Memorandum to the Home Affairs Committee

Post-Legislative Scrutiny of the Racial and Religious Hatred Act 2006

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MEMORANDUM TO THE HOME AFFAIRS SELECT COMMITTEE POST LEGISLATIVE SCRUTINY – RACIAL AND RELIGIOUS HATRED ACT 2006

INTRODUCTION

This memorandum provides a preliminary assessment of the Racial and Religious Hatred Act 2006 (2006 Ch.1) and has been prepared by the Home Office for submission to the Home Affairs Committee. It is published as part of the process set out by the previous Government in the document *Post-Legislative Scrutiny – The Government's Approach* (Cm 7320). The current Government has accepted the need to continue with the practice of post-legislative scrutiny as it supports the coalition aim of improving Parliament's consideration of legislation.

SUMMARY OF OBJECTIVES OF THE RACIAL AND RELIGIOUS HATRED ACT 2006

2. During its passage through Parliament, the Home Office Minister at the time stated the rationale behind the Racial and Religious Hatred Bill, which was the Labour Government's third attempt to place this legislation onto the Statute book:

> *"The provision should be extended to both religious and racial hatred. ..... If we do not extend it to both, we provide one set of protection for Jews and Sikhs, who are currently covered by the race hate legislation, and another for other religious groups."*
>
> Home Office Minister Paul Goggins, Hansard – 11 July 2005

3. Over the years, case law has developed which states that certain religious groups should also be viewed as groups determined by their ethnic origin; Jews (Seide v Gillette Industries Ltd – 1980) and Sikhs (Mandla v Dowell Lee -1983). As these two groups are judged to be an ethnic group as well as a religious group they fall under the remit of the incitement to racial hatred offences created in the Public Order Act 1986 (Sections 18-23). However this protection under the law does not spread to other religious groups which are not judged as an ethnic group (e.g. Christians and Muslims). It was this perceived anomaly that the Government of the day set out to correct.

IMPLEMENTATION

4. The Racial and Religious Hatred Act 2006 (RRHA) received Royal Assent on the 16 February 2006 but was not implemented until the 1 October 2007.

5. There are a number of provisions under the Act that have not been implemented. These are sections:

- 29(B)(3) – *Use of words or behaviour or display of written material* - A constable may arrest without warrant anyone he reasonably suspects is committing an offence of using threatening words or behaviour or

displaying any threatening written material with the intention of stirring up religious hatred. This provision was not consistent with the new general arrest powers in the Police and Criminal Evidence Act (PACE) 1984 which provide that an arrest without warrant can be made where necessary for one of a number of specified purposes. The previous Government intended that these new general arrest powers should apply to the new offence and therefore section 29(B)(3) was not commenced.

- 29(H)(2) *Powers of search and entry* and 29(I)(2)(b) and (4) – *Power to order forfeiture – and lodging of an appeal*. These provisions relate to the application of search and entry and forfeiture in Scotland. This was unintended and therefore the sections were not commenced.

6. A Home Office circular 029/2007 was sent to all Chief Officers of Police on 5 September 2007 announcing that the Act would come into force on 1 October 2007 and setting out which provisions would be commenced.

SECONDARY LEGISLATION

7. There are no powers under the Act to make secondary legislation.

LEGAL ISSUES

8. The legislation has not been the subject of litigation. There have not been any reports from Parliamentary committees into this Act. The House of Commons Library provided a briefing for MPs on the Act which was last updated on 6 November 2009.

OTHER REVIEWS OR ASSESSMENTS OF THE ACT

9. The Home Office is not aware of any other reviews or assessments of the Act.

PRELIMINARY ASSESSMENT OF THE ACT

10. The RRHA 2006 amended the Public Order Act 1986 (POA) to create new offences of hatred against persons on religious grounds. The offences created were:

29B - *Use of words or behaviour or display of written material* – and includes the following subsections:

(1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred;

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a

person inside a dwelling and are not heard or seen except by other persons in that or another dwelling;

(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section;

(4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling;

(5) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme service.

29C - *Publishing or distributing written material* – and includes the following subsections:

(1) A person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred; and
(2) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

29D - *Public performance of play* – and includes the following subsections:

(1) If a public performance of a play is given which involves the use of threatening words or behaviour, any person who presents or directs the performance is guilty of an offence if he intends thereby to stir up religious hatred;

(2) This section does not apply to a performance given solely or primarily for one or more of the following purposes —

(a) rehearsal,
(b) making a recording of the performance, or
(c) enabling the performance to be included in a programme service;

but if it is proved that the performance was attended by persons other than those directly connected with the giving of the performance or the doing in relation to it of the things mentioned in paragraph (b) or (c), the performance shall, unless the contrary is shown, be taken not to have been given solely or primarily for the purpose mentioned above.

