

GUIDANCE

# Equality and Human Rights Law during an Election Period

Guidance for local authorities,  
candidates and political parties

Updated April 2017

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# About this publication

## **What is the aim of this publication?**

This publication provides guidance about how the legal framework for equality and human rights law operates in England, Scotland and Wales during local and national elections. If issues arise, it should not be used as a substitute for legal advice.

## **Who is it for?**

This guide is for local authority senior managers and returning officers. It is also for political parties, including candidates and regional and constituency staff, and should be of interest to police and crime commissioners, the police and the general public.

## **What is inside?**

- Freedom of expression and free and fair elections
- Guidance for political parties and candidates
- Guidance for local authorities
- Restrictions on freedom of expression prescribed by law
- How to complain and the role of regulators

## **Why has the Commission produced it?**

The Equality and Human Rights Commission promotes and enforces the laws that protect our rights to fairness, dignity and respect.

# Introduction

This guide explains how equality and human rights law applies and operates during an election period.

It is important to state at the outset that there is a particularly high level of legal protection for freedom of expression during election periods. Any interference with this right must be exceptional and subject to the strict limitations set out in human rights law.

The law permits people to say things that offend others during election periods and at other times. It is entirely proper that there should be vigorous debates about controversial matters, and this is particularly important during elections periods.

However, it is also important to note that the right to freedom of expression does not justify incitement to racial or religious violence or hatred, or other unlawful conduct. The right to freedom of expression cannot be at the expense of the rights and freedoms of others.

# 1 | Freedom of expression and free and fair elections

Freedom of expression is a fundamental right protected under the Human Rights Act 1998 by Article 10 of the European Convention on Human Rights (the Convention). It is also protected under the common law.<sup>1</sup>

It applies to everyone, and means that people are free to hold opinions and receive and impart information and ideas without unjustifiable interference from the state.

The courts frequently describe freedom of expression as one of the ‘essential foundations of a democratic society’, protecting not only the expression of opinions which are uncontroversial but also those that ‘offend, shock or disturb’.<sup>2</sup>

All public bodies (including central and local government, criminal justice agencies, courts and statutory bodies) have positive obligations to protect the right to free expression and act compatibly with it.

The precise circumstances and context in which expression occurs will be relevant to whether it is protected by Article 10. Protection of political speech, debate, journalism and commentary on matters of public interest is considered extremely important, particularly during election periods. Accordingly, the threshold to justify interference with freedom of expression in this particular context is set at a high level.

But freedom of expression is not an absolute right; its exercise carries duties and responsibilities. It can be restricted under Article 10(2) where there is a law permitting the restriction, where the restriction is ‘necessary in a democratic society’<sup>3</sup> and where the restriction is for one of the following legitimate purposes:

- In the interests of national security or public safety (for instance to prohibit hoax bomb claims)
- For the prevention of disorder or crime (for instance to prohibit incitement to racial hatred)

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<sup>1</sup> The Commission has published guidance on the legal framework protecting freedom of expression: <http://www.equalityhumanrights.com/publication/freedom-expression-legal-framework>

<sup>2</sup> *Delfi As v Estonia* (2014) App No 64569/09.

<sup>3</sup> ECHR Art 10 para 2.

- For the protection of health or morals (for instance laws against certain types of pornography)
- For the protection of the reputation or rights of others (as reflected in our defamation law)
- For preventing the disclosure of information received in confidence (for instance, trade secrets)
- For maintaining the authority and impartiality of the judiciary.

In addition, expression which violates the rights of others is not protected by Article 10. This is because Article 17 of the Convention prohibits people relying on Convention rights in order to 'engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' of others.

In the context of elections, Article 10 complements Article 3 of the First Protocol to the Convention, which guarantees the right to free elections:

'[States] undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

In the case of *Bowman v UK* (1998)<sup>4</sup> the European Court of Human Rights stated:

'Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system... The two rights are interrelated and operate to reinforce each other... For this reason it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.'<sup>5</sup>

This is because, by protecting people's right to exchange information, debate ideas and express opinions, freedom of expression enables members of the public to decide which policies to support and how they wish to exercise their vote.

*Continued...*

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<sup>4</sup> 26 EHRR 1.

<sup>5</sup> *Ibid.*, paras 42-3.

Electoral rules that are devised to support free and fair elections can lawfully limit free expression rights during an election period. For example, radio and television broadcasters in the UK are under a legal duty to be politically impartial<sup>6</sup> and there are also legal restrictions in place covering political advertising on radio and television.<sup>7</sup>

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<sup>6</sup> See section 320 of the Communications Act 2003.

