament itself.

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1 Handyside v. United Kingdom, App. No. 5493/72.

2 Id.

3 [1999] EWHC Admin 733

4 See e.g. this story from the Guardian which is relevant to several aspects of this issue. A group of flatmates in north London hung a "White Silence is Violence" banner out of their window, only to be ordered to remove said banner by the police on the grounds that it was "offensive to white people." It is our position that silence is not in fact violence and that people should enjoy the freedom both to be silent and to hang banners out their windows free from state interference, regardless of the issue on which they are silent or the content of the banners. Strong statutory protections for political expression, such as those we propose here, would promote this freedom. "Police order removal of 'white silence is violence' banner in London." The Guardian, 23 July 2020. https://www.theguardian.com/uk-news/2020/jul/23/police-order-removal-of-white-silence-is-violence-banner-in-london

5 Hammond v. DPP [2004] EWHC 69 (Admin).

The United Kingdom allows the easily offended and the fragile to threaten fellow citizens with fines and imprisonment for expressing unpopular opinions or having unpopular conversations:

- In 2008, a teenage demonstrator eponymously known as "Epic Nose Guy" received a summons from the City of London police for refusing to put away a sign that read "Scientology is a Dangerous Cult" while protesting in front of the UK headquarters of the Church of Scientology on Queen Victoria Street in Blackfriars.
- In 2013, an Oxford university graduate, Bethan Tichborne, was convicted of a public order offence for yelling at then-Prime Minister David Cameron, at a public event, that he had "blood on his hands" for cutting disability living allowance.
- In 2014, Eurosceptic EU Parliament candidate Paul Weston was arrested on suspicion of violating the Public Order Act for quoting Winston Churchill verbatim.
- In 2020, Darren Grimes, a conservative commentator, was investigated and threatened with an interview under caution by the Met for having conducted an interview with historian David Starkey in which Starkey — not Grimes — made highly offensive comments about slavery. After public outcry the investigation was dropped.

All of these individuals were subjected to mandatory interactions with law enforcement pursuant to the provisions of the Public Order Act 1986. This law has been the primary vehicle for the easily offended to suppress political speech in the public square since *Hammond v. DPP* which, in 2003, essentially overturned the High Court's much-lauded 1999 decision in *Redmond-Bate v. DPP* — albeit with much less fanfare.

The Public Order Act 1986 extensively criminalizes offensive speech. Its continued existence as-written is antithetical to even the most basic conception of freedom of expression. It must be substantially revised if freedom of expression is to survive in the United Kingdom.

Sections 5(1)(a) and (b) of the Act, which are frequently used to arrest individuals who are expressing political speech in public, criminalize the use of "abusive" words or behavior "within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby." "Abusive" given its plain and ordinary meaning is so broad, and this statute is so vague as a result, that virtually any offensive speech may be captured by it, given the presence of an easily offended listener who feels that, in listening, they have been the victim of "abuse." See e.g. the examples provided immediately above.

Although Section 5 used to also criminalize "insulting" words and behaviour, the word "insulting" was removed in 2013 following a public campaign by a number of English public figures including Stephen Fry and Rowan Atkinson.

Public pressure campaigns by much-loved comedians notwithstanding, the conduct proscribed by the term "abusive" has been held by English courts to be coextensive with the term "insulting"[6], and the word "insulting" remains intact in numerous speech crimes elsewhere in the Public Order Act 1986 (principally Sections 4A, 18, 19, 20, 21, and 22). The 2013 reforms — hailed as a "victory" by the "Reform Section 5" campaign at the time — should thus be viewed by contemporary free speech advocates as having been mostly cosmetic and of little practical effect. [7]

An individual who subjectively feels distressed by political speech has, in the view of magistrates hearing these cases, a right to not be offended in public even if the content which causes the offence would, otherwise, be completely legal if heard by an individual who was *not* offended. As a result, the easily offended can, and do, call the police in response to what in the past would have been considered controversial but nonetheless normal political speech.