(3) For the purposes of this section —

(a) a person shall not be treated as presenting a performance of a play by reason only of his taking part in it as a performer;

(b) a person taking part as a performer in a performance directed by another shall be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that person's direction; and

(c) a person shall be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance;

and a person shall not be treated as aiding or abetting the commission of an offence under this section by reason only of his taking part in a performance as a performer.

(4) In this section "play" and "public performance" have the same meaning as in the Theatres Act 1968.

(5) The following provisions of the Theatres Act 1968 apply in relation to an offence under this section as they apply to an offence under:

section 2 of that Act —
section 9 (script as evidence of what was performed);
section 10 (power to make copies of script);
section 15 (powers of entry and inspection).

29E - *Distributing, showing or playing a recording* – and includes the following subsections:

(1) A person who distributes, or shows or plays, a recording of visual images or sounds which are threatening is guilty of an offence if he intends thereby to stir up religious hatred;

(2) In this Part "recording" means any record from which visual images or sounds may, by any means, be reproduced; and references to the distribution, showing or playing of a recording are to its distribution, showing or playing to the public or a section of the public;

(3) This section does not apply to the showing or playing of a recording solely for the purpose of enabling the recording to be included in a programme service.

29F - *Broadcasting or including programme in programme service* – and includes the following subsections:

(1) If a programme involving threatening visual images or sounds is included in a programme service, each of the persons mentioned in subsection (2) is guilty of an offence if he intends thereby to stir up

religious hatred;

(2) The persons are —

(a) the person providing the programme service;
(b) any person by whom the programme is produced or directed, and
(c) any person by whom offending words or behaviour are used.

29G - *Possession of inflammatory material* –

(1) A person who has in his possession written material which is threatening, or a recording of visual images or sounds which are threatening, with a view to —

(a) in the case of written material, its being displayed, published, distributed, or included in a programme service whether by himself or another; or
(b) in the case of a recording, its being distributed, shown, played, or included in a programme service, whether by himself or another, is guilty of an offence if he intends religious hatred to be stirred up thereby.

(2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, or inclusion in a programme service as he has, or it may be reasonably be inferred that he has, in view.

Other provisions included within the Act are:

29H - Powers of entry and search

(1) If in England and Wales a justice of the peace is satisfied by information on oath laid by a constable that there are reasonable grounds for suspecting that a person has possession of written material or a recording in contravention of section 29G, the justice may issue a warrant under his hand authorising any constable to enter and search the premises where it is suspected the material or recording is situated.

(2) If in Scotland a sheriff or justice of the peace is satisfied by evidence on oath that there are reasonable grounds for suspecting that a person has possession of written material or a recording in contravention of section 29G, the sheriff or justice may issue a warrant authorising any constable to enter and search the premises where it is suspected the material or recording is situated.

(3) A constable entering or searching premises in pursuance of a warrant issued under this section may use reasonable force if necessary.

(4) In this section “premises” means any place and, in particular, includes—

(a)any vehicle, vessel, aircraft or hovercraft;
(b)any offshore installation as defined in section 12 of the Mineral Workings (Offshore Installations) Act 1971; and
(c)any tent or movable structure.

29I - *Power to order forfeiture*

(1) A court by or before which a person is convicted of —

(a)an offence under section 29B relating to the display of written material; or
(b)an offence under section 29C, 29E or 29G, shall order to be forfeited any written material or recording produced to the court and shown to its satisfaction to be written material or a recording to which the offence relates.

(2) An order made under this section shall not take effect —

(a)in the case of an order made in proceedings in England and Wales, until the expiry of the ordinary time within which an appeal may be instituted or, where an appeal is duly instituted, until it is finally decided or abandoned;
(b)in the case of an order made in proceedings in Scotland, until the expiration of the time within which, by virtue of any statute, an appeal may be instituted or, where such an appeal is duly instituted, until the appeal is finally decided or abandoned.

(3) For the purposes of subsection (2)(a) —

(a)an application for a case stated or for leave to appeal shall be treated as the institution of an appeal; and
(b)where a decision on appeal is subject to a further appeal, the appeal is not finally determined until the expiry of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided or abandoned.

(4) For the purposes of subsection (2)(b) the lodging of an application for a stated case or note of appeal against sentence shall be treated as the institution of an appeal.

29J - Protection of freedom of expression

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

11. The penalties that apply to these offences are triable either way and range from a maximum sentence on indictment of 7 years/fine or summarily, 6 months/£5,000 fine.

12. The main objective of the legislation was to provide equal protection under the law for all religious groups. As stated above, before the RRHA was introduced, religious groups such as Jews and Sikhs were protected under incitement to racial hatred provisions in the POA 1986 whereas other religious groups were not.