<sup>7</sup> See sections 321 and 333 of the Communications Act 2003 and the judgment of the European Court of Human Rights in *Animal Defenders International v UK* (2013 ECHR 362 (GC)) and the Ofcom broadcasting code.

## 2 | Guidance for political parties and candidates

This section explains how equality law applies to political parties and candidates and when their right to freedom of expression may be limited. It also touches on the legal protections that candidates have if they are targeted because of a characteristic that is protected under equality law.

### Equality law, political parties, candidates and councillors

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The Equality Act 2010 applies to certain activities of registered political parties and their employees and agents, but not all of them. Campaigning in an election period is not covered by its terms. Neither political parties nor candidates are subject to section 149 of the Equality Act 2010 (the public sector equality duty (PSED)). However, the Equality Act 2010 does apply to how political parties select candidates for elections. It may also apply to the conduct of councillors and MPs if they are deemed to be exercising a public function or providing a service to the public.

Although political parties enjoy great latitude in the way they exercise their right to freedom of speech, the All Party Parliamentary inquiry into electoral conduct recommended that they have an important voluntary role to play in rebutting extremist myths.<sup>8</sup>

Both candidates and political parties are subject to the criminal law in respect of incitement to racial or religious violence or hatred, and other unlawful conduct.

### Members of political parties and candidates

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The Equality Act 2010 applies to certain activities of registered political parties and their employees and agents. A registered political party is a membership association under the Act.<sup>9</sup> Instructing, causing or inducing another person to commit certain

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<sup>8</sup> The All Party Parliamentary [inquiry into electoral conduct](#), Oct 2013 para 156.

<sup>9</sup> As defined in section 107 (2) Equality Act 2010 and specific provisions in this Act are directed to registered political



unlawful acts or aiding certain contraventions of the Equality Act 2010 is also unlawful.<sup>10</sup>

Part 7 of the Equality Act 2010 prohibits discrimination, harassment and victimisation against people seeking to become members or who are members or associates of a membership association.<sup>11</sup> Part 7 covers the protected characteristics of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation. Harassment related to religion or belief and sexual orientation is not covered.

**Example** — The constitution of a registered political party restricts membership to English nationals only. This is likely to be unlawful direct discrimination because of race.

Part 7 also prohibits discrimination in the selection process for candidates for local and general elections.<sup>12</sup>

**Example** — A shortlisted candidate informs his constituency Chair that he intends to spend the rest of his life living as a woman. As a result of this, he is removed from the shortlist. This is likely to be unlawful direct discrimination because of gender reassignment.

Recognising the under-representation of women, political parties are permitted to have all-women shortlists.<sup>13</sup> Provided there is evidence of under-representation and the action is proportionate, they may take positive action in relation to candidates who have other protected characteristics. They may also reserve places on shortlists for people who have a particular protected characteristic, provided that political parties do not exclude others who do not share that characteristic and there is evidence of under-representation.<sup>14</sup>

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parties (sections 104 and 107(7)).

<sup>10</sup> See sections 111 and 112 of the Equality Act 2010.

<sup>11</sup> See section 101 of the Equality Act 2010 for further details.

<sup>12</sup> Ibid.

<sup>13</sup> Section 104(7) Equality Act 2010 and Sex Discrimination (Election Candidates) Act 2002.

<sup>14</sup> S.104 Equality Act 2010.

## Services and employment

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Discrimination, harassment and victimisation are also prohibited when a political party provides goods, facilities or services to the public or a section of the public.<sup>15</sup> MPs' and councillors' advice surgeries are likely either to constitute the provision of a service or exercising a public function.

Like any other employer, a political party must not discriminate against or harass or victimise its staff or job applicants.<sup>16</sup>

For detailed guidance on the Equality Act 2010 and Membership Associations refer to the [EHRC Statutory Code of Practice on Services, Public Functions and Associations](#).

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<sup>15</sup> Part 3 of the Equality Act 2010.

<sup>16</sup> Part 5 of the Equality Act 2010.

## 3 | Guidance for local authorities, electoral registration and returning officers

Local authorities and returning officers have legal obligations under equality and human rights law. As public bodies they must act consistently with the right to free expression, exercise their public functions and deliver services in accordance with equality laws and discharge other statutory responsibilities governing the use of publicly-funded premises by election candidates and the issue of publicity material. Electoral registration and returning officers exercise public functions for the purposes of equality and human rights law and they have specific legal duties under election laws.

### Equality law duties

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Equality law prohibits local authorities from doing anything that constitutes unlawful discrimination, harassment or victimisation against individuals when exercising public functions, providing services to the public or acting as an employer.<sup>17</sup> It also requires local authorities to comply with the public sector equality duty (PSED).<sup>18</sup> When exercising public functions they must have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act 2010
- advance equality of opportunity between people who share a protected characteristic and those who do not
- foster good relations between people who share a protected characteristic and those who do not.