A free speech right of any consequence necessarily encompasses the right to intentionally offend. In order to protect freedom of expression, the words "or abusive" should be removed from Section 5(1) the Public Order Act and the words "abusive" and "insulting" should be removed wherever found in Part I and III of the Public Order Act. We recommend amending this legislation such that only (a) threatening language or (b) direct incitement which is likely to result in imminent lawless action is banned. This would have the effect of establishing an objective standard which can be ascertained by a speaker in advance, and would remove the ability of the easily-offended to subjectively determine the lawfulness of non-threatening speech by taking offence to it.

COMMUNICATIONS ACT 2003, SECTION 127

Section 127 criminalizes the sending of a communication "that is grossly offensive or of an indecent, obscene, or menacing character." It also criminalizes sending false information with the intent that another be caused "annoyance, inconvenience, or needless anxiety."

This statute has been widely used to procure the arrests of people with whom offended people disagree online.[8] Over 400 people were arrested in London alone over the last 5 years under the guise of making communications of an "offensive nature," sending an "offensive message" and sending a message containing "false information".[9]

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6 See Abdul v. DPP (2011) at paragraph 29.

7 See, e.g., "Section 5 Victory in Sight," Guido Fawkes, 15 January 2013. https://order-order.com/2013/01/15/section-5-victory-in-sight/

8 See e.g. "Arrests for offensive Facebook and Twitter Posts Soar in London," The Independent, 04 June 2016 https://www.independent.co.uk/news/uk/arrests-offensive-facebook-and-twitter-posts-soar-london-a7064246.html

9 See e.g. https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/disclosure_2019/june_2019/information-rights-unit---people-arrestedcharged-under-section-127-communications-act-2003-from-april-2008-and-march-2019

It should not be the law of the land that the sending of a single offensive communication constitutes a criminal offense, particularly when this communication is made in a public forum such as Twitter or Facebook. Internet users have the ability to control their experiences with blocking and muting features. The government should not act as a content moderator or speech policeman ensuring that all which is spoken online is factually correct. Police resources are scarce enough without needing to use the coercive might of the state to referee offensive viewpoints in online fora.

A harassing course of conduct, on the other hand, is something which is rightly criminalized all over the world. Section 127 is over-broadly drafted and over-broadly applied; preserving freedom of expression requires Parliament to limit its scope. Section 127 should be expressed to address threatening communications only. For other forms of cyber-harassment we recommend the adoption of a statute similar to the U.S.' federal cyberstalking statute under 18 U.S. Code § 2261A, which criminalizes "a course of conduct that… places that person in reasonable fear of the death of or serious bodily injury to a person...; or… causes, attempts to cause, or would be reasonably expected to cause **substantial emotional distress**" in the victim (Emphasis added.) Such a reform would operate to carve out single communications such as a single Tweet or Facebook post not directed towards that person from the ambit of criminal law. It also would create an objective, rather than subjective standard which is ascertainable by the speaker in advance and create a substantially higher threshold than the current requirement that a communication cause mere "annoyance or anxiety" before criminal liability may be imposed. Current law, given its plain and ordinary meaning, potentially covers a schoolyard taunt sent via the Internet. The British people should learn to deal with and brush off these insults rather than be expected to report them to the local constabulary.

MALICIOUS COMMUNICATIONS ACT 1988, SECTION 1

The Malicious Communications Act criminalizes the conveyance of communications which are "indecent or grossly offensive; a threat; or information which is false or believed to be false" if the sender's "purpose, or one of his purposes, in sending it is that it should… cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated."

In an era of grievance politics, and the massively online nature of our societies, it is easy to understand how someone who is easily capable of becoming distressed will cross paths with individuals whom, for whatever reason, decide that those sensibilities need to be offended.