13. One of the simplest ways to view whether this piece of legislation has been successful against the objective ascribed to it is by the number of convictions that have been secured. If it was judged that there was a need for the legislation in the first place then it would be expected that convictions would follow from the creation of the offences. If we were to judge the RRHA solely on this measure then it has not been a successful piece of legislation. There has been one successful conviction under the legislation, with a person convicted of an offence in relation to stirring up hatred against persons on religious grounds under Section 1 of the Act. Two other people have been arrested and charged with offences under the legislation, a prosecution was bought against the person in one case and they were acquitted of all charges at trial, and the charges were dropped against the person in the second case due to a technicality – however the investigation on this case remains ongoing.

14. There are a number of reasons why the legislation that made it on to the statute books has not met the objectives stated for it by the Government of the day. The legislation that received Royal Assent was substantially different to that which was originally introduced. The previous Government had sought to amend the provisions of the POA 1986 to include offences covering incitement to religious hatred, that were comparable to those relating to racial hatred. Ministers wanted the test for both offences to be 'threatening, insulting or abusive behaviour'. They also wanted the existing provisions amended to make *intending* to incite hatred an offence, as well as that of the offender knowing that it would be likely that religious hatred would be stirred up.

15. Opponents of the Bill in both Houses disagreed that religious groups should receive the same level of protection as racial groups – the argument being that a person's religion was a matter of personal choice and could therefore legitimately be subject to criticism. This led to the separation of the two offences of incitement to racial hatred (Part 3) and incitement to religious hatred (Part 3A). Amendments also removed the words 'insulting' and 'abusive' from the offences in Part 3A, to ensure that people who criticised religion should not be at risk of prosecution. To provide a further safeguard Parliament inserted into the legislation what has become known as the 'freedom of expression' clause (29J). This section states:

"Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system."

16. There is no comparable provision in the POA 1986, and that Act was amended by this legislation.

17. Another of the differences between the legislation which was originally proposed, and that which made it on to the statute books, was the need to prove the defendant had intended to stir up religious hatred. The offences in Sections 18 – 23 of the POA (incitement to racial hatred) state that an offence has been committed either when the defendant has intended to stir up racial hatred, or it must be proved that in all circumstances racial hatred was likely to be stirred up. However, in the provisions dealing with incitement to religious hatred, the 'likely to' section was taken out during the Bill's passage through Parliament so the offence would only be committed where the perpetrator intended to stir up religious hatred.

18. The Crown Prosecution Service (CPS) view is that it is very difficult to prove a specific intent where the action(s) or speech may be ambiguous, or an isolated incident. Without corroborative evidence of a suspect's mindset, such as ideological material found in searches, it is often not possible to prove the requisite intent. In relation to the offence of incitement to religious hatred, it is rare to find such corroborative material. In relation to racial incitement, whilst the specific intent does not need to be proved, many cases have relied on evidence demonstrating e.g. membership or support for white supremacist groups, or online networks which are explicit as to their intentions.

19. The Government of the day recognised during the passage of the Bill that the legislation, as amended by the House of Lords, would make it very difficult for prosecutors to secure convictions. The – then Home Office Minister Baroness Scotland told the House of Lords on the 8 November 2005:

"Limiting the offence only to threatening words and behaviour would make it far too difficult to get to the sort of material that is used to incite hatred and would severely curtail the ability of the Crown Prosecution Service to bring to justice those responsible."

20. This was demonstrated where defendants were convicted of publishing racially inflammatory material pursuant to section 19 of the POA 1986. Offences under this section can be brought when the written material that is published or distributed is threatening, abusive or insulting.

21. The defendants were convicted of inciting racial hatred against Jews and other minority ethnic groups by writing, publishing and distributing offensive and racist material. The investigation began when a complaint about a leaflet was reported to the police in 2004 after it was pushed through the door of a

synagogue. The Judge in passing sentence on the defendants said he had rarely seen or read material that was so abusive and insulting in its content towards racial groups within society in this country. In their press release after the case, the CPS stated that leaflets distributed:

> *"went much further than simply denying the Holocaust, which is not in itself an offence in this country. The whole subject was treated in a way that was insulting and abusive and as a subject for humour."*

22. In contrast, the offences created by the RRHA do not allow prosecutors to prosecute insulting or abusive words or behaviour. Instead, the behaviour has to be threatening. The threshold was deliberately set high to protect freedom of speech. While we should anticipate convictions under the legislation, this can also make it difficult to secure them.

23. In the case of the successful conviction to date under the RRHA, the defendant was charged with publishing material intending to stir up religious hatred as well as offences under other legislation. However, the other prosecution (where the defendant was acquitted of all charges) gives an idea of the difficulties. In this case the defendant was charged with seven counts under the legislation. The prosecution argued that the defendant had distributed thousands of leaflets in order to stir up religious hatred. After studying the evidence the CPS decided to prosecute the case as the leaflets were, in their opinion, threatening, and approached the Attorney General for permission to prosecute for distributing leaflets and letters with the intention of stirring up religious hatred.