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<sup>17</sup> See Parts 3 and 5 of the Equality Act 2010.

<sup>18</sup> Section 149 of the Equality Act 2010. The Equality and Human Rights Commission has published [technical guidance](#) on the PSED in England, Scotland and Wales.

Fostering good relations in this context is defined as the ‘need to... tackle prejudice and... promote understanding’.

## Equality and election law duties concerning disabled people

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There are specific legal duties under equality law on individuals and organisations involved in administering elections to make reasonable adjustments to enable disabled people to exercise their vote. This includes taking steps to ensure that information, for example on how to vote, is available in formats that are accessible to disabled people such as those with visual impairments and people with learning difficulties. Reasonable steps must be taken to ensure premises where voting takes place are accessible to disabled people. Processes and facilities to exercise voting rights by proxy or by post must also be accessible for disabled people in so far as this is reasonable and consistent with other legislative requirements. In addition, under the PSED those carrying out public functions must have due regard to the need to advance equality of opportunity for disabled people.

Election laws<sup>19</sup> also specify measures for visually impaired voters. All polling stations are required to display a large print copy of the ballot paper, which voters are permitted to take into the voting booth. A companion or member of polling station staff is permitted to read out the list of candidate names. Visually impaired voters can be assisted to the polling booth and ballot box. Each polling station is required to provide a tactile voting device to help visually impaired voters cast their votes. However, the requirement for ballots to be secret means that no one can enter the voting booth with an elector, including those who seek to assist voters who have visual impairments or learning difficulties.

Further information and advice on these matters is available from the [Electoral Commission](#).

## Use of local authority premises for public meetings

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Under sections 95 and 96 of the Representation of the People Act 1983 (RPA) all lawful candidates in local and general elections have a right to use rooms in schools<sup>20</sup> or publicly-funded premises for public meetings during an election period.

<sup>19</sup> See section 18B (4) (b) of the RPA and regulation 12 of The Representation of the People (England and Wales) Regulations 2001 (SI 2001/341) and the Representation of the People (Scotland) Regulations 2001 (No 497)

<sup>20</sup> ‘Schools’ means community, foundation and voluntary schools in England and Wales, and schools that are not

This is mandatory, and even if local authorities have concerns about what candidates may say during such meetings, these concerns cannot permit local authorities to decide to override this statutory duty on public bodies to provide a room free of charge. This means that a local authority or school governing body cannot refuse a lawful candidate permission to use a school room or other publicly-funded premises, even if the candidate conducts his or her campaign in a manner which is harmful to equality of opportunity or good relations.

However, rooms for public meetings are subject to the conditions listed below:

- the meeting must be open to all members of the public
- the purpose of the meeting must be to advance the candidate's prospects of victory at the election
- the room must be 'suitable' i.e. it must be adequate for the requirements of the meeting
- the room must be used at reasonable times, not causing any disruption to the activities it is normally used for, and the candidate must give reasonable notice of wishing to use it
- candidates must pay for the costs of heating, lighting, and cleaning the room, preparation for the meeting, and for restoring it to its usual condition after the meeting
- candidates must pay for any damage done to the premises.

It is the candidate who has the right to use rooms, not the political party. If there is no candidate, or if the candidature is not lawful, the council or school is under no duty to provide a room.

Outside an election period, the statutory duty to provide rooms does not apply, so local authorities have greater discretion whether to hire out rooms. Different local authorities have different policies: some hire premises to political parties for meetings, others do not. However, a blanket ban on the use of premises by a particular party or candidate is likely to be unlawful. Local authorities should consider each application on its merits, and act according to their responsibilities under equality law, public law, criminal law and human rights law.

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independent in Scotland.

## Public order

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Individuals who attend election meetings have legal responsibilities under section 97 of the RPA not to act in a disorderly manner (or incite others to do so) to prevent the business for which the meeting was called. Such conduct amounts to a criminal offence.

If a meeting room is in an area where there have been community tensions and the returning officer has reasonable grounds for believing that the meeting could cause disruption, they should consult in England and Wales the Chief Constable or other senior officer in the local police force and in Scotland their local police office. Similarly, if members of the public or community groups fear for their safety should the meeting take place, they should also report their concerns to the police.

The police have duties to protect public safety, prevent criminal conduct and exercise their powers consistently with the right to peaceful assembly and lawful protest<sup>21</sup> without undermining the democratic political process. Preventing legitimate political meetings is a last resort in uncommon circumstances, for example where there is compelling evidence that the meeting is intended to intimidate members of the community or incite violence. The common response to compelling threats of disorder is ensuring organisers of meetings and protests take all reasonable steps to prevent disorder and, where resources allow and it is necessary, policing the meeting.