These interactions should not be punishable by our criminal law. Reiterating our point from immediately above, user tools such as "block" and "mute" functions mean that it is possible for any user of most interactive computer services to cut off permanently from their view any persons or content they find offensive. We ques-

tion the prudence of a statutory power of arrest that is engaged when the purpose of a public communication is to cause "distress or anxiety" but which does not constitute a course of conduct which includes threatening or harassment — *i.e.*, most internet trolling.

Threatening communications, of course, have no place in a free society. Much like the Public Order Act and the Communications Act, the plain language of the Malicious Communications Act is susceptible to misuse and overbroad application in a massively online society. The effect of leaving this law on the books as-written is and will continue to be a "chilling effect" on freedom of expression.

The Malicious Communications Act 1988 should be repealed in its entirety and replaced with a stalking/threatening statute similar to 18 U.S. Code § 2261A.

A NOTE ON THE LAW COMMISSION PROPOSALS, HATE CRIME (PUBLIC ORDER) (SCOTLAND) BILL, AND 'ONLINE HARMS'

There are a number of current proposals for new legal rules that would, if enacted, infringe on freedom of expression in the United Kingdom, even more so than existing rules.

The parts of these proposals that do not directly impact freedom of speech are unobjectionable. This would include, for example, the Law Commission's suggestion to retain bias enhancements to common law crimes such as common assault, actual bodily harm and malicious wounding.

We object to the criminalization of political speech, no matter how extreme, where that speech is not directed towards the incitement of imminent lawless action *and* is not likely to incite or produce such action. We repeat the concerns of the Free Speech Union, as set out in their document "Ten Reasons to Throw Out the Law Commission's Anti-Free Speech Proposals,"[10] which points out that the Law Commission's report suggested that law reform should be directed towards making publication of content like the "infamous" *Charlie Hebdo* or *Jyllands-Posten* cartoons — each of which gave rise to terrorist violence directed at innocent civilians — illegal on British soil.[11] Terrorism is the most desperate form of heckler's veto. Criminalizing expression that provokes terror in hopes that the terror will be appeased, as the Law Commission appears to suggest we should, is moral cowardice.

The Hate Crime (Public Order) (Scotland) Bill (the "Bill") presents free speech issues that largely mirror problems with the Public Order Act, and are worse in

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10 See https://freespeechunion.org/wp-content/uploads/2020/11/Ten-reasons-to-throw-out-the-Law-Commissions-anti-free-speech-proposals.pdf

11 See e.g. Paragraph 18.75 of the Law Commission's final report on hate crime laws, Consultation Paper 250, dated 23 September 2020: "However, if inflammatory material which does not amount to a display or recording is distributed – for instance, by the posting of inflammatory cartoons online – it may not be caught by the existing legislation... It does not reflect the fundamental harm involved[.]"

places. See e.g. Section 3 of the Bill which suffers from all of the shortcomings of Part III of the Public Order Act after which it is modelled. As with the Public Order Act, draft Section 3 *not only* criminalizes intentional conduct (which, while reprehensible, should not, in our view, be unlawful) but it also does not require intent to the extent that it is "likely" that listeners to the statement will have a particular reaction to it. This law's application to political speech broadens as social attitudes shift.

The Scottish Bill represents a slide back into rules of law which the people of the United Kingdom had, at one point, begun to reject with reforms to the Public Order Act made in 2013. Those reforms must be taken back up in earnest. As with our suggestions for reform of the Public Order Act 1986, the Bill's references to "insulting" material should be removed. Ideally the word "abusive" should be removed as well as the English precedents show that magistrates courts give the word an overbroad and imprecise meaning. The remaining element of the *actus reus* of the proposed new Scottish stirring up offence, "threatening," should be specifically defined by statute to avoid overbroad application by local magistrates situations where highly offensive but non-threatening speech meets a highly sensitive listener.

A proscription of "threatening" language does not offend free speech principles as there are broad categories of threats which (when uttered) constitute a criminal offence and have never constituted free speech in any Western country.