24. During the trial, the defendant successfully argued that the leaflets that had been distributed were not threatening. This was argued by primarily setting out that being threatened is subjective; what one person thought was threatening might not instil the same emotion in another person. The defendant also claimed that they wanted to start a debate on the drugs trade and did not want to incite hatred against any group. The defendant represented themselves in the trial, arguing that they were an ordinary working person who had a close relation who was a drug user. The defendant also argued that they were merely saying something that they thought to be true and that they had not intended to stir up hatred or to cause any trouble. The jury agreed with the arguments and the defendant was cleared of all the charges.

25. Whilst it is true to say that there have only been two prosecutions with one successful conviction, under the RRHA, it is not necessarily the case that this measure is the only way to establish the true value of the legislation. It could be argued that the preventative aspect of the law means that the numbers of offences are limited because people moderate their behaviour to avoid prosecution. It is difficult to provide evidence of instances where this has been the case, but it is certainly conceivable that the existence of the legislation may have led potential offenders to moderate their language or behaviour.

26. More widely, data in this area is limited. The only statistics formally published on religious hate crime relate to the racially and religiously aggravated offences from the Crime and Disorder Act (as amended by the Anti-terrorism, Crime and Security Act 2001). The offences covered are;

- **Section 29 - Racially or religiously aggravated assaults**
  - an offence under section 20 of the Offences Against the Person Act 1861
  - an offence under section 47 of that Act (actual bodily harm);
  - common assault,

- **Section 30 - Racially or religiously aggravated criminal damage**
  - section 1(1) of the Criminal Damage Act 1971

- **Section 31 - Racially or religiously aggravated public order offences**
  - an offence under section 4 of the Public Order Act 1986 (fear or provocation of violence);
  - an offence under section 4A of that Act (intentional harassment, alarm or distress);

- **Section 32 - Racially or religiously aggravated harassment**
  - offence under section 2 of the Protection from Harassment Act 1997 (offence of harassment); or
  - an offence under section 4 of that Act (putting people in fear of violence),

27. Since a peak in 2006/07 (43,742 recorded offences), the number of offences has fallen to 39,647 in 2007/08 and 38,054 offences in 2008/09 and 36,928 for 2009/2010. The difficulty with looking at this data is that it is not possible to disaggregate the figures down to see what numbers are racially aggravated and which ones are religiously aggravated.

28. On the 30 November 2010, the Association of Chief Police Officers (ACPO) published figures of hate crimes across the five 'monitored' strands (disability, gender identity (transgender), race, religion or belief, and sexual orientation). Whilst there are a number of caveats associated with this data (e.g. figures are not comparable between different police forces), it provides an indicative picture of hate crime offences in England and Wales. The data showed that there were 43,426 racist hate crimes, and 2,083 religious hate crimes, recorded in 2009. Following a commitment in the coalition's Programme for Government, police forces started formal collection of this data in April 2011. From summer 2012, this will be published as official statistics, providing a clearer picture of local patterns and trends in hate crime, and helping the police to target their resources more effectively.

29. A further problem in data collection for religious hate crime in general is that the police record a hate crime when the victim or other person perceives the offence to have been motivated by hostility. However, there are many crimes triggered by religious icons or clothing where the offender uses racist

slurs. Anecodotal evidence suggests these are often recorded by the police as racist, rather than religious hate crimes.

30. Using the figures as a crude guide, we might assume that the majority of offences recorded under the relevant sections in the Crime and Disorder Act are likely to be racially aggravated offences, but that there could be a significant number which are religiously aggravated. We might also assume that, notwithstanding the minimal number of prosecutions in the last 5 years, there have been some offences committed of inciting religious hatred. In practice, instances which could conceivably meet the requirements of the Act may have been recorded as other crime types, for example as threats to kill or offences related to public order.

CONCLUSION

31. Scrutinising the Racial and Religious Hatred Act 2006 against the objectives ascribed to it by the previous administration is difficult as the final version of the Act is substantially different to the one that had been proposed. The changes made to the Act during its passage through the Houses of Parliament (including removing the words 'insulting' and 'abusive', 'likely to' and the inclusion of Section 29J) made it much less likely to meet the original objectives.

32. However, whilst it is clear that the Act provides a different level of protection for religious groups than that afforded to racial groups, it nonetheless offers a level of protection to the former that they did not have before. This may have had a preventative impact on potential offenders' behaviour, although the current limited data makes it impossible to discern subsequent trends in religious hate crime, or to ascribe cause to effects.

33. The Government will continue to monitor use of this legislation.

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