## Correcting false, erroneous and misleading information during election periods

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Local authorities cannot issue publicity (or fund others to do so) which appears to be designed to affect public support for a political party.<sup>22</sup>

When local authorities become concerned that public statements during an election period are spreading misinformation, they have discretion to consider issuing a corrective statement, subject to strict conditions.

In the past, a few election campaigns have used false, erroneous or misleading information relating to equality and diversity issues to influence the public vote.

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<sup>21</sup> European Convention of Human Rights, Article 11.

<sup>22</sup> Section 2 of the Local Government Act 1986 – prohibition on political publicity.

These include:

- inflated figures for the number of migrant workers and for the costs to public and local services
- accusations that people from ethnic minorities, such as Gypsies and Travellers, migrant workers or Black members of a local community, commit more crimes
- statements that disability fraud accounts for 70 per cent of all benefits fraud, (thereby associating disabled people with fraudulent activities).

Subject to the law on publicity during election periods, local authorities may correct misinformation including where it relates to equality and diversity issues. When considering their power to do so, local authorities in England should have regard to the statutory [Code of Recommended Practice on Local Council Publicity](#)<sup>23</sup> 2011 (the Code on Publicity).

Paragraph 16 gives local authorities discretion to publish material which corrects false, erroneous or misleading information, provided the correction is factual and objective (politically impartial) and even-handed (i.e. does not seek to influence how people vote):

‘Any publicity describing the council’s policies and aims should be as objective as possible, concentrating on the facts or explanation or both. It is acceptable for local council publicity to correct erroneous material which has been published by other parties, despite the fact that the material being corrected may have been published with the intention of influencing the public’s opinions about the policies of the authority. Such publicity should seek to explain the facts in an objective manner.’

Paragraph 16 of the Code on Publicity does not touch on whether corrective information may be published during an election period, but in 2013 a Ministerial Statement clarified that local authorities may correct false information during such times:

‘During an election period, for example, local councils may publish factual material. A local council should take care when issuing publicity and should not be issuing publicity that seeks to influence voters...

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<sup>23</sup> Issued under section 4 of the Local Government Act 1986.

[I]f there is disinformation in circulation promoting harassment, a local council may take action to correct it at election time or indeed any other time...<sup>24</sup>

In exercising its discretion, a local authority must comply with the PSED and ‘place considerations of equality, where they arise, at the centre of formulation of policy.’<sup>25</sup> However, context is very important and the PSED itself does not require any specific outcomes. In having due regard to the aims of the PSED, a local authority can decide it should act to correct false, erroneous or misleading information in order to encourage informed and open debate, providing this is consistent with its duties regarding political impartiality on controversial issues during an election period. Alternatively, it can choose to leave this to others it decides are better placed to act during an election period. Much depends in practice on the purpose, style and content of the publicity, its timing and the broader circumstances.

## Scotland and Wales

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Scottish and Welsh councils must have regard to the 1988 and the revised 2013 Codes of Recommended Practice on Local Authority Practice on Publicity respectively. Both Codes require publicity which comments on the policies of the local authority or national governments or the UK government to be objective, balanced, informative and accurate. The Codes also require particular care to be taken during an election period to avoid influencing public opinion or promoting the public image of a particular candidate, or group of candidates. In addition, publicity must not be issued which deals with controversial issues or which reports views or policies in a way that identifies them with individual members or groups of members.

The revised 2013 Code for Welsh councils states that during an election period, ‘it is acceptable for the authority to respond in appropriate circumstances to events and legitimate service enquiries provided that their answers are factual and not favourable to a political party.’

The 1988 Code for Scottish councils contains no parallel provision.

<sup>24</sup> Baroness Hanham, HL Deb 15 July 2013 col. 602 [Lords Chambers].

<sup>25</sup> PSED Technical Guidance for England, Scotland and Wales and *Bracking v Secretary of State for Work and Pensions* (2013 EWCA Civ 1345).



## Publishing information about equality and diversity

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Local authorities may also use their publicity powers to influence public attitudes on equality and diversity issues.

In England, the Code on Publicity contains specific guidance for local authorities on equality:

**Paragraph 31** – Publicity by local authorities may seek to influence (in accordance with the relevant law and in a way which they consider positive) the attitude of local people or public behaviour in relation to matters of health, safety, crime prevention, race relations, equality, and diversity and community issues.

**Paragraph 32** – Local authorities should consider how any publicity they issue can contribute to the promotion of any duties applicable to them in relation to the elimination of discrimination, the advancement of equality and the fostering of good relations.