We vociferously object to the offence of "possessing inflammatory material" under Section 5 of the Bill, a provision which – if enacted – would likely criminalize common everyday communication such as the sharing of offensive Internet memes, or writing letters, even before the letters were sent,[12] even if the recipients of the letters wished to receive them and were not offended by them. The Bill's proposal to repeal the dwelling exception, not prosecuting individuals for speech spoken in their own homes — found in the Public Order Act 1986 — is similarly outrageous.

The Government's proposed "Online Harms" regime also raises substantial free speech concerns. The Online Harms proposals would create a bizarre "Duty of Care" — a tort law concept pertaining to negligence, twisted and warped to justify government oversight of "harmful" public expression — on any online company that allows users to interact with each other unsupervised. This "duty" would be enforced by a new regulator.[13] This "Duty of Care" would require the online plat-

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12 See e.g. Section 5(2)(ii) of the Hate Crime (Public Order) (Scotland) Bill, which criminalizes "[having] possession of threatening or abusive material with a view to communicating the material to another person, and… it is likely that, if the material were communicated, hatred would be stirred up against such a group." If enacted this would likely criminalize, for example, the sharing of offensive memes.

13 Per HM Government's Online Harms White Paper — Initial Consultation Response: "Rather than requiring the removal of specific pieces of legal content, regulation will focus on the wider systems and processes that platforms have in place to deal with online harms, while maintaining a proportionate and risk-based approach." To wit, the government does not have an interest in a state-initiated notice-and-takedown procedure, but rather it wants companies to know what content needs to be taken down and to action it on pain of being haled before the regulator. See https://www.gov.uk/government/consultations/online-harms-white-paper/public-feedback/online-harms-white-paper-initial-consultation-response

form to essentially baby-sit its users and impose a duty on interactive computer service providers to prevent users' feelings from being hurt. While this might be a standard appropriate for hiring, say, a pre-school teacher, it is not a standard which is appropriate to govern the behavior of consenting adults on a publishing platform which permits political discussion.

There are some categories of material covered by the Online Harms proposal (*e.g.* terrorist content and child sexual abuse material) which are *already* banned by law and would also be included within the scope of the Online Harms legislation. We do not object to that material continuing to be restricted.

However, and bizarrely, the Government has included 'legal but harmful' speech within scope of this inappropriately named "duty of care," even referencing speech that is merely offensive and, otherwise, entirely legal, even under the UK's current speech-unfriendly rules. This risks creating an expansive, and poorly-defined, set of speech, with no legal definition, that an independent government regulator could deem "harmful" and force online service providers to remove from the Internet.

This approach to the regulation of lawful speech ignores the fact that users, not the state, are in the best position to dictate what offensive political content they do or do not wish to see (by use of block and mute functions). It will also raise barriers to entry by increasing compliance costs on new social media companies based in the United Kingdom, who can ill-afford the additional compliance burden of their more established competitors.

A UNITED KINGDOM FREE SPEECH ACT

Parliament should, in addition to these reforms, explore providing express, blanket statutory protection from government interference — by which we mean discriminatory treatment by any state agency, government funded body or 'Quango' — for political speech that does not constitute direct incitement or is otherwise not expressly illegal under common law or statute (such as criminal threatening, harassment, defamation, or lying under oath).

The Free Exercise Clause of the First Amendment to the United States' Constitution should be a model for this statutory provision, although a Free Speech Act would require considerably greater detail to be enacted up-front. This is because the meaning of the First Amendment has evolved over time, through case law, such that the meaning of the 10 words that constitute the Free Exercise Clause is considerably more complex than their plain and ordinary meaning suggests.

The intention of the First Amendment, as described by twentieth century legal philosopher Zechariah Chafee, was intended to "wipe out the common law of sedition, and make further prosecutions for criticism of the government without any incitement to law-breaking, forever impossible in the United States of America." This principle has since been extended in the U.S. to cover criticism of fellow citizens, their beliefs, their deeds, and anything else of political consequence or public interest which may be rightly the subject of public critique. It "protect(s) the free-

dom to express 'the thought that we hate' "[14] because it recognizes that any lesser protection will lead to a situation such as the one in which the United Kingdom finds itself now, where shifting attitudes and subjective laws threaten to snuff out free inquiry for a generation.

There are a range of tests available in American law which may be useful to adapt to the British context; for example, the so-called "imminent lawless action" test, which delineates between unlawful incitement and lawful inflammatory speech. It criminalizes speech directed towards inciting or producing imminent lawless action *and* is likely to incite or produce such action, and does not disturb inflammatory speech which falls short of that objective test. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

We are cognizant that this is a complicated task and, accordingly, offer no suggestions for how such legislation should be worded. What we will say is that the sun is setting on the Enlightenment in the United Kingdom, and the only body with the power to stop it is Parliament. To arrest this process, particularly given the seriousness of recent threats to free speech emanating from subsidiary legislative assemblies of the United Kingdom which wield coercive power (e.g. the Scottish Parliament's speech bill), Parliament should seek to make the protection for political speech as permanent and inviolable as United Kingdom constitutional convention will permit.

CONCLUSION

Sedley LJ in *Redmond-Bate* explains the proper regime for policing political speech in public spaces:

> " 'Lawful conduct can, if persisted in, lead to conviction for wilful obstruction of a police officer.' This proposition has in my judgment no basis in law. A police officer has no right to call upon a citizen to desist from lawful conduct. It is only if otherwise lawful conduct gives rise to a reasonable apprehension that it will, by interfering with the rights or liberties of others, provoke violence which, though unlawful, would not be entirely unreasonable that a constable is empowered to take steps to prevent it."

We add to this the following proposition: **there should be no right to not be offended, no right to prevent others from expressing ideas that one finds uncomfortable or dislikes, in positive law.** Parliament, and Parliament alone, has the power to make this the rule in the United Kingdom. In the massively online and interactive world awaiting future generations, the only way free inquiry will survive is if the police have no role in the regulation of political speech.

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14 Matal v. Tam, 582 U.S. ___ (2017) quoting United States v. Schwimmer, 279 U.S. 644, 655 (Holmes, J., dissenting).

Due in large part to poorly drafted laws that allow bad actors to take advantage to censor their critics, freedom of expression has been substantially undermined in the United Kingdom. The law is in dire need of reform.

APPENDIX 1: ANSWERS TO HUMAN RIGHTS (JOINT COMMITTEE)'S FREEDOM OF EXPRESSION INQUIRY

The following section answers questions presented by the UK Parliament's Human Rights (Joint Committee) inquiry into Freedom of Expression.[15]

Does hate speech law need to be updated or clarified as shifting social attitudes lead some to consider commonly held views hateful?

Yes.

A range of laws are capable of being used to censor speech as social attitudes shift to consider more views hateful. What in the past has been considered ordinary policy debate with no bias component — for example, opposition to government spending — is now painted by opponents of these policies as being grounded in 'hate.'[16] This is transparently tactical rhetoric. Under current legal rules, the use of this rhetoric is capable of giving rise to a not unreasonable fear among the public that expressing support for policies such as reduced government spending may invite criminal sanction. Existing law thus has a chilling effect which is magnified by an increasingly polarized political environment and reduces discourse between opposing viewpoints. This problem should be addressed, as discussed above, by reforming these existing laws and introducing stronger protections for political speech under a UK Free Speech Act.

Is there a need to review the wording and application of Public Space Protection Order (PSPO) legislation?

We do not regard freedom from taking offence as being a legitimate "right or liberty" one will find in a free society. The right to not listen/block and walk away, which is a legitimate right, should not be confused with the current state of affairs, which is that the easily offended wield an immense censorial power: chiefly, the ability to call down armed police to intervene against, and thereby silence, minority viewpoints.