In Wales and Scotland, the Codes allow publicity campaigns as an appropriate means of influencing public behaviour or attitudes on matters such as race relations in Scotland and equal opportunities in Wales.

The power to issue publicity to influence public attitudes on equality and diversity does not mean that there is a legal duty to do so.

## 4 | Restrictions on freedom of expression prescribed by law

As explained previously, some provisions in domestic law restrict freedom of expression. We outline a range of relevant criminal law provisions in more detail below. It should be noted that high thresholds are set to prosecute and convict individuals for conduct which restricts freedom of expression. All public bodies in the criminal justice system (police, prosecutors and the courts) are legally obliged to act consistently with an individual's right to free expression, and sometimes this right has been successful as a defence to a criminal charge.

### Incitement to hatred

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Political parties and candidates are given significant leeway in how they campaign, but their right to freedom of expression may be restricted when their electoral conduct incites racial or religious hatred or hatred because of sexual orientation.

In England and Wales, speech or behaviour which stirs up racial or religious hatred or hatred on the grounds of sexual orientation is a criminal offence under the [Public Order Act 1986](#).<sup>26</sup> The offence of stirring up racial hatred differs from the offences of stirring up hatred based on sexual orientation or religion.<sup>27</sup>

**Inciting racial hatred** occurs when a person uses words or behaviour or displays written material which is threatening or abusive with the intention of stirring up racial hatred or where it is likely that racial hatred will be stirred up. This can include such things as making a racist speech, distributing racist leaflets or displaying a racist poster.

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<sup>26</sup> Inciting racial hatred offences are contained in sections 18 to 23 of the Public Order Act 1986 which applies to England, Scotland and Wales, and racial hatred is defined in section 17 of the same Act.

<sup>27</sup> Inciting hatred on religious and sexual orientation grounds are in sections 29B to 29F of the Public Order Act 1986 and these particular offences only apply in England and Wales.

For example, there have been past convictions for handing out racist stickers to pupils on a bus;<sup>28</sup> distributing leaflets which said that Jewish people must die,<sup>29</sup> and distributing leaflets to local residents which said that Muslims had been attacking White people in the area.<sup>30</sup>

**Inciting religious hatred and hatred because of sexual orientation** occurs when a person uses words or behaviour or displays written material which is threatening with the intention of stirring up hatred. There is a specific statutory defence which protects free expression; this provides that it is not an offence to criticise, insult or ridicule religious beliefs or criticise sexual conduct or practices or urge restraint.

In order to ensure that simply giving a view about marriage of same-sex couples is not an offence, there is a specific provision that ‘any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred’.

In Scotland, only the parts of the Public Order Act prohibiting racial hatred are in force. Scotland has its own legislation for racial harassment and other forms of hate crime in respect of religion, sexual orientation, transgender and disability.<sup>31</sup>

In Scotland, the Lord Advocate has published “[Prosecution Guidance in Relation to Same Sex Marriage](#)” in relation to public order offences. When expressing a view on same sex marriage, where comments or behaviours do not incite hatred and are not intended to cause public disorder they will not be subject to criminal prosecution.

Should members of the public be concerned about the activities of a political party and wish to pursue criminal proceedings, a prosecution for incitement offences can only be brought with the permission of the Attorney General (in England and Wales). This provision does not apply to Scotland.

The Crown Prosecution Service, the Attorney General and trial judge must act compatibly with Article 10 of the Convention<sup>32</sup> and may take into account:

- the accuracy, tone, content, apparent cogency, persuasiveness and content of the words, behaviour or material under scrutiny

*Continued...*

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<sup>28</sup> *R v Anthony White* (BBC News, 2003).

Mr White was convicted after handing out stickers to pupils on a bus which focused on an alleged attack by a group of Asians on a white man during the racial troubles in Oldham. He was jailed for 6 months.

<sup>29</sup> *R v Ifkhar Ali* (BBC News, 2003) Mr Ali was convicted of distributing anti-Semitic leaflets.

<sup>30</sup> *R v Wilson* (BBC News, 2002)

<sup>31</sup> See <http://www.scotland.gov.uk/Topics/archive/law-order/8978>

<sup>32</sup> Human Rights Act 1998 section 6 duty on public authorities to act compatibly with Convention rights.

- the social and political context in which the communication is made, including the impact on good relations
- the likely recipients of the communication, including their number, susceptibility and predisposition to be stirred up by the communication
- the method of communication is also likely to be a relevant consideration.

In Scotland, details of how the Crown Office and Procurator Fiscals Office ensure compatibility with the European Convention on Human Rights and of the public interest considerations that the prosecutor must take into account in reaching a decision to prosecute are set out in the Prosecution Code<sup>33</sup>.

**Example** — In a Scottish case, a man was convicted of incitement to racial hatred after posting through doors leaflets which claimed that Muslims had attacked White people in the area. In her verdict, the Sheriff stated:

‘It was clear from the evidence that the information contained in the leaflet was substantially inaccurate. The evidence was that substantial efforts had been made in Pollockshields by all sectors of the community to promote good race relations. This was the evidence of local people who had lived in Pollockshields for many years; local community councils, the West of Scotland Council for Racial Equality and the Strathclyde Police.

‘That being so, the contents of the leaflet were insulting and abusive towards the community in Pollockshields where a high percentage of the community were Black Muslims of Pakistani origin. The selective distribution in Pollockshields of inaccurate and threatening material containing anti-Muslim sentiment was clearly aimed at provoking ill-feeling and hostility towards the Pakistani community there.’

Electoral conduct which incites hatred against persons with other protected characteristics, such as gender or disability, is not a criminal offence; however such conduct could constitute other offences, such as harassment.

**Example** — A candidate regularly distributes leaflets and writes blogs about a rival female candidate. The leaflets and blogs constantly refer to the female candidate’s sexual partners and include photographs of her in revealing clothes.

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<sup>33</sup> Prosecution Code [www.crownoffice.gov.uk](http://www.crownoffice.gov.uk)

If the leaflets and blogs cause distress or alarm to the female candidate then she might complain to the police of harassment under the Protection from Harassment Act 1997.

## Harassment

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The Public Order Act 1986 makes intentional harassment ([section 4A](#)) and causing harassment, alarm or distress ([section 5](#))<sup>34</sup> criminal offences.

Intentional harassment can occur when a person uses threatening, abusive or insulting words or behaviour, or disorderly behaviour with the intent and effect of causing a person harassment, alarm or distress.

Intentional harassment also includes the display of any writing, sign or other visible representation which is threatening, abusive or insulting with intent and effect of causing a person harassment, alarm or distress.

Causing harassment, alarm or distress occurs when a person uses threatening or abusive words or behaviour or disorderly behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress.

[The Protection from Harassment Act 1997](#) makes harassment both a criminal offence and a civil matter. Harassment occurs where there is a course of conduct (i.e. more than one incident), which amounts to harassment, and which the defendant knows, or ought to know, amounts to harassment of another person. The harassing conduct must cause distress or alarm.

In Scotland, the test for harassment (except in domestic abuse cases) is a course of conduct which amounts to harassment of another and either a) is intended to amount to harassment of that person or b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment. The criminal offence is only committed if there is a breach of a non-harassment order.

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<sup>34</sup> Note that the 'insulting' limb of this specific offence was removed by section 57 of the Crime and Courts Act 2013 (taking effect from 1 February 2014) in part because of concerns as to how it had been used to restrict legitimate freedom of expression.

## Racially or religiously aggravated harassment

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The Crime and Disorder Act 1998 creates an offence of racially or religiously aggravated harassment in England and Wales. In Scotland only racially aggravated harassment is a crime.

Racially or religiously aggravated harassment occurs when a person commits an offence of harassment under the Protection from Harassment Act 1997 or the Public Order Act 1986 and, at the time of committing the offence, the offender shows hostility towards the victim based on the victim's actual or perceived membership of (or association with) a racial or religious group; or if the offence is motivated in whole or part, by hostility towards members of a racial or religious group based on their membership of that group.

In Scotland, racially aggravated harassment occurs when a person pursues a racially aggravated course of conduct which amounts to harassment, or acts in a manner which is racially aggravated, and which causes, or is intended to cause, alarm or distress to a person.

## Other racially or religiously aggravated criminal offences

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[The Crime and Disorder Act 1998](#) creates separate offences for crimes that are aggravated by the victim's race in Scotland or race and religion in England and Wales, such as violence or criminal damage. (These are in addition to racially or religiously aggravated offences of harassment.)

An aggravated offence occurs if, at the time of committing an offence or immediately before or after doing so, the offender shows hostility towards the victim's race or religion or perceived race or religion; or where the offence is motivated by hostility towards members of a racial or religious group.

Racially or religiously aggravated offences may be committed if, for example, damage or offensive graffiti is caused to places of worship, homes or community buildings, rubbish is selectively dumped (racially or religiously aggravated criminal damage) or individuals are subjected to racist attack (racially or religiously aggravated assault). Offences which are racially or religiously aggravated will attract an additional penalty to the offence sentence.