What obligations does an employee have to their employer when expressing views on social media, and to what extent can, and should, employers respond to what their employees say on these platforms?

The relationship between employer and employee is a private contractual arrangement which should be subject to the minimum degree of disturbance by the state. An exception to this would be in the case of government employees. We believe that government employees should be free to express themselves regarding political matters outside of the office and in unofficial capacities, to the extent that that

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15 See https://committees.parliament.uk/work/778/freedom-of-expression/

16 See e.g. "Research: Opposition to Federal Spending Is Driven by Racial Resentment." Krimmel and Rader, HBR, September 2017. https://hbr.org/2017/09/research-opposition-to-federal-spending-is-driven-by-racial-resentment

expression does not directly relate to the workplace, free from interference from their (government) employer.

We also believe the government should not regulate employers to such an extent that they feel compelled to dismiss employees who express controversial views out of the office. As a regime which protected political speech from state interference would leave sufficient options for individuals with controversial opinions to express themselves while minimizing the personal consequences (e.g. pseudonymity), we do not view "free speech" in the context of a contract between two private parties as a pressing legislative priority.

Is greater clarity required to ensure the law is understood and fair?

Yes.

As we mentioned above, British speech codes are primarily subjective in their application. Offensive speech is not unlawful until someone is offended. Speech should be capable of being judged by any third party observer reading the words on a page as being lawful or unlawful.

This is not currently the case due to the fact that speech protections in the United Kingdom are so weak that one offended person is enough to trigger a police investigation *even where the subject of the investigation did not utter the speech in question.* See, e.g., the Darren Grimes/David Starkey incident mentioned above.

How has the situation changed in universities in the two years since the Committee's report on the issue?

We offer no view save to say that anecdotal evidence appears to point towards (a) the growth of censorial attitudes at universities across the Western world and (b) the tendency of university administrators to yield to, rather than confront, the loudest proponents of pro-censorship views.

Strong statutory protection for expression of political ideas which can be enforced by students against state actors, including publicly funded universities and student unions, is an essential prerequisite to academic freedom.

Does everyone have equal protection of their right to freedom of expression?

No.

Broadly speaking, minority and extreme viewpoints which do not enjoy broad acceptance in British society do not benefit from equal protection of the laws:

- The Communications Act 2003 and the Malicious Communications Act are routinely used to suppress offensive Facebook posts and Tweets.
- The Public Order Act 1986 has been used for decades to suppress offensive opinions voiced in the open.

- The Law Commission and Scottish Parliament's reform proposals will enable greater suppression of controversial or offensive opinions by the state at the behest of the easily offended.
- The Terrorism Acts, similarly, are overbroad in their wording and application and have been used to investigate innocent persons — see *e.g.* the case of Rizwaan Sabir[17] and ss. 57-58 of the Terrorism Act 2006, or Section 12 of the Terrorism Act 2000. Although these statutes do not presently appear to be frequently misused to restrain benign political speech at quite the same level as public order and malicious communications laws are, while the terrorism statutes are problematic from a free speech standpoint, we do not offer further analysis of those provisions or suggestions for their amendment at this time.

Re-iterating the key takeaway from Sedley LJ's opinion in *Redmond-Bate* in 1999, "[f]reedom only to speak inoffensively is not worth having."

The people of the United Kingdom deserve freedom of speech, can be trusted with it, and it is the role of Parliament to protect and expand it. However, our conclusion, on a reading of the United Kingdom's speech codes, given their plain and ordinary meaning and as interpreted by case law, is that the people of the United Kingdom do not have it.

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17 "Student who was wrongfully arrested on suspicion of being a terrorist is awarded £20,000 by police." Daily Mail, 15 September 2011 https://www.dailymail.co.uk/news/article-2037708/Student-wrongfully-arrested-suspicion-terrorist-awarded-20-000-police.html