## Offences aggravated by disability, race, religion or belief or sexual orientation or transgender status

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The criminal courts, in England and Wales, have the power to increase sentences for offences committed by an offender who shows hostility during or after the offence towards the victim's actual or perceived race, religion or belief, sexual orientation, transgender status or disability.

In Scotland, the courts are required to take into account aggravating factors when sentencing for offences where, immediately before or after they were committed, the offender shows or is motivated by malice or ill-will towards the victim's actual or perceived (or association with) membership of a religious or social or cultural group with a perceived religious affiliation.<sup>35</sup>

In Scotland statutory aggravations can also be applied to any offence motivated by prejudice towards lesbian, gay, bisexual, transgender or disabled people. Again, the requirement is not for an automatic increase in the sentence, but for the court to take aggravating factors into account when passing sentence.<sup>36</sup>

## Making false statements about a person

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Section 106 of the RPA makes it a criminal offence to make or publish a false statement of fact about the personal character or conduct of an election candidate for the purpose of affecting the return of any candidate at the election. A false statement of fact about political matters is not prohibited.

### Example

In an area where a planning application for a secure mental health unit has been fiercely resisted by residents, a campaign leaflet falsely states that a rival candidate has a history of mental illness. This may be an offence under the RPA. By contrast, a leaflet which falsely states that the rival candidate voted in Parliament for an increase in funding for mental health services is likely to be a false statement of fact on a political matter.

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<sup>35</sup> Criminal Justice (Scotland) Act 2003.

<sup>36</sup> Offences (Aggravation by Prejudice) (Scotland) Act 2009.

In 2007 a councillor was convicted under section 106 of the RPA of having falsely accused a rival candidate of being a 'paedophile' in a local authority election.

In 2010, Phil Woolas MP was found by an electoral court to have breached section 106 of the RPA following a complaint by an unsuccessful candidate that he had been portrayed by him as courting votes from militant Muslims. Mr Woolas was required to vacate his seat, resulting in a by-election, and was barred from standing for election for three years.

## Offences concerning online communications

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The Malicious Communications Act 1988 makes it an offence in England or Wales to send an electronic communication to another person which conveys:

- an indecent or grossly offensive message, a threat or information which is false and known or believed to be false by the sender, or
- which is, in whole or part, of an indecent or grossly offensive nature with the intention to cause distress or anxiety to the recipient (or any other person).

Section 127 of the Communications Act 2003 makes it an offence in England, Wales and Scotland to improperly use a public electronic communications network. This occurs when a person:

- sends an electronic message that is grossly offensive, indecent, obscene or of a menacing character
- sends a message known to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another
- persistently makes use of a public electronic communications network for the purpose of causing annoyance, inconvenience or needless anxiety to another.

It is also an offence under this Act to make obscene, offensive or annoying telephone calls.

In Scotland, the offence is committed in two situations:

1. when a person intentionally or recklessly communicates an actual or implied threat to carry out a seriously violent act which is likely to cause fear and alarm; or;
2. sending a threatening communication with the intent of stirring up religious hatred.



Discussion or criticism of religion or belief or religious practices and expressions of antipathy, dislike, ridicule, insult or abuse towards religion are permitted.

Also in Scotland, the communication of threats of serious violence and threats intended to incite religious hatred, whether sent through the post or posted on the internet, is an offence.

Prosecutors set a high threshold for prosecuting these offences, emphasising that the legal test is whether the message is grossly offensive (not offensive), the need to act consistently with human rights law and the public interest test.

The Crown Prosecution Service (CPS) guidance<sup>37</sup> states: 'The CPS has the task of balancing the fundamental right of free speech and the need to prosecute serious wrongdoing on a case by case basis.' In considering whether to prosecute in this context it looks at several relevant factors which include whether:

- there is a one-off communication or a sustained campaign of harassment of an individual
- grossly offensive or threatening remarks are maintained or swiftly deleted
- the individual intended the message to go beyond friends and family to the public at large
- the intention behind the message (e.g. a misguided attempt at humour as opposed to inciting others)
- the effect it had on recipients
- whether the individual has expressed any remorse for their actions.

In practice this has resulted in successful prosecutions of an individual who used Twitter to make threats of rape to Stella Creasy MP and a person who used the same method of communication to make anti-Semitic remarks against Luciana Berger MP. Both perpetrators received a sentence of imprisonment.

On the other hand, the CPS decided not to prosecute Daniel Thomas who made homophobic tweets regarding the Olympic diver Tom Daley because it was not intended for circulation beyond Mr Thomas's followers (making its way into the public domain through others), it was swiftly removed, Mr Thomas expressed remorse, Mr Daley was not the intended recipient and, after being consulted by the CPS, he did not feel this matter needed to be prosecuted.

It should be noted that this is a very complex and rapidly evolving area of the law.

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<sup>37</sup> DPP Guidance on Social Media Prosecutions June 2013.

## Further reading

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### Incitement and harassment

You can report hate crime online through True Vision at [report-it.org.uk](https://report-it.org.uk)

In Scotland, you can use the [Police Scotland online reporting form](#).

Other third-party reporting centres include:

[CST \(protecting our Jewish community\)](#)

[Tell MAMA \(anti-Muslim hate crime\)](#)

[Stop-Hate UK](#) (all hate crimes)

[Galop \(LGBT\)](#)

## **Electoral offences**

The [Electoral Commission](#) publishes guidance ahead of general elections in Great Britain. This includes advice on the dos and don'ts of election campaigning and information about election offences.

## 5 | How to complain and the role of regulators

### Political party

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A complaint to the Chair (or equivalent) of the political party may be made if electoral conduct is:

- factually incorrect
- damaging to good relations
- makes a false statement about the character and conduct of a candidate
- incites hatred for persons with a protected characteristic
- breaches the Party's own code of conduct.

### Local authority

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Any complaints about the behaviour of existing elected members can be referred to the local authority's monitoring officer, who is responsible for the complaint if there is an allegation that a member has breached the local Code of Conduct.

### Police

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Electoral conduct which is likely to stir up racial or religious hatred or hatred because of sexual orientation should be reported in England and Wales to the Chief Constable or other senior police officer and in Scotland to the police. The test for incitement offences is set high, so before making a complaint it is a good idea to consult local community groups and councillors to see if there is a consensus on whether the conduct is likely to incite hatred or lead to other offences. Even if material does not meet the criminal threshold for incitement offences, the police may still decide to discuss the complaint with the perpetrator.

All other criminal offences should always be reported to the police, such as harassment, assault, criminal damage, racially and religiously aggravated offences. During an election period, the police may exercise extra diligence in monitoring hate crimes and so it is especially important that crimes are reported to them.

Occasionally, the personal safety of individual candidates and their team may be at risk. If candidates have any concerns about their safety then they should discuss these with the police as soon as possible.

## The Equality and Human Rights Commission

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The [Equality and Human Rights Commission](#) is a statutory body established under the Equality Act 2006. It is an independent body responsible for promoting and enforcing the laws that protect fairness, dignity and respect. It contributes to making and keeping Britain a fair society in which everyone, regardless of background, has an equal opportunity to fulfil their potential. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited by the UN as an 'A status' National Human Rights Institution.

In the first instance, complaints should be made to the [Equality Advisory and Support Service](#), which is a separate organisation from the Commission. The Commission cannot deal with complaints about other legislation, even if they are related to equality, such as the laws concerning incitement.

## The Electoral Commission

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The [Electoral Commission](#) regulates the finances of political parties and their expenditure. It also reports on performance standards for electoral registration officers and returning officers to ensure that elections are fair and open.

Performance standards may touch on such matters as accessible information on how to vote, the accessibility of polling stations and how effectively candidates can become involved in elections.

## The Advertising Standards Agency

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The [Advertising Standards Agency](#) has no role in elections. It cannot look into political advertisements and elections are excluded from the Advertising Code.

## The Independent Press Standards Organisation

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The [Independent Press Standards Organisation](#) (IPSO) deals with complaints about failure to adhere to its editor's code of practice and harassment. It only has jurisdiction over those media outlets which are members.

## Ofcom

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[Ofcom](#) regulates the broadcast media. This includes responsibilities to regulate the broadcast media in respect of political impartiality and causing harm and offence. Ofcom also oversees broadcasters so that they do not incite crime or provoke disorder. Ofcom deals with complaints and has the power to launch investigations when it thinks a broadcaster has broken the rules. Ofcom is subject to the Human Rights Act 1998 and therefore cannot act in contravention of the right to freedom of expression.

# Contacts

This publication and related equality and human rights resources are available from the Commission's website: **[www.equalityhumanrights.com](http://www.equalityhumanrights.com)**

For advice, information or guidance on equality, discrimination or human rights issues, please contact the Equality Advisory and Support Service, a free and independent service.

Website [www.equalityadvisoryservice.com](http://www.equalityadvisoryservice.com)

Telephone 0808 800 0082

Textphone 0808 800 0084

Hours 09:00 to 20:00 (Monday to Friday)  
10:00 to 14:00 (Saturday)

Post FREEPOST Equality Advisory Support Service FPN4431

Questions and comments regarding this publication may be addressed to: **[correspondence@equalityhumanrights.com](mailto:correspondence@equalityhumanrights.com)**. The Commission welcomes your feedback.

## Alternative formats

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